



# New Jersey Family Lawyer

Vol. 37, No. 4 — February 2017

## Chair's Column

### **It's the Holiday Spirit!**

*by Timothy F. McGoughran*

**A**s I sat in front of the yule log, a hot toddy in hand, what to my wondering eyes should appear? An email from Ron Lieberman with alimony updates for next year! Oh the joy of family law at this time of year. While the courts are closed between Christmas Day and New Year's, there are still members working hard at legal cheer! Generally a quiet time of year for us. Who wants to file a complaint during the month of December? Bah humbug! But alas, the holidays give way to a New Year, and we start a blank page on another trip around the sun.

In 2017, New Jersey family lawyers will continue to see changes in the law and refinement of the alimony reforms of 2014. During the holiday time of year, we in the Family Law Section like to gather around the fire with family and friends and reflect upon the changes in family law around the country. And yes, Virginia, that email I received from Ron Lieberman was true, and it concerned proposed changes to South Carolina's alimony laws.

In 2016, South Carolina was feeling the heat of 'alimony reform,' and a new bill was being hotly debated in the Palmetto State. In the new bill two new types of alimony were introduced:

(6) Transitional alimony to be paid periodically or in a finite total sum, but terminating upon remarriage, continued cohabitation of the supported spouse, upon the death of either spouse (except as secured in subsection (D)), or upon a date certain that is not longer than three years from the date of the divorce. Transitional alimony is modifiable based upon changed circumstances occurring in the future. The purpose of this form of support is to assist with the transition of the supported spouse to new financial circumstances, a new adjusted lifestyle, a new location or any other consequences of divorce when other forms of alimony would not be appropriate.



(7) Fixed term alimony is the finite periodic payment of support to a recipient spouse who is economically dependent but terminating upon remarriage, continued cohabitation of the supported spouse, expiration of the fixed term, or upon the death of either spouse (except as secured in subsection (D)). Fixed term alimony is modifiable based upon changed circumstances occurring in the future. The purpose of this form of support is to allow a finite award where the court finds it appropriate and desirable to make a current determination and requirement for a fixed term of support for a spouse.

While I imagine these two types of alimony can be crudely fashioned under New Jersey law, I found it interesting that in South Carolina there are currently five types of alimony that can be awarded, with a catch-all (sixth)—“Such other form of spousal support, under terms and conditions as the court may consider just, as appropriate under the circumstances without limitation to grant more than one form of support.” Under the new bill, there would be seven types of available alimony awards, as well as the eighth catch-all provision. Why then, in New Jersey, do we limit the remedies available to judges?

We certainly all know that the overwhelming majority of our cases settle on their own, through mediation or other alternate dispute resolution (ADR). In my opening statement as a mediator or early settlement panel (ESP) panelist, I always say the benefit of an ESP or mediation is that I can recommend settlement solutions the court cannot, based on the applicable statute or case law. I am also guessing that most of you who mediate or panel cases have a similar statement you make to litigants. This allows them to take control of their case and fashion a remedy that suits their family. Why should courts have their hands tied behind their backs when fashioning a judicial remedy for that same family when it has to have the matter resolved by the court? Lump-sum alimony is an element of the existing South Carolina law,<sup>1</sup> while the transitional and fixed-term alimony are parts of the new bill.<sup>2</sup>

Don't get me wrong, I am not looking to re-open alimony reform here in New Jersey. But, I think by having more options available for the court by statute, we allow for more creativity in settling cases or providing for a judicial remedy that is best suited for the family before the court.

As an update, the NJSBA Family Law Section has drafted two bills that are pending in the Legislature. The first bill deals with removal applications<sup>3</sup> and the second codifies college educational expenses.<sup>4</sup> Of course, the legislation road is a long one, and we already have seen some bumps in the road with regard to these bills, as well as some legitimate concerns from victims of domestic violence specifically regarding the removal bill. This issue was highlighted by the death of a young mother who tried to flee New Jersey with her children due to domestic violence issues.

Movement is afoot in Trenton for proponents of presumed joint legal and physical custody in New Jersey custody cases. Senator Anthony R. Bucco has sponsored just such a bill,<sup>5</sup> which has not seen much movement but has been lobbied. This bill also has its own section concerning the relocation of children outside the state of New Jersey. This, of course, is an interesting discussion we will continue to monitor. It has been, and continues to be, the position of the Family Law Section and the NJSBA that cookie-cutter solutions do not fit every family. While this bill does have some laudable goals, the thrusting of 50/50 parenting plans on every family simply does not work. The cases we handle have evolved naturally, with parents of alternate residence having more time with their children and carrying more of the parental obligations than the old ‘every other weekend and a few nights for dinner.’ That older paradigm simply does not exist anymore as far as I can see in my practice. The custody laws are fine as written, providing that the rights of both parents shall be equal and that the polestar shall always be the best interests of the child.

So another busy year in the books here at the Family Law Section North Pole. Best wishes for a happy, prosperous and healthy 2017 from the section's executive board.

I hope you kept this thought in mind as we entered 2017: “New Year's Day is the first blank page of a 365 page book. Write a good one!”<sup>6</sup> ■

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## Endnotes

1. South Carolina Code of Laws Section 20-3-130.
2. South Carolina Senate Bill S93introduced 12-13-16.
3. A-339 and companion bill S-1137.
4. A-327 and companion bill S-813.
5. S-1493 with no Assembly companion bill.
6. Brad Paisley.

## Inside this issue

Chair's Column

### **It's the Holiday Spirit!**

by Timothy F. McGoughran

1

Editor-in-Chief's Column

### **Targeted Arbitration**

by Charles F. Vuotto Jr.

4

Executive Editor's Column

### **Retroactivity of the 2014 Amended Alimony Statute: Can Someone Please Tell Me What is Going on Here?**

by Ronald G. Lieberman

6

### **Interdisciplinary Collaborative Divorce: Can Advocacy Be a Team Sport?**

by Heather C. Keith and Bruce David Cohen

10

### **Analyzing Child Support in True Shared Parenting Arrangements: The Limitations of Wunsch-Deffler**

by Drew Molotsky

16

### **Parenting Coordination in New Jersey: The Surprisingly Nebulous Task of Removing a Parenting Coordinator**

by Thomas Roberto

19

### **The Implications of Sheridan Warnings and Potentially Coercive Effects on Settlement: Should Attorneys and Judges Think Before They Speak?**

by Amy L. Rokuson and Shari B. Veisblatt

25

Commentary:

### **The New Family Lawyer**

by Matthew Abatemarco

29

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## Editor-in-Chief's Column

# Targeted Arbitration

by Charles F. Vuotto Jr.

How many times is a case stalled by one or two limited issues or problems? How many times have you found that a discreet discovery issue stops the case dead in its tracks? The kneejerk reaction is to file a motion. However, aside from the substantial time and money associated with motion practice, there is often a lack of finite resolution to these vexing obstacles that ultimately do not allow the case to move forward in a productive fashion. As we all know, there are times when litigants and/or counsel have trepidation about arbitrating all issues in a case. However, the concerns with arbitration of a family law matter may be assuaged if the arbitration is relegated to limited issues. The author suggests that parties are free to engage in *targeted arbitration* of discreet issues that may be impeding the progress of the case.<sup>1</sup>

A review of most family judges' dockets would likely reveal that attorneys typically fail to avail themselves of all of the remedies contemplated by the statutory and procedural schemes, which the Legislature and Judiciary have established. Although the concept of what the author describes herein as targeted arbitration may strike many as a novel approach, it is only novel if parties fail to regularly utilize all of the tools available to them to resolve family disputes in a combination of ways, rather than choosing one method to the exclusion of all others. There is no question that the New Jersey Supreme Court has repeatedly stated that the public policy of the state of New Jersey supports arbitration of disputes.<sup>2</sup> Most view this pronouncement as suggesting arbitration of all issues in a case. However, it need not be the only viable approach.

The revised form of Rule 5:1-4 provides for an "Arbitration Track" under the following terms, "[a]t any point in a proceeding, the parties may agree to execute a Consent Order or Agreement to arbitrate or resolve *the issues* pending before the court pursuant to the Uniform Arbitration Act, N.J.S.A. 2A:23B-1 *et seq.* (hereafter referred to as "UAA"), the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 *et seq.* (hereafter referred

to as "APDRA") or any other agreed upon framework for arbitration of disputes between and among parties to any proceeding arising from a family or family-type relationship except as provided in R.5:1-5. Issues not resolved in the arbitration shall be addressed in a separate mediation process or by the court after the disposition of the arbitration."<sup>3</sup> Although the rule refers to "issues," and one could infer that it means *all* of the issues, once directed to the relevant Rules of Court, it becomes abundantly clear that the rules anticipate the option of bifurcating the issues impeding the resolution of the case.

The court rules provide that "prior to the execution of any Agreement or entry of a Consent Order, each party shall review and execute the Arbitration Questionnaire, which is set forth in Appendix XXIX-A, and each party's questionnaire shall be attached to the Agreement or Consent Order."<sup>4</sup> The questionnaire seeks to ensure that litigants fully understand the effect their choice of arbitration will have on their options available to resolve their dispute. Question 5 inquires: "Do you understand that you have the right to a trial in the Superior Court of New Jersey in which a judge would render a decision, and that by entering into the arbitration/alternate dispute resolution agreement, *you are waiving your right to a trial?*" (Emphasis added)<sup>5</sup> Admittedly, this question gives one the impression that the choice to arbitrate is an either/or decision. The author believes the questionnaire is clearly directed to the *clients* in the dispute, not counsel, and that it, therefore, errs on the side of overstating the limitations.

A simple review of the template forms provided to draft an agreement to arbitrate reveal that the resolution of discreet issues is clearly contemplated by the court. Both the template provided for agreements to arbitrate pursuant to UAA and the template provided for agreements to resolve disputes pursuant to the APDRA allow the parties to decide the scope of the issues to be resolved by the arbitrator/umpire.<sup>6</sup> The parties can choose whether they are submitting "*all issues* that could be raised and adjudicated in the Superior Court of New Jersey..."

or whether they wish to “exclude” certain identified issues. Significantly, for this discussion, the third choice is that the “parties elect to submit *the following issues* to the umpire for resolution” with the added instruction to list issues.<sup>7</sup> The APDRA also explicitly provides for the court’s ability to stay any judicial proceeding that involves a claim subject to arbitration. But it also explicitly states that, “If a claim subject to the arbitration is *severable, the court may limit the stay to that claim.*” (Emphasis added).<sup>8</sup> Thus, the court can move forward to resolve other contested issues while the arbitration is pending.

This option of targeted arbitration can be utilized for a myriad of issues. For example, as family practitioners we are frequently faced with such issues as whether a particular timesharing arrangement is appropriate, whether an asset is exempt from equitable distribution, whether a gift was given to one party or both, whether a prenuptial agreement is enforceable, what the value is of an asset (most commonly a home or business), to name just a few thorny disputes. Often, pending issues such as the aforementioned prevent the entire case from otherwise settling.

There are other advantages to isolating certain issues for arbitration. For example, the client who has a business valuation issue might also have a *Sheridan* problem if the matter is heard by the court.<sup>9</sup> Additionally, a complex issue might be more easily resolved before an arbitrator

whose sole focus is the matter at hand, rather than before a family court judge whose calendar does not permit the court to schedule consecutive trial dates, and, while in trial, is repeatedly forced to interrupt testimony to hear various other urgent family court matters such as temporary restraining orders, bench warrants, etc.

Finally, there is another tangible benefit to utilizing targeted arbitration in family matters. If the parties elect to arbitrate, the litigation shall be assigned to the Arbitration Track, and the arbitration shall proceed pursuant to Rule 5:1-5. Rule 5:1-5(c) provides that the matter shall be placed on the Arbitration Track “for no more than one year following the Arbitration Track assignment, which term may be extended by the court for good cause shown. Cases assigned to the Arbitration Track should be given *scheduling consideration when fixing court appearances in other matters.*” (Emphasis added).<sup>10</sup> Therefore, targeted arbitration intended to resolve discreet issues that are causing an obstacle in the case cannot only result in removing the issue that may be holding up the resolution of the case, but also can provide a reduction of stressors on the court, the litigants and their counsel. ■

*The author wishes to thank Lynn Norcia, of counsel with Starr, Gern, Davison & Rubin, P.C., for her assistance with this column.*

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## Endnotes

1. Mediation can also be used in a similar manner during the course of the litigation to target and isolate discreet issues for resolution with a mediator.
2. “Our courts have long noted our public policy that encourages the ‘use of arbitration proceedings as an alternative forum.’ *Wein v. Morris*, 194 N.J. 364, 375-76, 944 A.2d 642 (2008) (quoting *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 489, 610 A.2d 364 (1992)). *Fawzy v. Fawzy*, 199 N.J. 456, 468, 973 A.2d 347, 354, 2009 N.J. LEXIS 674, \*23 (N.J. 2009).
3. R. 5:1-4(a)(5).
4. R. 5:1-5(b)(1).
5. Appendix XXIX-A (5).
6. The APDRA uses the term ‘umpire’ to describe the individual conducting the proceeding and the UAA uses the term ‘arbitrator’ for the same individual.
7. Appendix XXIX-B, ¶2 and Appendix XXIX-C, ¶ 2.
8. N.J.S.A. 2A:23B-7g.
9. *Sheridan v. Sheridan*, 247 N.J. Super. 552, 589 A.2d 1067, 1990 N.J. Super. LEXIS 496 (Ch. Div. 1990).
10. R. 5:1-5(c).

## Executive Editor's Column

# Retroactivity of the 2014 Amended Alimony Statute: Can Someone Please Tell Me What is Going on Here?

by Ronald G. Lieberman

As practitioners know, Section 2 of the 2014 amendments to the alimony statute, N.J.S.A. 2A:34-23, stated that the amendments would be construed not to modify the duration of alimony ordered or agreed upon, or set forth in otherwise bargained-for contractual provisions that were part of a final judgment of divorce or dissolution, a final order that concluded post-judgment litigation, or any enforceable written agreement between the parties in existence as of Sept. 10, 2014. Since that statute was enacted, our case law, both reported and unreported, has created doubts about anti-retroactive application of the statute. So, what is going on regarding clear language that the 2014 amendments were not to be construed to modify prior alimony awards?

The only way to determine what is transpiring regarding the retroactivity of the 2014 amendments to the alimony statute is to look at the case law that has developed since the statute was enacted.

The first case citing the statute was *Shubeck v. Shubeck*,<sup>1</sup> which addressed modification of an alimony obligation predating the amendments to the alimony statute. The Appellate Division recognized the need to adhere to the prior law, meaning the alimony statute that predated the Sept. 10, 2014, amendments.

In a matter dealing with cohabitation, the Appellate Division, in *Schlumpf v. Schlumpf*,<sup>2</sup> addressed an issue wherein a 2005 marital settlement agreement specifically mentioned that alimony could be modified or terminated upon cohabitation by making citations to the then-existing case law so holding. The Appellate Division recognized that cohabitation as a basis to modify alimony underwent specific changes under the Sept. 10, 2014, amendments. But, the Appellate Division held the law existing before the amendments went into effect would apply because the matter arose beforehand.

The Appellate Division had another opportunity to discuss the retroactivity of the statute in *Harvey*

*v. Harvey*,<sup>3</sup> regarding an award of alimony. There, the Appellate Division held that because the statute was amended after the trial occurred in 2012, the prior law would apply since the amended statute was to be “applied prospectively only....”<sup>4</sup>

Then, a few months later, in the matter of *Wachtell v. Wachtell*,<sup>5</sup> the Appellate Division reviewed termination of alimony based on cohabitation. It held that the statute did not apply retroactively.

The determination that the statute would not apply retroactively was further ruled upon weeks later in another case, *Baker v Baker*,<sup>6</sup> where the Appellate Division reviewed a modification motion and stated the alimony modification provisions of the new statute did not apply because the motion was heard before the effective date of the statute.

The Appellate Division, in the matter of *Rodrigues v. Rodrigues*,<sup>7</sup> addressed 2011 and 2012 trial decisions on alimony and recognized the amendments to the alimony statute did not apply to the case because it was decided before the amendments were enacted.

Thus, up until this point, it would appear clear to the practitioner that because of the language in the alimony statute it would not apply retroactively.

Anti-retroactivity was the ruling in *Spangenberg v. Kolakowski*,<sup>8</sup> wherein the Appellate Division addressed a party's motion to terminate or suspend alimony based on cohabitation and change in circumstance that was decided by the trial judge on Sept. 19, 2014. The appellant raised the issue that the newly enacted alimony statute should apply retroactively. The Appellate Division disagreed, and held that the new provisions of the alimony statute, which addressed modification and cohabitation, would not apply.<sup>9</sup> The Appellate Division in *Spangenberg* noted that the statute itself only mentioned that the amendments were effective immediately, without providing any language regarding whether they were retroactive.<sup>10</sup> But, regardless of the missing language,

according to the Appellate Division, Section 2 of the statute, which specifically stated the circumstances under which the statute would not apply, demonstrated “the Legislative recognition of the need to uphold prior agreements executed or final Orders filed before adoption of the statutory amendments.”<sup>11</sup>

Seemingly trying to avoid any ambiguity on the issue, the Appellate Division in *Spangenberg* then held that the “new cohabitation provisions do not apply or otherwise impact” the alimony determination “due to the fact that the Order in issue was effective before the statute was amended.”<sup>12</sup> So, anti-retroactivity was held to be the rule of law.

In an issue regarding retirement and the effective date of the alimony statute amendments, the Appellate Division, in *Landers v. Landers*,<sup>13</sup> held that the relevant retirement portion of the statute, N.J.S.A. 2A:34-23(j), depended upon when the alimony award was established. One subsection (subsection (j)(1)) would be limited to awards entered after the statute was amended, and subsection (j)(3) governed the review of alimony awards existing before the statute was amended.

The *Landers* case cited to the *Spangenberg* case for the proposition that in amending the alimony statute the Legislature was keeping unchanged the agreements or final orders in effect before the statute was amended. It was the specific language of those two subsections ((j)(1) and (j)(3)) that differentiated in the application of the statute.<sup>14</sup> The Appellate Division recognized that courts must follow the Legislature’s clear direction.<sup>15</sup>

Following *Landers*, the Appellate Division made it clear that a trial judge erred in applying the 2014 amendments to a cohabitation decision in the matter of *Chernin v. Chernin*.<sup>16</sup> There, the Appellate Division held that it was error for the trial court to apply the amendments to the statute for the duration of alimony ordered or agreed upon or in any provision prior to the enactment of the statute, citing to *Spangenberg*. The *Chernin* court did not agree with the appellant that *Spangenberg* was applied incorrectly, and it determined to follow the *Spangenberg* reasoning. The Appellate Division looked to the legislative statements of Assembly Bill 845 (predecessor to the eventual alimony law) from Jan. 2014, which made it clear that the sponsors of the alimony modification statute wanted alimony awards in existence to remain unchanged as of the date of amendments.

But something happened on the way to undisputed case law. In the matter of *Williams v. Freitag*,<sup>17</sup> the Appel-

late Division reviewed a post-judgment order denying a motion to modify alimony stemming an Oct. 15, 2006, matrimonial settlement agreement. The motion to modify was filed on Sept. 8, 2014, two days before the new alimony law took effect. This case was curious because the Appellate Division cited subpart (k) of the new alimony statute, which discussed when a non-self-employed party sought a modification of alimony and the various factors that would then be reviewed. Given that the alimony obligation was initially set in Oct. 2006, and the modification application was filed on Sept. 8, 2014, it is unclear why the Appellate Division would cite the new statute at all given the anti-retroactivity holdings espoused in *Spangenberg* and *Landers*.

Two days after the Appellate Division in *Williams*, Judge Lawrence Jones, in an unpublished decision,<sup>18</sup> recognized that when a payor sought to terminate alimony that did not arise from a final judgment or an order or settlement agreement pre-dating Sept. 10, 2014, the *Landers* case clearly held that subpart (j)(1) of the new alimony statute would apply. Thus, Judge Jones was acknowledging in that decision that certain provisions of the statute applied differently, depending upon when the review of an alimony obligation was determined.

The Supreme Court had the opportunity to discuss the new alimony statute in *Quinn v. Quinn*.<sup>19</sup> In the *Quinn* case, the Supreme Court was considering whether alimony could be suspended during cohabitation as opposed to terminated regardless of the terms of the party’s agreement on the topic. In a footnote, the Court noted that the settlement agreement was entered into by the parties in 2006, and thus would not be impacted by the amendments to the alimony statute from Sept. 10, 2014.<sup>20</sup> So anti-retroactivity seems to retain the upper hand.

Applying the analysis of *Landers* a few months later, the Appellate Division, in *Brown v. Brown*,<sup>21</sup> acknowledged that Section 2 of the new alimony statute was an “anti-retroactivity provision,” such that unless the new statute specifically provided otherwise, none of the provisions would apply to pre-existing alimony obligations set forth in final judgments of divorce, final post-divorce orders, or enforceable agreements.<sup>22</sup>

The issue of retroactivity/anti-retroactivity of the new alimony statute took an unexpected turn in the unpublished case of *Robitzski v. Robitzski*,<sup>23</sup> where the Appellate Division was addressing an appeal from an order denying the payor additional discovery regarding cohabitation. The issues in *Robitzski* in part revolved around burdens

of proof in cohabitation and how alimony modification would be handled under a 2003 settlement agreement. In addressing the issues, the Appellate Division in *Robitzski* recognized that the new statute had certain remedial alternatives after a finding of cohabitation. But, in trying to differentiate the issue from *Spangenberg*, the *Robitzski* court held “the PSA does not refer to *Gayet* or any other prior cohabitation precedent.”<sup>24</sup> It was curious that this panel of the Appellate Division would try to carve out a distinguishing scenario from *Spangenberg*, because in *Spangenberg* the parties’ settlement agreement referenced *Gayet* and case law.<sup>25</sup> But why would such a citation in an agreement make a difference? Was this a way around anti-retroactivity?

The matter of retroactivity twisted again in the matter of *Klemash v. Klemash*.<sup>26</sup> In that case there was an alimony obligation from 2013, with a party having filed a motion to modify on Sept. 30, 2014. In reviewing the order of the trial court, the Appellate Division in *Klemash* noted although the final judgment of divorce was entered into before the amendments to the alimony statute, contained no provision regarding a modification of alimony, and did not reference any agreement, the motion was filed after both the modification of the statute and the effective date of the amendments.

As a result of the filing date of the motion, the *Klemash* court then held that it would “apply the relevant portions of N.J.S.A. 2A:34-23 here to Defendant’s Motion to Modify Alimony Award.”<sup>27</sup> It appeared the appellate panel in *Klemash* was ruling that way because the order of the court stemming from the eight-day trial in 2013 had made no mention of obligations being consistent with case law, which predated the amendments. Thus, the trial court should have applied the new amendments to the statute. But wasn’t the *Klemash* court deciding to apply the statute retroactively?

The issue of whether to apply the new statute to a payor’s loss of employment occurred in *Mills v. Mills*,<sup>28</sup> wherein Judge Jones was addressing an alimony modification motion stemming from a 2013 divorce. Judge Jones held that under subpart k of the new alimony statute a judge could reduce an alimony obligation when a non-self-employed individual complied with the provisions of that statute. Judge Jones’s ruling hinged on the fact that there were no contractual provisions defining or limiting the standards for modification, and there were no prior post-judgment proceedings.

The most recent discussion on the retroactivity of the new alimony statute took place in *Frick v. Frick*,<sup>29</sup> wherein the Appellate Division reversed a trial judge’s decision to retroactively apply the new alimony statute to a cohabitation matter stemming from a 2009 divorce. The trial judge noted the parties’ settlement agreement had been silent on the issue of cohabitation, so the judge held he could apply the new alimony statute. In reversing the trial judge, the Appellate Division cited to *Spangenberg* and *Quinn*, holding the Legislature intended to uphold prior agreements and orders filed before the new statute went into effect, so the 2014 statute would not apply to a 2009 agreement.

So to review case law, not only is there a chancery court case (*Mills*), which states that one of the subparts would be retroactive to a settlement agreement entered into prior to the modifications, but more importantly there is a split in the appellate panels on the issue.

Having traveled through our case law, where are we? What is going on here? There is enough language in the cases to allow practitioners to try to distinguish between agreements or divorce decrees that make specific mention to case law pre-dating the Sept. 10, 2014, amendments and those settlement agreements or post-judgment orders or divorce decrees that make no mention to them whatsoever. Yet, is that enough to get around the legislative intent for there not to be retroactivity per *Quinn*, *Spangenberg* and *Landers*? Do we even know if there is legislative intent for there not to be retroactivity?

It does appear from the *Chernin* case that a review of Assembly Bill 845 showed the new alimony law was intended not to affect pre-existing orders, decrees or agreements. How, then, can the decisions in *Mills*, *Klemash*, or even *Robitzski* withstand scrutiny? Is the road to the answer on retroactivity filled with twists and turns, and thus undecided?

In sum, a practitioner needs to be mindful of these splits in the law and see if guidance is forthcoming from the Supreme Court. Barring that guidance, a crafty practitioner can try to apply the new alimony law to alimony awards predating Sept. 10, 2014, potentially by arguing that the orders or agreements predating Sept. 10, 2014, made no alimony awards mention of such law, so the new statute should be applied. Only time will tell if the amendments truly are retroactive. ■



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## Endnotes

1. 214 N.J. Super. Unpub. LEXIS 2321 (App. Div. 2014).
2. 215 N.J. Super. Unpub. LEXIS 317 (App. Div. 2015).
3. 215 N.J. Super. Unpub. LEXIS 729 (App. Div. 2015).
4. *Ibid.*
5. 215 N.J. Super. Unpub. LEXIS 745 (App. Div. 2015).
6. 215 N.J. Super. Unpub. LEXIS 941 (App. Div. 2015).
7. 215 N.J. Super. Unpub. LEXIS 1988 (App. Div. 2015).
8. 442 N.J. Super. 529 (App. Div. 2015).
9. *Id.* at 537-538.
10. *Id.* at 538.
11. *Ibid.*
12. *Ibid.*
13. 44 N.J. Super. 315 (App. Div. 2016).
14. *Ibid.* at 323-324.
15. *Id.* at 324.
16. 2016 N.J. Super. Unpub. LEXIS 454 (App. Div. 2016).
17. 216 N.J. Super. Unpub. LEXIS 912 (App. Div. 2016).
18. *Mueller v. Mueller*, 2016 N.J. Super. Unpub. LEXIS 1265 (Ch. Div. 2016).
19. 225 N.J. 34 (2016).
20. *Id.* at 50.
21. 2016 N.J. Super. Unpub. LEXIS 1029 (App. Div. 2016).
22. *Ibid.*
23. 2016 N.J. Super. Unpub. LEXIS 1032 (App. Div. 2016).
24. *Ibid.*
25. *Spangenberg, Supra* 442 N.J. Super. at 532.
26. 2016 N.J. Super. Unpub. LEXIS 1692 (App. Div. 2016).
27. *Id.* at page 8.
28. 447 N.J. Super. 78 (Ch. Div. 2016).
29. A-2744-14T3 (App. Div. 2016).

# Interdisciplinary Collaborative Divorce: Can Advocacy Be a Team Sport?

by Heather C. Keith and Bruce David Cohen

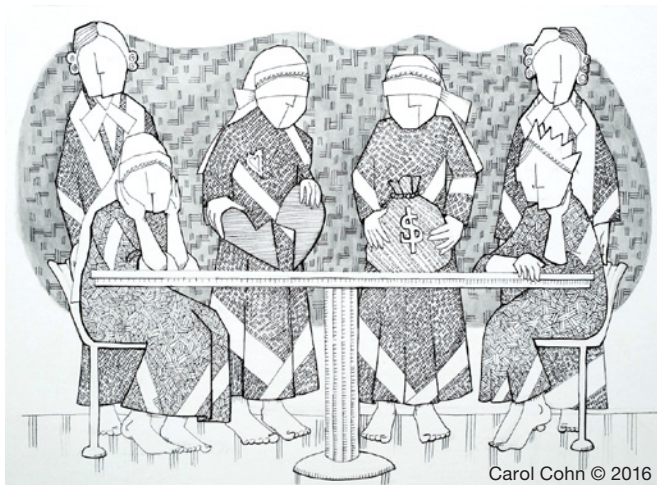
Collaborative family law practice has made significant inroads in New Jersey. Eight member groups make up the New Jersey Council for Collaborative Practice Groups (NJCCPG). These groups include attorneys, mental health neutrals, financial neutrals, and associate members statewide.<sup>1</sup> Still other practice groups function outside NJCCPG. These groups organize retreats, hold presentations, and conduct continuing legal education seminars—all in an effort to constantly investigate the best ways to work as collaborative divorce professionals.

There are several models of collaborative practice, including the more traditional two-lawyer model and a two-lawyer with neutrals model (introduced on an ‘as-needed’ basis and known as multi-disciplinary). No model is mandated under New Jersey law. The focus of this article will be on a configuration in which the attorneys and neutrals assemble as a team at the outset of the process—a model known as *interdisciplinary*.

Other *New Jersey Family Lawyer* articles have already touched upon the Sept. 10, 2014, passage of the New Jersey Family Collaborative Law Act<sup>2</sup> and addressed various concerns regarding its requirements related to disclosure, confidentiality, disqualification and ethics of collaborative practice.<sup>3</sup> This article will concentrate on the practical benefits of working as an interdisciplinary team alongside a mental health and a financial professional.

## Mental Health Neutral

One critical member of the interdisciplinary team is the mental health neutral. Almost all collaborative cases—especially those involving younger children or any



strong emotional component—will benefit when there is a trained therapist (sometimes referred to as a mental health neutral or divorce coach) on the collaborative team.<sup>4</sup>

Having a mental health professional on the team has several significant advantages, not all of which are readily apparent. The authors find these advantages so compelling

that they view having the mental health professional on the team as the default option for a collaborative divorce case. Bringing in a neutral at the outset of the case sends a strong signal to the clients that the process will not be focused solely on the lawyers and the law. The presence of a mental health neutral at the team’s inception also reinforces to the client that there will be other values at play that may be as important, if not more so, than monetary concerns. While the lawyers, of course, retain their obligations as advocates in collaborative divorce,<sup>5</sup> the advocacy role may now be viewed through a wider lens.

For example, a mental health neutral may help focus the clients on what is best for the family as both spouses move forward. Is there a way to see that both parents will be emotionally intact and have positive relations with the children during the process and post-judgment? A neutral provides invaluable support to the clients in this regard. The mental health neutral may also help both clients agree to a parenting plan, saving the clients significant time and fees with their lawyers. A neutral may also help the clients develop better ways to communicate with each other and their children.

Using the team model, the mental health neutral meets with both spouses, often as a couple and then each spouse individually, and sometimes after the spouses

have retained lawyers.<sup>6</sup> In this way, the mental health neutral can inform the lawyers of the basic psychological dynamics of and between the parties, raise special emotional issues, and discuss what challenges may lay ahead for the team in light of these observations. As a threshold question, the mental health neutral in the interdisciplinary collaborative model has an obligation, along with the lawyers,<sup>7</sup> to help the team make a determination regarding whether the collaborative process will likely succeed. The collaborative process requires cooperation. Spouses will need to be able to communicate effectively with one another in the same room and, with the team's assistance, handle conflicts in a mature and respectful manner. They will also need to be able to work effectively with the members of the collaborative team. The neutral is likely to have excellent insight on whether a client might be inordinately difficult or have a personality disorder that might preclude that client's participation in the collaborative process. Similarly, a neutral is well positioned to screen for any drug or alcohol issues.

The mental health neutral in an interdisciplinary collaborative divorce also plays an essential role in helping clients state their goals at the outset of the process.<sup>8</sup> By listening to one another's goals, spouses are almost always better able to empathize and focus their efforts on a larger, future-oriented picture rather than getting 'lost in the weeds' by focusing on past wrongs or minutia. In this way, the spouses (sometimes alongside their advocates) may become less rigid and less likely to feel backed into positional or defensive postures. The mental health neutral is able to remind the team of the larger goals that were stated by the spouses early on in the process, and help to refocus the spouses and the team in the event things get off track.

An oft-underappreciated role of the mental health neutral is his or her unique ability to facilitate a better dialogue between the lawyers. Attorneys—even those with collaborative training—still must deal with the tension between collaboration and advocacy the attorney's obligation to provide diligent representation might produce. Occasionally, clients might tug the attorneys toward unnecessary conflict, or the attorneys may unwittingly move their clients toward an unnecessary dispute. The lawyers may even have personality conflicts with one another or differing communication styles. The mental health neutral may be able, at least in some cases, to act as an intermediary, relieving these tensions and reminding all concerned parties of larger goals. This is not to say that a collaboratively trained lawyer cannot accomplish

this. The authors suggest simply that by virtue of their very neutrality, the mental health neutral is uniquely qualified and often better positioned to fulfill this role, especially at crucial points in the collaborative process.

At other times, conflict is necessary and inevitable. At these times, it is best for the collaborative team to plan (and sometimes 'choreograph' if possible) the best way to present the conflict. Again, the mental health neutral, with additional insights into the personalities of the spouses and their attorneys and their qualifications as mental health professionals in relation to conflict resolution techniques, often proves absolutely invaluable.

In addition, because the mental health professional often charges far less per hour than lawyers, the authors find the trained mental health neutral most often pays for him or herself. Clients might be reminded at the outset that the mental health neutral helps 'optimize' the collaborative process and increases a chance for final resolution. If that is done, the mental health neutral could save the clients tens of thousands of dollars in fees that might otherwise be spent in protracted litigation.

The authors, based on their experience, recommend incorporation of mental health neutrals in the collaborative process and, in fact, are highly reluctant to proceed in a collaborative divorce without the mental health neutral as an integral part of the process. The authors also note that for the first time in its history, the International Association of Collaborative Practice named a mental health professional, New Jersey's Shireen Meistrich, LCSW, as its president from 2015-2016.<sup>9</sup>

## Financial Neutral

The financial neutral also plays a key role in interdisciplinary collaborative divorce.<sup>10</sup> He or she meets with the attorneys and mental health neutral at the beginning of the case and is present at the first full meeting at which the clients are also present. As many divorce attorneys can attest, financial issues in divorce almost always relate to highly emotional content. By witnessing the 'hot button' issues from the start, the financial neutral is better able to lay out financial scenarios that will consider both parties' emotional needs and life goals.

The financial neutral may gather the spouses' data, prepare the marital lifestyle budget, prepare the spouses' future budgets, and assess the nature and amount of income available to each spouse. They will also identify assets and liabilities and any unique or complex financial issues. The financial neutral might help the team with

the case information statement, which he or she then shares with the team (first with each spouse's attorney privately, and then with the remaining team members).

It can be enormously helpful when, during the information-gathering process, the financial professional answers questions posed by the collaborative team and helps identify which further documents are needed. The financial neutral can also assist the spouses in assessing their future asset and cash flow scenarios developed in the collaborative process. In practice, the authors have seen cases resolve based on the spreadsheets provided by a financial neutral showing, over an average life expectancy, how each spouse will fare under a given support settlement proposal.

Along with the mental health neutral, the financial neutral's hourly rate is much lower than that of an attorney. In addition, the financial neutral's collection and analysis of the data (along with his or her specialized expertise) might save hours of legal time and effort. Equally as important, the financial professional neutral is brought on to present the data objectively and not in a manner more helpful to either spouse.

Using a financial neutral at the outset also helps to assure the clients that they will have the support they need to gain full disclosure, develop practical budgets, and consider issues such as tax consequences and valuation of assets. This can be especially helpful where one spouse, as is often the case, has much more financial savvy than the other.

Finally, because they are delving into the underlying details of data collection, the financial neutral may also serve to signal the team if a spouse is not providing full disclosure. While a minor omission might be easily rectified during the collaborative process, a pattern of omission or a willful misrepresentation would, of course, violate the terms of a participation agreement and/or the spirit of a collaborative process—indicating that the process would no longer be tenable.

### **The Interdisciplinary Collaborative Lawyer**

An interdisciplinary collaborative lawyer does not leave his or her license at the door and become 'a potted plant.' Each spouse executes a retainer agreement with his or her own counsel and enjoys an attorney-client relationship with its attendant confidences and privileges. The interdisciplinary collaborative attorney remains bound by the Rules of Professional Conduct and the Rules of Court. The collaborative attorney still has an

obligation to counsel his or her client on how a settlement scenario might relate to a likely range of judicial outcomes. That said, the lawyer is able to present the strictly legal/judicial scenario in the context of other values or concerns of the client, such as how a scenario might affect a family in transition or what the time and costs of litigation might entail.

Interdisciplinary collaborative lawyers still advocate for their clients in attorney-client conferences, meetings and conferences with professionals, full team meetings with the clients and, of course, in drafting the final settlement agreement. Perhaps the difference is that the collaborative lawyer is trained and may be better-situated to identify the ways in which the goals of the spouses may align, as well as to view the wider scope of a family in transition.

Advocacy also comes to the forefront when the financial neutral provides objective data. Budgets must still be fleshed out, data must be verified, and complex financial issues must be identified and addressed. There may be business valuations, executive compensation, and other issues to assess. The attorney-advocate still has a duty to make sure that all important issues are identified, and that there is full disclosure.

While in more traditional dispute resolution processes the outcome is determined by a disinterested third party (such as a judge, arbitrator or mediator), the collaborative process calls for a more team-centered outcome. When a collaborative team meets, the spouses often become more active as listeners, and thereby become more engaged in the process as they explore options for settlement. This changes the discourse for the collaborative attorney, but in no way removes his or her role as legal advocate. It does, however, often serve to help avoid posturing, since a collaborative lawyer is trained to present his or her clients' goals to a full team rather than to present more rigid, specific positions. This usually helps to create a more open dialogue in the settlement room. Often, an advocate may pose questions and help the spouses engage in a more reasoned and respectful discussion of the conflict.

### **Forming Interdisciplinary Teams**

There is no one way to form an interdisciplinary collaborative team. Often, a mental health professional is the first person to hear about the divorce.<sup>11</sup> If so, that neutral might suggest the other spouse come in to discuss which process works best. If both spouses

are believed to be suited for a productive collaborative process, the mental health neutral might then present a list of collaboratively trained lawyers to each spouse.

If one spouse first hears about the collaborative process from their attorney, there are different ways to embark on a collaborative process. If the other spouse has already expressed interest in proceeding collaboratively, they may have already selected collaborative counsel. If not, they may be willing to accept a list of collaborative lawyers from their spouse or the mental health neutral. Alternatively, the spouse who has met with collaborative counsel may suggest the other spouse join with them to meet with a mental health neutral. The neutral can then explain the process and compare the potential impact of that process on the spouses and their family with other available processes (such as mediation and traditional litigation). The mental health neutral can also coach the spouses on good communication practices and present a list of collaborative counsel to the unrepresented spouse, or direct them to any number of online directories of collaboratively trained attorneys.<sup>12</sup>

Ultimately, moving a case into an interdisciplinary collaborative process will involve some thought regarding what might make each spouse receptive. In some cases, one spouse may be prepared to proceed with the collaborative process while the other is not. In those instances, the spouse desirous of moving forward should consider whether it would be beneficial to speak to his or her spouse directly, or broach the subject of collaboration through a third party. As stated by Stuart Webb, the founder of Collaborative Practice, “think about whether there’s a minister, priest, rabbi, psychologist, or good mutual friend” who might be willing to talk to the spouse.<sup>13</sup>

If both spouses start out with collaborative counsel and have not met with a mental health neutral, it is incumbent on counsel to discuss with their clients any advantage to bringing in the mental health or financial professional. Again, the lawyers can explain that while each member of the team will bill them for the time that team member expends, the collaborative lawyers are able to cede some time to the other neutral experts, resulting in a reduction in legal fees, while adding the benefits that the mental health and financial neutrals bring to a team.

### Setting the Pace for the Team

One area that merits careful consideration is how to manage the pace of an interdisciplinary collaborative

case. While frequent delays attendant to litigation can cause a case to drag out longer than a collaborative matter, judges do set a schedule to which litigants and counsel must adhere. In collaborative work, it becomes necessary to ensure the case does not lag, especially where the lawyers are involved in other ‘pressing’ litigated cases. For this reason, collaborative attorneys may want to give careful thought to the number of litigated cases, if any, they might realistically want to keep on their schedules. In addition to the pressures of litigation, attorneys focused on preparing for trial, or other trial-type proceedings, may also find it more difficult to ‘switch gears’ to the framework of collaborative goals and best transition for a family.

On the one hand, the ability of a collaborative team to set its own pace, based on the clients’ needs and schedules, can prove to be enormously helpful in reaching a resolution. Examples found by the authors of cases where scheduling flexibility in the collaborative process has proven to be beneficial in leading to settlement include where one spouse was too depressed to make decisions and needed time to regroup, and where one spouse wanted to settle into a new home before committing to a specific parenting plan. Other examples include cases where additional time might help a spouse accept the reality of the divorce, or where extra time is needed so some anger or other emotions might subside.<sup>14</sup>

For these reasons and others, it is also possible a collaborative case might proceed too quickly.<sup>15</sup> There lurks the danger that the team process and effort might be suboptimal if careful attention is not paid. There are different ways to monitor the pace of a case—the more important issue is that, one way or another, the case is monitored and a reasonable schedule is devised. For some teams, the mental health neutral is well positioned to watch over the pace. The authors suggest the interdisciplinary team, at a minimum, schedule calls at predetermined intervals, and that the pacing of each case is addressed as part of each tele-conference.<sup>16</sup>

### Conclusion

The interdisciplinary collaborative team helps to optimize a plan for families in transition and creates an opportunity for more positive outcomes in the clients’ divorce. Not only can the interdisciplinary collaborative practice be beneficial to the clients, but the authors have seen the enriching impact it can have on the professional

lives as lawyers and, indeed, as human beings. The additional perspective and beneficial input of therapists, financials, and other neutral team members from the outset cannot be underestimated. The growth of collaborative practice will continue to provide for fresh and original perspectives worthy of consideration in divorce matters in New Jersey. ■

*Heather C. Keith is founder of Keith Law Firm, LLC, in Westfield. Bruce David Cohen is founder of Bruce David Cohen Law Firm in Montclair.*

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## Endnotes

1. New Jersey Council of Collaborative Practice Groups at <http://www.collaboratenj.org/>.
2. Joseph DiPiazza, The New Jersey Collaborative Law Act, *New Jersey Family Lawyer*, Vol. 35, No. 1, Sept. 2014; Amy Shimalla, The Passage of the New Jersey Family Collaborative Law Act and the Impact on Collaborative Practice, *New Jersey Family Lawyer*, Vol. 35, No. 1, Sept. 2014; Chair's Column, Collaborative Divorce: A Paradigm Shift, *New Jersey Family Lawyer* Vol. 35, No. 3, Feb. 2015.
3. Risa A. Kleiner, Ethical Considerations in Collaborative Practice: Understanding Collaborative Practice, *New Jersey Family Lawyer*, Vol. 32, No. 118, Dec. 2011; Linda Piff, Jeff J. Horn, Steven P. Monaghan, Ann Marie O'Hare, Suzanne Jorgensen, Sharon Beskin Goodman, A New Approach to an Old Problem: Collaborative Law, *New Jersey Family Lawyer*, Vol. 27, No. 2, Oct. 2006.
4. Ideally, collaborative team members are formally trained in the collaborative process, and many are trained in mediation, in addition to their training and expertise in their respective fields.
5. Assuming the legal role on a collaborative team does not relieve an attorney of his or her duties under the Rules of Professional Conduct and the Rules of Court. See N.J.S.A. 2A:23D-5(a)(9); N.J.S.A. 2A:23D-11. Although "zealous advocacy" is no longer expressly stated in the Rules of Professional Conduct, attorneys must still act with reasonable diligence under RPC 1.3 in representing a client.
6. If a collaborative participation agreement has not been signed, the neutral may want to have his or her own confidentiality agreement in place or some other mechanism to protect confidentiality.
7. For example, pursuant to RPC 1.2(c), an attorney must disclose potential risks and benefits of collaborative practice as compared with risks and benefits of the other methods of ADR and of traditional litigation. See Opinion 699, Advisory Committee on Professional Ethics, 14 N.J.L. 2474 (2005). In addition, an attorney's duty to act in the client's best interests naturally extends to screening for suitability in potential collaborative cases.
8. Stating goals is normally on the agenda at the first or second conference, which is held with all team members and the spouses attending. For further understanding of goals as compared to positions, see Stuart Webb, Ronald D. Ousky, *The Collaborative Way to Divorce* (Appendix E, "Examples of Common Goals and Interests in Divorce Cases," at p. 211) Plume, 2007. See also Roger Fischer, William Ury, Bruce Patton, *Getting to Yes*, Penguin Books, 2011; Forrest S. Mosten, *Collaborative Divorce [Handbook]: Helping Families without Going to Court*, John Wiley & Sons, 2009; Gary Friedman, Jack Himmelstein, *Challenging Conflict*, American Bar Association, 2009; Nancy J. Cameron, *Collaborative Practice: Deepening the Dialogue*, The Continuing Legal Education Society of British Columbia, 2004.
9. The Board of the International Association of Collaborative Practice (IACP) can be found at <https://www.collaborativepractice.com/public/about/about-iacp/board.aspx>.
10. Many practice groups require their financial neutral members to have certified financial planner (CFP) or certified divorce financial analyst (CDFA) credentials.
11. As discussed previously, they are also trained to screen for whether the process is suitable for the clients. (Naturally, the lawyers still bear responsibility to ensure that any process choice will square with specific needs, i.e., a spouse about to hide assets would force the other spouse to require a restraining order only obtained in a litigated setting).
12. Such as a mediator if the spouses elect mediation or litigation counsel if this path is indicated.

13. Webb and Ousky, *The Collaborative Way to Divorce*, p. 69.
14. Of course, counsel must also consider countervailing issues, such as the need to set a valuation date. This may be done through written agreement so that a spouse is not prejudiced by an agreed upon hiatus.
15. Studies have shown that fast-tracking couples through an adversarial conflict may have a negative impact and prolong conflict. See, e.g., Cameron, *Collaborative Practice: Deepening the Dialogue*, at p. 79, (citing Judith S. Wallerstein, Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce*, Basic Books, 1980 at p. 50-51; E. Mavis Hetherington, John Kelly, *For Better or For Worse: Divorce Reconsidered*, W.W. Norton & Co., 2002 at p. 57).
16. For some practical suggestions, see Cameron, *Collaborative Practice: Deepening the Dialogue*, (Checklist 15: “Keeping things on Track,” at p. 314).

# Analyzing Child Support in True Shared Parenting Arrangements: The Limitations of *Wunsch-Deffler*

by Drew Molotsky

The New Jersey Child Support Guidelines were not designed to deal with today's true shared parenting situations. The process of addressing child support is becoming increasingly confusing as more parents with equal parenting time seek court intervention related to the payment of support. There are only two published opinions on the subject, and only one is from the Appellate Division. Neither of these decisions provides a definite approach to addressing child support in circumstances such as these, which can leave practitioners uncertain and unable to properly advise clients.

Appendix IX-A of the New Jersey Court Rules establishes a rebuttable presumption for the use of the guidelines in all situations involving parties with combined net income below \$187,200. Equal parenting time is not, however, expressly excluded from the application of the guidelines in these cases.

In accordance with Rule 5:6A, these guidelines must be used as a rebuttable presumption to establish and modify all child support orders. The guidelines must be applied in all actions, contested and uncontested, in which child support is being determined...A rebuttable presumption means that an award based on the guidelines is assumed to be the correct amount of child support unless a party proves to the court that circumstances exist that make a guidelines-based award inappropriate in a specific case.<sup>1</sup>

That said, recent amendments to Appendix IX-A have specifically listed an equal parenting time arrangement as a reason for deviation from the guidelines (although deviation is not mandatory in such cases). In practice, courts throughout the state are understandably reluctant to deviate from the guidelines, despite the language in Appendix IX-A affording them the discretion to do so.

The guidelines may be disregarded or a guidelines-based award adjusted if a party shows, and the court finds, that such action is appropriate due to conflict with one of the factors set forth in sections 4, 7, 10, 13, 14, 15 or 20 of Appendix IX-A, or due to the fact that an injustice would result due to the application of the guidelines in a specific case. The determination of whether good cause exists to disregard or adjust a guidelines-based award in a particular case shall be decided by the court.<sup>2</sup>

As a result, judges attempt to use the guidelines to deal with these situations by employing varying and inconsistent methodologies. They can hardly be blamed for this inconsistency, however, as there is little published case law or other authority providing guidance on the issue. In *Benisch v. Benisch*,<sup>3</sup> the Appellate Division broached the subject over 14 years ago. In that decision, the author believes the Appellate Division did more to identify the problem than solve it. The *Benisch* court first suggested the idea that 25 percent of the guidelines-based amount intended to cover "controlled expenses" could be "backed out" of the child support calculation in equal parenting time situations.<sup>4</sup> Again, this was more of an observation than a mandate. While the Appellate Division in *Benisch* suggests that adjusting the guidelines to deal with 'controlled expenses' is one reasonable approach, the court goes on to state that, "if the court has some alternative which it deems more desirable, it should not feel preempted from employing such a device..."<sup>5</sup>

Seizing on the language of *Benisch*, and establishing the methodology now most widely employed, was Judge Michael Haas's trial-level decision of *Wunsch-Deffler v. Deffler*.<sup>6</sup> *Wunsch-Deffler* has not been expressly adopted by the Appellate Division or the Supreme Court, but has been affirmatively referenced since its publication. In the more recent unpublished opinion in *DiFilippo v. DiFilippo*,<sup>7</sup> the Appellate Division reaffirmed its grant of



discretion to the trial court in dealing with these matters.

In accordance with our views in *Benisch*, and the more recent treatment of those principles in *Wunsch-Deffler*, the Family Part in this case acted within its discretionary authority to employ a calculation tailored to the circumstances of the parties' custody arrangement and we have no occasion to tamper with that exercise of principled discretion.<sup>8</sup>

The basic logic of *Wunsch-Deffler* (as alluded to in *Benisch*) is that an adjustment is necessary to the normal guidelines calculation in order to account for both parents' responsibility for paying the child(ren)'s controlled expenses as they are defined by the guidelines. 'Basic child support' consists of three consumption categories: 1) fixed expenses (representing 38 percent of the child support amount); 2) variable expenses (representing 37 percent of the child support amount); and 3) controlled expenses (representing 25 percent of the child support amount).<sup>9</sup> 'Fixed' expenses are those incurred even when the child(ren) is not residing with the parent (such as housing). 'Variable' expenses are incurred only when the child(ren) is with the particular parent (such as food). 'Controlled' expenses include things like clothing, personal care, and entertainment, and the guidelines assume they are only incurred by the parent of primary residence.<sup>10</sup> As such, controlled expenses need to be apportioned between the parties based on their income shares, not in relation to time spent with the child(ren).

A standard guidelines-based calculation in a true 50/50 parenting time scenario would, therefore, be unfair because the guidelines assume that only the parent of primary residence would incur controlled expenses when, in fact, both parents are doing so equally. The *Wunsch-Deffler* adjustment, therefore, backs out the 25 percent in controlled expenses from the child support paid. The *Wunsch-Deffler* adjustment, however, is not a perfect solution, in that it still requires one party to be designated as the parent of primary residence in order to run guidelines. When that designation is changed arbitrarily from one parent to the other, the support numbers change significantly.

For example, assume the following basic facts: a father having income of \$100,000 per year; a mother having income of \$50,000 per year; two children under 12 years old; equal parenting time; no alimony; and no

out-of-pocket health insurance or child care costs. Applying the *Wunsch-Deffler* adjustment to the guidelines, the father would owe child support of \$66 per week if he is designated as the parent of primary residence, but would owe \$166 if the mother is so designated.<sup>11</sup>

The guidelines themselves further confuse the issue via the manner in which they define parent of primary residence and parent of alternate residence. The guidelines provide specifically: "If the time spent with each parent is equal [50% of overnights each], the PPR is the parent with whom the child resides while attending school."<sup>12</sup> This might provide some guidance with regard to who shall have the designation for child support purposes, but raises as many questions as it answers. What does "while attending school" mean? If the children attend school in the father's district but spend an equal number of school days at each parent's home, does that give the father the parent of primary residence designation? If both parents live in the same district but the mother has the children three school days compared to father's two. Does that give the mother the designation? The answers to these questions remain uncertain.

It has been suggested by some judges anecdotally, with support from the Administrative Office of the Courts in their judicial training (although, interestingly, no published materials were found to document this position), that the parent with higher income should always be designated as the parent of alternate residence since he or she will be the payor in the end. While this may make some logical sense, it hardly explains why that parent of primary residence is entitled to the large financial benefit that comes with the designation. Further, *Wunsch-Deffler* leaves open the question of what is to be done about the controlled expenses once they are backed out.

In a more extreme situation where one party has all of the income, is it fair to assume equal contribution toward these controlled expenses? Should the parties be contributing on a proportionate basis toward each other's controlled expenses? These questions and more remain unanswered by Court Rules and case law, and the author believes the need for a practical resolution of these issues is readily apparent.

What can practitioners do to help guide clients through these potential pitfalls? One seemingly commonsensical solution, utilized by some attorneys and judges alike, would be to run multiple sets of guidelines, each designating one parent as primary, and then offsetting the guidelines-calculated amounts. A potential alternative

solution would be to determine child support in true shared parenting situations without use of the guidelines.

While not adopted in any published or unpublished opinion in New Jersey, an alternative method used by some practitioners is to create two separate child support worksheets, each assuming equal parenting time but designating one parent as the parent of primary residence without any adjustment for the controlled expenses.<sup>13</sup> This would theoretically determine what each parent would owe the other for the time spent by the child(ren) with the other parent, and the two figures could be offset. Applying this methodology to the above income scenario, the result would be a net figure owed by the father to the mother of \$100 per week. Based on the hypothetical facts described above, this \$100 figure would seem to represent an equitable middle ground between the figures calculated per the guidelines based on the custodial designations.

Perhaps the most literal reading of the guidelines, as well as N.J.S.A. 2A:34-23a, is that equal parenting time situations should be considered a non-guidelines situation calling for a deviation and assessment of child support pursuant to the statutory factors without application of the guidelines. This approach, however, is relatively unattractive, as it may frequently call for plenary hearings, extensive findings of fact, and discretionary determinations of the children's needs and the parties' relative abilities to contribute to those needs. The author believes this will not facilitate either settlement or expeditious determinations, and will require matters to be diverted from hearing officers to judges to be resolved by way of plenary hearings.

The author believes this is an issue requiring Appellate Division clarification. Pending further judicial and/or legislative guidance on determining child support in shared parenting arrangements, attorneys and litigants alike will be compelled to bring these issues to the attention of the court for resolution. ■

*Drew A. Molotsky is a partner at the Haddonfield law firm of Adinolfi & Packman, PA.*

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## Endnotes

1. Child Support Guidelines, Pressler & Verniero, *Current N.J. Court Rules*, Appendix IX-A, ¶2 to R. 5:6A (2016).
2. *Id.*
3. *Benisch v. Benisch*, 347 N.J. Super. 393 (App. Div. 2002).
4. *Id.* at 398.
5. *Id.* at 400.
6. *Wunsch-Deffler v. Deffler*, 406 N.J. Super. 505 (Ch. Div. 2009).
7. *DiFilippo v. DiFilippo*, No. A-3985-09T1, 2011 N.J. Super. Unpub. LEXIS 626, at 11-12 (App. Div. March 14, 2011).
8. *Id.*
9. Child Support Guidelines, Pressler & Verniero, *Current N.J. Court Rules*, Appendix IX-A, ¶14.g to R. 5:6A (2016).
10. Child Support Guidelines, Pressler & Verniero, *Current N.J. Court Rules*, Appendix IX-A, ¶14.i to R. 5:6A (2016).
11. It is worth noting as well that when the mother is designated as the parent of primary residence, the guidelines also place her on the sole parenting worksheet due to income poverty guidelines thresholds, further increasing the father's obligation simply as a result of this arbitrary parent of primary residence designation.
12. Child Support Guidelines, Pressler & Verniero, *Current N.J. Court Rules*, Appendix IX-A, ¶14.b.1 to R. 5:6A (2016).
13. Some judges and attorneys have suggested using sole parenting worksheets on both sides in this scenario, as they feel it provides a more 'pure' child support figure before the offset.

# Parenting Coordination in New Jersey: The Surprisingly Nebulous Task of Removing a Parenting Coordinator

by Thomas Roberto

While the appointment of parenting coordinators in contentious custody matters is not an uncommon occurrence in New Jersey courts, there is a surprising lack of authority guiding the parenting coordination process and, specifically, the process for removing a coordinator. No New Jersey statute or case law articulates an applicable standard or formal procedure for parenting coordination. There is, however, some guidance to be found via New Jersey's short-lived Parenting Coordination Pilot Program and certain national organizations. For example, in 2011, the American Psychological Association (APA) approved its 'best practices' *Guidelines for the Practice of Parenting Coordination* among psychologists.<sup>1</sup> The Association of Family and Conciliation Courts (AFCC) published its own *Guidelines for Parenting Coordination* in 2005.<sup>2</sup>

These resources are merely illustrative and, in fact, they remain the only available forms of guidance on parenting coordination in New Jersey, together with a very limited body of interpretive case law. The lack of authority on the subject of parenting coordination makes it incumbent upon attorneys and parties to carefully consider and define, on a case-by-case basis, the process for appointing a parenting coordinator, the scope of the coordinator's authority, and the process for removing the coordinator and terminating his or her services.

## What is Parenting Coordination?

Parenting coordination is defined by the APA as "a non-adversarial dispute resolution process that is court ordered or agreed upon by divorced and separated parents who have an ongoing pattern of high conflict and/or litigation about their children."<sup>3</sup> The APA guidelines provide "[t]he underlying principle of the Parenting Coordination intervention is a continuous focus on children's best interests by the Parenting Coordinator (PC) in working with high conflict parents and in decision-

making."<sup>4</sup> While the concept of parenting coordination is clear, the standards governing the coordination process—specifically the standard by which a coordinator can be removed—is anything but.

As a starting point in an attempt to define standards and processes for removal of a parenting coordinator in New Jersey, the role of a coordinator has been anecdotally compared to that of a mediator or, more importantly, a judge. A judge makes binding decisions while a parenting coordinator makes only recommendations, as will be discussed in some detail below. However, there is a distinct parallel between their roles: Like a judge, a parenting coordinator is a neutral third party tasked with assisting the parties in resolving disputes they are incapable of resolving on their own. On this basis, some practitioners contend that an application for removal of a parenting coordinator should be reviewed under the same standards applied to an application for judicial recusal where removal may be appropriate upon showing of a mere "appearance of impropriety."<sup>5</sup>

However, the Appellate Division made a distinction between the roles of judges and parenting coordinators in *Parish v. Parish*.<sup>6</sup> The *Parish* decision makes clear that while a parenting coordinator makes recommendations on issues that could also be presented to a court for resolution, a coordinator's recommendation is in no way a substitute for a judge's determination on contested issues.<sup>7</sup> The role of the parenting coordinator, then, is to aid parents by providing a different forum to discuss resolutions to parenting disputes, but a parenting coordinator cannot serve as a replacement for resolving such disputes by way of presentation to a court.<sup>8</sup> This would suggest that removal of a coordinator cannot be sought based upon an appearance of impropriety or other standard applicable to judicial recusal.

In addition to the *Parish* decision, the APA outlines the unique and distinctive nature of the parenting coor-

dinator's role. Although in many cases the individual appointed to serve as coordinator is a psychologist or other mental health professional, the APA acknowledges "the role of the PC differs in significant ways from the usual roles of psychologists and requires specialized knowledge and training, including mediation and arbitration skills, familiarity with relevant legal contexts, and experience in assisting parents with high conflict."<sup>9</sup> If coordinators are expected to possess this additional specialized knowledge, it would be impractical and inadequate to hold mental health professionals serving as parenting coordinators accountable to the APA's code of conduct alone.<sup>10</sup>

Upon what standard, then, are practitioners left to rely when seeking to remove a parenting coordinator? The history of the parenting coordination program in New Jersey provides some guidance.

### **New Jersey's Parenting Coordinator Pilot Program and *Milne v. Goldenberg***

Prior to 2007, the Supreme Court Family Practice Committee attempted on several occasions to establish formal rules addressing the parenting coordination process. The proposed rules were ultimately rejected. In their place, in 2007 the Supreme Court established the Parenting Coordinator Pilot Program in a limited number of counties (Bergen, Middlesex, Morris, Sussex and Union).<sup>11</sup>

The 2007 pilot program implemented specific guidelines and model forms issued by the Administrative Office of the Courts (AOC) and approved by the Supreme Court.<sup>12</sup> These guidelines addressed, among other issues, the appointment of a parenting coordinator, authority of a coordinator, procedures for handling grievances, and termination of the coordinator's services.<sup>13</sup> The pilot program was terminated five years later, in Nov. 2012.<sup>14</sup> In notifying the bar of the conclusion of the pilot program, the AOC specifically left open the potential for appointment of parenting coordinators with the consent of the parties or upon order of the court: "Family Judges may continue to appoint Parenting Coordinators in specific cases in any vicinage...Parenting Coordinators so appointed will need to be qualified to serve either by consent of the parties or by the court in the same manner as other experts."<sup>15</sup> No direction was provided, however, on the process for removing the coordinator once appointed.<sup>16</sup>

Although New Jersey's pilot program was short-lived, it did have sufficient reach to garner enforcement by the Appellate Division in *Milne v. Goldenberg*.<sup>17</sup> The

*Milne* court stated that "any Family Part judge ordering the appointment of a PC must comply with the Supreme Court's established guidelines."<sup>18</sup> *Milne* involved a challenge to a parenting coordinator, appointed by the court without the consent of both parties, on the basis that the coordinator (an attorney and non-mental health professional) was unqualified under the pilot program guidelines.<sup>19</sup> The plaintiff in *Milne* argued that the trial court erred by appointing an attorney because the guidelines provide for appointment of attorneys only with the consent of the parties.<sup>20</sup> The Appellate Division agreed, stating, moreover, that "[o]n remand, if a Family Part judge appoints a [parenting coordinator] for these parents, future management of the PC is subject to the Guidelines, which contain procedures both for grievances...and termination."<sup>21</sup>

Although the Appellate Division's directive to apply the guidelines on remand was specific to the trial court presiding over the dispute between *Milne* and *Goldenberg*, the court's decision to require adherence to the guidelines merits note. It stands to reason that this decision would have had a precedential impact had the pilot program not been terminated almost immediately after the *Milne* decision was published. Interestingly, *Milne* was decided on Sept. 12, 2012;<sup>22</sup> the notice to the bar terminating the pilot program was issued one month later, on Nov. 13, 2012.<sup>23</sup> The *Milne* decision is, however, significant regarding interpretation of the guidelines and AOC directives issued in conjunction with the now-defunct pilot program as one of the only sources upon which New Jersey attorneys and litigants can rely in navigating the coordination process and addressing the specific issue of removal of a parenting coordinator.

### **Where are We Now?**

Because there is no clear authority on the issue of removal, it appears that the best way to minimize future conflicts is to craft appointing orders which comprehensively address the parenting coordination process and carefully specify the procedure to apply in the event a party seeks to remove the coordinator and terminate his or her services. The following list, which is illustrative but not exhaustive, suggests issues to be addressed in any appointing order:

- *Appointment*: Identify the individual to be appointed as the parenting coordinator, including all pertinent contact information.
- *Role/Scope*: Define the parenting coordinator's role

in making recommendations for resolution of issues between the parties. Where possible, identify the specific issues to be addressed by the coordinator, which can range widely and may include anything from disputes over the exchange of custody to issues concerning discipline of the children.

- *Issuing Recommendations*: Specify the manner in which the recommendations of the coordinator will be disseminated, whether to the parties directly, to counsel or both.
- *Fees*: State the amount of the coordinator's retainer, hourly rate and the apportionment of the coordinator's fees between the parties. Appending a copy of the coordinator's retainer agreement to the order may also prove helpful.
- *Absence of Confidentiality*: The parties should understand their communications, as well as their counsel's communications, with the coordinator are not confidential and could potentially be used in court.
- *Termination*: Set forth in explicit detail the process for seeking the removal of a coordinator's services and the standard under which such a removal request will be reviewed.

The pilot program guidelines, defining processes for 'grievances' and 'termination,' provide some direction for setting forth the process and standards applicable to a parenting coordinator and, specifically, to an application for removal of a coordinator and termination of his or her services, in an order appointing a coordinator.

## Grievances

The pilot program guidelines establish a three-step procedure to address grievances a party may have with the coordinator. First, a party with a complaint about any aspect of the parenting coordination process "shall discuss the matter with the Parenting Coordinator in person in an attempt to resolve it before pursuing it in any other matter."<sup>24</sup> If the issue remains unresolved after direct communication with the coordinator, the guidelines require written submission of the grievance, with notice to all parties and counsel, to the coordinator. Thereafter, the "Parenting Coordinator shall within thirty (30) days provide a written response to both parties and the attorneys."<sup>25</sup>

The 30-day window for the coordinator to produce a written response is unattractive to many litigants due to perceived and actual delay. A dissatisfied party could

potentially file a motion bringing the issue to the court for resolution within the same amount of time (and possibly six days sooner). Moreover, the coordinator's response may not resolve the issue, leaving an application to the court as the inevitable last resort with additional delay. Indeed, the guidelines indicate that if, after receipt of the coordinator's written response, the grievance remains at issue, "the dissatisfied party may request a court hearing to make a determination on the issue(s)."<sup>26</sup>

There is nothing in the guidelines preventing a grievance motion from including a request to remove the coordinator from his or her appointment. A determination by a court that a legitimate grievance with the coordinator exists, therefore, would seem to provide a basis for the coordinator's removal. Accordingly, it would seem any formal grievance application filed with the court could also include a request for removal. However, this interpretation of the pilot program grievance procedure conflicts with the termination procedure set forth in a separate section of the pilot program guidelines.

## Removal and Termination

The pilot program guidelines break down the process of removing a coordinator from his or her appointment and terminating the coordinator's services into two components: 1) removal of the coordinator by the court or the coordinator him or herself; and 2) removal of the coordinator by a party.

Regarding the former, the guidelines provide specifically that: "The court or the Parenting Coordinator may terminate the appointment if the services of the Parenting Coordinator do not meet the needs of the family, if the children have reached the age of majority, or if the parties stipulate to such termination."<sup>27</sup> This standard for removal by a court and/or by the coordinator is not entirely clear. The children reaching the age of majority and the parties' agreement as bases for removal are straightforward. But, by what standard are the "needs of the family" determined? Absent further explanation, it would seem this standard is best analogized to the 'best interests of the children,' permitting a court or coordinator to terminate services upon a conclusion that the coordinator's continued involvement is no longer in the best interests of the children or the family.<sup>28</sup>

The second component of the guidelines, regarding removal of a coordinator upon application of a party, provides: "Either party may petition the court by motion for termination of the Parenting Coordinator's appoint-

ment whenever the Parenting Coordinator has exceeded his/her mandate or has acted in a manner inconsistent with the approved procedures, or has violated professional conduct, *provided the approved grievance procedure has been utilized.*<sup>29</sup> The guidelines specifically instruct parties to jump through the ‘grievance’ hoops, previously discussed, *before* proceeding with a formal application for removal.

Notably, this section of the guidelines does not state that removal is automatic upon a showing that the coordinator as “exceeded his/her mandate,” acted “inconsistent with the approved procedures,” or otherwise “violated professional conduct.”<sup>30</sup> Rather, the guidelines provide that upon the occurrence of one or more of the articulated bases for removal, a party “may petition the court” for termination.<sup>31</sup> This section of the guidelines can reasonably be interpreted to suggest that, if a party succeeds in showing one or more of the articulated grounds for removal of the coordinator, removal will be granted. The plain language, however, states that proof of one or more of these grounds merely provides a party with the ability to petition a court for removal, with the success of that application lying within the discretion of the court.

Even assuming, however, that the guidelines can be interpreted to mean that a court will grant a removal request upon a party’s showing of one or more of the articulated grounds, how does a party actually go about making that showing?

Whether a parenting coordinator has “exceeded his/her mandate,” and/or “acted in a manner inconsistent with the approved procedures” would depend on the role of the coordinator and the scope of his or her responsibilities (terms that can easily be set forth in the appointing order or agreement). If the coordinator’s role is defined in the appointing order or agreement as being limited to addressing disputes between parents regarding the exchange of custody of a child for parenting time, for example, the coordinator would potentially be “exceeding his/her mandate” by making a recommendation as to a child’s extracurricular activities.

Similarly, whether a coordinator has acted “inconsistent with the approved procedures” would depend on the procedures established in the appointing order or agreement. If the appointing order mirrors the guidelines procedure for grievances and removal (requiring a formal grievance procedure to be followed before a party can proceed with a formal application to the court), a coordinator could be found to be acting inconsistent with those procedures by, for example, failing to issue

a written response within 30 days of receiving written notice of a grievance. Whether or not this claim would be sufficient to justify removal in the eyes of a court is uncertain, unless of course the standard upon which removal should be granted is spelled out in detail in the appointing order prepared by an experienced, well-read New Jersey family lawyer.

The final basis for removal, where the coordinator has “violated professional conduct,” is perhaps the most difficult to define, as it begs the following questions: To which standards of professional conduct are parenting coordinators bound? Are coordinators bound to standards of professional conduct of an attorney or judge, where a conflict of interest or even mere appearance of impropriety can be sufficient to justify termination of the coordinator’s services? The *Parish* decision suggests they are not.<sup>32</sup> Although the APA guidelines address the standards of conduct applicable to psychologist-coordinators on a national scale, those standards cannot be appropriately applied in every case because not all parenting coordinators are mental health professionals. Creating an appointing order that clearly establishes the professional standards of conduct to which the coordinator will be held would prove essential in this regard. It may be beneficial, if not necessary, to consider the guidelines established by the APA and AFCC, in addition to the New Jersey pilot program guidelines, when fashioning the language of an appointing order.

### **APA and AFCC Guidelines on Professional Standards of Conduct**

Though they differ in content, both the APA and the AFCC guidelines address professional standards applicable to parenting coordinators. The APA guidelines direct psychologists serving as parenting coordinators to “[s]trive to be familiar with sources of ethical and professional guidance that may be relevant to the provision of Parenting Coordination services, including the APA Ethical Principles of Psychologists and Code Conduct... [s]trive to recognize and respond to relevant sources of professional guidance about multicultural and diversity issues in the provisions of Parenting Coordination services...[and] [s]trive to develop and maintain professional and collaborative relationships with all other professionals involved in the case.”<sup>33</sup>

The first two of these guidelines hinge on an understanding of the APA code of ethics for psychologists. While this may suffice in cases where the appointed

coordinator is indeed a psychologist, trying to hold an attorney to a code of conduct developed for psychologists would be like trying to fit a round peg in a square hole. It would seem more practical to apply the spirit of the APA ethical guidelines for parenting coordinators and seek to hold coordinators to the specific standards set forth in an appointing order, and/or specific ethical standards that apply to the individual coordinator's profession.

Similarly, the AFCC guidelines setting forth ethical standards require parenting coordinators to:

- Be qualified by education and training to undertake parenting coordination and continue to develop professionally in the role;
- Maintain impartiality in the process of parenting coordination;
- Not serve in a case that presents a clear conflict of interest;
- Not serve in dual sequential roles;
- Inform the parties of the limitations on confidentiality in the parenting coordination process and maintain confidentiality in regard to sharing information outside of the coordination process;
- Fully disclose and explain the basis of any fees and charges to the participants; and
- Communicate with all parties, counsel, children, and the court in a manner that preserves the integrity of the parenting coordination process and considers the safety of the parents and children.<sup>34</sup>

The AFCC guidelines borrow from the professional ethical standards of both attorneys and mental health professionals in arriving at these guidelines. However, not all of these guidelines will apply in every case. For that reason, the need to tailor the removal language, and all other terms of the appointing order, based on the specific facts and circumstances of a given case, is critical.

## Conclusion

Absent the development of case law, court rules and/or statutory authority on the parenting coordination process and the specific issue of removing a parenting coordinator, attorneys and judges alike would be wise to carefully craft appointing orders and agreements setting forth clear and practical terms addressing the appointment and removal of a parenting coordinator and all other issues relating to the scope of the coordinator's role. The 2007 pilot program guidelines, as well as the APA and AFCC guidelines, provide a sensible framework for the construction of these orders and are a logical starting part for any practitioner. ■

*Tom Roberto is an associate with Obermayer Rebmann Maxwell & Hippel, LLP, in Cherry Hill.*

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## Endnotes

1. American Psychological Association, *Guidelines for the Practice of Parenting Coordination* (2011) at <http://www.apa.org/practice/guidelines/parenting-coordination.aspx>.
2. Association of Family and Conciliation Courts, *AFCC Task Force on Parenting Coordination, Guidelines for Parenting Coordination* (May 2005) at [http://www.afccnet.org/Portals/0/AFCCGuidelinesforParenting coordinationnew.pdf?ver=2013-08-21-071822-000](http://www.afccnet.org/Portals/0/AFCCGuidelinesforParenting%20Coordinationnew.pdf?ver=2013-08-21-071822-000).
3. American Psychological Association, *Guidelines for the Practice of Parenting Coordination*.
4. *Id.*
5. *Panitch v. Panitch*, 339 N.J. Super. 63 (App. Div. 2001).
6. *Parish v. Parish*, 412 N.J. Super. 39, 53 (App. Div. 2010).
7. *Id.*
8. *Milne v. Goldenberg*, 428 N.J. Super. 184, 205 (App. Div. 2012)(citing *Parish*).
9. American Psychological Association, *Guidelines for the Practice of Parenting Coordination*.
10. American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* (2010) at <http://www.apa.org/ethics/code/>.
11. Notice to the Bar: Parenting Coordinator Pilot Program—Program Guidelines and Related Material (April 9, 2007) at <http://www.judiciary.state.nj.us/notices/2007/n070403a.pdf>.

12. *Id.*
13. *Id.*
14. Notice to the Bar: Parenting Coordinators—Conclusion of Pilot Program; Continuing Authority to Appoint in Individual Cases (Nov. 13, 2012), at <https://www.judiciary.state.nj.us/notices/2012/n121126a.pdf>.
15. *Id.*
16. *Id.*
17. *Milne v. Goldenberg*, 428 N.J. Super. 184 (App. Div. 2012).
18. *Id.* at 205.
19. *Id.* at 204.
20. *Id.*
21. *Id.* at 206.
22. *Id.*
23. Notice to the Bar: Parenting Coordinators—Conclusion of Pilot Program; Continuing Authority to Appoint in Individual Cases.
24. Notice to the Bar: Parenting Coordinator Pilot Program—Program Guidelines and Related Material at 6.
25. *Id.*
26. *Id.*
27. *Id.* at 7.
28. Whether it is appropriate for the coordinator to make a determination as to the children’s best interests is a topic for another article.
29. *Id.* (emphasis added)
30. Notice to the Bar: Parenting Coordinator Pilot Program—Program Guidelines and Related Material at 7.
31. *Id.*
32. *Parish v. Parish*, 412 N.J. Super. 39 (App. Div. 2010).
33. American Psychological Association, *Guidelines for the Practice of Parenting Coordination*.
34. Association of Family and Conciliation Courts, *AFCC Task Force on Parenting Coordination, Guidelines for Parenting Coordination*.



# The Implications of *Sheridan* Warnings and Potentially Coercive Effects on Settlement: Should Attorneys and Judges Think Before They Speak?

by Amy L. Rokuson and Shari B. Veisblatt

Virtually all New Jersey family lawyers have heard of the case of *Sheridan v. Sheridan*,<sup>1</sup> and some may have inevitably issued a ‘*Sheridan* warning’ to a client or two. Although *Sheridan* issues are by no means uncommon within the context of divorce, their potential impact on settlement agreements is often overlooked.

*Sheridan v. Sheridan* was the 1990 Chancery Division case of first impression addressing whether “marital property acquired with funds obtained illicitly and not reported for federal and state taxing purposes is subject to equitable distribution.”<sup>2</sup> The Sheridans fit snugly into that special category of clients practitioners know far too well: those who report minimal income but are somehow able to fund a lifestyle well beyond the means of their reported earnings. Mrs. Sheridan was a homemaker reporting no income, while Mr. Sheridan, employed as an oil-delivery truck driver, reported income of less than \$20,000 *total* during a five-year period spanning from 1983 through 1987.<sup>3</sup> Somehow, on less than \$20,000 reported dollars, the Sheridans spent over \$325,000 during that same five-year period on remodeling and decorating their home (which they purchased with cash), furniture, appliances, vehicles, vacations, jewelry, gifts, private school educations and an investment property.<sup>4</sup> Despite the clearly questionable nature of the parties’ income, the matter proceeded all the way to trial on the issues of equitable distribution, alimony and child support.

When questioned about the source of funds that afforded the parties such a comfortable lifestyle, Mr. Sheridan testified that his father, on the day of his mother’s death, gave him \$180,000 in cash.<sup>5</sup> Mrs. Sheridan, on the other hand, testified that Mr. Sheridan conspired with his employer in a “skimming” scheme wherein they overcharged on oil delivery orders, never actually delivered the oil, and then resold the undelivered oil to third parties.<sup>6</sup>

Mrs. Sheridan was able to testify credibly about

the large cash deposits that funded the marital lifestyle. While the parties’ testimony about the source of the funds differed, both parties testified they did not pay any inheritance, gift or income taxes on the funds.<sup>7</sup> The court ultimately found that 100 percent of the \$325,000 expended by the parties from 1983 through 1987 was a result of “untaxed, undeclared cash,” and that at least \$250,000 of the total sum was the result of illegal activities.<sup>8</sup>

Despite Mrs. Sheridan’s candid explanation of the less-than-ethical ways in which she and her husband funded their lifestyle, the court determined it could not permit either party to benefit from illicit marital conduct. “[E]quity will follow the common law precept that no one shall be allowed to benefit by his own wrongdoing. . .nor enrich himself as a result of his own criminal acts.”<sup>9</sup> In sum, the answer to the underlying question of whether “marital property acquired with funds obtained illicitly and not reported for federal and state taxing purposes is subject to equitable distribution” was “no.” The parties were instead left “exactly where the court found them at the commencement of this litigation,” or in *pari delicto*.<sup>10</sup>

However, the *Sheridan* case may not be best known for its holding that courts cannot aid parties in dividing marital assets acquired with illicit funds. Rather, the part of *Sheridan* that has become an integral part of legal practice is the holding that judges have an obligation to report illicit conduct. *Sheridan* makes clear that judges are required, when presented with sworn testimony indicating that a crime has been committed, “to make a prompt report to [the] proper authority.”<sup>11</sup> Judge Herman, who presided over the *Sheridan* case, held that, in accordance with the Canons of Judicial Conduct, it is a judge’s absolute duty to report such wrongdoing to the appropriate authority.<sup>12</sup>

As a result of *Sheridan*, practitioners may find themselves issuing a *Sheridan* warning to those clients who appear to have been underreporting (or simply not reporting) income for tax purposes, or who have engaged

in criminal conduct in order to amass their wealth. The typical warning to clients may go something like this: “If we take this case to trial, the judge is obligated to report you and your spouse to the IRS and there may be serious criminal consequences. Accordingly, I strongly encourage you to attempt to settle your case outside of the courtroom.” In other, albeit less frequent, instances, the warning may come from a judge him or herself, as was the case in *All Modes Transport, Inc. v. Hecksteden*.<sup>13</sup>

*All Modes* was a non-matrimonial matter, though the ruling from the Appellate Division could not be more applicable to matrimonial practice. *All Modes* arose from an employment dispute between the plaintiff employer (All Modes) and the defendant employee (William Hecksteden), whom the plaintiff sued under theories of breach of contract, fraud, breach of fiduciary duty and conspiracy.<sup>14</sup> While Hecksteden was on the stand being cross-examined at trial, it became clear the plaintiff’s attorney was on the verge of presenting evidence that would confirm Hecksteden had been claiming as deductions on his tax returns the same expenses for which he received reimbursement from All Modes—a clear tax violation.<sup>15</sup> Rather than permit the cross-examination to continue, the trial judge suddenly declared a recess and asked to see counsel in chambers.<sup>16</sup> The trial judge warned counsel in chambers that if the documents the plaintiff’s counsel intended to introduce revealed “similar and more material transgressions,” the judge would have no choice but to write a *Sheridan* letter to the authorities regarding Hecksteden’s potential federal and state tax law violations.<sup>17</sup> The trial judge, therefore, urged that “counsel attempt to settle the matter.”<sup>18</sup>

The trial judge directed counsel to discuss the case and the potential for settlement during the in-chambers conference. After conversing for approximately 45 minutes, counsel returned with a settlement agreement.<sup>19</sup> As is the case with many divorce matters that settle ‘on the courthouse steps’ on the day of trial, counsel placed the parties’ settlement on the record that day.<sup>20</sup> Hecksteden was specifically questioned by his attorney about the voluntariness of his agreement to the settlement reached that day.<sup>21</sup> The matter was settled thanks primarily, if not solely, to the trial judge’s in-chambers comments to counsel.

Here is the rub: Several weeks later, Hecksteden filed a motion to vacate the settlement, claiming he was “under extreme duress” when he agreed to the terms of settlement, as the judge’s comments to counsel amounted

to coercion.<sup>22</sup> Hecksteden specifically argued that even though he talked to a tax attorney during the recess, who advised him there could be civil and criminal penalties resulting from his tax filings, he was not given the time to consult with his own accountant or with a criminal attorney to discuss: 1) whether there were such issues; and 2) what the actual consequences would be of a tax fraud investigation.<sup>23</sup>

The trial court denied Hecksteden’s motion to vacate the settlement, citing largely to the fact that he could not prove that contact with his tax accountant would have made any difference in his agreeing to the settlement, since there was nothing the tax accountant knew that Hecksteden did not himself know.<sup>24</sup> The Appellate Division, however, reversed the order denying Hecksteden’s motion to vacate the settlement agreement and made several important findings:

1. *Despite the state’s public policy of encouraging settlement, the trial court erred in interrupting Hecksteden’s cross-examination to issue a Sheridan warning to counsel and suggesting the parties consider settlement.*<sup>25</sup> While the trial court may not have violated any specific ethical rule, the Appellate Division likened the trial court’s *Sheridan* warning to a violation of RPC 3.4(g), which prevents adverse lawyers from threatening criminal charges to obtain an advantage in a criminal matter.<sup>26</sup>
2. *The trial court took “too restrictive a view on the issue of voluntariness.”* Despite Hecksteden’s testimony that he entered into the agreement voluntarily, and despite the fact that Hecksteden could not prove that contact with his tax accountant would have made a difference in his decision to agree to the terms of settlement, the effect of the trial judge’s *Sheridan* warning (even if unintended) was potentially to coerce a settlement out of Hecksteden.<sup>27</sup> In deciding Hecksteden’s motion to vacate the settlement, the sole issue before the trial court should have been “whether Hecksteden entered into the settlement under duress because he feared that a continuation of the trial would result in the trial court referring his testimony to the appropriate prosecuting authority.”<sup>28</sup>
3. *It was the responsibility of Hecksteden’s counsel, not the trial court, to advise Hecksteden of the potential that his testimony could be self-incriminating and that the court could refer his testimony to the IRS or U.S. attorney.*<sup>29</sup> In this case, Hecksteden’s counsel actually did issue a *Sheridan* warning, and the trial court was aware of this fact.<sup>30</sup>

In *All Modes*, the Appellate Division found that the trial court's actions (rather than the attorney's actions) could have had potentially coercive effects on the ultimate settlement. The *All Modes* decision offers lessons to attorneys on how to protect settlement agreements and avoid claims that the settlement was coerced. The authors suggest the next time a client's reported income on his or her tax return simply does not fit with the family's expenses as identified on a case information statement, practitioners should think before immediately telling the client the case simply 'has to settle.' Practitioners could find themselves in a position where the client can claim he or she entered into a settlement agreement under duress or coercion.

So what should be done instead? The following are some suggestions gleaned from the Appellate Division decision in *All Modes*:

1. *Don't threaten or insist; just inform.* As discussed in *All Modes*, it is a violation of the Rules of Professional Conduct to threaten an adverse party with criminal charges in order to obtain a favorable settlement. Therefore, one should not write a letter to his or her adversary threatening that the practitioner or the court will have to report criminal conduct to the appropriate authority if the case does not settle on certain terms. The practitioner also should not *insist* to his or her client that the case settle. Rather, he or she should *explain* the *Sheridan* decision to the client and make it clear that if the matter does proceed to trial, the trial court is obligated to report the client's potential misconduct to the appropriate authorities. Take the time to explain to the client the potential criminal, or other, ramifications of such judicial reporting. Remember that a court does not have the obligation to inform the parties about the *Sheridan* case—the attorney does. But 'inform' is all practitioners are obligated to do (and all they should do). If the client asks if this means the case *has* to settle outside of court, the answer should simply be, "no." The Appellate Division, in *All Modes*, specifically noted the coercive nature of the judge's warning was compounded by the judge's decision to stop trial and conduct an in-chambers conference to suggest that settlement be explored further.<sup>31</sup> Practitioners have to be careful to separate the 'warning' itself from any suggestion or recommendation that the case be settled outside of court.
2. *Give the client time to consult with an accountant, tax attorney, criminal attorney or other third-party professionals.* When it comes to a client who may have committed some level of wrongdoing, the practitioner should insist that the client consult with another professional before he or she decides whether to settle or proceed to trial. Only an experienced accountant can tell the client if he or she has committed tax fraud, and only a tax attorney can tell the client if he or she can remedy the potential issues. Only a criminal attorney can tell the client what the potential ramifications of his or her actions may be in the event a judge reports to the IRS or other prosecuting authority. If Hecksteden had the chance to talk to a criminal attorney before agreeing to the settlement, perhaps the result would have been different. A client may voluntarily choose to proceed to trial if he or she knows the crime committed would result in only a fine or warning, rather than jail time. Make sure to have a list of potential third-party professionals on hand for the client to consider.
3. *Talk about Sheridan right away; don't delay.* Perhaps the result in *All Modes* would have been different if the trial judge had made the same comments during a pre-trial settlement conference rather than squarely in the middle of trial. Trial is obviously a very stressful time, especially for the litigants whose lives are directly affected by the outcome. One cannot help but think that it would have been much more difficult for Hecksteden to argue that he was under duress to settle had his attorney conveyed the trial judge's thoughts weeks or months prior to trial during a more informal setting. The moment it becomes apparent that a client may have committed some level of wrongdoing, *Sheridan* should be discussed. If *Sheridan* is not discussed until the eve of (or in the middle of) trial, the client is clearly going to feel more panicked and pressured to enter into a settlement agreement.
4. *Troubleshoot at trial.* Unless the client has been completely dishonest with counsel throughout the entire litigation, the practitioner should know about a *Sheridan* issue well before trial commences and should, therefore, address *Sheridan* with the client well in advance of trial. However, if a *Sheridan* issue suddenly arises during trial and the practitioner finds him or herself in the same position as Hecksteden's counsel, he or she should attempt to obtain a brief adjournment (or at the very least a long recess) to permit the client an opportunity to talk to third-party

professionals so he or she can make an informed decision about whether to proceed with trial or agree to a settlement. Do not be afraid to tell the court that there may be a voluntariness issue, as trial courts do not want to entertain post-judgment motions to undo settlement agreements if they can avoid them. If the client ultimately agrees to a settlement, try to ‘beef up’ the questions about voluntariness to the client on the record. For example, try to confirm on the record that the client spoke with third-party professionals in evaluating his or her choice to settle (or that he or she was at least given the opportunity to talk to such professionals).

Clients are under enough pressure to settle cases without feeling additional pressures from counsel and/or the court. Many clients experience financial pressure, societal and familial pressure and even pressure from employers. Attorneys have to be careful not to further pressure these clients into settling, even if going to trial may result in the revelation of prosecutable offenses. So long as practitioners appropriately educate their clients about *Sheridan* issues, they have done their job. When practitioners cross the line into suggesting, recommending or coercing clients into settlement, they open themselves up to potential post-judgment litigation attempting to undo otherwise sound settlement agreements. ■

*Shari Veisblatt is a partner with Obermayer Rebmann Maxwell & Hippel, LLP, in Cherry Hill. Amy Rokuson is an associate with Obermayer Rebmann Maxwell & Hippel, LLP, in Cherry Hill.*

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## Endnotes

1. *Sheridan v. Sheridan*, 247 N.J. Super. 552, 556 (Ch. Div. 1990).
2. *Id.*
3. *Id.* at 557.
4. *Id.*
5. *Id.*
6. *Id.* at 557-58.
7. *Id.* at 558.
8. *Id.*
9. *Id.* at 562, citing *Neiman v. Hurff*, 11 N.J. 55, 60 (1952); *Jackson v. Prudential Ins. Co. of America*, 106 N.J. Super. 61, 68 (Law Div. 1969).
10. *Id.* citing *Marx v. Jaffe*, 92 N.J. Super. 143, 146 (App. Div. 1966).
11. *Id.* at 563.
12. *Id.* at 566.
13. *All Modes Transport, Inc. v. Hecksteden*, 389 N.J. Super. 462 (App. Div. 2006).
14. *Id.* at 465.
15. *Id.*
16. *Id.*
17. *Id.* at 466.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 467.
23. *Id.*
24. *Id.* at 468.
25. *Id.* at 469.
26. *Id.* at 471, citing *Rule of Professional Conduct 3.4(g)*, “[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.”
27. *Id.* at 470.
28. *Id.* at 473.
29. *Id.* at 471.
30. *Id.*
31. *Id.*

## Commentary: **The New Family Lawyer**

by *Matthew Abatemarco*

**D**octors, politicians, educators, and corporations use collaborative teams to solve problems. The cancer patient, citizen, student, and stockholder experience a sense of security knowing their health, national security, education, and profit margin are being handled by more than one person. Lawyers now also see the wisdom in collaboration and how they can better serve their clientele through a team model.

The concept that more minds are better than one is self-evident. The president of the United States relies upon a cabinet to address each area of the nation's domestic and foreign policy. Education institutions and corporations utilize boards of trustees to manage finance and product development. Undoubtedly, these collaborative models are clearly better for the citizen, student and patient. Collaboration is also better for the professional.

The collaborative law model has much to offer the mediator and litigator. When collaborative law began in New Jersey a decade ago, proponents expected the entire divorce industry to change. Collaborative proponents assumed there would be a shift from litigation-driven practice to settlement-focused negotiations. That day has not come and may never happen. Nonetheless, all family lawyers can use the collaborative law model to enhance their practice, better their client's level of satisfaction, create better professional relationships, and obtain more satisfaction in their daily practice.

Much has changed in the past decade, not only in the area of technology, but also in the expectations of clients. The role of the family lawyer must evolve to meet the needs of a changing clientele. The modern client is well informed and can conduct Internet research to answer legal inquiries in seconds. With information so readily available, knowledge of the law is no longer the only reason a client seeks to hire counsel.

An easy change to any practice is to begin each client experience in a positive manner by making a referral to a therapist, financial advisor, or other professional. The practitioner should let the client know that he or she will

work in tandem with others to strategize a long-term solution for their situation. Building a team of professionals around the client will foster better settlements, improve client satisfaction, and make the practice of family law more enjoyable. The author believes it would be folly to keep this method of collaboration reserved for alternative dispute resolution. The family lawyer can refer a litigation client to a therapist, financial advisor, or other professional just the same.

Attorneys can set themselves apart from the masses by utilizing a team model to assist their clients. Law, psychology, and finance collide at the time of divorce. Lawyers know the law, but are not equipped to deal with the psychological underpinnings and difficult financial analysis required to produce long-term success for their clients.

Utilizing a team of professionals to resolve marital conflict enhances the family lawyer's practice. No longer must an attorney or mediator attempt to serve therapeutic and financial roles. Instead, the role of the family lawyer is evolving into a facilitator, a problem solver, and a healer. Family clients want expeditious and cost-effective resolution. More importantly, clients increasingly seek to exert control over the process and the content of agreements. Rather than be frightened by this shift, the family lawyer can embrace these changes and find new ways to deliver value-added service to clients.

The collaborative law process provides clients a method to resolve conflict by using more than a lawyer alone. Lawyers have long known that resolving complex family matters requires therapists and accountants. Unlike traditional litigation, collaborative law utilizes therapists, financial advisors, and other professionals as equal members of a team, working together to move a matter toward resolution. Most clients now want lawyers to be a tool to assist in the process, rather than a general on a battlefield.

There is no reason that utilizing a team concept should be reserved for just the collaborative law process. There are ways to provide clients or mediation couples

with an array of professionals to assist them through their own divorce.

Co-mediation is a solution for clients who want to avoid the adversarial process and want ‘value-added’ service. In co-mediation, more than one mediator is employed to handle the various issues in a matter. The co-mediators may be lawyers, accountants, financial advisors, therapists, or religious individuals. The crux of this benefit is, of course, that the clients have control over who is influencing decisions.

Having conducted several co-mediations, the author has worked alongside a child therapist, a family therapist, a financial advisor, and a rabbi. The clients and professionals reported high levels of satisfaction with the process. As one might expect, there was a high level of sophistication and creativity within the settlements. Instead of form agreements, the parties created unique arrangements that met their needs, with the help of the co-mediators.

In addition, the clients appreciated the level of expertise the co-mediators brought to the table. Rather than positional bargaining, the parties went straight to the work of developing comprehensive solutions.

Likewise, the mental health and financial professionals found the experience gratifying. Creativity, brainstorming, and a fruitful sharing of ideas replaced the often-entrenched battles that typically play out in other forums. The therapists played an instrumental role in reducing conflict and finding common ground. The financial professionals showed the parties how to resolve debt concerns, contribute to college, and work out a financial support arrangement that was mutually agreeable. Co-mediators develop a relationship with the lawyer built upon trust. When people collaborate with one another routinely, they develop a level of trust that is long lasting.

Mediators often experience frustration when reaching impasse. With a co-mediator present, impasse was transformed from a problem to a challenge. Working alongside individuals whose craft is rooted in psychology or finance opens the door to a more productive method of navigating impasse.

The author believes litigators, perhaps even more than mediators, will achieve the greatest benefit from having their clients working with therapists and financial advisors. Imagine a client who is trying to co-parent young children and is dealing with a spouse who has a personality disorder. Providing this client with a therapist who can assist in working through the personality disorder to co-parent the children would be invaluable.

Likewise, imagine the client who is facing retirement with half the assets, half the net income, and rising debts. A financial advisor would be better able to help the client work through the implications of divorce than a divorce attorney. In both of the foregoing scenarios, the lawyer is ill equipped to resolve the issues long term for the client.

To some, this may seem like nothing new. Lawyers have always had close relationships with custody evaluators and forensic accountants. However, those roles are different than what is being suggested here. The custody evaluator and forensic accountant have very specific roles tailored to meet the attorney’s needs. By contrast, the co-parent therapist and financial planner are client-centered. The custody evaluator cannot be asked to assist a client who is facing addiction problems or struggling with depression. Far be it for the lawyer to provide this level of treatment or assistance. Likewise, the forensic accountant should not offer future financial planning.

Obviously, there are new challenges to implementing this model. Perhaps the first is finding the right team members that share the practitioner’s vision for his or her clients and mediation couples. This challenge actually offers opportunity, as it forces networking to find like-minded professionals.

There are, of course, ethical implications to using other professionals as part of one’s client’s team. The free flow of information in collaborative law or with co-mediators cannot be done as easily when working with a litigation client. Authorizations must be prepared in order for the information to be shared between the attorney and the third-party professionals. There are other ethical considerations regarding the protection of conversations and whose work product is discoverable that are beyond the scope of this article.

In addition to providing greater client satisfaction, improving the attorney work product, and developing stronger referral sources, there is another substantial benefit to this type of collaboration, namely continued learning. Law school never provided the family lawyer with courses on psychology or finance. Sitting alongside the mental health professional or financial advisor gives the attorney the ability to learn about things that are often overlooked in their practice. For example, the therapist can educate the lawyer on borderline personalities or triangulation of a child. Similarly, the financial advisor can educate the lawyer on utilizing IRC 72(t) to avoid the 10 percent penalty on a 401k or IRA. This interdisciplin-

ary education makes the lawyer better and gives him or her a greater knowledge base to serve the client's needs.

Finally, people are never more human than when they are creating. Creativity through art, innovation, or science is the cornerstone to a fulfilling life. When one creates with others and innovates new solutions to complex family law matters, he or she is engaging in a powerful transformation of the practice that is mutually beneficial to all involved. The lawyer now is not limited to creative legal arguments or crafty language in a settlement. The opportunities to create unique resolutions in this collaborative arena are boundless.

The family lawyer's knowledge and experience still serve an important role in resolving conflict. The traditional lawyer model was rooted in an adversarial system and, therefore, can limit the ability of the lawyer. Collaborative law provides a new way to serve clients holistically. By including other professionals to assist clients through the divorce process, attorneys can provide value added service and develop better experiences for their clients, their colleagues and themselves. Also consider the following: A client whose emotional, financial and legal needs are met is much more likely to attribute a monetary value to those services and refer others to that process. ■

*Matthew Abatemarco practices with Madden & Abatemarco.*