New Jersey
Family Lawyer

Vol. 37, No. 3 — January 2017

Chair's Column

The Good, the Bad, and the...

by Tim McGoughran

As we all know, a hot topic in 2016 was the increase in filing fees. The New Jersey State Bar Association has been actively monitoring this fee increase and trying to minimize the damage to practicing attorneys. President Thomas H. Prol and other members of the state bar met with the chief justice on multiple occasions in 2016. The purpose of these meetings was to discuss filing fee increases adopted pursuant to N.J.S.A. 2B:11-7, and specifically fee increases related to substitution of attorneys, certification of copies, answer fees and motions *in limine*. Some of these matters have been addressed satisfactorily, while others are still works in progress.

Some history behind the fee increases is important. In a notice to the bar from acting administrator Judge Glenn Grant dated Sept. 15, 2014, the Administrative Office of the Courts provided a proposed schedule of state court fee increases. The Court cited the above statute, which authorized it to "adopt rules of Court to revise or supplement filing fees and other statutory fees payable to the Court for the sole purpose of funding: (1) the development, maintenance and administration of a state-wide pre-trial services program; (2) the development, maintenance and administration of a state-wide digital E-Court information system; and (3) the provision to the poor of legal assistance in civil matters by Legal Services of New Jersey and its' affiliate." Judge Grant also noted that authorization to raise fees would expire on March 1, 2015.

To be clear, this fee increase offers two very positive components and one component that may be positive or may be negative, but only time will tell. Obviously, Legal Services has suffered considerably as interest rates have declined and the IOLTA income from trust accounts has decreased. Any society is always judged on how it treats its weakest members, and all individuals, rich or poor, should have access to the court system. This is a laudable goal.

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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.

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I believe e-filing will be transformative in family practice. Most offices have moved to paperless green offices, and this will bring that revolution full circle. Let's face it, most of us are busy and procrastinators. Extending that last minute from 3 p.m. on the due date to 11:59 p.m. provides breathing room. We all live and die by the deadlines established by the Rules of Court. Extending those deadlines to 11:59 p.m. is certainly part of the 'good' in the title of this column.

Criminal justice reform went into effect on Jan. 1, 2017. For those of you who have practices that touch on criminal law, note that there are significant rule amendments that were put in place by order of the Court dated Aug. 30, 2016. They will have a substantial impact on the pre-trial detention of defendants. It will take some time for this to shake out and for us to see where it ends up. I can tell you, as a municipal court judge, that everyone in our area of the law is feeling the clock ticking as we begin 2017. That includes the police, prosecutors, judicial staff and probationary workers. They have called this a 'sea change,' and I am expecting some choppy waters ahead.

Regarding progress and clarification being made on filing fees, Judge Grant, on Oct. 13, 2016, did clarify that "where an attorney or litigant furnishes a copy of the Judgment of Divorce, the Superior Court or designee shall certify that the Judgment is a true and accurate copy of the Judgment filed by the Superior Court. That one certified copy shall be provided at no cost to the person requesting the certified document, thus, each attorney or self-represented litigant shall be entitled to one copy of the Judgment of Divorce at no charge." This resolved a short-term issue where our clients were being charged $25 for a certified copy of the judgment of divorce. Please note, this does not apply to qualified domestic relations orders, where a gold seal is required by many (but not all) pension plan administrators.

Also on Oct. 13, 2016, Judge Grant provided a notice to the bar regarding the substitution of attorney required for firm dissolution, merger or disbarment. In those cases, the Court has determined a substitution of attorney must be filed for each matter, and a $35 filing fee pursuant to Rule 1:43 is assessed. Further, where a law firm or practice seeks to transfer more than 100 matters to one law firm or practice, the process will be managed by the Superior Court Clerk's Office, which will provide the firm with standard forms and instructions on how to complete the bulk substitution. This bulk substitution process does not affect the required filing fees, which remain at $35 for each case in which the attorney or firm is substituting.

Please do note that where a law firm or practice seeks to change its name for reasons other than those set forth by way of dissolution, merger or disbarment, written correspondence is required from an attorney of the firm notifying the clerk of the superior court. In such situations, a substitution of attorney is *not required* to be filed on each matter where a firm name change is required. Law firms are required to comply with all requirements necessary to effectuate the name change throughout the Court's electronic systems and data base. The law firm requesting the change will be responsible for the *nominal* cost of the programming necessary to complete the name change.

Judge Grant also noted that when there are instances where the substituting attorney, for whatever reason, is unable to obtain the required substitution transferring the case to him or her for representation, the filing of a notice of appearance will be sufficient to change the attorney of record with the Court. The attorney in that situation will be required to pay the $50 notice of appearance filing fee. This has become somewhat tricky in FD cases, and also where the 45 days has run since the last and final order was entered, thus relieving counsel by rule.

Nobody likes filing fee increases. As set forth in my title, there is some good and some bad involved in the filing fee increases. Nonetheless, some of the goals are praiseworthy as far as where the funding is going.

I can tell you that the state bar association has been following this matter and vigorously advocated on behalf of our attorney members. Several county bar associations, including Bergen, Passaic and Middlesex county, have sued the state of New Jersey and the state Supreme Court as defendants. The matter is being litigated in Mercer County Superior Court. The lawsuit opines that the fee increases were unconstitutional since the Legislature and the governor improperly delegated the authority to increase the filing fees to the Supreme Court.

The overriding concern is that filing fees should be paid by the public at large, instead of being looked at as a 'user tax' by way of filing fees only being lodged against those persons who appear in court. Those lofty discussions are for another time.

I hope everyone had a lovely holiday, and I look forward to see you on the warm beaches of Cancun at the Family Law Retreat in March.

Editor-in-Chief's Column

Judicial Salaries in New Jersey—Action Required

by Charles F. Vuotto Jr.

Simply put, this author respectfully asserts that the failure of this state to provide appropriate pay for its judges is endangering our judicial system. More particular to the readers of the *New Jersey Family Lawyer,* and because of the nature of family law matters, this judicial salary problem directly impacts the families of this state. The crux of the problem is that superior court judges in New Jersey earn less than some first-year associates, and certainly on the very low end of average salaries for lawyers. Judicial salaries are currently $165,000 per year, where they have remained since 2008. While that is a substantial salary, make no mistake about it, it is not competitive with what judges could be earning in other areas of the law.

In addition, there are state-mandated deductions from the $165,000 per year salary in the form of required medical and pension contributions exceeding $20,000 per year, which have been phased in since 2012, and which will likely continue to increase. Therefore, in reality, judges are earning approximately $140,000 annually, before taxes.

Further, judges receive no cost-of-living adjustments, although most other state employees are entitled to them.

Contrast this with starting salaries in large law firms. The *New Jersey Law Journal* reported on June 9, 2016, that "[i]t didn't take long for at least five New York law firms to match Cravath's news Monday that it would increase starting salaries for first-year associates to $180,000…"[1] In the July 4, 2016, *New Jersey Law Journal* it was reported that Lowenstein Sandler will be paying its first-year associates in its New Jersey office $160,000 annually. So, some associates right out of law school will earn more than trial judges.

It is not just first-year associates who have salaries that outpace those of the Judiciary. The *New Jersey Law Journal* reported in 2014 that salaries and bonuses for general counsel at New Jersey's prominent public companies were on the upswing, though they had not yet reached the impressive levels of 2011, according to a *Law Journal* survey of in-house compensation. Nevertheless, the *Law Journal* reported that the average annual salary in fiscal 2013 for the 29 general counsel included on the list was $386,078, which represented a 3.2 percent uptick from the prior year's survey average of $374,287 per year for the 31 lawyers on that list.

According to the 2016 *Salary Guide for the Legal Field* by Robert Half,[2] it is critical to benchmark compensation levels periodically to ensure that what is being paid is in line with what other organizations are offering in a particular area. This basic concept seems to have fallen by the wayside with regard to judicial salaries in the state of New Jersey. According to the Robert Half *Salary Guide*, salaries for lawyers with 10+ years of experience (which is the appropriate data to consider because judges must have practiced for at least 10 years) discloses the following ranges for 2016:

Firm Size	**Salary Ranges**[3]	
Large Law Firm	$194,250	$279,500
Midsize Law Firm	$162,750	$268,500
Small/Midsize Law Firm	$139,500	$193,750
Small Law Firm	$108,250	$169,750

In order to adjust the above salaries for New Jersey, the above figures need to be adjusted by 1.15 for the Mount Laurel area, 1.30 for the Paramus area, 1.25 for the Princeton area and 1.265 for the Woodbridge area. For example, a lawyer out 10+ years in a small firm in the Woodbridge area is likely to earn in the range of $136,936.25 to $214,733.75 per year. Therefore, for example, the state's judges are not earning much more than the low end of the range for an attorney with 10+ years' experience in a small law firm in the Woodbridge area.

The problem is further exacerbated by the fact that the projected salaries for attorneys in New Jersey drawn from the Robert Half *Salary Guide* reflect base pay only.

Bonuses, incentives and other forms of compensation (which judges do not receive) are not taken into account. When these other forms of compensation are considered, judicial salaries fall far below the average ranges. Also note that the *Salary Guide* indicates that attorneys in private practice enjoyed an increase of four percent from 2015 to 2016, a benefit not available to the Judiciary.[4]

The author believes all of these facts call into question just how much value the state places on the Judiciary.

On Feb. 1, 2016, the *New Jersey Law Journal* reported, in an article entitled "Judicial Pay Raises are Long Overdue," that "[f]or comparison sake, in 1974 a Superior Court judge's salary was $40,000, which translates to $192,564.71 in 2015 when a CPI (consumer price index) inflation analysis is applied." Thus, at $165,000 annually, the current pay for trial judges is almost $30,000 lower than the equivalent of that paid to judges more than 40 years ago, after adjustment for inflation. The differential widens further when considering the additional deductions exceeding $20,000 for health insurance and pension.

Interestingly, last year the New York Office of Court Administration asked a pay commission to bring the salaries of New York state Supreme Court (trial level in New York) justices, now $174,000, into line with those of federal district judges, expected to reach $203,100 next year. Yet there appears to be no similar effort with respect to judges' pay on this side of the Hudson.[5]

The state relies upon the Judiciary to help maintain order so that civilization may thrive. Certainly, parents and children in the throes of marital or custodial disputes require a Judiciary to help them during such difficult times. Without the Judiciary, disputes would go unresolved and lead to catastrophic results. Yet those charged with such an important task are not compensated commensurate with the important position in society they fill. Why? Obviously, fiscal downturns, the economy and many other factors impact state budgets. While belt-tightening is required in such times, the author believes what is happening here is too much for too long.

It is a difficult choice for a lawyer to decide to become a judge, because in most cases a private sector attorney will be taking a dramatic pay cut to be elevated, a dilemma that may cause some to forego such an honor. Also, because of the manner in which recall judges are compensated (at $300 per day), very few agree to return on recall after mandatory retirement (at age 70) to lend their wisdom to the system. Worse, many judges are not waiting to age 70 to retire. Instead, they retire as soon as they are pension-eligible, because they cannot afford to remain in a job where they work so hard but are compensated at a much lesser rate than their peers. There is a financial disincentive to remain and provide their skill and experience to a system that desperately needs their assistance.

Historically, the New Jersey Judiciary has been considered to be among the best in the nation. In order for that designation and honor to continue, the author believes it is important to insist that judges be compensated for their hard work and dedication. If, however, their compensation is not reflective of the roles judges play in society, then, over time, society will be negatively impacted, and the families in crisis in New Jersey will continue to suffer. The author believes family lawyers who understand the severity of this situation should reach out to legislators and demand this perplexing and long-lasting situation be corrected.

Post Script: Subsequent to the drafting of this column, the New Jersey Legislature considered S-2851/A-4430 (Scutari/Schaer) in a voting session on Monday, Dec. 19, 2016. The bill was blocked.[6] The measure reportedly provided, among other things, a pay increase for judges, and was intended to bring New Jersey in line with several other states by providing automatic COLA increases.[7] Although the author applauds the effort as a step in the right direction, as detailed above, this relatively small three percent increase in judicial salaries (about $5,000 per year) would not bring our judges in line with an appropriate compensation level.

Endnotes

1. *See* New Jersey State Bar Association Daily Briefing on June 9, 2016.
2. According to this publication, the *Salary Guide* is so highly regarded that the U.S. Department of Labor Bureau of Labor Statistics has included the guide's data in its *Occupational Outlook Handbook*.
3. *See* https://www.roberthalf.com/sites/default/files/Media_Root/images/rhl-pdfs/robert_half_legal_2016_salary_guide.pdf. Since professionals joining a company may enter at a variety of experience levels, Robert Half reports salaries in ranges.

4. https://www.roberthalf.com/sites/default/files/Media_Root/images/rhl-pdfs/robert_half_legal_2016_salary_guide.pdf.
5. *See* New Jersey State Bar Association Daily Briefing on Dec. 1, 2015.
6. See http://www.nj.com/politics/index.ssf/2016/12/bill_allowing_christie_to_profit_from_book_deal_di.html.
7. The relevant portions of the proposed legislation as to judicial salaries provides that: "The annual salaries of justices and judges shall be increased by three percent on January 1, 2017. The annual salaries of justices and judges for the year beginning January 1, 2017 shall be increased by three percent beginning on January 1, 2018. Beginning on January 1, 2019 and thereafter, the amount of the annual salary determined for the prior calendar year shall be adjusted annually by the State Treasurer in direct proportion to the percent change in the Consumer Price Index over a 12-month period beginning November 1 and ending October 31. For the purpose of this subsection, "Consumer Price Index" means the Consumer Price Index for All Urban Consumers, New York-Northern New Jersey-Long Island Metropolitan Area, All Items (1982-84=100), as published by the Bureau of Labor Statistics in the United States Department of Labor. The State Treasurer shall determine the amount of the adjustment by December 1 of each year and the adjustment shall become effective for payments to be made during the calendar year following the determination, beginning with payments made on or after January 1 of each calendar year. An adjustment in the annual payment shall be made only if the percent change in the Consumer Price Index for the period specified is greater than zero. If the reference base of the index is changed, the index used to determine the Consumer Price Index shall be the index converted to the new base by standard statistical methods. The first adjustment determination shall be made by December 1, 2018 and applicable to payments commencing on January 1, 2019. (cf: P.L.2007, c.350, s.1)" S-2851 Scutari/O'Toole.

Executive Editor's Column

Is 'Bird Nesting' a Hare-Brained Scheme or an Appropriate Custody Arrangement?

by Ronald G. Lieberman

Practitioners know that joint or shared physical custody is a situation where the parents not only share decision-making authority for a child or children, but share primary caretaking responsibilities so that 365 overnights are split equally, or just about equally. Such an arrangement has been defined to mean a situation where "the child lives day in and day out with both parents on a rotating basis…."[1] Under case law, specifically *Beck v. Beck*,[2] a joint physical custody arrangement is disfavored. But there exists in the law a trend of 'bird nesting,' whereby one parent vacates the home for a week and the other parent stays in the home for that week, with a rotation each week thereafter, while the children stay in the home at all times. This trend seems to be going in the opposite direction from case law.

The trend of bird nesting has been around for quite some time,[3] but is an approach fraught with issues. On its face, bird nesting, hereinafter referred to as nesting, whereby a child or children remain in the home and the parents move in and out during their physical custody periods, would seem to provide the child or children with the stability of staying long term in a residence. At present, the author could find no studies that address whether nesting is an effective resource for minimizing any negative effects of divorce on children, let alone promoting positive adjustment in the children.

One of the seminal cases addressing nesting originated in California in the matter of *Lester v. Lennane*,[4] although there were cases revealing that nesting has been around as early as 1979.[5]

The cases that do address the issue of nesting have not revealed whether it had been successful in minimizing the disruption to children. There seem to be advantages and disadvantages to nesting. The advantages of allowing a child or children stability in their home and allowing them to remain in school seem to be important. That way, by remaining in the home, the child or children have the continuity of their relationships and remain in a familiar and likely comforting environment. Nesting would also allow parents to have an equal division of the child care responsibilities, and maybe even establish new relationships with the children.

But, the negative effects or disadvantages seem to be clear as well, making this trend a double-edged sword. As studies have shown, a child has difficulty separating from a custodial parent to go to a non-custodial parent, and there are differences between the two parents. As Kenneth D. Herman's study indicated, nesting might blur the differences between the custodial and non-custodial parent, and the acrimony that exists during a divorce may cause the child to become traumatized.[6]

Other disadvantages of nesting seem to be obvious. Practitioners are aware that a client's finances are strained during a divorce. Adding the need for each parent to obtain separate housing means there will be *three* households to maintain: one for each parent and the former marital residence.

Also, certainly nesting would be inappropriate upon remarriage or the introduction of a significant other.

Does nesting make sense? Couples who separate have decided that they cannot live together and share the same household, but with nesting the children are not able to begin the process of actual physical separation. The delays in resolving the equitable distribution of property—both real and personal—would seem to be affected by a nesting arrangement because instead of selling the home and then dividing the personal property, the status quo for the children has primary consideration.

Practitioners cannot fault judges for approaching nesting as a panacea for a divorce. But, the author believes to foist a joint physical custody arrangement in divorce cases runs contrary to the Supreme Court decisions in *Beck* and *Pascale*. The parties may not be able to have a joint physical custody arrangement because of

their routines or because their relationship is so strained that co-parenting in a joint physical custody scenario will be inappropriate.

So, when the advantages of stability for the children in the near term are measured against the disadvantages (e.g., economics and the potential for the parents to be unable to focus solely on the children) nesting may not be appropriate. Although the author believes judges are correct in stating the disruption in a child's life should be reduced as much as possible, the old school thought, that divorced children are negatively affected by a change in homes, should not be the way of resolving issues about custody.[7] Dual residences cause temporary instability in children with regard to being able to adjust to a post-divorce life, yet it is all but certain to occur post-divorce.[8]

Where there is conflict between the parents and joint physical custody is forced upon the parties by a judge, such a situation may, in and of itself, be a source of conflict that should be avoided.[9]

The author believes a practitioner should think about respectfully, but potentially firmly, pushing back against a court-imposed nesting arrangement. Perhaps a shared residence is not in the children's best interest during a divorce. The parents may be uncomfortable with the arrangement and the children may pick up on that anxiety. There could be issues with the friction and tension the parents feel in coming back and forth without their own stability. The delay in having the children adjust to separate residences with each parent might delay the inevitable new routine with its period of adjustment, especially when the child or children will eventually have to deal with the new reality of two houses in two different locations.

The postponement of the inevitable when balanced against the idea of trying to minimize the disruption to a child that a divorce may cause is not easy for any judge in the family part; however, the author does not feel the default concept of bird nesting should be the way to go in every case.

Endnotes

1. *Pascale v. Pascale*, 140 N.J. 583, 596-96 (1995).
2. 86 N.J. 480 (1981).
3. Rachel Emma Silverman and Michelle Higgins, When the Kids Get the House in a Divorce, *Wall St. J.*, Sept. 17, 2003, at D1, Col. 2.
4. 101 Cal. Rptr. 2nd 86 Cal. Ct. App. 2000.
5. *In Re Marriage of Burham*, 283 N.W. 2nd 269 (Iowa 1979).
6. Kenneth D. Herman, A Child's Resistance/Refusal of Contact with Non-Custodial Parent, 15 *Am. J. Fam. L.* 137-39 (2001).
7. Gerald W. Hardcastle, Joint Custody: A Family Court Judge's Perspective, 32 *Fam. L. Q.* 201 (1998); C.S. Bruch, and How are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States, 30 *Fam. & Conciliation Cts. Rev.* 112-34 (1992).
8. Susan Steinman, The Experience of Children in a Joint-Custody Arrangement: A Report of a Study, 51 *Am. J. Orthopsychiatry* 403, 408-14 (1981).
9. Elizabeth Scott and Andre Derdeyn, Rethinking Joint Custody, 45 *Ohio St. L.J.* 455, 488 (1984).

Major v. Maguire: The Supreme Court Elucidates Case Management Procedures for Grandparent Visitation Matters

by Jessica C. Diamond

Although the New Jersey Supreme Court previously addressed the legal standard that grandparents seeking visitation with their grandchild(ren) must establish to prevail in their claims, there has been much confusion over the procedures to be followed beyond the pleading stages of such a case.[1] The recent Supreme Court case of *Major v. Maguire* elucidated these procedures.[2] This article will discuss the pertinent facts of *Major v. Maguire;* the evolution of New Jersey's standard for evaluating and adjudicating grandparent visitation claims; and the new procedures developed by the Court in *R.K. v. D.L., Jr.,* which were tested and affirmed in *Major v. Maguire*.[3] In summary, the Supreme Court in *Major v. Maguire* adopted the following procedures with regard to grandparent visitation matters:

1. When a grandparent visitation matter is complex, the plaintiff should ordinarily file a non-conforming complaint to supplement the form pleading;
2. When a grandparent visitation matter is complex, a parent opposing visitation should use his or her responsive pleading to identify issues on which the parties agree and counter the grandparents' factual allegations on disputed issues;
3. If factual discovery is required, the court and the parties should work together to coordinate and streamline discovery;
4. Trial courts should encourage parties to mediate or arbitrate grandparent visitation actions;
5. Trial courts should not hesitate to summarily dismiss an action without a trial if the grandparents cannot meet their initial burden to make the required *prima facie* showing of particularized harm to the child(ren).

Background: The Standard for Compelling Visitation Between Grandparents and Grandchildren under N.J.S.A. 9:2-7.1

In *Troxel v. Granville*, the United States Supreme Court addressed the question of whether a Washington state statute impeded upon the constitutional due process rights of parents who elect not to allow their child's grandparents to see them, against the grandparents' wishes.[4] The United States Supreme Court determined that the statute at issue was overly broad. The statute at issue provided that any person could petition the court for visitation at any time, and allowed the court to enforce visitation rights for any person so long as the best interests of the child were served. Finding that this impeded the constitutional due process rights of parents to make child-rearing decisions, the *Troxel* Court struck down the statute.[5]

It was in the wake of the *Troxel* decision that the New Jersey Supreme Court addressed its own grandparent visitation statute,[6] which states as follows:

a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.

b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:

(1) The relationship between the child and the applicant;

(2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;

(3) The time which has elapsed since the child last had contact with the applicant;

(4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

(5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;
(6) The good faith of the applicant in filing the application;
(7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and
(8) Any other factor relevant to the best interests of the child.

c. With regard to any application made pursuant to this section, it shall be *prima facie* evidence that visitation is in the child's best interest if the applicant had, in the past, been a full-time caretaker for the child.[7]

Discussing the statute's effect upon constitutional due process rights of parents, the Court found that, when a state statute interferes with family and parental autonomy, a fundamental right is at issue, namely the fundamental child-rearing right of a parent. Therefore, such a statute is subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest.[8] A statute that protects the due process rights of parents is one that: 1) accords parents the "traditional presumption" that a fit parent acts in the best interests of the child; and 2) gives "special weight" to a fit parent's determination regarding visitation.[9]

Thus, the *Moriarty* Court established a burden of proof that must be met by a grandparent seeking visitation, which also balances the parent's fundamental right. Specifically, the *Moriarty* Court held that when a child's parent(s) object to the proposed grandparent visitation, the grandparent seeking visitation must prove by a preponderance of the evidence that denial of his or her visitation application would result in harm to the child.[10] If the grandparent meets this initial burden of proof, then the presumption in favor of parental decision-making is overcome, and the Court must set a visitation schedule that is in the best interests of the child.[11]

Major v. Maguire: The Facts and Procedural History

Factual Background

The parents of the granddaughter at the center of *Major v. Maguire* cohabited between 2007 (the year the granddaughter was born) and 2009, before separating. The plaintiff-grandparents are divorced. The plaintiff-grandmother alleged that during this period she visited with her granddaughter about once every two weeks. It is unclear how frequently the plaintiff-grandfather visited with his granddaughter while the parents were cohabiting.

In 2010, the parents entered into an agreement regarding custody of their daughter, wherein they enjoyed approximately equal parenting time and joint legal custody. However, the defendant-mother was named the parent of primary residence. The child's paternal grandmother alleged she frequently spent time with her granddaughter after the parents' separation. Specifically, she alleged she visited her granddaughter at her son's home every weekend, that the child visited her home about once a month, that she attended the child's dance recitals, that she brought her granddaughter to "take your child to work" day, and that she took annual vacations with her son and granddaughter. The child's grandfather alleged that, after the parents separated, he would visit with his granddaughter about once every two weeks, and that he took her on frequent fishing trips.

In Sept. 2012, the father experienced a significant decline in his health. Both grandparents took on greater roles with the care of their granddaughter during her parenting time with her father, who passed away on Feb. 21, 2013. At that time, the relationship between the child's mother and paternal grandparents became antagonistic and, according to the paternal grandparents, the defendant severely limited their contact with their granddaughter.

The Trial Court Decision

The plaintiffs, grandparents Anthony and Suzanne Major, filed an action in the family part seeking an order to compel their deceased son's wife to allow them to visit with their granddaughter based upon the grandparent visitation statute. They did so by way of a verified complaint. At the initial hearing, the plaintiffs requested a discovery schedule to allow them to present expert testimony on the standard established in *Moriarty*; specifically, to help them establish their *prima facie* showing that their separation from the child would harm her.

The Court ruled that because they had failed to make a *prima facie* showing of particularized harm to the child, they were not entitled to discovery. On the next day of the hearing, the plaintiffs sought leave to present the testimony of an expert witness on the question of

harm. The Court disallowed this, on the grounds that the grandparent-plaintiffs had an obligation to demonstrate they could meet their threshold burden of proof—the showing of harm to the child—before the defendant-parent could be compelled to litigate the matter.

After hearing the testimony of the plaintiff-grandparents, who testified that their granddaughter would indeed suffer harm if deprived of a continued relationship with them, the trial court dismissed the plaintiffs' complaint without prejudice. The dismissal was based on the following grounds: 1) the plaintiffs had failed to show by a preponderance of the evidence that their granddaughter would experience particularized harm in the absence of grandparent visitation and, though not germane to the discussion in this article, 2) that the grandparents did not make "substantial efforts at repairing the breach" in their relationship with the child's parent, and did not show that the parent denied all visitation "with finality," before they commenced litigation.

The trial court's reasoning regarding the issue of discovery presents a proverbial 'chicken or egg' dilemma: How can grandparents show, even by a preponderance of the evidence, particularized harm to the child if they don't have the ability to obtain relevant discovery that would allow them to make such a showing? Must the court rely solely on the testimony of the grandparents?

The Appellate Division Decision and the Parties' Arguments on Appeal to the New Jersey Supreme Court

The Appellate Division thought not. Instead, the Appellate Division ruled that the procedural guidelines set forth in the recent case of *R.K. v. D.L., Jr.* should be applied, though it acknowledged that *R.K.* had not yet been decided when the trial court made its ruling.[12] The matter was remanded with the instruction to the trial court to apply the procedures described in *R.K.*, which will be discussed further below.

On appeal to the New Jersey Supreme Court, the defendant argued that the Court should overrule the procedures established by the Appellate Division in *R.K.* because they are antithetical to the holding of *Moriarty* and overly burdensome to courts and litigants. The plaintiff-grandparents argued that the procedures established in *R.K.* did not alter the holding in *Moriarty*, but rather clarified procedures in a manner that safeguards parental and grandparental visitation rights.

Procedural Changes Leading up to the Supreme Court Ruling in *Major v. Maguire*

R.K. v. D.L., Jr.

Directive 08-11, issued on Sept. 2, 2011, by the acting administrative director of the courts, provides a statewide uniform system for processing cases under the non-dissolution, or FD docket.[13] The non-dissolution docket addresses claims between never-married parents as well as non-parent relatives seeking custody, child support, and/or visitation of minor children, such as the plaintiffs in both *Major v. Maguire* and *R.K.* The directive further noted that, in compliance with Rule 5:4-4(a), all non-dissolution matters shall be deemed summary actions and must be initiated with a form complaint. Specifically, Rule 5:4-4(a) states:

> Family Part summary actions shall include all non-dissolution initial complaints [...]. The court in its discretion, or upon application of either party, may expand discovery, enter an appropriate case management order, or conduct a plenary hearing on any matter.

The Appellate Division, in *R.K.*, acknowledged that grandparent visitation complaints under N.J.S.A. 9:2-7 are summary actions by virtue of the fact that they must be docketed as non-dissolution matters. However, relying on Rule 5:4-4(a), the Appellate Division noted that the trial court is empowered with discretion to order discovery either on the court's own motion or "upon application of either party." Accordingly, the Appellate Division held that:

> [A] complaint seeking grandparent visitation as the principal form of relief should not be automatically treated by the Family Part as a summary action requiring expedited resolution, merely because it bears an FD docket number. As this case illustrates, such a default approach can be inconsistent with sound principals of judicial case management, and potentially inhibit the grandparents' due process rights to prosecute their case in a manner likely to produce a sustainable adjudicative outcome.

Indeed, the Appellate Division rejected the entire concept of 'cookie cutter' non-dissolution cases. Although the Appellate Division acknowledged that the majority

of non-dissolution matters are litigated *pro se*, and that there may be a need for conformity in the docket to allow for procedural ease, some cases must be handled differently than others. The *R.K.* Court went on to require that judges presiding over grandparent visitation cases engage in active case management:

> Thus, as previously noted, notwithstanding its FD docket designation as a non-dissolution case, when a litigant brings an action seeking grandparent visitation under *N.J.S.A.* 9:2–7.1, either using the standardized complaint form approved under Directive 08–11 or through an attorney-prepared pleading, the vicinage Family Part Division Manager shall designate the matter as a contested case after joinder of issue and refer the case for individualized case management by a Family Part judge selected by the vicinage Presiding Judge of Family. The judge shall review the pleadings and determine whether active case management is needed.
>
> In furtherance of this case-sensitive approach, we suggest the judge meet with the parties and counsel, if available, as soon as practical after joinder of issue, to determine, on the record:
>
> (1) the nature of the harm to the child alleged by plaintiff;
> (2) the possibility of settlement through mediation or as otherwise provided in Rule 5:5–5;
> (3) whether pendente lite relief is warranted;
> (4) the extent to which any of the facts related to the statutory factors identified in N.J.S.A. 9:2–7.1(b)(1) through (8) can be stipulated by the parties;
> (5) whether discovery is necessary, and if so, the extent and scope of the discovery, as permitted by Rule 5:5–1(a), written interrogatories, production of documents, Rule 4:18–1, request for admissions, and consent to release documents not within the possession of the party—discovery may be completed within the time allotted in Rule 5:5–1(e), or as otherwise ordered by the court;
> (6) whether expert testimony will be required, and if so, the time for submission of the expert's report and curriculum vitae, the time for submission of defendant's rebuttal report if any, and whether deposition of the expert(s) will be required or permitted;
> (7) a protocol for the filing of motions, including motions to compel discovery, motions seeking protective orders to exclude or limit evidence based on an assertion of privilege, or because the release of the information would adversely affect the child's best interest, or unduly infringe upon the privacy rights of the custodial parent; and
> (8) a tentative date for the filing of dispositive motions and/or a plenary hearing if necessary to adjudicate plaintiff's complaint and resolve any material facts in dispute.
>
> This list is by no means exhaustive of the myriad of potential case management issues that may arise in any given case. The need and degree of judicial supervision is left entirely to the discretion of the trial judge. As a practical matter, the court may direct plaintiff's counsel to prepare a draft case management order for the court's review. If plaintiff is appearing pro se, the court, or in the court's discretion, defense counsel, if available, shall prepare a case management order that reflects the outcome of the matters, issues, and decisions discussed and decided at the case management conference.

Thus, the Appellate Division in *R.K.* began to pave the way for a more case-sensitive approach to adjudicating grandparent visitation matters by evaluating each individual case's case management needs.

Sept. 1, 2015, Amendments to the New Jersey Court Rules

On the heels of the Appellate Division decision in *R.K.*, on Sept. 1, 2015, the Supreme Court adopted three recommendations of the Supreme Court Family Practice Committee. The first such amendment allowed a party to request in the complaint or counterclaim that his or her case be designated as complex under Rule 5:4-2(j). An amendment to Rule 5:4-2(i) authorized the filing of a non-conforming complaint, to which is appended a completed supplement as promulgated by the administrative director, when a party seeks to have a non-dissolution matter designated as "complex" under Rule 5:5-7(c). Finally, an amendment to Rule 5:5-7(c) permitted a trial

court, either on the application of a party or on its own motion, to assign non-dissolution cases that cannot be heard in a summary manner to the complex track, "based only on a specific finding that discovery, expert evaluations, extended trial time or another material complexity requires such an assignment." Applications for complex track assignment made after the initial hearing may be considered upon presentation of "exceptional circumstances."

Based on *R.K.* and the amendments to the Court Rules adopted by the Supreme Court, it became clear that the Judiciary was rejecting automaton-like, inflexible procedures for adjudicating grandparent visitation, and perhaps more generally, non-dissolution matters as a whole, in favor of a case-by-case and fact-sensitive approach.

The New Jersey Supreme Court's Decision in *Major v. Maguire*: Does it Appropriately Balance Parental Rights Against Grandparents' Claims for Visitation?

As discussed above, the Supreme Court in *Moriarty* concluded that the avoidance of harm to the child is "the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent." Thus, the Court cannot even consider a grandparent visitation schedule over the objection of a fit parent until there is a *prima facie* showing that deprivation of a grandparental relationship will harm the child. This standard was intended to protect the constitutional due process rights of parents, undoubtedly of paramount importance.

Disagreeing with the plaintiff-mother's position, the *Major v. Maguire* Court held that, when it comes to *complex* grandparent visitation cases, the case management recommendations set forth in *R.K.* enhance the constitutional standard established in *Moriarty* because, without fact-specific case management, litigants may be deprived of an opportunity to meet their burdens under the statute and case law. Balancing that interest, however, with the burden on privacy and resources of families who are suddenly forced to litigate and go through the burdensome discovery process, the Court recognized that not every grandparent visitation case should be deemed complex.

Thus, the Court endorsed the approach set forth in Rule 5:5-7(c), which requires the trial court to hold an initial and final case management conference and to enter an order addressing the full list of issues set forth in *R.K.*, but *only* in grandparent visitation cases that warrant assignment to the complex track. All other grandparent visitation cases are deemed summary actions, with or without case management and discover as authorized under Rule 5:4-4(a).

The Court also addressed the procedures a party should follow when seeking to have a matter deemed complex. Specifically, the plaintiff should file a non-conforming complaint, as permitted by Rule 5:4-2(i), to supplement the form pleading required by Directive 08-11. The grandparents should plead particularized harm and present all relevant facts "with precision and detail." Likewise, the parent's responding pleading should identify issues on which the parties agree and counter the grandparents' factual allegations on disputed issues.

If discovery is required, then *Major* indicates the court and the parties should "work together to coordinate and streamline the process." Further, regardless of whether the matter is deemed complex or summary, "Family Part judges have broad discretion to permit, deny, or limit discovery in accordance with the circumstances of the individual case." Importantly, the Court explained that "any discovery should be carefully circumscribed to prevent or minimize intrusion on the privacy of the child and his or her family."[14]

Specifically, the Court underscored that, although expert testimony may be needed for grandparents to meet their burden of proof under N.J.S.A. 9:2-7.1, in determining whether expert testimony is appropriate trial courts must be sensitive to how the involvement of an expert might adversely affect family resources and the privacy of the child.

Taking into consideration all of the facts, *Major* instructed trial courts to dismiss actions without conducting a full trial if it is determined that grandparent-plaintiffs cannot sustain their burden to make the required showing of harm. If this is the case, the summary action can be dismissed pursuant to Rule 4:67-5, and complex visitation cases can be dismissed by summary judgment under Rule 5:45-2(c).[15]

Lastly, the Court emphasized that the trial court should emphasize—though not mandate—mediation or arbitration to resolve grandparent visitation actions.

Conclusion

Although time will tell, it seems the procedural safeguards and steps set forth in *Major v. Maguire* balance

such important interests as public policy in favor of alternative dispute resolution; protection of fit parents' due process rights; prioritization of the best interests of children; and judicial economy. Perhaps most importantly, *Major v. Maguire* rejects the 'one-size-fits-all' approach to non-dissolution matters that may be tempting for trial courts to apply. Whether the procedures set by *Major v. Maguire* are adequate remains to be seen, but there is no question that the Supreme Court's holding provides much-needed guidance to litigants and attorneys when it comes to grandparent visitation matters. ■

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Endnotes

1. *Moriarty v. Bradt*, 177 N.J. 84 (2003).
2. *Major v. Maguire*, 224 N.J. 1 (2016).
3. *R.K. v. D.L., Jr.*, 434 N.J. Super. 113 (2014).
4. *Troxel v. Granville*, 530 U.S. 57 (2000).
5. *See generally Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982)).
6. *Moriarty*, *supra* 177 N.J. 84.
7. N.J.S.A. 9:2-7.1.
8. *Moriarty*, *supra* 177 N.J. 84, at 103.
9. *Id.*
10. *Id.* at 117.
11. *Id.*
12. *Major v. Maguire*, No. A-5560-12T1, 2014 WL 1491442, at 4 (N.J. Super. Ct. App. Div. April 17, 2014), *aff'd as modified*, 224 N.J. 1, 128 A.3d 675 (2016) *citing R.K. v. D.L., Jr.*, 434 N.J. Super. 113 (App. Div. 2014).
13. *R.K., supra* 434 N.J. Super. 113, 131.
14. *Major, supra,* 224 N.J. 1, 23-24 (2016).
15. *Id.* at 25.

Making the Case for *Pro Bono*

by Kaleia Edmundo

There are many competing interests for a lawyer's time, including client demands, professional obligations, and personal commitments. With a busy law practice it may not always be practicable or feasible to fit *pro bono* work into one's day. Many attorneys genuinely want to do *pro bono* work but are concerned about the time constraints in their already busy lives. Despite busy schedules, there are still many compelling reasons to integrate *pro bono* work into a law practice, as well as things to consider when deciding to do so.

The Need for New Jersey Attorney's to Handle *Pro Bono* Matters

First, one cannot ignore the overwhelming unmet needs of low-income individuals in need of legal help. According to 2012 Census data, 31.5 percent of New Jersey's population live below 250 percent of the federal poverty level, which is 2.7 million people. One-third of people living in actual poverty have a civil legal issue requiring the assistance of a lawyer, and less than one-sixth of those living in poverty actually get help.[1] Without access to legal help, many low-income people are left to navigate the judicial system on their own, which can be a daunting task for someone lacking the knowledge and ability to understand the court system. To an attorney, drafting pleadings is routine, while to a self-represented litigant, completing court forms can be daunting and can take weeks of effort to complete, if they can be completed at all.

Second, *pro se* litigants are unfamiliar with common legal practices and rules. To provide self-represented litigants with a better understanding of the court system and family law process, legal services offices coordinate regular legal clinics for the public (such as the office affiliated with this author).

Just one of the state's many *pro bono* service providers, Volunteer Lawyers for Justice (VLJ), runs monthly legal clinics in the areas of divorce and child support. Through these legal clinics volunteer attorneys provide limited-scope assistance to *pro se* litigants by explaining the court process, helping prepare pleadings, and providing legal advice about their matters. In this author's experience, the most common barriers *pro se* litigants face include literacy issues, comprehension issues for non-native English speakers, disabilities that impact litigants' abilities to prepare their cases, limited education levels, or fear and misconceptions about seeking help. Without legal assistance, many litigants are unable to pursue their legal matters at all, and others with grounds for relief do such a poor job identifying their position to the court that their otherwise valid claims are nonetheless dismissed. Attorney involvement at any stage in a family law case can make a significant impact in resolving the litigant's legal matter.

The Benefits of *Pro Bono* Work

To illustrate the impact an attorney can make when doing *pro bono* legal work, consider Maria's case. Maria was an elderly cancer survivor who was separated from her husband for over 25 years. However, due to her cancer treatments, she was greatly weakened and struggled to fill out the divorce pleadings on her own. By the time she came to the VLJ Divorce Program, she had given up hope of ever getting divorced—as her previous divorce filings were dismissed by the court for administrative reasons. With volunteer help, a new divorce complaint was filed, a filing fee waiver was obtained, and she received guidance on how to properly serve her spouse. Maria obtained her divorce in less than six months and was ecstatic to move on with her life and concentrate on her recovery. While the volunteers who helped Maria considered their assistance to be minor, their help made a major impact on her life.

But there is more to *pro bono* work than just personal fulfillment. In New Jersey, all attorneys licensed in the state have an obligation to do *pro bono* work on a regular basis. Pursuant to New Jersey's Rules of Professional Conduct, specifically R.P.C. 6.1, every lawyer has a professional responsibility to render public interest legal

service. This responsibility can be satisfied by providing *pro bono* legal services to any court-certified program pursuant to R. 1:21-12, which states:

> Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility: by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Under *Madden v. Delran*, lawyers in New Jersey are subject to court-mandated *pro bono* service.[2] Pursuant to a New Jersey Supreme Court directive, the mandatory *pro bono* cases fall into three common case types: 1) providing representation to those accused of violating domestic violence restraining orders, 2) providing representation to people with municipal appeal issues (typically criminal matters), and 3) providing representation to parolees facing parole revocation. *Madden* appointments are made at the pleasure of the court.

When an attorney is assigned a *Madden* case he or she is given little substantive law training. The court does not provide mentors, malpractice coverage, or consider the demands of an attorney's schedule when assigning a *pro bono* case. However, if an attorney provided 25 hours of *pro bono* service through a court-approved provider, he or she can be exempted from *Madden* assignments.[3] The providers on this list coordinate *pro bono* programs in various areas of law, and they typically provide more flexible time commitments than mandatory assignments. When choosing a *pro bono* program, ask what benefits they can provide to volunteers. Also, choosing a *pro bono* experience according to one's schedule and interests is far better than having a *Madden* assignment imposed.

Finally, by doing *pro bono* work, volunteer attorneys help improve the perception of attorneys in the community. *Pro bono* work is looked upon favorably in the legal community by colleagues and current and potential clients. It is clear that the Judiciary is supportive of *pro bono* work, evidenced by Chief Justice Stuart Rabner's recent positive endorsement, stating "[p]ro bono work is in keeping with the noblest traditions of the legal profession. Pro bono work is not just a helpful supplement to the legal system, it's vital to the delivery of justice in our state and in our nation."[4]

Things to Consider Before Deciding to Do *Pro Bono* Work

When choosing a *pro bono* experience, it is important to choose the *pro bono* provider wisely. An attorney's time is precious and *pro bono* time is even more valuable to the people the attorney helps. When looking for a *pro bono* organization, there are a few things to look for to make sure it is a good fit for the volunteer attorney. The author recommends finding a provider that: 1) is court-approved, so the attorney is exempt from *Madden* assignments the next year after completing 25 hours in a calendar year; 2) provides interesting legal issues; 3) offers multiple volunteer opportunities, including the ability to provide limited-scope legal services or to provide full representation; 4) provides continuing legal education and training for volunteers; 5) offers malpractice insurance; and 6) offers hands-on support for volunteers, including co-counseling and/or ongoing mentoring.

Pro bono work is not only a professional obligation, but also provides one an opportunity to develop professionally. *Pro bono* work gives attorneys the opportunity to pursue their passions, hone legal skills, and give back to the community, all at the same time. It also allows for networking with colleagues, the chance to improve the lives of others, and the opportunity to advance the perception of the legal profession overall. ■

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Endnotes

1. Legal Services of New Jersey, Poverty Research Institute, Sept. 2014.
2. *Madden v. Delran*, 126 N.J. 591 (1992).
3. The list of court-approved providers can be found at http://www.judiciary.state.nj.us/probono/.
4. In the Matter of Opinion No. 17-2012 of the Advisory Committee on Professional Ethics.

If an Agreement Has Been Determined to be Unenforceable, Can it be Used as Evidence During Trial?

by Derek M. Freed

Matrimonial practitioners often encounter prenuptial agreements, mid-marital agreements, reconciliation agreements or marital settlement agreements alleged to be unenforceable. If the agreement is found to be enforceable, it may be dispositive of one or more issues in the litigation. However, if the agreement is found to be unenforceable, can it still be used as evidence at the time of trial? The case law, as well as the Restatement (Second) of Contracts, suggests that in certain circumstances, although not dispositive of the issues, even an unenforceable agreement can be admitted as evidence in a trial. This article outlines the operative legal principles regarding utilizing unenforceable agreements at the time of trial and the limitations on the use of these agreements.

Preliminary Issue: Has the Court Found that the Agreement is Unenforceable, Voidable or Void?

The first step before addressing whether an unenforceable agreement may be used as evidence during a trial is to determine whether the court has found the agreement in question to be unenforceable, void or voidable. An agreement found to be voidable or unenforceable may still be admitted into evidence, while an agreement found to be void presents a more significant challenge for admission into evidence.

Courts have created formal classifications such as 'void,' 'voidable' and 'unenforceable' to distinguish between contracts found to be invalid.[1] "With predictable recurrence, court opinions, statutes, scholarly literature, and contract draftsmen use the words 'void,' 'voidable' and 'unenforceable'—as well as dozens of other terms of the same ilk—to describe flawed contracts."[2] Often, a court uses the words 'void,' 'voidable' and 'unenforceable' imprecisely or interchangeably, but in a small number of the cases the distinction between the terms is a central issue.[3]

A void contract is void *ab initio* (from the beginning), and has no legal effect.[4] It is as if the contract never existed.[5] Common law generally categorizes contracts that are void *ab initio* as those contracts that are *mala in se* (*i.e.*, contracts that involve moral turpitude).[6] This can include contracts involving parties that do not have the capacity to contract, such as parties lacking the requisite age to enter into a contract or the ability to consent.[7]

Many times, however, when a contract is declared void, what is really meant is that the contract is voidable or unenforceable.[8] The Restatement (Second) of Contracts defines a voidable contract as "one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal ramifications created by the contract, or by ratification of the contract to extinguish the power of avoidance."[9] "The propriety of calling a transaction a voidable contract rests primarily on the traditional view that the transaction is valid and has its usual legal consequences until the power of avoidance is exercised."[10] Grounds for avoidance of a voidable contract include those contracts induced by fraud, mistake or duress.[11]

Common law generally categorizes contracts that are voidable as those that are *mala prohibita* (*i.e.*, relating to regulation).[12] While voidable contracts are valid until avoided by the party with the power to avoid elects to do so, the right to avoid a voidable contract can also be lost due to unreasonable delay or ratification.[13]

The Restatement (Second) of Contracts defines an unenforceable contract as "one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification."[14] In theory, the category of unenforceable contracts does not constitute a wholly distinct category from that of voidable contracts. As noted in the Restatement (Second) of Contracts "[v]oidable contracts might be defined as one type of unenforceable contract."[15] However, the Restatement (Second) of Contracts attempts to carve out a specific category of unenforceable contracts, which involve

contracts in which "the duty of performance does not depend solely on the election of one party" and "some legal consequences other than the creation of a power of ratification follow without further action by either party."[16] In addition, "[s]ome contracts are unenforceable because they arise out of illegal bargains that are neither wholly void nor voidable."[17] Other contracts "are unenforceable because of laws relating primarily to remedies, such as the Statute of Frauds or Statute of Limitations."[18] The legal effect of an unenforceable contract is not specifically articulated in the Restatement (Second) of Contract, rather it seems "the law recognizes an abstract duty of performance" when a contract is categorized as unenforceable.[19]

While the technical differences between voidable and unenforceable contracts remain somewhat abstract, the law provides a clear distinction between contracts that are void and those that are voidable/unenforceable. Specifically, with a void contract, one starts with the assumption the contract has no legal effect. In contrast, with a voidable/unenforceable contract, one starts with the assumption the contract *does* have some legal effect.

The New Jersey Cases Addressing Void, Voidable, and Unenforceable Contracts

The New Jersey Supreme Court differentiated between void and voidable agreements in *Bauer v. City of Newark*.[20] In *Bauer*, the New Jersey Supreme Court examined the distinction between a purported contract, which a municipality is utterly without capacity to make under any and all circumstances; a contract within the general powers of the corporation but void and unenforceable for lack of an appropriation or for nonconformance with a statutory condition precedent; and an "*intra vires*" contract "merely voidable for want of authority or for an irregularity in the exercise of the contractual power."[21] Ultimately, after providing this differentiation, the *Bauer* Court was not required to address the distinction because the contract before the Court was "null and void" for statutory reasons.[22]

In *Summer Cottagers' Ass'n of Cape May v. City of Cape May,*[23] the Supreme Court of New Jersey revisited this distinction, stating:

> There is a distinction between an act utterly beyond the jurisdiction of a municipal corporation and the irregular exercise of a basic power under the legislative grant in matters not in themselves jurisdictional. The former are Ultra vires in the primary sense and void; the latter, Ultra vires only in a secondary sense which does not preclude ratification or the application of the doctrine of estoppels in the interest and equity and essential justice.

The Court in *Summer Cottagers'* added that although the original rule was a contract *ultra vires,* was void *ab initio* and could not be validated by performance or estoppel, there were exceptions to the rule for the rights of persons innocently entering *ultra vires* contracts with private corporations where to declare the contract void *ab initio* would defeat the ends of justice or work a legal wrong.[24] Thus, the Supreme Court affirmed the trial court's decision ruling against the plaintiffs, as the plaintiffs took no action to vacate the sale until after the erection of a structure of great value.[25]

In the seminal case of *Marschall v. Marschall*, the Chancery Division addressed the issue in the context of evaluating the enforceability of an antenuptial agreement.[26] The court examined whether antenuptial agreements dealing with divorce were void (*i.e.*, void *ab initio*, as being contrary to public policy), or whether an antenuptial agreement could be enforced as long as it conformed with certain requirements.[27] Ultimately, the court concluded antenuptial agreements were not void *ab initio* and could be enforced in a court of equity as long as certain factors were met.[28]

The Consideration of Otherwise Unenforceable Contracts as Evidence in New Jersey

In the family law context, if an agreement is found to be void or unenforceable, New Jersey courts appear to take a practical approach that considers the actual facts of the case being litigated when evaluating whether an otherwise unenforceable or void contract can be considered in evidence.

For example, in *Heuer v. Heuer*, the husband challenged the validity of the parties' marriage during their divorce on the basis that the wife's first divorce was invalid.[29] While the New Jersey Supreme Court did not articulate whether the parties' marriage contract would have been void or voidable due to the invalidity of the first divorce, the Court nonetheless prohibited the husband from attacking the validity of the marriage on the basis of quasi-estoppel.[30]

In reaching its decision, the *Heuer* Court noted the husband was aware of his wife's first divorce at the time of the marriage and also at the time he adopted his wife's daughter from her prior marriage.[31] Furthermore, at no time did the husband "either suggest that [his wife] should take any additional action respecting the putative Alabama divorce, or seek to legally attack his marriage to plaintiff prior to filing an answer and counterclaim to plaintiff's complaint [for divorce] in 1995."[32] The Court would not allow the husband to attack the validity of the marriage at such a late date when the sole purpose was to avoid "alimony and equitable distribution under N.J.S.A. 2A:34-23 and decisional law interpreting that statute."[33] It is submitted that such an approach is inherently logical and fair given the facts of the case.

In the case of *In re Baby M*, the New Jersey Supreme Court considered whether an otherwise void contract can still be relevant and have evidentiary value.[34] The Court evaluated a surrogacy contract between Mr. Stern and Mrs. and Mr. Whitehead,[35] and found the contract to be "invalid" and "unenforceable" because it was in direct conflict with existing statutes and with the public policies of the state.[36] The Court determined the contract was illegal and perhaps criminal under New Jersey's adoption statutes and long-established policies and likened the contract to baby selling.[37] The Court stated:

> This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition on the payment of money in connection with adoption exists here.[38]

The Court further added, "In New Jersey the surrogate mother's agreement to sell her child is void" and "[t]he surrogacy contract is based on, principles that are directly contrary to the objectives of our laws."[39]

Despite the New Jersey Supreme Court's unequivocal finding that the surrogacy contract was illegal and unenforceable, the Court specifically recognized the contract could still be considered for other evidentiary purposes. The Court stated:

> Having decided that the surrogacy contract is illegal and unenforceable, we now must decide the custody question without regard to the provisions of the surrogacy contract that would give Mr. Stern sole and permanent custody. (That does not mean that the existence of the contract and the circumstances under which it was entered may not be considered to the extent deemed relevant to the child's best interest.)[40]

The Court explained further that "[t]he custody decision must be based on all circumstances, on everything that actually has occurred, on everything that is relevant to the child's best interests."[41] It further noted, "[t]hose circumstances include the trip to Florida, the telephone calls and threats, the substantial period of successful custody with the Sterns, and all other relevant circumstances."[42]

As with the *Heuer* decision, the *Baby M* decision is logical and equitable. The Court in *Baby M* realized that despite the fact it found the contract in question to be illegal and unenforceable, it had to deal with the actual factual circumstances existing as a result of that contract. While the surrogacy contract could be "erased" from existence, the child's and the parent's circumstances could not be erased. All relevant facts and circumstances would need to be considered to reach a proper determination.

A third decision by the New Jersey Supreme Court references considering an otherwise unenforceable agreement. In *Smith v. Smith*, the parties executed an agreement, which the husband characterized as an enforceable "property settlement agreement" and the wife characterized as an unconscionable "separation agreement."[43] The trial court initially enforced the agreement and barred equitable distribution of any further assets.[44] However, following the New Jersey Supreme Court's interpretation of the equitable distribution statute in *Painter v. Painter,*[45] the trial court found that "while the agreement might be evidential upon the issue of equitable distribution of assets, it could not be deemed determinative."[46] On review, the New Jersey Supreme Court considered the otherwise unenforceable agreement in determining the date of division for equitable distribution.[47]

In addition to these three cases, the Restatement (Second) of Contracts supports the use of otherwise unenforceable contracts for a specific purpose. In a section dealing with the statute of frauds, the comments to the restatement provide that the statute of frauds "does not lay down a rule of evidence, and an unenforceable contract may be proved for any legitimate purpose."[48]

While an Argument Can Be Made to Admit an Unenforceable Agreement into Evidence, such an Agreement Cannot Be Solely Dispositive of the Issues

The *Heuer*, *Baby M*, and *Smith* decisions by the New Jersey Supreme Court are logical in that they indicate a court should essentially consider all facts and circumstances that exist to reach a just determination. While each case may have involved an unenforceable contract, the contract, as well as the facts arising *out of the contract* were considered as evidence. *In re Estate of Shinn,*[49] however, indicates there are limits to the use of an unenforceable contract in a court of equity.

In *Shinn*, a husband sought for his future wife to sign a prenuptial agreement.[50] Each party had legal counsel, but the husband refused to provide full financial disclosure to the wife's attorney.[51] When the wife's attorney attempted to obtain the disclosure, as well as negotiate some of the terms of the proposed agreement, the husband's attorney responded that all information the husband would provide had already been provided, and the agreement would have to be signed "as is or the marriage was off."[52] Ultimately, the wife signed the agreement without the disclosure, and the parties were married.[53] During the parties' marriage, the husband died. The wife commenced litigation "seeking, among other things, a judgment that would both declare the premarital agreement unenforceable…. and recognize [her] right to receive her elective share of [her husband's] estate."[54]

The trial judge concluded the husband had failed to provide "full and fair disclosure."[55] Additionally, the trial judge determined the parties' agreement failed to set forth an "adequate written waiver of the right to full financial disclosure."[56] Based on these findings, the trial court determined the agreement was unenforceable.[57]

Notwithstanding the finding that the premarital agreement was unenforceable, the trial court decided to "enforce the agreement's waiver of the elective share by applying the doctrine of equitable estoppel."[58] The trial court determined "that it was 'fundamentally unfair' for [the wife] to be able, 'now that her husband[,] who insisted on this as a condition precedent is dead, to walk away from that agreement and to have it set aside.' Based upon these observations, the judge applied the doctrine of equitable estoppel in denying the relief that [the wife] sought."[59] Essentially, the trial court enforced the terms of the unenforceable agreement through its equitable powers.

The Appellate Division reversed the trial court's decision, finding the trial judge "allowed his personal sense of fairness to override the statutory consequence of [the husband's] failure to comply with N.J.S.A. 3B:8-10 and N.J.S.A. 37:2-38 and the public policy embodied by those statutes." [60] The Appellate Division stressed equitable maxims could not be applied, as "equity will not create a remedy that is in violation of law nor create a remedy where the law has recognized there can be no liability."[61]

Shinn is factually distinguishable from *Heuer*, *Baby M*, and *Smith*; however, it illustrates there are limits on the use of unenforceable agreements at the time of trial. Specifically, *Shinn* suggests an otherwise unenforceable agreement cannot be *solely dispositive* of an issue as if that very same agreement were actually enforceable. *Shinn* stands for the proposition there must be a legal consequence to a judicial finding that an agreement is unenforceable, and that consequence should *not* be to enforce the agreement as a matter of equity.

Conclusion

If a prenuptial agreement, mid-marital agreement, reconciliation agreement, or marital settlement agreement is found to be unenforceable, the terms of the agreement may no longer be dispositive of the issues. The first step in such a situation is to determine if the agreement is void, voidable or unenforceable. Given the evidentiary ramifications of categorizing an agreement as void as opposed to voidable or unenforceable, it may be necessary to obtain clarification from a court in any orders that are issued. It is also important to be mindful of the language used to describe the agreement in trial stipulations or preparing the form of an order.

Assuming the court has found the agreement to be unenforceable, a party may still seek to introduce the terms of the agreement and the facts arising out of the agreement into evidence. While the unenforceable agreement will likely not be solely dispositive of the issues, it can serve as valuable evidence with respect to an issue in dispute in the litigation.

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Endnotes

1. Jesse A. Schaefer, Comment: Beyond a Definition: Understanding the Nature of Void and Voidable Contracts, 33 *Campbell L. Rev.* 198, 196 (2010).
2. *Id.* at 193.
3. *Id.* at 194-195, *citing Daugherty v. Kessler*, 286 A.2d 95, 97 (Md. 1972), and Abraham J. Levin, The Varying Meaning and Legal Effect of the Word "Void," 32 *Mich. L. Rev.* 1088, 1089 n. 3 (1933).
4. *See Minder v. Minder*, 83 N.J. Super. 159, 163 (Ch. Div. 1964).
5. *Ibid.*
6. Schaefer, at 200.
7. *Minder*, 83 N.J. Super. at 164.
8. Schaefer, at 193. *Citing e.g.*, *Green Tree Acceptance, Inc. v. Blalock*, 525 So.2d 1366, 1370 (Ala. 1988) ("Although the statute states that the contract is automatically void, in practice the contract is merely voidable...."); *Ewell v. Daggs*, 108 U.S. 143, 148-49 (1883) (observing that the word "void" is "often used in statutes and legal documents...in the sense of voidable merely...and not as meaning that the act or transaction is absolutely a nullity, as if it had never existed").
9. Restatement (Second) of Contracts §7 (1981).
10. *Id.* at § 7 comment e. *See Flaxman v. Flaxman*, 57 N.J. 458, 461 (1971).
11. Restatement (Second) of Contracts § 7 comment b.
12. Schaefer, at 200-01.
13. Restatement (Second) of Contracts § 7 comments d-e.
14. Restatement (Second) of Contracts § 8.
15. Restatement (Second) of Contracts § 8 comment a.
16. *See* Schaefer, at 199-203 (discussing the issues and inconsistencies of the approach of the Restatements); Restatement (Second) of Contracts §8 comment a.
17. Restatement (Second) of Contracts §8 comment b.
18. *Ibid.*
19. Schaefer, at 200.
20. *Bauer v. City of Newark*, 7 N.J. 426 (1951).
21. *Id.* at 434.
22. *Id.* at 433, 435.
23. *Summer Cottagers' Ass'n of Cape May v. City of Cape May*, 19 N.J. 493, 504 (1955).
24. *Id.* at 505-06.
25. *Id.* at 506.
26. *Marschall v. Marschall*, 195 N.J. Super. 16 (Ch. 1984).
27. *Id.* at 22-27.
28. *Ibid.*
29. *Heuer v. Heuer*, 152 N.J. 226 (1998).
30. *Id.* at 240-241.
31. *Id.* at 239.
32. *Ibid.*
33. *Id.* at 240.
34. *In re Baby M*, 109 N.J. 396 (1988).
35. *Id.* at 412.
36. *Id.* at 421-22.
37. *Id.* at 422, 425.
38. *Id.* at 437-38.
39. *Id.* at 441-443.
40. *Id.* at 452-53.
41. *Id.* at 456.
42. *Ibid.*
43. *Smith v. Smith*, 72 N.J. 350, 354 (1977).
44. *Id.* at 356.
45. *Painter v. Painter*, 65 N.J. 196 (1974).
46. *Smith*, 72 N.J. at 356.
47. *Id.* at 361.
48. Restatement (Second) of Contracts §143 comment.
49. *In re Estate of Shinn*, 394 N.J. Super. 55 (App. Div. 2007), *certif. denied*, 192 N.J. 595 (2007).
50. *Id.* at 60.
51. *Ibid.*
52. *Ibid.*
53. *Id.* at 60-61.
54. *Id.* at 61.
55. *Id.* at 63.
56. *Id.* at 64.
57. *Id.* at 66.
58. *Ibid.*
59. *Id.* at 67.
60. *Ibid.*
61. *Ibid.*

Mediation: Alternative Methods of Settlement Preservation via Audio Recordings

by Matthew N. Tsocanos

Consider the following scenario: A family law attorney represents the wife in a divorce matter. The wife and her husband have been ordered to attend mandatory economic mediation in accordance with Rule 5:5-6. In multiple mediation sessions, the parties and counsel work toward a global settlement. Each party makes various concessions to ultimately reach a full settlement. The mediator brings everyone together and summarizes the settlement. Both attorneys agree that the mediator correctly recited the core terms of the agreement. Both parties express and acknowledge their acceptance of the terms spoken by the mediator. The wife believes, based on representations from opposing counsel, statements by the mediator, and statements from her soon-to-be ex-husband that a deal has been struck. She has proceeded in good faith toward final resolution, making significant concessions to compromise and finalize a deal. In addition, significant legal fees have been incurred during the process. Everyone at mediation agrees there is a settlement, and letters are written to the court indicating that substantial progress has been made throughout the mediation process. Trial is scheduled to commence in three days.

Due to time constraints, no writing is made to memorialize the terms of the settlement prior to leaving the last mediation session. No agreement is signed. The husband had to rush out of the last session to attend a business meeting and the wife had to return home to care for the children. On top of that, the mediator had to leave for an urgent appointment.

The following morning, the wife's attorney writes to the court to indicate that a settlement has been reached, and the attorney requests an extension of time to prepare an agreement. A day later (*i.e.*, two days before trial) the husband's attorney advises the court that there is no settlement.

Who is right? Where no agreement or term sheet was signed by the parties at or after mediation, does an enforceable agreement exist? And, if it does not, what could have been done differently to create an enforceable agreement without the necessity of a signed writing?

Does an Agreement Exist?

Harrington View

For many years, family law mediation participants relied upon the Appellate Division's 1995 decision in the matter of *Harrington v. Harrington,* that "to be enforceable, matrimonial settlement agreements, as any other agreements, need not necessarily be reduced to writing or placed on the record."[1] So long as "the parties agree upon the essential terms of a settlement...the settlement will be enforced notwithstanding the fact that the writing does not materialize because a party later reneges."[2] Thus, verbal agreements and oral contracts, including those reached at mediation, were generally considered valid and legally binding if reasonable, equitable, conscionable and made in good faith.[3] And, in the case of the foregoing fact pattern, the essential terms of settlement discussed and agreed upon at mediation may have been deemed by the trial court to be enforceable so long as it was clear that an agreement was reached subject only to the mechanics being "fleshed out" in a writing to be thereafter executed.[4]

Willingboro View

However, in 2013 the New Jersey Supreme Court made a decision in the matter of *Willingboro Mall, LTD v. 240/242 Franklin Avenue, L.L.C.* that appears to have changed the fate of verbal agreements reached at mediation.[5]

Although the particular facts of *Willingboro Mall* are complex, the relevant facts and procedural history boils down to the following: The defendant, Franklin Avenue, L.L.C., defaulted on a mortgage obligation. The plaintiff, Willingboro Mall, LTD, brought suit to enforce the mortgage obligation. During litigation, the trial court directed the parties to attend mediation. In the presence of the mediator, the defendant offered the plaintiff $100,000 to

settle the entire dispute.[6] The plaintiff verbally accepted the offer in front of the mediator and counsel for both parties. However, the parties did not reduce the agreement to writing at that time.

Notwithstanding the verbal agreement reached at mediation, the plaintiff later disputed that a final, binding settlement agreement had been reached. In response, the defendant filed a motion seeking to enforce the oral agreement reached in the mediator's presence. Following discovery, a plenary hearing was conducted over four days. Five witnesses testified, including the meditator.[7] Notably, during initial motion practice, the plaintiff did not assert a privilege to bar the mediator's testimony. At the conclusion of the hearing, the trial court found that the parties did, in fact, arrive at a binding settlement at mediation, and entered an order enforcing it.[8]

The plaintiff appealed the trial court's order enforcing the parties' verbal agreement at mediation, arguing that Rule 1:40-4 precludes enforcement of an oral settlement reached at a mediation session. The plaintiff further argued that Rule 1:40-4(i) prohibits enforcement of any oral settlement because the terms of the settlement were not reduced to writing at the mediation session and signed by both parties.

The Appellate Division held that a settlement reached during a Rule 1:40 mediation session may be enforced only when the parties have waived the confidentiality provisions of the Uniform Mediation Act, specifically N.J.S.A. 2A:23C-4, and Rule 1:40-4(d). And, with respect to the particular facts of the case, as gleaned over the course of the four-day evidentiary hearing, supported the finding that the plaintiff had, in fact, waived the confidentiality provisions of the Uniform Mediation Act, thereby warranting enforcement of the oral settlement agreement reached at mediation.[9]

The plaintiff sought relief from the Appellant Division's decision with the New Jersey Supreme Court. In support of its application, the plaintiff argued that Rule 1:40-4(i) requires a settlement reached at mediation to be reduced to a writing and signed at the time of mediation in order to be enforceable, and that the plaintiff in that case had not waived the mediation communication privilege.[10]

In the decision, New Jersey Supreme Court Justice Barry Albin ruled that, "going forward, parties that intend to enforce a settlement reached at mediation must execute a signed written agreement,"[11] essentially finding that an oral agreement made in mediation is not enforceable unless evidenced by a signed writing.

In light of the bright-line rule created by *Willingboro Mall*, it is clear that an argument no longer exists in favor of enforcing a verbal agreement reached at court-ordered mediation under *Harrington*. And, in the case of the hypothetical fact pattern presented above, the wife has no legal basis for enforcing the settlement terms reached at mediation. That being said, is there anything practitioners can do to preserve an agreement reached during mediation where they simply cannot prepare a term sheet, memorandum of understanding or other enforceable writing?

Practical Points for the Family Law Practitioner: Consider Making an Audio Recording

Careful practitioners will often insure their clients have time to process, review and consider settlement terms discussed in mediation. The practical, prudent and best course of action after a successful mediation session is to schedule a follow-up session to afford the attorneys sufficient time to draft a formal agreement. But, what if circumstances warrant immediate action? Toward the very end of his opinion in *Willingboro Mall*, Justice Albin left open the possibility that an audio or video recording of an agreement could be sufficient evidence to support enforcement of an agreement reached at mediation. More specifically, he stated:

> Although neither the Mediation Act nor N.J.R.E. 519 specifies what constitutes an "agreement evidenced by a record" and "signed," the UMA Drafters' Comments give insight regarding the intended scope of those words. The *UMA* Drafters' Comments report that those words apply not only to "written and executed agreements," but also to "those recorded by tape...and ascribed to by the parties on the tape." For example, "a participant's notes about an oral agreement would not be a signed agreement." In contrast, a "signed agreement" would include "a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement."[12]

In general, attorneys should expressly and clearly state that mediation is continuing until such time as the agreement can be drafted and exchanged. It should also

be expressly stated that any issues that may arise during the drafting phase can be resolved at the next mediation session, if necessary. If, however, a particular case calls for the memorialization of an agreement reached without the ability to do so in writing, consider making an audio recording. With the advent of smartphone technology, personal recording devices now belong to the masses. Most phones now have recording capabilities, as well as the ability to make digital copies of the recording available to all present. Tips on recording can be obtained directly from your wireless carrier.[13] There are also applications designed to improve the quality of voice recordings made on a wireless phone.[14] Such applications are designed to allow the user to make high-quality, lengthy voice recordings and easily sync them with programs like Dropbox so they can be shared with, and accessed by, others quickly.

That said, care must be put into the creation of any such recording, and each party, as well as the mediator, would have to first expressly agree to be recorded. The contents of the audio recording should include, at a minimum:

1. An express agreement by all present to make an audio recording of the settlement terms;
2. A clear recitation of all material terms of the agreement;
3. A list of the material representations relied upon by each party that serve as the basis for important provisions of the agreement;
4. To the extent there was a disproportional distribution of any assets, and/or trade-offs involved in reaching an agreement regarding alimony, a careful description of all such trade-offs;
5. The language describing the agreement should be clear enough to be understood and enforceable, and each recited provision should leave no room for interpretation;
6. An expression of each parties' mutual consent to the material terms and an expression of each party's intent to be bound by the material terms;
7. After each party acknowledges acceptance of the terms recorded, there should be a final express agreement that the recording itself will be admissible for future use in court, as needed to enforce the agreement terms.

The goal of creating an audio record is to be as clear and complete as possible, and to avoid not only either party reneging, but also claims by either party of duress, coercion, fraud or mistake. The recording should be determinative regarding whether an agreement was entered into, as well as the terms.

As a final practice pointer, it is important to note that some states have a 'cooling off period' during which consent to a contract can be withdrawn. For example, in these states certain contracts may be rescinded within three days.[15] Such rights are usually created by statute and address very specific types of goods or services. Such a right may also defeat the purposes of making an audio recording. Therefore, if the facts and/or applicable law of the case requires, caution may dictate permitting either party additional time to consider the terms of the agreement. Consider negotiating a short period for withdrawing consent to the settlement agreement and including the agreement in the audio recording itself. Such an approach protects the parties without encroaching on the confidentiality requirements dictated by *Willingboro Mall*.

Conclusion

Settlement of litigation ranks high in the public policy of New Jersey.[16] With the ever-expanding growth of court-ordered mediation, as well as private mediation, the conflicts that can arise during mediation have given rise to a substantial body of case law. A case such as *Willingboro Mall* brings into focus the recurring debate over confidentiality in mediation. If a practitioner faces a case where one party repeatedly reneges on every agreement, or repeatedly brings up issues after an agreement is thought to have been reached, but the practitioner is unable to memorialize the agreements reached in writing, consider making an audio recording of the mediation session. Although it should not be common practice, it could prove a useful tool to create an enforceable agreement where one might not otherwise exist. There may be circumstances where binding one party will outweigh the proposition of leaving mediation without a clear agreement (in writing or with an audio recording). ■

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Endnotes

1. *Harrington v. Harrington,* 281 N.J. Super. 39, 46 (App. Div. 1995) *cert. denied*, 142 N.J. 455, 472 (1995).
2. *Id*. at 46. (*quoting Lahue v. Pio Costa*, 263 N.J. Super. 575, 596, 623 A.2d 775 (App. Div. 1993)).
3. Pursuant to *Harrington,* the determination regarding whether an oral settlement agreement was reached between the parties is generally subject to a plenary hearing. In *Harrington,* both parties to a contested divorce, their attorneys, and the defendant's accountant engaged in a settlement conference in the cafeteria of the courthouse, at which time it was alleged by the plaintiff that the parties had reached an oral settlement agreement. *Id*. at 43. After the plaintiff sought enforcement of the oral agreement with the trial court and lost, she applied to the Appellate Division, who then remanded the matter to the trial court for a hearing on whether or not there was an enforceable oral agreement. *Id*. at 47.
4. *Id*. at 46.
5. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242 (2013).
6. *Id*. at 247.
7. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.* (N.J. Super. 2011) Docket No. A-4598-09T2, page 5-6.
8. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.* (N.J. Super. 2011) Docket No.A-4598-09T2, page 6.
9. *Id*.
10. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 251 (2013).
11. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242 (2013).
12. *Id*. at 263 (internal citations omitted).
13. http://www.verizonwireless.com/mobile-living/tech-smarts/how-to-record-audio-smartphone/.
14. *Id*.
15. By way of example, Minnesota has a three-day 'cooling off period' in connection with home solicitation sales; life insurance policy purchases; hearing aid purchases; extended car warranty purchases; debt management contracts; credit services contracts; health club contracts; roofing and siding contracts; reverse mortgage contracts; and others. *See, e.g.,* Minn. Stat. § 325G.08.
16. *Harrington v. Harrington, supra* at 39.