New Jersey
Family Lawyer

Vol. 37, No. 2 — November 2016

Chair's Column

What are We, Chopped Liver?

by Timothy F. McGoughran

This summer, I was pleased to meet a new association of family lawyers that has organized, and whom we know in one way or another. This group consists of the county Matrimonial Early Settlement Program (MESP) coordinators, chaired by Carol Ann Aschoff of Hudson County. This group was formed in an attempt to promote professionalism and uniformity to the MESP vicinage-based program, as codified under Rule 5:5-5 and Rule 5:5-6. Prior to our meeting, this group met with Acting Administrator of the Courts Judge Glenn A. Grant, JAD, to open the dialogue regarding family lawyers who volunteer their time as MESP panelists and the fact that they are not receiving any type of compensation or credit for the good work that is done. There is no doubt that family lawyers provide, by a large margin, the most volunteer hours in assisting the Judiciary in administering justice through the Early Settlement Panel Program, Mandatory Economic Mediation and Intensive Settlement Panel Programs that take place in all vicinages of the New Jersey Superior Court.

In support of this effort, I appointed an *ad hoc* committee at the June 28, 2016, Family Law Executive Committee meeting. The purpose of the committee is to explore the concepts of early settlement panelists being compensated, either by continuing legal education credit, an exemption for *pro bono* assignment, or, indeed, some type of monetary compensation. The committee is being chaired by Amy Shimalla. The cross-over between the Family Law Section and this group of MESP coordinators is noteworthy based upon the many members of the Family Law Section Executive Committee who are also MESP coordinators.

In the family part, for over four decades we have been providing volunteer service to the settlement of matrimonial litigation as early settlement panelists serving without compensation, reward or accolade. Like ethics committees, serviced by volunteer attorneys, the Early Settlement Panel Program is an organized bar function, which has served the court system and litigants well.

Concern arises due to the fact that we do serve in this role uncompensated in any manner. This is not the case in all parts of the superior court. In the civil part, there is also a mandatory arbitration program. Unlike the family part, civil arbitrators are compensated by court rule. This compensation is found in Rule 4:21A-1 *et seq.*, where qualifications and the appointment of arbitrators are largely overseen by county bar associations. By rule, those arbitrators are paid a $350 *per diem* for a single panel and split a $450 *per diem* for a two-person panel.

In the criminal part, public defenders are appointed and paid. In addition, pool attorneys are assigned and paid in cases where multiple defendants create a conflict for the public defender's office.

The Mandatory Early Settlement Panel Program has worked well as one facet of the alternate dispute resolution process in the family part. Panelists have served voluntarily and happily for many decades. The reality is that the practice of family law 40 years ago is vastly different than the practice now.

The court also enacted, through court rule, mandatory economic mediation, which requires participant mediators to provide two free hours of service. Most recently in the *J.E.V.*[1] case (where our very own Cheryl Connors argued the *amicus* position of the NJSBA) Chief Justice Stuart Rabner and a *unanimous* Court ruled that litigants have a right to appointed counsel in contested adoption matters, stating:

> As noted above, this Court has found that due process requires appointment of counsel to indigent litigants in various settings. Given the fundamental nature of the right to parent that may be lost forever in a disputed adoption hearing, there is no room for error here. We therefore hold that indigent parents who face termination of parental rights in contested proceedings under the Adoption Act are entitled to have counsel represent them under Article I, Paragraph 1 of the State Constitution.

In *J.E.V.*, the Court specifically noted that until some state funding occurs the bar association and family law attorneys will be bearing the brunt of these assignments:

> The very reasons that call for a lawyer to be appointed also *favor the appointment of attorneys with the experience to handle these matters*. Contested adoption proceedings raise important substantive issues and can lead to complicated and involved hearings. The Office of Parental Representation in the Public Defender's Office has developed expertise in this area from its fine work in state-initiated termination of parental rights cases. Without a funding source, we cannot direct the office to take on an additional assignment and handle contested cases under the Adoption Act. *See Crist*, *supra*, 135 N.J. Super. at 575-76; *see also Pasqua, supra*, 186 N.J. at 153.
>
> In the past, as we noted in Pasqua, "the Legislature has acted responsibly" and provided counsel for the poor when the Constitution so requires. Ibid. For example, after Crist, the Legislature enacted N.J.S.A. 30:4C-15.4(a), which directs judges to appoint the Office of the Public Defender to represent indigent parents who ask for counsel in termination of parental rights cases under Title 30. Once again, we trust that the Legislature will act and address this issue. *See Pasqua, supra*, 186 N.J. at 153.
>
> In the interim, we have no choice but to turn to private counsel for assistance. We invite volunteer organizations to offer their services, as *pro bono* attorneys have done in other areas. See, e.g., In re Op. No. 17-2012 of Advisory Comm. on Prof'l Ethics, 220 N.J. 468, 469 (2014). *Until the Legislature acts, we may need to assign counsel through the Madden list, which is not an ideal solution. See Madden v. Delran*, 126 N.J. 591, 605-06 (1992). [my emphasis added][2]

It is clear this language envisions family lawyers getting these appointments in difficult emotionally charged and draining cases. At some point the question arises: When will it be enough, and why are family lawyers treated differently than civil or criminal lawyers? The answer clearly stems back to a day when matrimonial law was not the complex, vibrant and specialized practice it is today.

As officers of the court, we all realize that we have a *reasonable* obligation of *pro bono* service that goes along with the privilege of having our law license. Our practice is a noble one, and we should be proud of the service we provide to society. The burden of *pro bono* service appears to fall disproportionately on family lawyers, in particular. Sadly, for the most part the good work of early settlement panelists and other volunteer family law attorneys goes

unnoticed. It is my hope that in the coming months we will have a report from this committee to be reviewed by the Family Law Section and, if approved, the board of trustees of the New Jersey State Bar Association. It is my intention to have the state bar association lobby the Supreme Court for some type of recognition for the thousands of volunteer hours given each year by members of our profession.

The nature of family law practice has changed significantly over the last 40 years. The demands on qualified early settlement panelists have grown, and I have heard stories in some counties of panelists serving every six weeks. Members of the Family Law Section, and family lawyers in general, due to the nature of our practice, have a heightened sense of collegiality and collaboration. We understand that our system requires involvement and interaction between the bench and bar. It requires constant improvement of alternate dispute resolution mechanisms, as the court system is simply unable to handle, in an efficient manner, the resolution of the significant volume of domestic relations cases.

With the recent changes in alimony law, post-judgment litigation is burgeoning. The courts are now ordering, on a regular basis, participation in early settlement panel programs on a post-judgment basis, as well as economic mediation. I believe that is an appropriate use of those programs for proper dispute resolution. Nonetheless, this creates an additional uncompensated burden on family lawyers.

This issue is long overdue for review. While I am certain the road will be a long one to accomplish some type of meaningful acknowledgment of the volunteer efforts of family lawyers, it is something that needs to be done. The road to the proper recognition of the volunteer efforts of family lawyers serving in the Mandatory Early Settlement Panel Program starts this year.

Before I end this column, I must report that after having reviewed my first column I noted a terrible blunder on my part. I did not take the time to thank the incredible work of my predecessor, Amanda Trigg, for her efforts as chair of this great section in 2015-16. Amanda, through her rich organizational and leadership skills, led our section through a fantastic year, topped by a fabulous retreat in Savannah, Georgia. As I am going through the process now I have renewed admiration and respect for Amanda and all others who have served as chair of our section. Her leadership will be hard to emulate, and I thank her on behalf of the section for a job well done. Be well.

As an ending thought: "Nobody has ever before asked the nuclear family to live all by itself in a box the way we do. With no relatives, no support, we've put it in an impossible situation." ~Margaret Mead.

Endnotes

1. In the Matter of the Adoption of a Child by J.E.V. and D.G.V., 2016 N.J. LEXIS 710, *37.
2. In the Matter of the Adoption of a Child by J.E.V. and D.G.V., 2016 N.J. LEXIS 710, *40.

Inside this issue

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

Editor-in-Chief's Column

Sensitivity in the Divorce Process

by Charles F. Vuotto Jr. with Carly DeCotiis

We all know that divorce is a very stressful occurrence in anyone's life. It is stressful not only for the parties and their children, but also for the lawyers, and even the judges, involved. However, the authors posit that there are some things lawyers can do to help their clients that do not technically fall into the category of the law. Generally, family law attorneys may be more effective when working with divorcing couples if they focus on empathy and sensitivity to the emotional issues experienced by couples. This is a skill set that most mental health experts possess and practice on a daily basis.

This column seeks to offer lawyers a brief overview of some of the tools they can employ to help their clients deescalate the situation, rather than escalate it (within ethical guidelines, of course). First, lawyers may wish to try to approach 'divorce' as more of an *uncoupling* and be more sensitive to everyone's feelings. In most cases, such an approach will facilitate the process by causing the parties to be less emotionally distressed (most importantly for the children). Lawyers are taught to be advocates. That's who they are. That's not wrong in most kinds of legal work, but in divorce, lawyers are faced with many scenarios where advocacy takes a back seat to preservation of the family and the children. Lawyers are not typically trained in psychology, which would help them be more aware and sensitive to their client's emotional needs. There are exceptions, in terms of those trained in mediation and collaborative law. Unfortunately that is a small part of most lawyers' educational process, yet lawyers are forced to navigate the emotional impact of divorce without that training.

The following are some of the tools family lawyers can utilize to achieve the aforementioned goals for their clients. Many lawyers may instinctually use some or a combination of these techniques in their daily practice; however, if lawyers consciously engage in these techniques they can assist their clients more effectively.

Validation: Validation is the recognition and acceptance of another person's thoughts, feelings and behaviors as understandable/valid. In many cases people are invalidated, with a person's emotional experience rejected, judged or ignored. Validation does not mean agreeing or approving. Validation can be one of the best tools to help emotionally sensitive people (*i.e.*, a person getting a divorce) to manage their emotions effectively. It's crucial for divorce lawyers to be mindful of this and practice validating their clients.

Building rapport: Building rapport with a client is essential for him or her to trust his or her lawyer and the lawyer's judgment. The client wants to feel like you genuinely care about his or her situation, not that it is just another 'case.' Answering emails and calls promptly fosters rapport. Creating rapport at the beginning of the attorney/client relationship will often make the interpersonal interactions more successful, along with the outcome.

Positive affirmations/encouraging words: During a difficult time, such as while in the process of getting a divorce, encouraging words can go a long way. Encouragement is one of the most important attributes when getting along with others/clients.

Use 'common' language: Legal jargon can make the intimidating divorce process even more frightening. It can also be confusing. It's important to use understandable language in order to ensure the client understands the points the lawyer is explaining.

Review the divorce process: It is important to verbally explain to the client the sequence of events in the divorce process, along with providing a handout reiterating those points. When a client is emotionally distressed, he or she often does not pay full attention to what is being explained, or can miss certain parts. A handout helps the client feel more secure, because he or she has something to reference and does not need to constantly call the lawyer with questions.

Reflective listening: It is important to fully understand what the client is saying before offering suggestions, feedback or ideas. Reflection lets the client know you are

listening and trying to understand his or her point of view. When engaging in reflective listening, the lawyer will reiterate back what he or she heard the client state. This technique gives the client the opportunity to correct any misunderstandings or share additional information.

Obtain client's objectives: It is essential for the lawyer to understand the client's objectives and gauge whether his or her objectives are realistic. If they are not realistic, it gives the lawyer the platform to explain why.

Discuss client's worst fears about the divorce process: If a lawyer understands the client's fears about the process, he or she can be sensitive to those topics and pay extra attention to helping the client work through those issues.

Understand family dynamics: In order to truly understand your client in the divorce process, it's imperative to know the specifics about his or her family dynamics. It is important to ascertain whether your client or his or her spouse came from divorced families. Determine the quality of the relationship within his or her nuclear family, and whether there was any mental health or substance abuse in the family.

Review aspects of the divorce process that may be emotionally taxing: (*i.e.*, custody evaluations, mental health or substance abuse evaluations, testifying if it goes to trial): Often, lawyers may not fully consider the emotional toll custody evaluations, testifying in court and other aspects of litigation will have on him or her or the children. It is imperative for the lawyer to discuss the processes in detail, prepare the client and perhaps role play with the client.

Provide a list of professional resources: It is helpful if the client is provided with a list of recommended couples, child, individual and family counselors, as well as mediators. If a client goes to a professional and does not have a positive experience, he or she often will not go back, and will not find someone else. A client who trusts his or her lawyer feels comfort in going to someone they recommend. During the divorce process, it's imperative for the client and his or her family to have professional support.

Some mental health experts may have the impression that lawyers are too aggressive and divisive, and only concerned with money. Conversely, some counselors may not fully understand the divorce process and the legal issues involved. Concepts clash at times. Both sides, in the authors' humble opinion, could benefit from education about the other for the betterment of divorcing (uncoupling) parties and, most importantly, the children, who often are the ones most impacted by the process. If lawyers employ the above techniques, it ultimately may help them to possess a skill set that can be used to enable them to be more emotionally sensitive, for the betterment of the divorcing couples and their children. ■

Carly DeCotiis, MA, NCC, LPC, ACS, CCS, a licensed professional counselor in private practice in Summit and Raritan, assisted the author in preparing this article.

Executive Editor's Column

Parens Patriae Doctrine Reprise: Are There Ever Limits?

by Ronald G. Lieberman

Does a judge have any limits on equitable power? Recently, a story broke in the news that a Virginia judge precluded a 10-year-old golf prodigy from competitive golf for one year. At the conclusion of a year-long custody dispute, a judge in Loudoun County, Virginia, entered an order that, in part, held that the child would be precluded from playing competitive golf for one year. The girl has won 11 of the last 12 local events she entered, and before the age of nine won a nine-hole tournament with a score of six-under-30.[1] In her only 18-hole round, she won a 2015 women's club championship at a local golf course with a score of 84.[2] By all accounts, she was a true golf prodigy.[3]

This story caused the author to wonder just what limits a judge would have on his or her equitable authority if he or she could ban a child from participating in a sport in which, by all public accounts, she is a prodigy.

Practitioners know that under case law, including *Fawzy v. Fawzy*,[4] courts can review and vacate any custody decision if harm to the child will be shown. But, given the facts of the golf prodigy case as known to the public, what possible harm could there be to cause a judge to act in a way that appears to be contrary to what both parents had been pursuing, and to the professional development of this child? Is it up to a judge to act as an 'uber' parent to overrule parents' decisions that cause a child to work hard at something like golf? If the parents both wanted this activity to continue, could a judge overrule them and direct something different?

Parens patriae authority is exercised in the "best interest of the child," and "it is an expression of the court's special responsibility to safeguard the interest of a child at the center of a custody dispute."[5] Practitioners have, over the years, begun to see the outer reaches of this *parens patriae* doctrine. In a recent unreported case, divorced parents of an 11-year-old could not agree on whether the mother could take the child to see a pop star in concert.[6] The judge permitted the child to attend the event. But, can a judge now preclude a child from attending or participating in an event where the child seems to flourish? Where would the best interest be on the issue that would warrant judicial intervention? (Aren't these fact-sensitive cases?)

As the *parens patriae* doctrine expands, the question raised by the author is whether it is a doctrine with any limits, or whether it is based merely on how a judge feels without any restrictions or boundaries other than the ever-amorphous 'abuse of discretion' standard. Why would one judge choose to intervene whereas another might not?

Practitioners should be able to provide their clients with some measure of guidance on the outcome of a case, and given this newest case, the *parens patriae* doctrine begins to feel like nothing more concrete than judge-to-judge or day-to-day or courtroom-to-courtroom. Without any quantifiable limits on the *parens patriae* doctrine, a family part judge can be the 'uber' parent or the sole guardian, without limits or measurable boundaries.

A practitioner need only look back through history to determine that the *parens patriae* doctrine is an ancient one, and was held to allow a court to intervene "if the health and comfort of the inhabitants of a state are threatened, [then] the state is the proper party to represent defendant."[7] What limits are there on acting when someone is threatened? What limits are there in representing and defending such a party? Is there any way to determine or fix what best interests can be, let alone the limits of the *parens patriae* doctrine? Shouldn't the parents be able to decide for themselves what benefits their child if, by all quantifiable facts made public, this 10-year-old child is a golf prodigy and would only benefit from further exposure to golf? Can a judge decide what is best for the child when the parents think otherwise, absent harm or child endangerment?

These questions and more should be raised by practitioners daily when they are in court addressing issues of the best interest of a child. Silence is not golden in this regard. ■

Endnotes

1. http://thegolfnewsnet.com/golfnewsnetteen/2016/07/04/michael-vecher-warren-florence-cottet-moine-divorce-38848/
2. *Ibid.*
3. *Id.*
4. 199 N.J. 456, 467, 476-77 (2009).
5. *Kinsella v. Kinsella*, 150 N.J. 276, 317 (1997).
6. *Zoe v. Zoe*, FM-15-623-07N, Jones J. (Ch. Div. 2015).
7. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

Groundbreaking Precedent Has Been Set By *In The Matter of the Adoption of a Child by J.E.V. and D.G.V.*

by Frank Donahue and Alex M. Miller

On Oct. 23, 2015, the Appellate Division decided *In The Matter of the Adoption of a Child by J.E.V. and D.G.V,*[1] which was a case of first impression in New Jersey. The Supreme Court of New Jersey affirmed the Appellate Division on July 26, 2016.[2]

This matter addresses the constitutional rights of a biological mother, L.A., and her special-needs daughter, who was two years old at the inception of the matter. In March 2012, L.A., while living in a shelter and relying on welfare assistance to support her family, requested the assistance of foster care from a state-licensed agency, the Children's Home Society (CHS). As a result of poverty, L.A. placed her two-year-old special-needs daughter in short-term foster care through CHS and continued to visit with the child. Through CHS, L.A. signed a plan where she agreed to find a job and permanent housing with the intention of continuing to parent her daughter.

While the child was in foster care, L.A. temporarily moved to Pennsylvania to live with her sister for several months. As a result of transportation issues while traveling from Pennsylvania, there were missed visits.[3] L.A. also gave birth to a second son while her daughter was in foster care.

Approximately one year after L.A.'s daughter was placed in short-term foster care, CHS advised L.A. by letter dated March 1, 2013, that they were making a plan for adoption. The same letter advised that L.A. "may or may not have the right to have counsel appointed to represent [her]."[4] CHS, on July 8, 2013, then executed an agency consent to early filing of adoption complaint, which stated CHS believed L.A. had "abandoned the child" and "was not fit to parent the child."[5]

Shortly thereafter, on Aug. 1, 2013, the foster family filed a complaint for adoption. The court entered an order on the same date, scheduling the hearing, which included form language regarding the right to counsel or court-appointed counsel, if unable to afford counsel. L.A. was served with the complaint, order and notice of hearing, which also included form language, listing phone numbers to call to obtain an attorney and the phone number for the Essex County Legal Aid Society in the event she could not afford counsel. L.A. was unable to obtain counsel.[6] While unrepresented, she objected to the adoption of her daughter in writing at every opportunity.[7]

When the matter reached the courtroom, the trial court did not inform L.A. that she was entitled to appointed counsel if she could not afford an attorney. On one occasion, prior to the trial, the court asked L.A. if she intended to obtain a lawyer. When she responded that she was "working on it," the court informed her she should act quickly, but again, did not advise her of her right to appointed counsel.[8]

The trial, which took place in Feb. and March 2014, lasted two days.[9] L.A. represented herself, while the foster family was represented by counsel and retained an expert psychologist. It is apparent by review of the record that L.A., unfamiliar with legal procedure or the rules of evidence, was not able to effectively defend herself. Specifically, she was unable to effectively cross examine witnesses, and the only evidence she presented was her own testimony. She was also unable to connect any evidence to the legal standard and declined to present a closing argument.[10] Immediately following the brief trial, the court issued an order terminating L.A.'s parental rights.[11]

L.A., still self-represented at the time, filed an appeal with the Appellate Division and attempted to draft briefs in support of her position. Upon reviewing the trial record, the authors were contacted by the Appellate Division and asked to undertake the *pro bono* representation of L.A. to address whether she was deprived of her right to legal representation at the trial court proceeding, which ultimately resulted in the termination of her parental rights. The issue was successfully argued in the Appellate Division and affirmed by the New Jersey Supreme Court.

The Appellate Division's opinion addressed the fact that this matter began with L.A. trying to ensure the wellbeing of her daughter. However, if the matter

had been referred to the Division of Child Protection and Permanency based on child welfare concerns, L.A. would have been accorded more due process than she was provided when trying to ensure her child's wellbeing.[12] Specifically, the division's involvement would have promoted reunification and would have provided legal safeguards, such as the appointment of counsel for the biological parent and the child.[13] Additionally, the division frequently provides bus passes and other social services to make visitation easier.

Acknowledging the importance of the issue before the court, the Appellate Division stated, "After the elimination of the death penalty, we can think of no legal consequence of greater magnitude than the termination of parental rights."[14] After addressing the substantial magnitude of the rights at stake, the Appellate Division held that L.A. had a constitutional and statutory right to court-appointed counsel beginning before trial, when the private adoption agency first proceeded with an adoption over her objection.[15] L.A. was granted a new trial with appointed counsel.[16]

The New Jersey Supreme Court granted certification on Dec. 17, 2015. On July 26, 2016, the Court, in a unanimous decision written by Chief Justice Stuart Rabner, affirmed the Appellate Division's decision of Oct. 23, 2015. Specifically, the Court stated:

> Because of the nature of the right involved—the invaluable right to raise a child—and the risk of an erroneous outcome without the help of an attorney, we hold that indigent parents are entitled to appointed counsel in a contested private adoption matter under the due process guarantee of the State Constitution. We therefore affirm the judgment of the Appellate Division.[17]

In addressing the due process issue, the Court drew on common principles from *N.J. Division of Youth & Family Services v. B.R.*[18] and the *Mathews* test.[19] Specifically, the Court looked to "the nature of the right involved; the permanency of the threatened loss; the risk of error at a hearing conducted without the help of counsel; and the State's interest, which is bounded by its *parens patriae* jurisdiction."[20]

The Court found that all of the factors examined weigh in favor of counsel. As established by *B.R.*,[21] *Moriarty v. Bradt*,[22] and a number of cases throughout and outside New Jersey, the right to raise one's child is fundamental. Further, "when parental rights are terminated, the tie between parent and child is severed completely and permanently."[23] With regard to the risk of error, the Court found "the risk of an erroneous outcome is high."[24] The Court addressed the fact that the issues in a contested adoption matter are not simple and may involve expert medical and psychological evidence. Further, an indigent litigant without legal training will not know how to cross examine an expert or present and defend his or her own case in accordance with the relevant legal standard, which includes preventing adverse counsel from introducing hearsay or other inadmissible testimony.[25] The Court acknowledged L.A. faced such issues during trial, which demonstrates the risk an uncounseled parent faces.[26]

The Court further held that the right to counsel attaches when the birth parent objects to the adoption. The Court asked the director of the Administrative Office of the Courts to develop a form to enable each parent to respond directly to letters from the adoption agency.[27]

The Court acknowledged that the Office of Parental Representation in the Public Defender's Office has "developed expertise from its fine work in state-initiated termination of parental rights cases."[28] However, the Court noted it cannot direct the office to take on such cases without a proper funding source. Acknowledging that the *Madden* list is not an ideal solution, counsel may need to be assigned through this mechanism until the Legislature acts.[29]

The birth parents also attempted to argue L.A. waived her right to counsel.[30] The Court, however, held there was no known right to counsel until the Appellate Division's decision in this matter.[31] The Court also noted the notices received by L.A. were equivocal and "L.A. did not knowingly and intentionally waive a right to have the court appoint a lawyer to represent her."[32]

This has not been an easy journey for any of the parties involved, and the journey is not yet over as the matter returned to the trial court, where it is now pending. However, now that safeguards have been put in place for indigent parents in the private adoption setting, there is hope for future litigants who find themselves in the same position as L.A. ■

Frank Donahue is an equity partner in Donahue, Hagan, Klein & Weisberg, LLC. Alex M. Miller is an associate with Donahue, Hagan, Klein & Weisberg, LLC.

Endnotes

1. *In re Adoption of Child by J.E.V.*, 442 N.J. Super. 472 (App. Div. 2015).
2. *See In re Child by J.E.V.*, 226 N.J. 90 (2016).
3. *See In re Adoption of Child by J.E.V.*, 442 N.J. Super. at 475.
4. *In re Child by J.E.V.*, 226 N.J. at 95.
5. *See In re Adoption of Child by J.E.V.*, 442 N.J. Super. at 476.
6. *See In re Child by J.E.V.*, 226 N.J. at 96.
7. *See In re Adoption of Child by J.E.V.*, 442 N.J. Super. at 477.
8. *In re Child by J.E.V.*, 226 N.J. at 96.
9. *See Id.*
10. *See Id.* at 110.
11. *See Id.* at 97.
12. *See In re Adoption of Child by J.E.V.*, 442 N.J. Super. at 475.
13. *See Id.* at 478.
14. *Id.* at 481.
15. *See Id.* at 474-5.
16. *See Id.* at 488.
17. *In re Child by J.E.V.*, 226 N.J. at 94.
18. *N.J. Division of Youth & Family Services v. B.R.,* 192 N.J. 301, 306 (2007).
19. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
20. *Id.* (internal citations omitted).
21. *See generally B.R.*, 192 N.J. at 305.
22. *See generally Moriarty v. Bradt*, 177 N.J. 84, 101 (2003).
23. *In re Child by J.E.V.*, 226 N.J. at 109.
24. *Id.*
25. *Id.*
26. *Id.*
27. *See Id.* at 112.
28. *Id.* at 113.
29. *See Id.*
30. *See Id.* at 98-9.
31. *See Id.* at 114.
32. *Id.*

The Termination of Child Support Law: A Helpful Tool or an Unnecessary Burden?

by Alyssa Engleberg and Sandra Starr Uretsky

It is a common misconception that children are automatically emancipated and child support terminated at the age of 18 in New Jersey. In reality, there is no specific age at which the child is emancipated and child support terminates.[1] Courts have generally found that reaching age 18 establishes *prima facie*, but not conclusive, proof of emancipation. The issue of the effective date of emancipation is fact sensitive and requires a critical evaluation of the then-prevailing circumstances of each case.[2]

In practice, the burden to emancipate a child absent consent usually falls upon the non-custodial parent to file a motion to emancipate a child and terminate child support. To this end, the non-custodial parent must decide the appropriate time to file and whether to incur counsel fees to seek a termination of his or her child support obligation. The recent bill signed into law by Governor Chris Christie, at C.2A:17-56.67,[3] seeks to reverse this trend and place a greater burden on the custodial parent receiving support to ensure payments continue.

C.2A:17-56.67, referred to throughout this article as the termination of child support law, is effective Feb. 1, 2017, for "all child support orders issued prior to, on, or after the effective date."[4]

The termination of child support law provides, in relevant part:

> 1. a. Unless otherwise provided in a court order or judgment, the obligation to pay child support shall terminate by operation of law without order by the court on the date that a child marries, dies, or enters the military service. In addition, a child support obligation shall terminate by operation of law without order by the court when a child reaches 19 years of age unless:
>
> (1) another age for the termination of the obligation to pay child support, which shall not extend beyond the date the child reaches 23 years of age, is specified in a court order;
>
> (2) a written request seeking the continuation of child support is submitted to the court by a custodial parent prior to the child reaching the age of 19 in accordance with subsection b. of this section; or
>
> (3) the child receiving support is in an out-of-home placement through the Division of Child Protection and Permanency in the Department of Children and Families.

Of great significance, the termination of child support law sets forth a presumption that child support will automatically terminate, without the necessity of a court order, at the age of 19. While the automatic termination is subject to exceptions, it will now be the custodial parent who must establish a basis for support to continue.

For child support orders administered through the Probation Division, a notice of proposed child support obligation termination will be sent to both parents regarding the proposed termination.[5] In response to a notice of proposed termination of child support, a custodial parent may submit a written request, on a form and within timeframes promulgated by the Administrative Office of the Courts, with supporting documentation to the court, including a projected future date when support will terminate, seeking the continuation of child support beyond the date the child reaches 19 years of age in the following circumstances:

1) the child is still enrolled in high school or other secondary educational program;
2) the child is a student in a post-secondary education program and is enrolled for the number of hours or courses the school considers to be full-time attendance during some part of each of any five calendar months of the year; or
3) the child has a physical or mental disability, as determined by a federal or state government agency, that existed prior to the child reaching the age of 19 and requires continued child support.[6]

A custodial parent may also file a motion or an application with the court seeking to extend the obligation to pay child support beyond the date the child reaches 19 years of age due to exceptional circumstances, as may be approved by the court.[7]

If the court finds the form and supporting documentation submitted by the custodial parent establish sufficient proof to continue the child support obligation beyond the date a child reaches 19 years of age, the child support obligation shall not be terminated by operation of law when the child reaches the age of 19, and the court shall issue an order establishing the prospective date of child support termination.[8] The payor may, at any time, file a motion or an application with the court seeking relief from that obligation.[9]

In many cases, the custodial parent receiving support through the Probation Division will still be required to file such a motion to continue support, regardless of whether the judgment of divorce or support order specifies a termination date other than the child's 19th birthday. Although that date will stand, the New Jersey Department of Human Services-Child Support cannot guarantee the information regarding any agreed-upon date of termination will be automatically entered into the system. In fact, information provided to the public at http://www.njchildsupport.org/ explains that parents may still receive a termination notice and be asked to send in a copy of the judgment of divorce or order containing the termination date, imposing another burden on the custodial parent.[10] In addition, parents may still receive the termination notice because the judgment of divorce or order specifies an event and not a specific age or date of termination, again imposing upon the custodial parent a burden of proof needed to verify the date.[11]

Notwithstanding language in the judgment of divorce or order, child support will automatically terminate upon the child's 23rd birthday.[12] The Probation Division and the State IV-D agency will provide both parents with a written notice of termination at least 90 days prior to the termination date and, to the extent feasible, the Probation Division and the state IV-D agency shall cooperatively provide additional notice to the parents by text message, telephone message, or other electronic means.[13]

Even though there is automatic termination of a child support obligation, the termination of child support law provides that nothing in the statute shall be construed to: 1) prevent a child who is beyond 23 years of age from seeking a court order requiring the payment of other forms of financial maintenance or reimbursement from a parent, or 2) prevent the court, upon application of a parent or child, from converting, due to exceptional circumstances including, but not limited to, a mental or physical disability, a child support obligation to another form of financial maintenance for a child who has reached the age of 23.[14] However, even if financial maintenance is ordered or agreed upon, it will be outside of the Probation Division's services.[15]

Presumably, the termination of child support law will reduce the number of applications filed given the automatic termination provision. However, the practical effects of the statute as currently drafted may result in additional litigation because a child, not just a parent, can seek payment of 'other forms of financial maintenance' from a parent.

Ironically, the passage of this law has commonly been referred to as the termination of child support law. Notably, however, the legislative history of the bill clarifies the obligation to pay child support *only*, and does not impact other parental obligations, such as support or other costs when a child is in college. Actually, the final version of the bill also removed reference to the term 'emancipation' and the statement provided in conjunction with this bill explained that "nothing in the bill would affect the authority of the court to make judicial determinations regarding the legal emancipation of a child."[16]

Further, the automatic termination provision at the age of 23 is a radical change to the current law. A frequent issue that arises in the existing law is the potential of paying child support indefinitely. For instance, there is case law to support the payment of child support through graduate school or the attainment of a law degree.[17]

In cases where the child support order does not specifically allocate support to multiple children, the court will not automatically recalculate child support once a child is emancipated.[18] Instead, the parents must have child support recalculated to take the emancipation into consideration, which will most likely require one of them to file an application with the court.

Notably, the termination of child support law only applies to cases administered through the Probation Division. Custodial parents will have to greatly consider whether support should be paid through the Probation Division given the extra steps that will now be imposed upon them to continue support, even if their agreement specifically calls for a later emancipation date between the ages of 19 and 23, or even later in certain cases.

Consider a circumstance in which the parties' agreement provides that child support shall continue until age 24, but under the new law, the Probation Division will automatically terminate child support at the age of 23. The custodial parent will have to file yet another application with the court to enforce the agreement and reinstate child support if the payor stops paying. If the custodial parent made the decision earlier to receive support directly, he or she might not be in the position of having to file another application. On the other hand, in all cases between the ages of 19 and 23, the non-custodial parent paying child support directly will still be required to file an application or motion with the court if child support is not administered by the Probation Division.

There is no doubt that the termination of child support law has lofty goals to reduce court backlog and properly shift the burden back onto the custodial parent to continue child support. However, the practical effects may result in the filing of more court applications and motions than before its enactment, and raise more questions about the fact-sensitive nature of emancipation and payment of child support.

Whether the termination of child support law will have unintended consequences is yet to be seen. However, practitioners must be prepared to address the issues with their clients immediately. In fact, families with a child between the ages of 18½ and 22½ as of Feb. 1, 2017, will be mailed a notice of proposed child support obligation termination on that date, with child support ending on Aug. 1, 2017, if objection is not lodged with the court.[19] As with all new statutes, practitioners will be forced to anticipate all possibilities and advise past, present and future clients accordingly. ■

Alyssa Engleberg is an associate with Donahue, Hagan, Klein & Weisberg, LLC. Sandra Starr Uretsky is an associate with the firm of Donahue, Hagan, Klein & Weisberg, LLC.

Endnotes

1. *Bishop v. Bishop*, 287 N.J. Super. 593,597 (Ch. Div. 1995).
2. *Ibid*. at 597.
3. For the full text of this statute, see http://www.njchildsupport.org/getattachment/Services-Programs/Custodial-Parents/Termination/Emancipation/Termination-of-Child-Support-Public-Law-2015,-Chapter-223_.pdf.aspx.
4. *Ibid*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. http://www.njchildsupport.org/Services-Programs/Custodial-Parents/Termination/Emancipation.aspx.
11. *Id*.
12. http://www.njchildsupport.org/getattachment/Services-Programs/Custodial-Parents/Termination/Emancipation/Termination-of-Child-Support-Public-Law-2015,-Chapter-223_.pdf.aspx.
13. *Id*.
14. *Id*.
15. http://www.njchildsupport.org/Services-Programs/Custodial-Parents/Termination/Termination-FAQs.aspx.
16. http://www.njleg.state.nj.us/2014/Bills/A3000/2721_S1.HTM.
17. *See Ross v. Ross*, 167 N.J. Super. 441, 442 (Super. Ct. 1979) (delaying the daughter's emancipation until she completed her law school education and directing parents to continue paying child support on her behalf in the interim).
18. http://www.njchildsupport.org/Services-Programs/Custodial-Parents/Termination/Termination-FAQs.aspx.
19. http://www.njchildsupport.org/Services-Programs/Custodial-Parents/Termination/Emancipation.aspx.

After the Divorce: A Wellness Checkup to Avoid Crisis

by Laura Guinta Gencarelli and Jill D. Turkish

Busy family law attorneys with high volumes of cases experience a sigh of relief when a matter is resolved, whether at the conclusion of a trial or by way of settlement. That relief, however, can provide a false sense of security that the work for that client is done, as that file is put aside and attention is turned to the next case. It is important that practitioners understand the job as a client's divorce attorney does not end upon entry of the final judgment of divorce. This is sometimes referred to as the 'beginning judgment of divorce,' when followed by a flurry of post-judgment motions. All too often, the file is set aside and the practitioner moves on, placing the post-divorce 'follow through' on the backburner. To protect against liability and to help clients as they move on with their lives, it is imperative that all loose ends surrounding the terms of the parties' agreement or final judgment be tied up as quickly as possible following the end of the case. This is practicing preventive litigation.

This article provides a wellness checkup that should be reviewed at the end of each case in order to proactively address certain matters with the client after the divorce to ensure these 'clean up' items are not neglected or forgotten. This can mean the difference between the client retaining the practitioner for post-judgment litigation, referring new clients to him or her, or even a malpractice lawsuit. Often the client becomes self-represented, so it is equally as important to review the checklist if they will be self-represented in the future.

The following is a list of topics from which a checklist can be created and used from one case to the next to avoid any issue 'falling through the cracks':

Deed Transfer

If one party is keeping the former marital home, has the deed transferring title solely to the spouse keeping the property been prepared? The realty transfer fee is a fee imposed upon the recording of deeds evidencing transfers of title to real property in the state of New Jersey, and is required to be paid upon the recording of deeds conveying title to real property in New Jersey.[1] However, there is an exception to the imposition of the fee as it relates to a divorce. Specifically, the fee is not applicable to a deed recorded within 90 days following the entry of the judgment of divorce, which dissolves the marriage between the grantor and grantee of the property.[2] Accordingly, in order to avoid the imposition of the realty transfer fee upon the parties, the deed transferring title must be recorded in the county where the property is located within 90 days of the entry of the final judgment of divorce between grantor and grantee. Ensuring the deed is recorded within the 90-day time period following the entry of the final judgment will fully exempt the parties from paying the realty transfer fee.[3]

It is, therefore, important to keep track of this time frame to avoid the fee being imposed to clients. As such, the property settlement agreement should identify which party will be responsible to prepare the deed and requisite property transfer paperwork, including the deed, seller's residency exemption certification and affidavit of consideration for use by seller. The property settlement agreement should also provide a time frame for each party to sign the deed transfer documents.

Where possible, and to avoid overlooking this step, the deed should be signed in court on the date of the uncontested hearing. Practitioners do not want to expose themselves to liability by failing to ensure the deed is recorded within 90 days of entry of final judgment. Most practitioners have come across a scenario where an adversary is not timely drafting the transfer documents, the other side is not responding to the documents drafted, or even one's own client has become unresponsive. As a practice tip, it is important to document each attempt and effort to comply with getting the deed transferred and recorded within 90 days of final judgment. The point is to avoid a client placing the blame on the practitioner if the deed transfer is not timely accomplished for a reason beyond the practitioner's control.

Domestic Relations Orders (QDRO)

Are there retirement assets to divide between the parties? While property settlement agreements identify what accounts are to be divided and each parties' interest therein, agreements often fail to identify which party/attorney will be responsible for taking the lead in getting the domestic relations order prepared.

The Employee Retirement Income Security Act of 1974 (ERISA), defines a QDRO as a domestic relations order, "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan."[4] It further defines a domestic relations order as "any judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and is made pursuant to a State domestic relations law."[5]

A QDRO must first create or recognize the existence of an alternate payee's right to, or assign to an alternate payee the right to, receive all of or a portion of the benefits payable with respect to a participant under a plan.[6]

The agreement should clearly state: 1) which company will be used to prepare the domestic relations order(s), 2) which party is responsible for the fee(s) or each party's respective contribution towards the fee(s), and 3) which party shall communicate with the company to start the preparation process. As a practice tip, including those three key provisions in an agreement will avoid post-judgment disputes related to the QDRO(s). Once the order has been drafted, and where possible preapproved by the plan, it must be filed with the court and then sent to the plan for implementation. However, remember that the process does not end there. The plan must approve the final order and will send a letter to confirm that the order has been approved. Also, if one represents the alternate payee spouse, they should be sent a letter instructing them to contact the plan to advise them on where the funds should be directed (*i.e.*, the account information for the retirement account where they want the funds to be deposited). In the case of a pension, the client should be reminded to update the plan administrator on any change of address so that, when the time comes, they will receive their share of their former spouse's pension.

Life Insurance

It is well settled in New Jersey that life insurance can be used as security for alimony or child support payments.[7] In fact, the alimony statute[7] includes a provision permitting the court to require "reasonable security" for support obligations. Life insurance provisions to secure support are common and are included in most agreements. Does the client have to maintain insurance on his or her life to secure an alimony and/or child support obligation? Does the client's former spouse have to secure his or her support obligation(s) via life insurance? If so, the property settlement agreement should provide a date certain following the entry of the final judgment for the parties to provide the necessary proofs that life insurance coverage is being properly maintained. In addition, to ensure compliance, the parties should provide each other with authorizations to speak directly with the other party's insurance carrier to confirm their maintenance of the requisite amount of life insurance and the appropriate beneficiary designations.

To avoid overlooking this after the entry of the final judgment, and to protect one's client, the authorizations should be signed by the parties at the time of the uncontested hearing, if not in advance of that date. In the alternative, the following language can be inserted into the property settlement agreement: *This Property Settlement Agreement shall act as an authorization for the Wife to contact the Husband's insurance company directly to determine whether the policy is in effect, the amount of the death benefit and the named beneficiary.*

Medical Insurance

At the conclusion of a divorce, typically each party is responsible for maintaining and paying for their own health insurance coverage and all unreimbursed medical, dental, pharmaceutical, counseling and other health-related expenses of any type without contribution from the other party. Often, the dependent spouse may not be employed, or does not have insurance available through employment. In those cases, it is necessary for him or her to obtain their own policy. Often, one option for the dependent spouse is to secure COBRA benefits. If this is an option for the client, then it is important to include language in the property settlement agreement requiring the other spouse to cooperate with any requests for documents needed to obtain health insurance through COBRA.

The following language can be inserted into the property settlement agreement: *Each party shall be responsible to secure and pay for his/her own health insurance coverage upon entry of the Judgment of Divorce and shall be solely responsible*

for his/her own unreimbursed, uncovered health-related expenses. In the event Wife wishes to elect COBRA health insurance coverage, she shall promptly notify Husband of this who shall cooperate in whatever means necessary to accomplish this.

A second option is for the client to purchase a policy on HealthCare.gov.[8] As a practice tip, if one represents the dependent spouse, have him or her explore the available healthcare options before the other financial terms of the agreement are finalized. As practitioners know, the expense may be significant and could impact negotiations in securing a reasonable amount of support for the client.

As another practice tip, keep a form follow-up letter on hand that can be sent to the client the day the judgment of divorce is entered, to remind him or her of the urgency of securing a policy, and, if applicable, make sure the client has the updated coverage card for the children. This is beneficial to the client personally, and telegraphs to him or her that the practitioner is still thinking about his or her needs and best interests, even after the divorce is final.

Establish a Probation Account

Many practitioners have received phone calls from a client upset that he or she has not yet received the court-ordered support, whether after entry of a *pendente lite* support order or final judgment of divorce. The procedure to set up the Probation Department account varies from county to county. As a practice tip, practitioners should familiarize themselves with the procedure in the county within which the case is venued. A simple five-minute phone call to the Probation Department, or even the judge's law clerk, could be the difference between fully and correctly explaining the process to the client and being caught off guard, which may lead to doubts about one's professional capabilities in the client's mind.

Obtain for the client whatever paperwork is necessary to establish the account and follow up with them to find out whether the account has been established. The client will appreciate the phone call, and it is important to be proactive by reaching out to the client before he or she takes that step. Again, this will indicate to the client that the practitioner is still looking out for his or her best interests, even after the divorce is finalized.

Maintain Records of Alimony/Child Support/ Medical Expenses Paid/Received

Most practitioners have had an initial consultation where the former client or potential new client is seeking to commence post-judgment litigation for alimony/child support arrears, and reimbursements for the children's activities, medical expenses or college expenses. Often, the client is seeking reimbursements for expenses but they do not have sufficient proofs, or any documentation to support their claims.

It is imperative to instill in the client the importance of maintaining his or her own records related to direct support payments, medical expenses and college expenses. Record keeping should be discussed with the client throughout the case, so he or she understands that the court will not award reimbursements for expenses that cannot be proven. It is also important that the client understand his or her responsibility as far as communicating with the ex-spouse before incurring certain medical and college expenses, in order to increase the likelihood of success in an enforcement action.

Gold Seal

Make sure the client has a copy of the final judgment of divorce with a gold seal. This will be important for future needs, such as remarriage. The same is true for the property settlement agreement.

Conclusion

Practitioners deal with a significant number of clients and cases each week, so follow-up work can easily be forgotten. Practitioners need to remember the importance of explaining each detail of the process to clients, even something they would deem minor or insignificant because they do it every day. Clients may have never been a part of the divorce process before, so practitioners need to put themselves in their shoes—they depend on their attorneys to guide them through this difficult, stressful time, so no detail can be overlooked.

As the end of each case nears, this article can be used as a checklist to ensure the practitioner has met the client's needs and will thrive, not just survive, in the future. ■

Laura Guinta Gencarelli is an associate with Snyder Sarno D'Aniello Maceri & da Costa LLC. Jill D. Turkish is attorney search director at Parker + Lynch Legal.

Endnotes

1. N.J.S.A. 46:15-5 *et seq.*
2. N.J.S.A. 46:15-10.
3. In partition actions between unmarried parties, imposition of the realty transfer fee can be avoided by selecting section (f) on partition, in section 4 on the affidavit of consideration for use by seller.
4. 29 U.S.C.A. § 1056(d)(3)(B)(i).
5. 29 U.S.C.A. § 1056(d)(3)(B)(ii).
6. 29 U.S.C.A. § 1056(d)(3)(B).
7. *See* N.J.S.A. 2A:34-25; *Meerwarth v. Meerwarth*, 71 N.J. 541, 366 (1976); *Davis v. Davis*, 184 N.J. Super. 430, 446 (App. Div. 1982); *Hirko v. Hirko*, 166 N.J. super. 111 (Ch. Div. 1979); *Grotsky v. Grotsky*, 58 N.J. 354, 277 (1971).
8. N.J.S.A. 2A:34-23.
9. https://www.healthcare.gov/get-coverage/.

A Parent Files an Application to Relocate with the Children While an Active Divorce Case is Pending: What Happens Now?

by Judith A. Hartz

Relocation applications present the most heart-wrenching and complex issues for litigants, family law practitioners and judges. The difficulties are compounded when circumstances arise during the pendency of a divorce case that lead to an application for relocation. A divorcing parent's request to relocate with a child prior to the finalization of a divorce requires an immensely fact-sensitive analysis. The lack of case law and legislation in this area leaves the family law practitioner and the court with little authority and guidance to rely upon, but provides opportunity for legal advocacy.

How is a court to treat an application to move with a child prior to the entry of a final judgment of divorce or a trial on the issue of custody and parenting time? Does the court have the authority to grant such an application pending a hearing? What if there is an existing order or consent order addressing custody and parenting time? This article provides an analysis of the issues presented by *pendente lite* relocation applications.

Preliminary Considerations

The New Jersey statutes provide courts with the authority to make orders with regard to *pendente lite* custody. N.J.S.A. 9:2-3 provides, in relevant part:

> …Until the court determines the final custody of the minor child and unless the parties agree otherwise, the court shall determine temporary custody based upon the best interests of the child with due regard to the caretaking arrangement that previously existed. No child shall be taken forcibly or against the will of the parent having custody by the other parent without a court order….

N.J.S.A. 2A:34-23 provides: "[p]ending any matrimonial action or action for dissolution of a civil union brought in this State or elsewhere…the court may make such order….as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just…."

Pending a typical divorce case, the parties will be required to participate in mandatory custody and parenting time mediation through the court system.[1] If the parties are unable to reach an agreement on custody and parenting time, courts may be asked to enter a temporary order setting forth custody and parenting time arrangements pending the outcome of the case, without prejudice to final adjudication. In making those determinations, the court's decisions are child-focused.[2] The court will seek to maintain the *status quo* so the children experience the least disruption pending a final hearing.[3] For example, absent unusual circumstances, a court would typically order a parenting time arrangement that would keep the children in the same schools whenever possible pending a divorce case, depending on the ages of the children.[4]

In contrast, a *pendente lite* removal application is requesting the exact opposite. A *pendente lite* removal application is seeking to change the status quo immediately, and involves changes in all facets of the child's life. These applications are usually made due to an event that is time sensitive, such as a parent's job transfer (*i.e.*, military),[5] the beginning of the school year, a potential job opportunity that would be lost if the parent is not permitted to relocate or harm to a child if relocation is not permitted. *Pendente lite* removal applications are highly fact sensitive, and the success of these applications often depend largely on the court's assessment of the moving party's likelihood of success on the merits after a hearing.

Removal Post-Judgment (*Baures* or *O'Connor*?)

In New Jersey, a child who is a native of the state may not be removed from the state without the consent

of the parties or permission of the court upon "good cause shown."[6] There are two different standards applied when deciding post-divorce relocation applications: 1) the *Baures* analysis; or 2) the *O'Connor* analysis.[7] In assessing a removal application, a court must first review the custody and parenting time arrangements between the parties to determine whether the matter is an application for a change in custody under *O'Connor* or a removal case under *Baures*.[8]

In cases where one parent is the 'primary caretaker' and the other parent is the 'secondary caretaker' the standard applied to a parent's removal application is in accordance with the criteria outlined in *Baures v. Lewis*.[9] *Baures* established a two-pronged inquiry requiring the moving party to show that: 1) there is a good faith reason for the move, and 2) the move will not be inimical to the child's interests.[10] The initial burden of the moving party set forth in *Baures* is "not a particularly onerous one."[11]

Once a *prima facie* case is established, the court will consider the following factors in determining whether to grant the application:

> (1) the reasons given for the move; (2) the reasons given for the opposition; (3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move; (4) whether the child will receive educational, health and leisure opportunities at least equal to what is available here; (5) any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location; (6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; (7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed; (8) the effect of the move on extended family relationships here and in the new location; (9) if the child is of age, his or her preference; (10) whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent; (11) whether the noncustodial parent has the ability to relocate; (12) any other factor bearing on the child's interest.[12]

In contrast, if parents share physical custody, either *de facto* or *de jure*, the removal application becomes a motion for a change in custody, requiring the analysis under *O'Connor* to be applied. The application will be governed initially by a changed circumstances inquiry and ultimately by a best interests analysis using the criteria set forth in N.J.S.A. 9:2-4.[13] The *Baures* inquiry and factors are inapplicable to a case in which the noncustodial parent shares physical custody.

In *Morgan v. Morgan*, the Supreme Court defined shared physical custody in a removal context.[14] The *Morgan* Court explained that the critical part of the analysis is "each party's responsibility for the custodial functions, responsibilities and duties normally reposed in the primary caretaker."[15] Shared physical custody is not based solely on the numerous parenting times with a child, but rather it is the nature of the interactions.[16] The Court set forth the following relevant considerations in determining what shared physical custody means:

> preparing and planning of meals; bathing, grooming, and dressing; purchasing, cleaning, and caring for clothes; medical care, including nursing and general trips to physicians; arranging for social interaction among peers; arranging alternative care, i.e., babysitting or daycare; putting child to bed at night, attending to child in the middle of the night, and waking child in the morning; disciplining; and educating the child in a religious or cultural manner.

Since the initial burden on the moving party under the *Baures'* standard is "not a particularly onerous one," and the best interests analysis applicable to a change of custody application is "more stringent," the analysis applicable to a request to relocate is extremely important.

Pendente Lite Relocation Applications

Currently, there is no case directly on point that provides a framework for a court to follow in deciding a *pendente lite* relocation application. However, the principles set forth in *Baures* and *O'Connor* may be utilized to craft arguments both in favor and against relocation.

If at the time a relocation application is made the parties are residing together, the *O'Connor* analysis should apply, particularly if there is no determination of a primary caretaker and secondary caretaker. The *Baures* standard is not likely to be the standard applied to a

pendente lite relocation application where the parties share caretaking responsibilities. Similarly, a removal motion made by a party in a case where the children live in both residences *pendente lite*, with each parent assuming full parental responsibility half of the time, is an application to change custody. If the parties are residing separately, have not resolved custody and parenting time issues and have hired or are about to hire a custody expert, the *O'Connor* custody analysis would apply. Moreover, even if the court entered a *pendente lite* order setting forth an interim parenting time schedule, the *O'Connor* analysis would apply because the interim arrangement is temporary pending a final hearing or trial.

On the other hand, if the parties are separated at the time of the relocation application and a *pendente lite* order exists pertaining to custody and parenting time, whether *Baures* or *O'Connor* applies may not be that simple. For example, if the parties entered into a consent order with a parenting time schedule that they agreed to and have been abiding by for six months, where the husband is designated as the parent of primary residence and the wife is the parent of alternate residence, and the wife has been spending every other weekend with the children, an argument can be made that the *Baures* analysis should apply. The counter argument in support of still utilizing an *O'Connor* analysis is that even if a *pendente lite* order is in place, it is temporary and does not necessarily resolve a request to relocate.[17]

Similarly, an application by a custodial parent to move away in a case in which the noncustodial parent sees the children on alternating weekends and the parties already reside a considerable distance from each other may be viewed as requiring the *Baures* analysis. Justice Virginia Long made it clear in *Baures*, although in a post-judgment removal context, that "[i]t goes without saying that a noncustodial parent who is lackadaisical or sporadic in his or her visitation ordinarily will be unable to prevail in a removal case. That is not by way of retaliation for past inadequacies but because he or she will not be able to show that particularized harm will occur from removal."[18] The possible factual scenarios that may apply *pendente lite* are limitless, and whether the motion should be viewed through the *Baures* prism or the *O'Connor* prism will depend on the facts.

Procedural Considerations—Plenary Hearing and Parenting Time Proposal

A *pendente lite* removal application may or may not require a hearing. Rule 5:8–6 establishes procedures relating to child custody trials and provides, in pertinent part:

> Where the Court finds that the custody of children is a genuine and substantial issue, the court shall set a hearing date no later than six months after the last responsive pleading. The court may, in order to protect the best interests of the children, conduct the custody hearing in a family action prior to a final hearing of the entire family action.

"The word 'shall' represents a 'clear, non-discretionary mandate' that the court set a hearing date once it finds that custody is a genuine and substantial issue."[19] "This time constraint limits the judge's discretion in scheduling the hearing, so as to vindicate the child's interest in securing "as speedy and final a disposition as possible."[20] "To further expedite the custody decision, the rule expressly authorizes bifurcation of the custody issue from the other contested issues in the case."[21] Bifurcation allows for a trial solely on the issue of relocation.

Due to the workload in the New Jersey judicial system, many counties in the state may not be able to hold a hearing as quickly as the moving party would like. Furthermore, a removal case may require hiring joint or individual custody experts who will need time to conduct an investigation and render a report. That process alone can take months, even if the process is streamlined and there are no delays. So, even if the court is able to schedule a hearing quickly, the custody experts may not be able to complete an evaluation and render a report within that time frame.

Litigants must be advised of the likely prolonged gap in time between the filing of a *pendente lite* removal application and receiving a decision. Litigants seeking relocation often do not have the luxury of waiting months for a decision on the application. If a party has an offer of employment or an opportunity to transfer for work, he or she may find that he or she must either accept the position and relocate without the children or defer accepting the position due to the uncertainty of the outcome of the pending relocation application. If the court entertains the relocation application, it will allow the parties to engage in discovery (under Rule 5:5-1 and Rule 5:5-2) and to retain experts (under Rule 5:3-3) before proceeding to a plenary hearing. Additionally, before the application is decided, courts are required to send the parties to

mandatory mediation pursuant to Rule 1:40-5 and Rule 5:8-1.[22] If the party making the application relocates while the application is pending, it may strengthen the application. On the other hand, a long separation from the children could impact a custody evaluation. This often poses a dilemma for the party seeking to relocate.[23]

Applications requiring an *O'Connor* analysis will require a hearing. Not every removal application, however, will require a plenary hearing.[24] In *Barblock v. Barblock,* the Appellate Division held that the moving party's application met the two prongs of the *Baures* test and no testimony was necessary. "The trial judge heard extensive oral argument on the motion, considered all of the written submissions of the parties and evaluated those proofs in light of the applicable law. Ultimately, the trial judge concluded that a plenary hearing was unnecessary because the defendant had failed to muster adequate reasons to forestall the [mother's] move."[25] In *Barblock*, the Appellate Division concurred with the trial judge's assessment on the threshold question of custody in finding that there was not a shared parenting arrangement, as the mother served as the primary caretaker of the children and, therefore, there was no "genuine issue of fact...bearing upon a critical question" under the removal standard to warrant a hearing.[26]

Similarly, in *Pfeiffer v. Ilson,* the father claimed the trial court misapplied its discretion in denying his motion for *pendente lite* physical custody of the children without a plenary hearing.[27] The Appellate Division held that a plenary hearing is not necessary in every case where removal of children is an issue. Instead, a hearing is required "only where a *prima facie* showing has been made that a genuine issue of fact exists bearing upon a critical question such as the best interests of the children, interference with parental rights, or the existence of a good faith reason to move."[28] Although *Pfeiffer* was decided when *Holder v. Polanski* was the law on removal, the general holding remains applicable to relocation applications.[29]

Importantly, every application for *pendente lite* relocation should include a parenting time proposal.[30] Once the primary caretaker has been determined and the case is denominated as one involving a removal analysis under *Baures*, the movant's *prima facie* case must include a parenting time proposal.[31] While the "advantages of the move should not be sacrificed solely to maintain the 'same' visitation schedule where a reasonable alternative visitation scheme is available," the mutual "rights of the noncustodial parent and the child to maintain and develop their familial relationship" must also be considered and "is usually achieved by means of visitation between them."[32] Including a parenting time proposal with the removal application is essential, as it captures the essence of two of the *Baures* factors: "(6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; and, (7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed."

Tactical Considerations

If a removal issue arises while the divorce case is pending, it should be raised then. Litigants should not seek to be designated as the parent of primary residence during the divorce proceeding to gain an advantage in a subsequent removal application or to avoid the *O'Connor* best interest custody analysis. The subsequent removal application may result in the court reopening the issue of custody and parenting time. In at least two cases where removal was sought shortly after the parties entered into an agreement on custody and parenting time, the court allowed for an examination of the circumstances surrounding the parties' custodial agreement, including whether one party sought a tactical advantage by entering into the custodial agreement.

In *Shea v. Shea,* the parties' property settlement agreement incorporated a *pendente lite* parenting agreement that provided for joint legal custody and designated the wife as parent of primary residence.[33] The mother filed a removal application three months after the parties had entered into a property settlement agreement. The father asserted that the mother "manipulated the intent of *Baures* by first settling the divorce and immediately thereafter filing for removal, effectively depriving him of the opportunity to contest custody."[34] The trial court ruled that if the father could prove the mother's manipulation of the removal procedures, fundamental fairness would require restoring the father to the position he was in before the final judgment was entered.[35] Under such circumstances the court would utilize the best interests custody standard under *O'Connor* in lieu of the *Baures* criteria.

More recently, in *Bisbing v. Bisbing,* the parties negotiated a marital settlement agreement providing for joint legal custody and the mother having primary residential custody, with the condition that she not relocate out of state.[36] Less than nine months after the agreement was

incorporated into their judgment of divorce, the mother advised that she intended to relocate, and 11 months after the divorce she filed a motion seeking to relocate. The Appellate Division stated that: "[s]imilar to the situation in Shea, the close proximity between the parties' agreement and [the mother's] plans to relocate provides evidence of suspicious circumstances requiring a plenary hearing."[37] Ultimately, if the family court finds that a party obtained primary residential custody by negotiating an agreement in bad faith, it is likely to analyze the relocation request under a 'best interests' analysis and not allow the manipulation of the established removal procedures to gain a more favorable removal analysis under *Baures*. On Sept. 7, 2016, the Supreme Court granted certification to review the Appellate Division's decision.

Cost Considerations

Litigants not only need to file a motion seeking relocation, but, as described above, the case involves retaining and paying for a custody expert and a possible hearing. If the case is bifurcated, the relocation hearing will not include the financial issues, which should be addressed at a later date, either by settlement or trial. A litigant seeking or opposing relocation should consider the time and cost involved in litigating the issue. Litigants should be encouraged to explore alternative methods of resolving the dispute, such as private mediation or family counseling. These settings allow for a faster and less expensive venue for exploring settlement options that may be suitable for the family.

Conclusion

Pendente lite relocation applications require an extremely fact sensitive analysis and, therefore, provide an opportunity for advocacy. There are many arguments that can be made for and against relocation at the *pendente lite* phase of a case. The facts presented by the parties both at the time the application is made and at a hearing will greatly impact the trial court's ruling. There should be a track for expediting *pendente lite* relocation cases, if for no reason other than the family, and especially the children, should not be held in limbo, particularly while experiencing the transition of a divorce. ■

Judith A. Hartz is a partner with Kozyra & Hartz, LLC, located in Livingston. She wishes to thank Michael Mattessich, an associate with the firm, for his assistance with this article.

Endnotes

1 . *See* R. 1:40-5 and R. 5:8-1; *see also D.A. v. R.C.*, 438 N.J. Super. 437, 451 (App. Div. 2014).
2. N.J.S.A. 9:2-4.
3. N.J.S.A. 9:2-3.
4. *See Barblock v. Barblock*, 383 N.J. Super. 114, 125 (App. Div. 2006) (recognizing that key custodial responsibilities include bringing child to and picking child up from school; helping child with homework assignments; bringing child to and attending sports and school activities).
5. For instance, in *Macek v. Friedman*, 240 N.J. Super. 614 (App. Div. 1990), the court permitted the mother of two children to relocate to West Germany pending a plenary hearing. The mother's new husband was on active duty in the United States Air Force. Notably, the case was decided pre-*Baures* and was not a *pendente lite* determination.
6. N.J.S.A. 9:2-2.
7. *O'Connor v. O'Connor*, 349 N.J. Super. 381, 385 (App. Div. 2002).
8. *Baures v. Lewis*, 167 N.J. 91, 116 (2001).
9. *O'Connor*, 349 N.J. at 385.
10. *Baures*, 167 N.J. at 122.
11. *Id.*
12. *Baures*, 167 N.J. at 116–17.

13. *Baures*, 167 N.J. at 116.; N.J.S.A. 9:2-4 provides:

> The Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.
>
> In any proceeding involving the custody of a minor child, the rights of both parents shall be equal and the court shall enter an order which may include:
>
> a) Joint custody of a minor child to both parents, which is comprised of legal custody or physical custody which shall include: (1) provisions for residential arrangements so that a child shall reside either solely with one parent or alternatively with each parent in accordance with the needs of the parents and the child; and (2) provisions for consultation between the parents in making major decisions regarding the child's health, education and general welfare;
> b) Sole custody to one parent with appropriate parenting time for the noncustodial parent; or
> c) Any other custody arrangement as the court may determine to be in the best interests of the child.
>
> In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.
>
> The court, for good cause and upon its own motion, may appoint a guardian ad litem or an attorney or both to represent the minor child's interests. The court shall have the authority to award a counsel fee to the guardian ad litem and the attorney and to assess that cost between the parties to the litigation.
>
> d) The court shall order any custody arrangement which is agreed to by both parents unless it is contrary to the best interests of the child.
> e) In any case in which the parents cannot agree to a custody arrangement, the court may require each parent to submit a custody plan which the court shall consider in awarding custody.
> f) The court shall specifically place on the record the factors which justify any custody arrangement not agreed to by both parents.

14. *Morgan v. Morgan*, 205 N.J. 50, 67 (2011).
15. *Id*.
16. *Morgan*, 205 N.J. 50, 66-67 (*quoting O'Connor*, *supra*, 349 N.J. Super. at 400).
17. *Mallamo v. Mallamo*, 280 N.J. Super. 8, 12 (App. Div. 1995) (provisions of a *pendente lite* order do not survive the entry of a judgment of divorce unless expressly preserved in it or reduced to judgment prior to entry of final judgment).
18. *Baures*, 167 N.J. at 120.
19. *P.V.P. v. F.J.C.*, No. A-2859-14T2, 2016 WL 1454489, at *8 (N.J. Super. Ct. App. Div. April 13, 2016) (*citing D.A. v. R.C.*, 438 N.J. Super. 431, 455-456 (App. Div. 2014)).
20. *Id. citing* Pressler, *Current N.J. Court Rules,* comment on R. 5:8–6 (2015).
21. *See* Pressler, *Current N.J. Court Rules,* comment on R. 5:8–6 (2015) citing Fall & Romanowski, Current N.J. Family Law, Relationships Involving Children (GANN) at 23:3-6(a).

22. *D.A. v. R.C.*, 438 N.J. Super. 431, 451 (App. Div. 2014) ("*Rule* 5:8–1 makes clear that "[i]n family actions in which the court finds that either the custody of children or parenting time issues, or both, are a genuine and substantial issue, the court *shall* refer the case to mediation in accordance with the provisions of [*Rule*] 1:40–5.").
23. *See Peregoy v. Peregoy*, 358 N.J. Super. 179 (App. Div. 2002), although a post-judgment case, even when trial judge erred in changing primary physical custody the passage of time established a new *status quo* that would not be disrupted pending remand for further proceedings.
24. *Barblock v. Barblock*, 383 N.J. Super. 114 (App. Div. 2006).
25. *Barblock*, 383 N.J. Super. at 124.
26. *Id*.
27. *Pfeiffer v. Ilson*, 318 N.J. Super. 13, 14 (App. Div. 1999).
28. *Id*.
29. *Holder v. Polanski,* 111 N.J. 344 (1988); *See also Cooper v. Cooper*, 99 N.J. 42 (1984); *Winer v. Winer*, 241 N.J. Super. 510, 515-21 (App. Div. 1990).
30. *Baures*, *supra*, 167 N.J. at 118.
31. *Morgan*, *supra*, 205 N.J. at 65–66.
32. *Morgan, supra, 205 N.J. at 64, citing Cooper, supra*, 99 N.J. at 57–58; *see also* N.J.S.A. 9:2-2.
33. *Shea v. Shea*, 384 N.J. Super. 266, 270 (2005).
34. *Id*. at 268.
35. *Id*. at 273-74.
36. *Bisbing v. Bisbing*, 445 N.J. Super. 207, 211 (App. Div. 2016), *cert. granted*, 2016 WL 5344659 (N.J. Sept. 7, 2016).
37. *Id*. at 217.

When Sexting Turns to Violence

by Abigale M. Stolfe and Sara B. Cohen

As of Jan. 2014, approximately 90 percent of American adults own a cellphone.[1] Further, as of Oct. 2014, approximately 64 percent of American adults own a smartphone.[2] As technology has advanced, so have the crimes and types of crimes associated with it, including sexting (the act of transmitting suggestive or sexually explicit photographs via cellphones). New Jersey is one of 20 states to have a law relating specifically to sexting.[3] However, it is not specifically incorporated into the domestic violence statute, but instead through the development of case law, redefining harassment.

The States' Approaches

Twenty of the 50 states in America have sexting laws.[4] A summary of the sexting laws in the tri-state area is as follows:[5]

State	Sexting Law	Includes Sexting	Addresses Under 18 Sending	Addresses Under 18 Receiving
New Jersey	YES	YES	YES	YES
New York	YES	NO	YES	YES
Pennsylvania	YES	NO	YES	YES

In New Jersey, pursuant to N.J.S.A. 2C:14-9:

> An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, "disclose" means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b. of N.J.S. 2C:43-3, a fine not to exceed $30,000 may be imposed for a violation of this subsection.

While this statute does offer protection for victims of crimes involving sexting, it is not specifically incorporated into the domestic violence statute at N.J.S.A. 2C:33-4. Instead, the concept of harassment has been utilized to address these acts. A review of relevant New Jersey case law shows what courts most often look to when seeking a conviction of a person for a sexting crime.

In *State v. Parsons,* the parties met through a dating application and began exchanging photographs with one another, clothed and unclothed.[6] When the plaintiff attempted to end the relationship, the defendant threatened to send the unclothed photographs of the plaintiff

via email to her employer, which he ultimately did, stating "you have an educator there that is…not proper."[7] The defendant did not "seriously challenge" the proofs regarding the disclosure of the photo.[8] Further, he conceded to sending "the photographs to the school; the photographs depicted J.B.'s intimate parts; and J.B. did not consent to the dissemination of the photographs."[9] As a result of the defendant's acts, he was sentenced to 18 months' imprisonment, together with mandated fines and penalties.[10]

In *K.M. v. J.G.*, the Appellate Division held that the defendant committed "acts of harassment under both subsections (a) and (c) of N.J.S.A. 2C:33–4."[11] Holding that "[u]nder subsection (c), defendant's numerous e-mails threatening to release nude photographs of plaintiff into the public domain, attempting to extort money from her, bragging that he enlarged them—a fact later confirmed at the custody exchange on March 11, 2012—and intimating that they have already been disseminated, constitute a course of conduct clearly meant to alarm, intimidate and seriously annoy plaintiff."[12] The Appellate Division affirmed the entry of the final restraining order entered by the trial court.[13]

The Appellate Division, in *State v. Fairley*, similarly found that a defendant's actions represented a course of conduct, when he conducted surveillance of the victim's fiancé and sent her sexual emails and messages.[14] In *Fairley*, the defendant caused the plaintiff such fear for her safety that she left her job and church and moved in with her fiancé.[15]

Youth and Sexting

Though New Jersey's law is developing concerning adults, the most substantive issue involves teenagers. In fact, sexting has become such a problem for New Jersey youth that the New Jersey Legislature designated February of each year as "'Teen Dating Violence Awareness and Prevention Month'...to promote public awareness and increase prevention of teen dating violence."[16] The legislative purpose is clear from the preamble: "Digital abuse and 'sexting' are becoming a new frontier for teen dating abuse and one in four teens in a relationship say they have been called names, harassed, or put down by their partner through cell phones and texting."[17] Further, the preamble states "[t]hree in 10 young people have sent or received nude pictures of other young people on their cell or online, while 61 percent who have 'sexted' report being pressured to do so at least once."[18]

N.J.S.A. 2A:4A-71.1 provides remedial measures and counseling programs for juveniles "who are criminally charged for sexting or posting sexual images." These measures and programs act as alternatives to criminal prosecution for those who post "suggestive or sexually explicit photographs, or who engage in the behavior commonly known as 'sexting,' in which these pictures are transmitted via cell phones." The statute is specifically limited to juveniles.[19]

Conclusion

As time moves forward and more Americans obtain cellphones, it is clear that crimes of this nature will become more popular and widespread. Over time, the continued development of direct laws specific to sexting, and enforcement/interpretation will be necessary and the catalyst in curtailing this conduct.

Abigale M. Stolfe is a partner with Stolfe Zeigler. Sara B. Cohen is an associate with Stolfe Zeigler.

Endnotes

1. *Mobile Technology Fact Sheet*, Pew Research Center (Dec. 27, 2013), http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/.
2. *Id.*
3. N.J.S.A. 2C:14-9.
4. Sammeer Hinduja and Justin Patchin, *State Sexting Laws: A Brief Review of State Sexting and Revenge Porn Laws and Policies* (July 2015), available at http://cyberbullying.org/state-sexting-laws.pdf (listing state sexting laws for all 50 states).
5. *Id.*
6. 2011 WL 6089210, Indictment No. 10-06-01372 (App. Div. 2011).

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. 2013 WL 3184781, Docket No. FV-03-1313-12 (App. Div. 2013).
12. *Id.*
13. *Id.*
14. 2015 WL 5009110, Indictment No. 11-07-0664 (App. Div. 2015).
15. *Id.*
16. N.J.S.A. 36:2-224 (2014).
17. *Id.*
18. *Id.*
19. (2) the creator and subject of the photograph are juveniles or were juveniles at the time of its making.