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Chair's Column

And So It Begins

by Stephanie Frangos Hagan

The past year leading up to my installation as chair of the Family Law Section has been filled with excitement and anticipation. Being installed on May 18, was truly the highlight of my more than 30-year legal career as a family law attorney. As a member of the Family Law Executive Committee for more than 20 years, I have had the opportunity to watch and learn from some of the best and most talented officers and past chairs of the section. The biggest lesson learned over the past four years as an officer is the amount of hard work and dedication it will take to successfully lead the section. I am truly honored and humbled to lead the section this year.

As a section, we are one of the largest and most active in the NJSBA. Family law attorneys are dedicated, hardworking attorneys who truly want the best for their clients and their families. We are one of the first to 'volunteer' our time, whether it be as a court-appointed mediator or early settlement panelist. As a section, we are very active, especially on the legislative front. Our section regularly reviews, comments and 'lobbies' for legislation that will affect the practice of family law, as well as our clients and their families.

The Family Law Section never fails in responding to the state bar's request for our position on legislation, and always carefully considers our position on bills. As a section, we have also drafted bills that are now pending in the Legislature and bills that have been signed by the governor and are now law in New Jersey.

As many of you are aware, alimony reform continues to remain an issue in the Legislature, with new bills being introduced each year. This is, and will continue to be, a priority for our section, with our alimony sub-committee and the officers of the section hard at work to insure our voice is heard and that we are responding to the most current bills attempting to revise the alimony statute. In order for our voice to continue to be heard, and for our section to have an impact on legislation, it is imperative for family lawyers to develop rela-

tionships with their local representatives in both the New Jersey Assembly and the Senate. Without support from local representatives, we are merely just another group of attorneys with our own agenda.

No better example of what can occur if our voice is not heard with respect to legislation that affects family law is the child support statute that was passed this year to alleviate the thousands of open probation child support cases for 'children' in their 30s. Because there is a direct correlation between the number of open probation files and the amount of federal funding New Jersey receives, the Administrative Offices of the Court (AOC) drafted a bill to presumptively terminate probation accounts for children once they turn 19, unless there is an agreement or proof that the child is in need of support or is attending school on a full-time basis. There is confusion among our colleagues, as well as our 21 county probation departments, regarding the purpose of the law. Each county probation department is sending different letters and processing termination of accounts differently. As a result of this legislation, there have been proposed revisions to our court rules as well. Jeralyn Lawrence testified before the Supreme Court on behalf of our section this past May regarding the confusion the legislation has caused and the problems with the lack of uniformity among the county probation departments. As a result of her testimony, the section was asked to prepare and provide uniform forms to be used by all 21 counties. The section approved the draft forms, which were provided to Justice Stuart Rabner in June.

I also had the privilege of testifying before the Supreme Court on behalf of the section in May, opposing the proposed court rule that family law economic mediators would be required to file an action in the special civil part to sue and collect their fees in court-ordered mediations. In highlighting for the justices the service family law mediators provide to the judicial system by helping to settle hundreds of cases each year, thereby reducing the judicial backlog plaguing our system, it adds insult to injury to not only require court-ordered mediators to 'donate' two free hours of their time, but then to make them file a separate action in special civil part to get paid for any additional time they spend helping litigants and attorneys settle their cases.

This coming year, I am committed to continuing to work on professionalism among our members, as well as to assist in ensuring better bench/bar relationships. Family law is by far the most emotionally charged area of law. As attorneys, we work hard every day advocating for our clients in and out of the courtroom. It is often said family lawyers represent the best people at the worst time in their lives. We deal with people who are angry and broken emotionally and often financially. It is easy to fall into the trap of taking on the persona of our clients and lodging personal attacks on our adversaries. Doing so is not only a disservice to our clients but to our profession.

As the advocate, it is our duty to keep a clear head and to always be guided by doing what is best for our client. Lodging personal attacks on your adversary is *never* what is best for your client. More importantly, it demeans us as a profession and continues to tarnish our image to the public, as well as to judges and their staff. It is always important to remember your case will end and your client will move on with his or her life. You will, however, in all likelihood, meet your adversary again in another matter. So, the next time your adversary calls or writes and asks for an extension of time or an adjournment because of a personal or family emergency, pick up the phone and ask them what you can do to help.

In closing, I am looking forward to continuing, along with my fellow officers, to work hard for our section, as well as for all family lawyers in New Jersey, in order to better serve our practice as well as our clients. ■

Inside this issue

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

Editor-in-Chief's Column

Reporting on Settled Cases

by Charles F. Vuotto Jr.

I am sure that the following situation has happened to many of us: We are in the throes of negotiations, making progress, and have the issues just about resolved. We just need a little more time, but we have a trial date scheduled for the next day or soon thereafter. The parties do not wish to derail their progress in settlement or waste time and money with a court appearance. They want to continue working in the relative comfort of one of their offices or the office of a mediator. Often, they need the mediator to help them get across the finish line. The lawyers agree that they should concentrate on trying to resolve the case rather than going to court, so the lawyers advise the judge that the matter is "almost settled" and that they just need a little time to achieve a signed agreement. How many of us have received the following response (or something like it) from the trial judge or his or her staff: *The trial will not be adjourned. This matter is an old case. Either advise the court that the matter is resolved and be prepared to come in to put it through with a signed agreement or be ready to start trial.*

This judicial response appears to contrast the needs, wants and desires of the parties to place their signature on a mutually acceptable agreement and proceed with an uncontested hearing. At such hearings, we typically ask our clients if they entered into their agreement voluntarily, under no compulsion, coercion or threat. However, when a judge says "settle now or set up for a trial," isn't that forcing litigants to abandon a productive settlement process, pull up stakes and head to the courthouse, usually losing the mediator or neutral third party helping them settle, not to mention incurring unnecessary fees?

As we know, most cases are settled. There were 28,582 dispositions of new cases last year. There were 60,829 in total dispositions, which represents 47 percent of the cases that were new while 53 percent were post judgment (motions). Of new cases 27 percent (7,834) were disposed by settlement, 56 percent (16,020) by default judgment, 13 percent (3,745) by dismissal, and 112 were transferred. These numbers vary by county, but have been stable for some time.[1] These statistics support the commonly held belief that less than two percent of cases are resolved by trial. One can draw the conclusion that these statistics mean that the best way to resolve a case (excluding default, dismissals or transfers) is through the settlement process. Why, then, are we often forced to abandon that process when both counsel believe it should continue? Yes, we all understand that being called to the courthouse, forced into an uncomfortable environment, spending money on attorneys and having the trial judge a few feet away puts pressure on litigants to settle. However, is this always appropriate? It may be, when a judge finds that the parties and/or counsel in a particular case have not made good faith efforts at settlement. However, this should not be assumed in every case.

Another problem arises when an attorney has a settled case, but the actual agreement has not yet been finalized or signed. This situation, too, presents issues. Some courts are requiring the submission of a signed agreement before they will list the matter as settled. I remember the days when all that was required to obtain an uncontested hearing date was to advise the court that you and your adversary had reached an agreement. There were usually no further requirements, a signed agreement did not need to be submitted and there was no risk of severe adverse consequences if for some reason, due to unforeseen circumstances, the settlement fell through between the date the court was advised of the settled case and the actual court date. Things appear to have changed.

Some courts are requiring the submission of a signed agreement before the matter will be listed for an uncontested hearing. Some judges have become very irate in the event they are advised of a settled case that does not ultimately materialize. Without question, it is preferable for the parties to be as sure as possible that the matter is settled before advising the court of the settlement. Further, if something does happen, it is certainly incumbent upon counsel to advise the court as soon as possible. Counsel who fail to do so should be called to

task. However, should it be routinely required for counsel to submit a fully signed marital settlement agreement (MSA) before a matter is listed for an uncontested hearing? What if the parties have agreed, for confidentiality reasons, to keep the MSA out of the court's file? Should counsel be excoriated should something happen between the date they advise the court in good faith that a settlement exists and the scheduled court appearance?

There is no question that attorneys, for the most part, attempt to settle their cases. However, in this author's humble opinion, in those rare cases where attorneys report the resolution of a case in good faith and something happens between then and the date they are to report to court, they should not face the wrath of the trial court, nor be required to submit a signed agreement before requesting the scheduling of an uncontested divorce hearing. Further, when two attorneys advise the court in good faith that they need more time to bring the matter to a close, deference should be given to them by a judge, unless past behavior of the attorneys (or their clients) suggests a different response.

It is understandable that a trial court could react adversely and become annoyed when attorneys repeatedly advise that they are near the finish line and need more time or advise that a previously reported settled case has fallen through. However, it is also true that forcing litigants to court when they almost have the case resolved, or requiring the submission of signed agreements as a pre-condition to obtaining an uncontested hearing date and being threatened with the wrath of a judge should a possibly settled case fall through, will put a damper on the resolution of cases. Such procedures may lead to claims of coercion by the court system itself. ■

The author wishes to thank Harry T. Cassidy, retired assistant director of the Administrative Office of the Courts, for his assistance and input with this column.

Endnote

1. Statistics from the NJ Administrative Office of the Courts, Family Practice Division, Dissolution Terminations Court Year 2016.

Editor's Column:
Substance Abuse—A Cry Out for Help

by Ronald Lieberman

As family law practitioners, we are involved in some of the most private aspects of our client's lives. Unfortunately, those aspects are not always positive. This author would venture to say that most family law practitioners have been involved in cases where one party or the other, or even both parties, have faced substance abuse issues. With the recent focus in the news on the opioid addiction issue, this author was struck by a new bill signed into law in June in New Hampshire, which provided that grandparents will receive preference in child custody cases involving drug or alcohol abuse by either or both parents.[1]

In the law, there is now preference for the appointment of a child's grandparent as the guardian for that child in certain cases where a parent suffers from substance abuse or dependence.[2] The law further provides that in cases where a parent objects to a grandparent's desire for guardianship brought as a result of the parent's substance abuse or dependence, the grandparent has the burden of proof to show that the guardianship will be in the child's best interest.[3] Once the guardianship has been in place, the burden of proof to terminate it will be on the parent and not the grandparent.[4] When asked about the rationale behind the bill, the sponsor said that parents who are reluctant to obtain treatment for drug or alcohol problems and fear losing custody of their child or children as a result, should be able to obtain help now that they know a family member will be involved.[5]

New Jersey does not have any similar law and, in fact, the New Hampshire law is the first in the nation. New Jersey law regarding grandparent's rights has long since been whittled back as a result of the U.S. Supreme Court decision *Troxel v. Granville*.[6]

The state of New Jersey, Department of Human Services, Division of Mental Health and Addiction Services provides an annual substance abuse overview that offers statistics on substance abuse treatment in New Jersey. The most recent overview provides information regarding calendar year 2015, and states that there were 69,477 treatment admissions and 67,555 discharges reported by substance abuse treatment providers.[7] According to the overview, for calendar year 2015, alcohol treatment admissions were 17,785 and heroin and other opiates accounted for over 32,000 admissions.[8] Of those addiction admissions, 11 percent were for married couples and four percent were for separated couples. Over 57,000 individuals were either single or divorced.[9] Given that family law clients cut across the spectrum of the marital status, it is important to understand that substance abuse issues, being a part of the life of a family, then become something family law practitioners need to recognize.

Family law practitioners know the path their clients face when going through a divorce is never easy and is likely made even more difficult when one of the litigants is facing a substance abuse issue. So what advice can a family law practitioner provide to a client who is divorcing a spouse suffering from substance abuse? What advice can the practitioner provide to his or her client who is struggling with a substance abuse issue?

When a family law practitioner has a client whose spouse or partner is facing a substance abuse issue, the practitioner should offer advice that directs the spouse or partner to have those experts join the case who understand the addiction issues. For example, the attorney could recommend that his or her client join support groups such as NAR-Anon, Families Anonymous or Narcotics Anonymous. The spouse or partner could find support for him or herself with such groups, and the children with mental health professionals the attorney can help identify. The attorney could suggest that his or her client offer to help the spouse or partner find professional help for rehabilitation. But, overall, the attorney should recommend that the non-substance-abusing spouse take over the family finances, including bill payment, securing credit cards, protecting online banking or other financial transactions and speaking to any financial advisor and/or tax advisor to ensure the family estate is not dissipated or threatened.

Whether the attorney represents the spouse or partner suffering from the addiction or facing its consequences, the attorney should be cognizant of the issues involving the children, their safety and their well-being. The attorney should recognize that the non-substance-abusing client, as a parent, is probably handling both ends of the parental spectrum, feeling exhausted, let down and hurt by the addiction issues on top of facing the breakdown of the family unit. Although the litigant may feel the urge to go into a full-fledged custody situation, the turmoil involved might be too much for the kids and that litigant to deal with at the same time. Certainly, if the spouse or partner suffering from the addiction issue will not recognize the turmoil he or she is causing to the family unit, there is little the litigant can do other than bring the issues up to a judge for resolution.

Currently, in order for a third party to overcome a presumption that only the fit parent is entitled to custody, the third party must show that the non-consenting parent is unfit, has abandoned the child, engaged in gross misconduct or other exceptional circumstances.[10] The high burden that such a third party faces when alleging that there are issues rebutting the presumption of custody faced by the parents, involves a two-step process, first of which is finding exceptional circumstances and then establishing that the third party has become a psychological parent.[11] That burden of proof may very well cause a child of a parent suffering from addiction issues to be placed in harm's way or removed from the home in favor of a foster parent. The law in New Hampshire, though, offers a better way forward for such children.

Rather than require the grandparent who is willing to step up and care for the child only to face such a daunting legal burden of proof, which is particularly important in situations where the other parent is either not involved or minimally involved, the author believes it is time for our state's Legislature to look at the well-crafted, well-meaning law from New Hampshire. From that law, it is hoped that the New Jersey Legislature can consider establishing the preference for appointment of a child's grandparent as guardian for that child in situations where the parent faces substance abuse or dependence issues. New Jersey's children deserve nothing less than a safe, fit home environment, preferably with a loving family member, and the fact that a parent has an addiction issue should not be an impediment to this laudable goal.

Endnotes

1. Chapter 53, HB 629-FN (2017 Session)(New Hampshire).
2. *Ibid.*
3. *Id.*
4. *Id.*
5. New Hampshire Law Gives Grandparents Custody Preference, Associated Press (June 28, 2017).
6. 177 N.J. 84 (2003).
7. New Jersey Drug and Alcohol Abuse Treatment, Substance Abuse Overview, 2015, Department of Human Services, Division of Mental Health and Addiction Services, Office of Planning, Research, Evaluation and Prevention (June 2016).
8. *Ibid.*
9. *Id.*
10. *Watkins v. Nelson*, 163 N.J. 235, 244-45 (2000).
11. *Zack v. Fiebert*, 235 N.J. Super. 424, 432-33 (App. Div. 1989).

Meet the Officers

Chair—Stephanie Frangos Hagan

Stephanie Frangos Hagan is a named founding partner in the law firm of Donahue, Hagan, Klein & Weisberg, LLC, and has limited her practice exclusively to family law for more than 30 years. She is a graduate of Seton Hall Law School and received an undergraduate degree from Rutgers University.

She is a frequent lecturer and panelist for NJSBA/ICLE and county bar associations on a variety of family law topics, including alimony, child support, custody, equitable distributions, domestic violence, civil unions and other important family law issues. She received the Distinguished Legislative Award from the NJSBA and serves as a blue ribbon panelist for the Essex, Union and Morris county family law early settlement programs.

Hagan has been a court-approved family law mediator since 2001 and is certified by the American Academy of Matrimonial Lawyers as a family law arbitrator. She has been a member of the Executive Committee of the Family Law Section of the NJSBA for more than 20 years. Hagan was formerly chair of the District Fee Arbitration Committee for Morris County, and was installed as an officer of the Morris County Bar Association and as a trustee of the Morris County Bar Foundation in Jan. 2014. She is currently president of the Morris County Bar Foundation and is scheduled to be installed as president of the Morris County Bar Association in Jan. 2019.

Hagan has been named as a Super Lawyer's Top 100 attorney in New Jersey in 2015 and 2017 and one of Super Lawyer's Top 50 Women attorneys in New Jersey since 2015.

Chair-Elect—Michael A. Weinberg

Michael A. Weinberg is co-chair of the family law department of Archer. As a partner in the matrimonial department, he concentrates his practice in matrimonial and family law. Weinberg is a former co-chair of the Camden County Bar Association

Family Law Section, Executive Committee, and currently serves as an officer on the New Jersey State Bar Association Family Law Executive Committee. He is a matrimonial early settlement panelist for Burlington, Camden and Gloucester counties and has also recently been named as a certified matrimonial attorney by the New Jersey Supreme Court's Board on Attorney Certification.

A master in the Thomas S. Forkin Inns of Court, Weinberg is a former chair of the Membership Committee. He has lectured for ICLE, the American Academy of Matrimonial Lawyers, American Trial Lawyers Association, and the National Business Institute, and has appeared on the television programs *Legal Lines* and *Legally Speaking*. A former adjunct professor at Burlington County College, he assisted with the "Bankruptcy and Divorce" chapter in *New Jersey Family Law Practice*, 2002 and 2006 editions.

Weinberg received his B.S. from Bentley College and his J.D., *magna cum laude*, from Capital University Law School, where he was published in the *Law Review* and was a selected member of the 1993 National Moot Court Team. He was a law clerk to the Honorable Charles A. Little.

First Vice Chair—Sheryl J. Seiden

Sheryl J. Seiden is the founding partner of Seiden Family Law, LLC in Cranford, where she practices family law exclusively. She is slated to be the chair of NJSBA Family Law Section for the 2019-2020 term.

Seiden graduated *magna cum laude* from New York Law School, where she served as the managing editor of the *New York Law School Law Review*. She received her B.A. in justice from the American University in Washington D.C., where she graduated *cum laude*. She is licensed to practice law in New Jersey and New York.

Seiden is a fellow of the American Academy of Matrimonial Lawyers. Prior to becoming an officer of the Family Law Section, she served as a co-chair of the Legislative Sub-Committee, and a co-chair for the Young Lawyer Family Law Sub-Committee of the Family Law Section.

She is a member of the Union County and Essex County bar associations. She has also volunteered for Partners for Women and Justice and has lectured for the Institute for Continuing Legal Education and the Union County Bar Association on family law issues, including speaking at the Family Law Symposium on several occasions. In Nov. 2014, Seiden argued for the American Academy of Matrimonial Lawyers *amicus curiae* in *Gnall v Gnall* before the Supreme Court of New Jersey.

Treasurer—Ronald G. Lieberman

Ronald G. Lieberman is the chair of the family law practice group of the firm of Cooper Levenson, PA in Cherry Hill. He is certified by the Supreme Court of New Jersey as a matrimonial law attorney, is a fellow with the American Academy of Matrimonial Lawyers, and a board-certified family trial lawyer by the National Board of Trial Advocacy. His practice is limited to family law issues, including matrimonial law, divorce, child custody, child support, parenting time, domestic violence, and appellate work.

Admitted to practice in New Jersey, New York and Pennsylvania, Lieberman is president-elect of the Camden County Bar Association and is co-chair of its Family Law Committee. He is also a longtime member of the Supreme Court's Family Law Practice Committee.

A former master of the Thomas S. Forkin Family Law American Inns of Court, Lieberman has lectured on family law topics for ICLE, the New Jersey Association for Justice, Sterling Educational Services, the National Business Institute, the New Jersey State Bar Association and the Burlington County and Camden County bar associations. He is executive editor of the *New Jersey Family Lawyer*, has authored articles that have appeared in the publication, and has been quoted by the *Courier Post, U.S. News and World Report, The New York Times* and CBS 3 Philadelphia.

Lieberman received his B.A. from University of Delaware and his J.D. from New York Law School. He was law clerk to the Honorable F. Lee Forrester, P.J.F.P. (Ret.).

Secretary—Robin C. Bogan

Robin C. Bogan is a partner at the law firm of Pallarino & Bogan, L.L.P., in Morristown. She has devoted her practice to family law and related matters for over 20 years.

Bogan is certified by the Supreme Court of New Jersey as a matrimonial law attorney. She is also actively involved in the legal community. She is the immediate past president for the Morris County Bar Association and past president of the Morris County Bar Foundation. She has served as a member of the Executive Committee for the Family Law Section of the New Jersey State Bar Association since 2005.

Bogan volunteers as an early settlement panelist for the superior court in Morris County. She is a barrister for the American Inns of Court and served as an investigator for the ethics committee for Morris and Sussex counties from 2006–2009.

Bogan received the 2013 Professional Lawyer of the Year Award for Morris County from the New Jersey Commission on Professionalism in the Law. *New Jersey Monthly* magazine honored her as one of the Top 50 Women Lawyers in New Jersey and in 2017 one of the Top 100 attorneys in New Jersey.

She has lectured on family law issues for the New Jersey Institute for Continuing Legal Education, New York Practicing Law Institute, the Barry Croland Family Law Inn of Court, and the Morris County Bar Association. Her articles on family law issues have appeared in several professional publications.

Bogan received her J.D. in June 1996 from Seton Hall University School of Law and her B.A. from the University of Richmond in May 1993. She served as a judicial law clerk for the Honorable Thomas H. Dilts, the presiding judge of the family part of the superior court of New Jersey in Somerset County from 1996 to 1997.

Immediate Past Chair—Timothy F. McGoughran

Timothy F. McGoughran is the founding partner of the Law Office of Timothy F. McGoughran, LLC, where he works with two associate attorneys and retired Superior Court Judge Eugene A. Iadanza of counsel. He served as municipal prosecutor for Ocean Township from 2000 until 2011 and has served as municipal court judge there since Jan. 2012.

Since 2007 he has been a member of the Family Law Section Executive Committee of the New Jersey State Bar Association and for many more years a member of the Family Law Committee of the Monmouth Bar Association. He served as co-chair of the Monmouth Bar Association Family Law Committee (2009-2011) and president of the Monmouth Bar Association (2007-2008), and still serves as a trustee.

He is a member of the New Jersey State Bar Association Military and Veteran's Affairs Section Executive Committee and Legal Education Committee. He serves as the trustee for Monmouth County on the New Jersey State Bar Association's Board of Trustees for the term of 2013-2019. McGoughran has been recognized by the New Jersey State Bar Association with the Distinguished Legislative Service Award in 2010 and 2013, as well as receiving the Family Lawyer of the Year Award in 2012 by the Monmouth Bar Association Family Law Committee.

He is a regular speaker and presenter at numerous symposiums regarding various facets of law and ethics. He graduated from the University of Pittsburgh with a B.A. in political science and from the Seton Hall University School of Law with a *juris doctorate*.

"What's Your Number?" Assessing the Value of Palimony Damages

by Thomas P. Zampino and Robert A. Epstein

Introduction by Judge Thomas P. Zampino, (Ret.):

While many may think the title is an old pickup line from your Jersey Shore days, I am actually referring to the value of a palimony case.

We have case context and historical reference for alimony awards, as well as established statutory criteria, yet there is little guidance or formula for a 'palimony' number.

While we do not have clear and concise direction for the 'equitable relief,' those in the practice recognize it is going to be a 'number.' It will always be a number, but how do the parties and attorneys reach the number upon which mutual agreement can be achieved. How does one choose a number that brings resolution without just picking one out of the air? How does one give foundation and support to the number (a dollar amount) chosen for the value of the case?

One does not just spin the 'wheel of palimony' and a number actually appears. Vanna White does not come with these cases. Also, we do not take the two positions proposed, add them together and then divide by two. That is the most intellectually dishonest method of resolution, but often the one most proposed.

While I am fully aware of the 2008 Appellate Division opinion in Connell v. Diehl *and further aware that there is a dwindling pool of cases that will not fall under the writing requirement in the 2010 amendment, I present my opinion to point out the inequity created by the holding in* Connell *on the issue of damages.*

First, there is no case that tells us how long the duration of the relationship must be to qualify for palimony. In Connell, *the relationship was for three decades and the parties were in their 60s. The Appellate Division determined Ms. Connell's life expectancy to be 22 years. If it were alimony, Mr. Connell would have paid until he was at least 82 years old.*

The Connell *decision tells us that case law did not require her to live just as before (lifestyle), but rather the award need only provide reasonable support sufficient to meet "her minimal needs" and prevent the necessity of her seeking public welfare.*

Thus, what we have is a lower amount of support for a longer period of time than that which would exist with a traditional open durational alimony award arising from the dissolution of a marriage.

We must recognize that alimony and equitable distribution cannot *be awarded in a palimony case, and that there are no tax adjustments to reduce a lump-sum payment for present value purposes.*

While my esteemed writing companion will discuss existing case law on this topic and general approaches employed by practitioners, I offer a more practical standard for utilization. Remembering that not every case is the same (some are strong and some are weak), my proposed standard will impact the range of numbers you consider for the value of the case. I traditionally do a side-by-side analysis. By that I mean I look at the statutory elements as if alimony in a divorce were being determined. While in palimony cases there is often a repeated promise to support for the rest of one's life, that same promise is made with the marriage vows. We will focus on those cases that fall under Maeker v. Ross *and are prior to the statute requiring a writing.*

If a divorce can break the promise for life made at the time of marriage, and duration is relevant in a divorce whereby there is an alimony ending for almost any marriage of less than 20 years, how can a person who has less than a marriage receive an unbridled promise to support 'for life'? Any marriage, whether it be for five years or 10, has a limited alimony life that cannot (except for good cause) exceed the duration of the marriage itself.

How does palimony, which is based on a relationship of lesser form, leap over these statutory boundaries and provide a lifetime of support based on a promise when this relief is not available in the dissolution of a marriage?

When we say 'tantamount to marriage' we, more or less, mean 'equivalent or the same as.' Therefore, I question how the lesser of the two can afford greater relief (such as lifetime support in a relationship of less than 10 years). The relief cannot be greater than in a divorce. Marriage is also a contract.

Since alimony cannot be awarded in a palimony matter, we should be looking to the present value (PV) of what alimony would be in that given case, but in a non-taxable lump-sum (or, if agreed, in installments). Ordinarily, we look at a person's expenses from the case information statement to determine the monthly and then annual deficit.

In determining present value, by way of example, if one were going to award $100,000 in alimony per year for 10 years and impose a 35 percent tax adjustment, the remaining amount due would be $650,000. After incorporating a present value discount, the net 'after tax' immediate payment due would be $483,000 (or paid in annual installments over a fixed period of time). A future marriage or cohabitation by the recipient would not affect or diminish the payments due. It is this approach that I suggest for palimony cases, with a further discount being given because the relationship is ultimately 'less than a marriage.'

It is this method how I propose you answer the question "What's Your Number?"

I now turn this over to Robert Epstein, for his analysis of existing law on this topic and a discussion of general approaches often utilized by practitioners and jurists in addressing this issue.

While the New Jersey Supreme Court's decision in *Maeker v. Ross*[1] kept palimony alive for the foreseeable future, it is certainly not what it once was. Following the state Legislature's 2010 amendment to the statute of frauds, which required "a writing memorializing palimony agreements and independent advice of counsel for each party in advance of executing any such agreement,"[2] *Maeker* primarily held that the amendment did not apply retroactively, so "void the indeterminate number of oral palimony agreements that predated its enactment."[3]

Despite the passage of several years since the amendment, written palimony or palimony-type contracts appear to remain relatively rare. Whether it is because most unmarried parties in a relationship do not memorialize their relationship and attendant support arrangement in writing (let alone include language detailing resulting damages in the event of a contractual breach), or because there exists a pure lack of knowledge of what the law provides, palimony cases involving some form of written agreement are uncommon in 2017.[4]

Even post-amendment, most palimony matters still allege the existence of pre-amendment, unwritten palimony contracts evidenced through conduct and/or oral statements.[5] These so-called pre-amendment cases survive on their own set of very specific factual allegations, with one party commonly alleging the existence of a palimony-type promise of lifetime support and the other denying formation of a contractual relationship.[6]

Understandably, as a result, the resolution of a palimony matter can be challenging at any litigation stage, even with a written palimony agreement. Even assuming a payor is willing to make any payment at all, he or she is asked to do so based on a contract that potentially does not exist. By contrast, a payee is often asked to accept a potentially smaller sum than his or her perceived entitlement if ultimately successful at trial. The same common, litigation-based cost/benefit analysis applies, with the cost and time of litigation weighed against the likelihood of success. The stakes are arguably higher than in divorce matters, however, since the result of a palimony matter is essentially all or nothing. In other words, a trial court will determine if there is a palimony contract and, if so, the resulting damages stemming from the breach of that contract by the promisor.

The primary questions addressed by this article are what does the law say about the issues of damages in a palimony matter and how do practitioners approach the issue?[7] While a handful of cases touch upon this topic, there is no clearly defined formula by which to assess how to quantify those damages. As a result, the analysis is often transformed into one more akin to an alimony analysis, with each case dependent upon its own set of facts and circumstances that allow space within which to advocate for clients.

What is Palimony? A Brief Primer

More than 30 years ago, in *Kozlowski v. Kozlowski*,[8] the Supreme Court of New Jersey recognized the enforceability of a palimony agreement against a person who promised to provide future support to a partner with whom he shared a marital-type relationship. As the Supreme Court noted in *Maeker*:

> We held that if one party induces the other to enter or remain in the relationship by promise of support, made either orally or in writing, the agreement—commonly referred to as a palimony agreement—will be enforceable in court.[9]

"[T]he right to support...does not derive from the relationship itself but rather is a right created by contract."[10] "[A] general promise of support for life, broadly expressed, made by one party to the other with some form of consideration given by the other will suffice to form a contract."[11] The highly personal nature of the contracts at issue require the trial court take special care to "determine whether such a contract has been entered into and what its terms are."[12]

While promisor litigants often argue there can be no palimony agreement in the face of insufficient consideration exchanged for a promise of lifetime support, the nature and extent of the consideration provided by the promisee in exchange for a promise of lifetime support "is not significant, so long as it is the bargained for detriment actually intended as such between the parties."[13] As famously espoused by the Supreme Court in *In re Estate of Roccamonte*:

> It is [ ] the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best they are able. And each couple defines its way of life and each partner's expected contribution to it in its own way. Whatever other consideration may be involved, the entry into such a relationship and then conducting oneself in accordance with its unique character is consideration in full measure.[14]

As noted above, palimony cases are highly fact-specific. A dispute will likely result regarding whether a promise was made, the nature and extent of the promise, the parties' living and financial arrangements, the promisee's economic self-sufficiency, the promisor's ability to pay, and more. Only through discovery can a litigant flesh out the nature and extent of the parties' relationship.

Case Law Addressing the Issue of Damages in Palimony Matters

As practitioners often assert, palimony is not alimony with a 'p.' While certain components of a palimony matter may overlap with those found in a divorce matter, such as an analysis of lifestyle, the Supreme Court in *Kozlowski* made clear that "Alimony may be awarded only in actions for divorce or nullity, and equitable distribution is awarded only in actions for divorce."[15]

Case law on the issue of palimony damages is limited and arguably inconsistent. Any lack of clarity or consistency is not surprising, however, especially when considering the great extent to which each palimony matter is dependent upon its own set of facts and circumstances. The general 'formula' upon which practitioners rely in addressing this issue was first espoused by the Supreme Court in *Kozlowski*:

> While the damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief. Where a wrong has been committed, and it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery courts will fashion a remedy even though the proof on damages is inexact. Accordingly, plaintiff is entitled to a one-time lump sum judgment in an amount predicated upon the present value of the

> reasonable future support defendant promised to provide, to be computed by reference to her life expectancy as shown by the tables referred to in R. 1:13-5.[16]

Rule 1:13-5—Tables of Life Expectancy and Mortality, provides, "The tables of life expectancy and mortality printed as an Appendix to these rules shall be admissible in evidence as *prima facie* proof of the facts contained therein."[17] The Supreme Court, in *Roccamonte,* confirmed that it is the promisee's life expectancy utilized in the calculation as "it matters not when the calculation is made in terms of the promisor's life because it is the promisee's life that is, in effect, the measuring life."[18] By incorporating the promisee's life expectancy in the analysis, the ultimate damages award is potentially akin to a buyout of open durational alimony on a potentially much greater scale because one's life expectancy may be far longer than the time during which a payor may be obligated to pay alimony, even extending to a potential claim against the promisor's estate.[19]

When relying upon this portion of *Kozlowski* in addressing damages, the primary question is: What constitutes 'reasonable future support' promised by the payor to the promisee? Analyzing this language in context, the issue is seemingly not just one of the lifestyle lived but, more specifically, what components of that lifestyle were promised to the promisee for life. A determination of that promise, however, will often be based on credibility findings and, stemming therefrom, the budgets contained in the subject case information statements.

Notably, the *Roccamonte* Court confirmed that there must be evidence of "economic inequality," where the "relevant question is whether the promisee is self-sufficient enough to provide for herself with a reasonable degree of economic comfort appropriate in the circumstances."[20]

In *Bayne v. Johnson*, the Appellate Division held:

> In contrast to the plaintiffs in *Kozlowski, Roccamonte,* and *Crowe*, nothing in the record indicates that with her income of approximately $60,000 a year, Fiona is unable "to provide for herself a reasonable degree of economic comfort appropriate in the circumstances."[21]

Related case law suggests, however, that an income imputation may be inappropriate where a palimony contract involves an indication by the promisor that the promisee is not expected to or will never have to work.[22] This represents a substantial difference from divorce matters, where the issue of the dependent spouse's earning capacity is often at issue.

To what extent, as a result, does the parties' lifestyle (both during the relationship and post-relationship) and the promisee's earning capacity impact upon a palimony award? As noted above, palimony is not alimony, but during the course of a palimony litigation case information statements are filed. Vocational expert reports may be procured even with an allegation that the promisee was told he or she would not have to work.

With damages to be determined, in part, based on 'reasonable future support' promised to the payee, and a notion of 'economic comfort' deemed 'appropriate in the circumstances,' palimony may seem more like a form of amplified alimony. As opposed to an alimony award based on the parties' marital lifestyle paid for a specified duration dependent upon the length of the marriage, a palimony award could be based on the parties' lifestyle and a promisee's life expectancy, which could extend for decades without an imputation of income.

The Appellate Division's 2008 decision in *Connell v. Diehl*, however, seemingly defied the notion that it is the parties' lifestyle during the relationship that must frame the damages calculus.[23] Rather, the decision confirmed that trial courts have a wide range of discretion in fashioning an appropriate damages award. Described by the appellate court as the "quintessential palimony action," the matter involved a 61-year-old promisee suffering from Stargardt's disease.[24] She was legally blind (with only peripheral vision), a high school graduate who collected Social Security benefits for more than three decades, and received permanent alimony in the amount of $20 every other week and weekly child support.[25] The parties cohabited for a period of 30 years, and the promisee had not meaningfully worked since the outset of the relationship.[26] In finding a palimony agreement and subsequent breach thereof, the trial court determined that the promisor was the promisee's sole source of support for three decades as they lived together in a relationship tantamount to marriage.[27]

In calculating damages, the trial court noted that if the parties had been married, the promisee's life expectancy was almost 18 years, and she would be "entitled to permanent alimony of $170 weekly in order to enable her to enjoy her former lifestyle with Diehl."[28] Utilizing an interest rate of 4.5 percent to determine a present value lump-sum award, the trial court determined that damages due to the promisee totaled $107,494.40.[29] In doing so, the trial court relied upon the promisee's post-separation lifestyle, deducting from the budget set forth in her case information statement her Social Security benefits and food stamps to determine her monthly shortfall.[30]

Addressing the quantum of damages on appeal, the Appellate Division reiterated, as a threshold matter, the above-quoted portion from *Kozlowski*, even emphasizing how the lump-sum payment is to be predicated on the "reasonable future support defendant promised to provide..."[31] It then detailed a process by which three calculations are required to determine an appropriate damages award:

> First, the judge was required to determine the reasonable future support Diehl promised to provide. That amount is to be calculated on a weekly or monthly basis. Second, the judge was required to determine the duration of future support. Third, the judge was required to reduce that period of annual future support to a present value lump sum. We have consistently applied the *Kozlowski* formula.[32]

Consistent with the awards outlined above, the *Connell* court noted that "the determination of the promisee's needs in order to maintain her lifestyle is within the sound discretion of the trial judge and should only be reversed if it constitutes an abuse of discretion."[33] Importantly, however, it noted how the Court in *Crowe* stated that "the award of weekly support 'should provide [the promisee] with her minimal needs and prevent the necessity of her seeking public welfare.'"[34] Finding a remand to the trial court was necessary so that certain fact findings could be made, the Appellate Division held, in pertinent part:

> We find no error in the exercise of the judge's discretion in using Connell's post-separation lifestyle as the basis for a palimony award, so long as the quantum of support was reasonably adequate and did not leave Connell reliant on public assistance, such as food stamps. The case law does not require that Connell be able to life just as before. Rather, the award need only provide reasonable support sufficient to meet "her minimal needs *and prevent the necessity of her seeking public welfare*." It is not clear that $170 per week accomplishes that goal.[35]

The Appellate Division further noted that findings were necessary regarding potential tax liability associated with the payment and the effect of inflation in calculating the present value of future support.[36]

Case law subsequent to *Connell* only emphasizes the trial court's wide range of discretion in calculating a damages award, especially where the parties' lifestyle was expressly relied upon. In *Kozikowska v. Wykowski*,[37] Judge Maureen P. Sogluizzo, J.S.C., awarded palimony damages in excess of $480,000.[38] In so doing, Judge Sogluizzo held that the promisee needed $3,412 per month "to maintain her status quo," that she was earning only $1,212.60 per month and, as a result, had a monthly shortfall of $2,200.[39] She also noted that the promisee had a life expectancy of 26 years and eight months.[40] As a result, she concluded that the total amount of money "necessary for her support, over the remainder of her life" equaled approximately $707,000 with a net present value of approximately $483,000.[41] In challenging the award on appeal, the promisor argued that the trial judge failed to consider all "requisite" elements of future support and make proper fact findings.[42] Not only did the Appellate Division conclude that proper fact-findings were made in support of the awarded damages, but it also held:

> Judge Sogluizzo discussed at great length the basis for her calculation of plaintiff's monthly expenses. She credited plaintiff's testimony and CIS. Furthermore, she then calculated plaintiff's life expectancy to determine the expected duration of support, and reduced the total lump sum amount to net present value. Defendant's argument that the judge did not make "specific findings" supporting each expense provides no specifics and is directly contradicted by the record.[43]

In awarding palimony damages in excess of two million dollars, the trial court in *Harrison v. Estate of Massaro* found that the parties "enjoyed an affluent lifestyle together, and that [the promisee] remained throughout the relationship economically dependent on [the promisor]."[44] It specifically rejected the argument that the awarded amount should "reflect a subsistence standard," while noting that the lifestyle resulting from the award must be reasonable.[45] In calculating damages, the trial judge reviewed the promisee's case information statement to determine a reasonable annual net lifestyle, and directed the parties' experts to utilize that annual amount to determine the present value of an appropriate total figure.[46] Affirming the award on appeal, the appellate court specifically held, "[w]e also reject the argument that [the promisee] was only entitled to an award that would meet her minimal needs and that income should have been imputed to her."[47]

One related issue that may impact the issue of damages is that of *pendente lite* support paid during the pendency of the palimony proceeding. While not a divorce proceeding during which the *status quo* requires maintenance to the extent possible,[48] temporary financial relief pending the outcome of palimony trial may be deemed appropriate where the alleged promisee can establish by way of motion that irreparable harm will otherwise result. Through a showing of urgent need and a likelihood of success on the merits, the Supreme Court, in *Crowe v. DeGioia,* applied equitable principles in holding:

> DeGioia, apparently now a person of substantial means, would suffer relatively inconsequential expense if relief is granted. By contrast, withholding support from Crowe would be devastating. On balance, the equities favor the grant of temporary relief to maintain the status quo pending the outcome of a final hearing.[49]

In contrast to a serial alimony payment for a specified duration, a lump-sum palimony award stems from an adjudicated breach of contract. What impact upon damages will occur, as a result, if a promisor is required to pay to a promisee interim support during a palimony proceeding? In addressing this issue, the Court in *Roccamonte* noted that the "total amount of [temporary periodic support], if granted, shall be deducted from any lump sum awarded."[50]

Approaches to Presenting or Opposing a Palimony Damages Position

Based on the above discussion regarding palimony damages and its underlying jurisprudence, practitioners have developed a variety of approaches regarding how to present a damages position on behalf of the promisee or oppose such a position on behalf of the promisor.[51] This article addresses two ways often utilized in addressing this issue. Notably, each approach may apply even where a writing exists memorializing the palimony arrangement in the event it does not specifically address the issue of damages.

Promisee's Life Expectancy

Whether acting on behalf of the promisor or promisee, the first step in the analysis should be a determination of the promisee's life expectancy under the table referenced by Rule 1:13-5.[52] The table is presently as follows:

APPENDIX I-A

Life Expectancies for All Races and Both Sexes[53]

Age	Expectancy	Age	Expectancy	Age	Expectancy
0-1	78.7	34-35	46.2	68-69	16.9
1-2	78.1	35-36	45.2	69-70	16.2
2-3	77.2	36-37	44.3	70-71	15.5
3-4	76.2	37-38	43.3	71-72	14.8
4-5	75.2	38-39	42.4	72-73	14.1
5-6	74.2	39-40	41.5	73-74	13.4
6-7	73.2	40-41	40.5	74-75	12.7
7-8	72.2	41-42	39.6	75-76	12.1
8-9	71.3	42-43	38.7	76-77	11.4
9-10	70.3	43-44	37.7	77-78	10.8
10-11	69.3	44-45	36.8	78-79	10.2
11-12	68.3	45-46	35.9	79-80	9.6
12-13	67.3	46-47	35.0	80-81	9.1
13-14	66.3	47-48	34.1	81-82	8.5
14-15	65.3	48-49	33.2	82-83	8.0
15-16	64.3	49-50	32.3	83-84	7.5
16-17	63.3	50-51	31.4	84-85	7.0
17-18	62.4	51-52	30.6	85-86	6.5
18-19	61.4	52-53	29.7	86-87	6.1
19-20	60.4	53-54	28.9	87-88	5.7
20-21	59.5	54-55	28.0	88-89	5.3
21-22	58.5	55-56	27.2	89-90	4.9
22-23	57.6	56-57	26.3	90-91	4.6
23-24	56.6	57-58	25.5	91-92	4.3
24-25	55.7	58-59	24.7	92-93	4.0
25-26	54.7	59-60	23.9	93-94	3.7
26-27	53.8	60-61	23.1	94-95	3.4
27-28	52.8	61-62	22.3	95-96	3.2
28-29	51.9	62-63	21.5	96-97	3.0
29-30	50.9	63-64	20.7	97-98	2.8
30-31	50.0	64-65	19.9	98-99	2.6
31-32	49.0	65-66	19.1	99-100	2.5
32-33	48.1	66-67	18.4	100+	2.3
33-34	47.1	67-68	17.6		

Reasonable Needs Approach

Similar to using the lifestyle portion of a case information statement to determine alimony, the couple's overall lifestyle may guide the determination of the reasonableness of the support promised by the promisor. As in divorce matters, the above-cited case law includes examples wherein trial judges parsed through budgets to determine what portions thereof were 'reasonable,' and what portions were extraneous.[54]

The question will often become to what extent the trial judge should consider the type of expenses paid by the promisor in calculating a damages award. In doing so, the court may take into consideration the type of home in which the parties lived, the vehicles driven, and the personal expenses paid for by the promisor. The promisee likely will argue that 'reasonable support' means the lifestyle that resulted during the relationship with the promise predicated on the notion it was made with the promisor's income in mind.

Since trial judges have a wide range of discretion in determining an appropriate award, however, there is no mandate that the trial court rely on the lifestyle lived during the relationship. Rather, a modified version of said lifestyle or even the promisee's post-relationship lifestyle may be determinative regarding what constitutes reasonable support.

Connell 'Subsistence Level' Approach

Not only will the promisor likely argue that a lifestyle short of what the parties lived during the relationship should be utilized in determining damages, but, in fact, the promisee should receive nothing more than that amount required to prevent him or her from becoming a ward of the state. The *Connell* decision opened the door to this position and, in the process, redefined the way in which 'reasonable support' can be determined.[55]

When spread across a promisee's life expectancy, however, even an annual subsistence level payment may amount to a payment exceeding several hundreds of thousands of dollars. This is especially the case where a trial court takes cost of living adjustments and inflation into account when rendering an award. That is why promisors often argue that the duration of the relationship should somehow come into play. Thus, while a promisor may successfully persuade a trial judge that the particular case merits this subsistence level support, there is no way to argue around the *Kozlowski* formula's unambiguous indication that the promisee's life expectancy must be taken into account.

Conclusion

While existing case law on the issue of damages in a palimony matter is relatively limited, it does provide a useful guide by which to advocate for both the alleged promisee and promisor. The Supreme Court's original 'formula' espoused in *Kozlowski* deliberately cast a wide net in its language, with the intention that the ultimate result would differ in each case, based upon the facts and circumstances at issue.[56] In years to come, these cases are likely going to end or, at best, be substantially reduced in number. Until that happens, however, the manner by which trial courts fashion palimony awards will continue to vary in each case. ■

Judge Thomas P. Zampino, (Ret.) served as a trial court judge in the New Jersey Superior Court, Chancery Division, Family Part for more than two decades before becoming of counsel at Snyder, Sarno, D'Aniello, Maceri & DaCosta LLC. Robert Epstein is a partner in Fox Rothschild LLP's family law group, and would like to thank his co-author and those members of his group at Fox whose insight and assistance aided in the writing of this article.

Endnotes

1. *Maeker v. Ross*, 219 N.J. 565 (2014).
2. N.J.S.A. 25:1-5(h) (2010).
3. *Maeker, supra*, 219 N.J. at 581.
4. Even with a rise in the use of prenuptial and postnuptial agreements to protect spousal interests and provide for a more definitive course of conduct in the event of a marriage's demise, written palimony contracts are simply uncommon. N.J.S.A. 37:2-31 *et seq.*

5. *In re Estate of Roccamonte*, 174 N.J. 381, 389 (2002) (*quoting Kozlowski, supra*, 80 N.J. at 384). Prior to the Jan. 18, 2010, amendment to the statue of frauds requiring that all such agreements be in writing, enforceable palimony agreements were usually oral because "parties entering this type of relationship usually do not record their understanding in specific legalese."
6. R. 4:46-2(e).
7. This article does not discuss or opine on the issue of equitable claims often filed in conjunction with a palimony claim and the remedies potentially stemming from said claims.
8. *Kozlowski v. Kozlowski*, 80 N.J. 378, 384-85 (1979).
9. *Maeker, supra*, 219 N.J. at 576.
10. *See In re Estate of Roccamonte*, 174 N.J. 381, 389 (2002).
11. *Id*. at 389-90.
12. *Id.*
13. *Crowe v. DiGioia*, 90 N.J. 126 (1982) (*citing* 1 Williston Contracts (3d ed. 1957), Sec. 100 at 371) (finding "ample" consideration where promise maintained the home, cooked for the promisor and acted as his social companion).
14. *Roccamonte, supra*, 174 N.J. at 392-93; *see also Devaney v. L'Esperance*, 195 N.J. 247, 259 (2008) (In finding that cohabitation was not necessary to establish a marital-type relationship, the Supreme Court held, "We recognize [ ] that palimony cases present highly personal arrangements and the facts surrounding the relationship will determine whether it is a marital-type relationship that is essential to support a cause of action for palimony.").
15. *Kozlowski, supra*, 80 N.J. at 383 (*citing* N.J.S.A. 2A:34-23, *et seq.*) ("Relief predicated upon a promise of marriage has been barred since 1935 by the Heart Balm Act, N.J.S.A. 2A:23-1, *et. seq.*").
16. *Id*. at 388.
17. R. 1:13-5.
18. *Roccamonte, supra*, 174 N.J. at 397.
19. *See Id*.
20. *Id*. at 393.
21. *Id*.
22. *See Harrison v. Estate of Massaro, supra*, 2012 WL 2285042, *7 (App. Div. June 19, 2012) (in awarding palimony damages in excess of two million dollars, the trial court held that no income should be imputed to the promisee based on a finding that the promisor indicated that the promisee would never have to work again).
23. *See Connell v. Diehl*, 397 N.J. Super. 477 (App. Div. 2008).
24. *See id*. at 481 (noting that Stargardt's disease is a juvenile form of macular degeneration, which the promisee had since the age of 13).
25. *See Id*.
26. *See Id*. at 488.
27. *See Id*.
28. *See Id*.
29. *See Id*.
30. *See Connell, supra*, 397 N.J. Super. at 498.
31. *See Id*. at 496 (*quoting Kozlowski, supra*, 80 N.J. at 388).
32. *Connell, supra*, 397 N.J. Super. at 497 (internal citations omitted).
33. *Id*. (*citing Roccamonte, supra*, 174 N.J. at 395, wherein the Supreme Court found that while the couple lived "lavishly" during their cohabitation, it was "highly unlikely" that the intent was for the promisee to become "impoverished;" therefore, a palimony award for adequate support is reasonable).
34. *Connell, supra*, 397 N.J. Super. at 498 (*quoting Crowe, supra*, 90 N.J. at 136).
35. *Connell, supra*, 397 N.J. Super. at 498-99 (*citing Crowe, supra*, 90 N.J. at 135) (internal citations omitted).
36. *See Connell, supra*, 397 N.J. Super. at 499 ("It is not clear whether a lump-sum palimony award such as in this case is subject to taxation.").

37. *Kozikowska v. Wykowski*, 2012 WL 4370430 (App. Div. Sept. 26, 2012).
38. *See Id.*
39. *See Id.*
40. *See Id.*
41. *See Id.*
42. *See Id.*
43. *Id.* at *14; *see also Bayne, supra*, 174 N.J. at 138 (while overturning the trial court's determination that the promisee was entitled to palimony, it did not comment on a palimony award based on a finding of what the promisee would need "to supplement her income as a travel agent to equal the lifestyle she enjoyed while living with Earl and multiplied the amount over sixteen years until Fiona reaches the retirement act of sixty-five.").
44. *See Harrison v. Estate of Massaro, supra*, 2012 WL at *6.
45. *See Id.*
46. *See Id.; see also Gelinas v. Conti*, 2016 WL 885141 (App. Div. March 9, 2016) (affirming palimony award for promisee in excess of $700,000).
47. *See Id.* (rejecting the estate's argument premised on *Crowe, supra*, 90 N.J. 126 (1982), "that courts generally have awarded palimony only when needed to prevent economic destitution," since said determination in *Crowe* applied only to an award of temporary support, with the final award being rendered in accordance with the *Kozlowski* formula).
48. *See* N.J.S.A. 2A:34-23.
49. *Ibid.*
50. *Roccamonte, supra*, 174 N.J. at 399-400.
51. This discussion does not take into account certain arguments potentially available to an alleged promisor, such as the ability to actually pay a damages award following a court's adjudication that a breach of contract occurred.
52. R. 1:13-5.
53. Rules Governing the Courts of the State of New Jersey, Appendix I-A (*citing* National Vital Statistics Reports, Vol. 52, No. 14, Feb. 18, 2004).
54. *See Kozikowska, supra* 2012 WL at *14; *Harrison, supra*, 2012 WL 2285042 at *7.
55. *See Connell, supra*, 397 N.J. Super. at 497 (internal citations omitted).
56. *Kozlowski, supra*, 80 N.J. at 388.

Celebrating *Gault*, and the Constitutional Rights of Children—50 Years Later...

by Lorraine M. Augostini

On May 15, 1967, the United States Supreme Court proclaimed that children are persons under the Constitution and, therefore, entitled to certain due process protections, and that "the condition of being a boy" does not justify denying children these "fundamental requirements of due process."[1] By providing children facing a potential loss of liberty in juvenile court with the right to notice, right to counsel, right to confrontation and cross-examination, and the right against self-incrimination, the *Gault* decision represented a critical shift in American jurisprudence regarding the treatment of juveniles in the system of justice.

As Amelia Lewis sat in her law office in Youngstown, Arizona, on a hot August day in 1964, the telephone rang.[2] "I have a man here who needs a lawyer for his son," said a colleague. "He wants me to tell you that he's got money to pay."[3]

An hour later, the man and his wife walked into Lewis's office. After handing Lewis $100 in crumpled dollar bills, the man and his wife proceeded to tell her the unbelievable story of their 15-year-old son, Jerry, who had been committed to the state industrial school for boys, until the age of 21, for something adolescent boys had been accused of doing for time immemorial: making a mildly lewd telephone call.[4]

The events described by the Gaults led to one of the most significant Supreme Court cases of the last half-century, *In Re Gault*,[5] which changed the landscape of juvenile justice and "cement[ed] in American law the idea that children have constitutional rights."[6] May 15 marked the 50th anniversary of this seminal decision.

When the Gaults shared their story that long-ago day, Lewis was outraged.[7] She immediately began researching ways to reopen young Jerry's case. In doing so, she discovered that Arizona, like many other states at that time, did not confer the right of appeal on juveniles.[8]

Thinking creatively, Lewis decided to challenge the legality of Jerry's confinement by filing a petition for *habeas corpus*, the "great writ of liberty."[9] Though Lewis could not secure the boy's immediate release, the *habeas corpus* proceeding afforded her a hearing, during which she could develop a record.[10] In juvenile courts at that time, proceedings were not recorded or otherwise preserved; therefore, the opportunity to recreate the trial record was critical if Lewis hoped to achieve appellate review in Arizona or ultimately take her client's case to the U.S. Supreme Court.[11]

The superior court gave short shrift to Lewis's arguments on behalf of Jerry Gault. Lewis then filed an appeal with the Arizona Supreme Court.[12] There, she challenged the court's decision, the denial of *habeas corpus* and the very "constitutionality of Arizona's juvenile court law."[13] The state's high court rejected Lewis's arguments, just as the lower court did previously.[14]

Undeterred, Lewis placed a call to her friend and colleague Melvin Wulf, national legal director of the American Civil Liberties Union.[15] Lewis implored Wulf to take the case, arguing that "this obscure case from Arizona raise[s] federal constitutional questions that only the U.S. Supreme Court [can] decide."[16]

She was right.

Lewis did not argue *Gault* before the U.S. Supreme Court. Characteristically modest, she considered it an act of malpractice not to engage a constitutional law professor to make the argument.[17] But Justice Abe Fortas, who wrote the majority opinion in *Gault*,[18] later told Lewis's son, Peter, "She needn't have done that. We decided that case on her record."[19] And Professor Norman Dorsen, who ultimately argued *Gault* before the Supreme Court, acknowledged that it was Lewis who deserved "primary credit for bringing this case to the Supreme Court and to the eye of the public and profession."[20] As he told Lewis after his victory, "Although there may be glory in arguing before the Supreme Court, it was due largely if not entirely to your efforts that the case got that far."[21]

The Supreme Court's 8-1 decision in *Gault,* and its pronouncement that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," established that juveniles are entitled to the same due process protections afforded adults, including notice of the charges, the right to counsel, the right against self-incrimination, the right to confront witnesses, the right to a transcript, and appellate review.[22] As Justice Fortas wrote, "[I]t is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what 'scientific method' is to science.'"[23] The *Gault* Court recognized that juvenile court, with its informality and "unbridled discretion, however, benevolently motivated," was a "poor substitute for principle and procedure."[24]

Furthermore, the *Gault* Court emphasized that children "require the guiding hand of counsel at every step in the proceedings" against them.[25] In light of the potential short- and long-term consequences children face in juvenile court, the assistance of counsel is essential to help the juvenile "cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." This bedrock principle announced by the Court in *Gault* remains true today.

The Continuing Impact of *Gault* on New Jersey Law

In the wake of *Gault*, New Jersey, like many other states, had to revise its Code of Juvenile Justice. At the same time, in response to the Supreme Court's earlier decision in *Gideon v. Wainwright*,[26] the state established the Office of the Public Defender (OPD). In addition to providing counsel to indigent adults, the OPD was charged with ensuring that juveniles received the effective assistance of counsel in delinquency proceedings.

Currently in New Jersey, a juvenile has the right to be represented by counsel at every "critical stage in the proceeding which, in the opinion of the court, may result in the institutional commitment of the juvenile."[27]

Gault has resulted in additional changes to the law in New Jersey regarding juveniles. For example, a juvenile is provided with "all defenses available to an adult charged with a crime, offense or violation, and all rights guaranteed to criminal defendants by state and federal Constitutions, except the right to indictment, the right to trial by jury and the right to bail."[28] Additionally, a juvenile may not waive any rights, including the right to counsel, "except in the presence of and after consultation with counsel, and unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding this decision."[29] A juvenile determined to lack mental capacity may not waive any right.[30]

New Jersey's law surrounding juveniles continues to evolve. Most recently, New Jersey's juvenile laws changed with the passage of S-2003/A-4299, which Governor Chris Christie signed into law in Aug. 2015. The new law provides juveniles committed to the custody of the Juvenile Justice Commission (JJC) with the right to counsel and other enhanced due process protections when facing transfer from a juvenile correctional facility to an adult prison.[31] The law also increases, from 14 to 15, the age at which a juvenile may be 'waived,' or transferred, to adult court; limits the use of solitary confinement (referred to in the new law as "room restriction"); and creates a presumption that a youth waived to adult court will remain in a juvenile detention facility pending trial and upon conviction may serve his or her sentence at the juvenile correctional facility until the age of 21 and beyond at the discretion of the JJC.[32]

The Impact of *Gault* Beyond Delinquency Matters

Although *Gault* does not technically extend beyond delinquency matters, its spirit has found its way into other practice areas. The first example of the impact of *Gault* in other practice areas involving juveniles relates to the right to counsel in child protection actions. Children do not have a federal constitutional right to counsel in child protection actions brought by the state.[33] Nevertheless, in 1974 Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), which requires states to provide children who are the subject of child welfare court proceedings—known in New Jersey as children in court, or CIC, matters—with a guardian *ad litem* who may be an attorney or a court-appointed special advocate.[34] *Gault* recognized the importance of representation when a young person's liberty interests are at stake. Likewise, the 'guiding hand of counsel' is also critically important when a child's right to family integrity as well as to safety and well-being are at the center of a children in court case.

In both abuse-and-neglect proceedings and state applications to terminate parental rights, children in New Jersey are statutorily entitled to legal representation through the OPD's Office of Law Guardian.[35] The child's attorney, referred to as a law guardian, is obligated to

preserve the confidentiality of client communications, zealously advance the client's cause and otherwise adhere to the ethical duties extended to adult clients.[36] In privately initiated family court actions involving custody and visitation, however, the court has discretion whether to appoint an attorney or guardian *ad litem* for the child.[37] If the court appoints an attorney for the child in such an action, Rule 5:8A permits the assessment of counsel fees against one or both parties.

Children removed from their families by state action in New Jersey are entitled to 16 specific rights outlined in the Child Placement Bill of Rights Act.[38] The act was created "to protect the most fundamental rights of children placed outside the home."[39] The Legislature intended the act to provide these children with "rights independent of their parent or legal guardian," to establish an "affirmative obligation of the State to recognize and protect the rights of the child placed into surrogate care" and to impose a "requirement for a clear and consistent policy from the State for the promotion of permanent placement over long-term temporary care."[40] As a result, the U.S. District Court held in *K.J. v. Div. of Youth & Family Servs.*[41] that the act provides children with a private right of action for certain violations under the act.

A critical decision-making point in a CIC proceeding is the "permanency" hearing. Courts must conduct a permanency "planning" hearing within 12 months of a child's out-of-home placement.[42] At this hearing, to ensure that the child does not languish in foster care indefinitely, the court must review and approve the child welfare agency's permanent plan for the child. In addition to the right to counsel, children in CIC proceedings are entitled to "[w]ritten notice of the date, time and place of the permanency hearing…" and "…to attend the hearing and submit written information to the court..."[43] As further emphasized in the Child Placement Bill of Rights Act, children have a "right to be represented in the planning and regular review" of their cases.[44] This fundamental notion of due process, that a child has a right to be heard and to participate in a meaningful way in the decision-making process, had its origin in *Gault*.

Conclusion

The efforts of Amelia Lewis, a solo practitioner in Arizona, to frame Jerry Gault's story in constitutional terms, assemble a compelling record, and persuade an accomplished oral advocate to take the case to the United States Supreme Court were instrumental in changing the law. Lewis understood that she not only needed to help Jerry Gault and his distraught parents, but she also needed to address a broader audience because, as she later explained:

> it seemed to me that if we were trying to teach our children democracy, trying to teach them the three branches of government, trying to teach them that everybody in America got a fair trial,…then we [needed to avoid] treating them [like Jerry Gault]…[and] making [them] not only skeptics, but [even criminals] before they got started.

The 50th anniversary of *Gault* is an opportunity to reflect not only on the significance of this landmark decision but on the role that advocates like Lewis play in crafting the policies and practices that shape our society. Amelia Lewis saw the legal system as a vehicle for change, and as a means to do what was right for a family and their son. Her advocacy changed the law in many ways, some intended and others in unimagined ways. The ripple effects of the *Gault* decision, begun on that hot August day in Lewis's office, continue to reverberate in the legal system 50 years later, as Lewis's foresight, perseverance and hard work stand as a shining example of the power of an individual to effect significant and lasting change in the justice system. ■

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Endnotes

1. *In re Gault,* 387 U.S. 1, 13, 28 (1967).

2. Interview with Amelia D. Lewis, Interview by Jo Ann Diamos, 17 Aug. 1989: 1-140, 72; Arizona Bar Foundation, Oral History Project: Arizona Legal History. Found at: http://www.legallegacy.org/images/PDFs/LEWIS_AMELIA_D 2.PDF; Tanenhaus, David S., Pursuing Justice for the Child: The Forgotten Women on *In re Gault* (2014); *Scholarly Works.* Paper 984, http://scholars.law.unlv.edu/facpub/984.
3. Interview with Amelia D. Lewis, page 72.
4. *Id.*
5. 387 U.S. 1 (1967).
6. Interview with Amelia D. Lewis, page 72; Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4*, (Univ. Press of Kansas, 2011); page 123.
7. Tanenhaus, David S., Pursuing Justice for the Child: The Forgotten Women on *In re Gault* (2014), *Scholarly Works.* Paper 984; page 42.
8. Interview with Amelia D. Lewis, at page 73.
9. Tanenhaus, David S., Pursuing Justice for the Child: The Forgotten Women of *In re Gault*, page 42.
10. *In re Gault*, 387 U.S. at 5-6; 58 (1967); Interview with Amelia D. Lewis, Interview by Jo Ann Diamos, 17 Aug. 1989: 1-140, at 76-78; Arizona Bar Foundation, Oral History Project: Arizona Legal History.
11. *In re Gault*, 387 U.S. at 5, 8-10.
12. *Id.* at 9-10.
13. Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4,* (Univ. Press of Kansas, 2011); page 39.
14. *Id*. at 42-43; *In re Gault*, 387 U.S. at 10.
15. Interview of Amelia D. Lewis, page 95-96; Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4,* page 44.
16. Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4,* page 44-45.
17. Interview with Amelia D. Lewis, page 111.
18. Before his appointment to the U.S. Supreme Court, Justice Abe Fortas was the attorney assigned to represent Clarence E. Gideon, petitioner in *Gideon v. Wainwright*, 372 U.S. 335 (1963).
19. *Id.*
20. Tanenhaus, David S., *The Constitutional Rights of Children: In re Gault and Juvenile Justice 4,* page 68.
21. *Id.* at 93.
22. *In re Gault*, 387 U.S. at 13, 31-59.
23. *Id.* at 22.
24. *Id.* at 18-20.
25. *Id.* at 36, *citing Powell v. Alabama,* 287 U.S. 45, 69 (1932).
26. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
27. N.J.S.A. 2A:4A-39 (a).
28. N.J.S.A. 2A:4A-40.
29. N.J.S.A. 2A:4A-39-(b)(1).
30. N.J.S.A. 2A:4A-39-(b)(3).
31. N.J.S.A. 52:17B-175.
32. 2015 N.J. ALS 89, 2015 N.J. Laws 89, 2015 N.J. Ch. 89, 2014 N.J. S.N. 2003, 2015 N.J. ALS 89, 2015 N.J. Laws 89, 2015 N.J. Ch. 89, 2014 N.J. S.N. 2003.
33. Duquette, Donald, Haralambi, Ann, Sankaran, Vivek, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases,*3rd Edition (National Association of Counsel for Children, 2016), page 819-820.
34. 42 U.S.C.S. § 5106a(b)(2)(A)(xiii).
35. N.J.S.A. 9:6-23; N.J.S.A. 30:4C-15.4(b).
36. *In re Maraziti,* 233 N.J. Super. 488 (App. Div. 1989); *In the Matter of M.R.*, 135 N.J. 155 (1994); *Div. of Youth & Fam. Serv. v. Robert M.*, 347 N.J. Super. 44 (App. Div. 2002), *cert. denied* 174 N.J. 39.
37. Fall, Robert A., Romanowski, Curtis J., *New Jersey Family Law: Relationships Involving Children,* (Gann Law Books,2015); N.J. Court Rules, R. 5:8A, R. 5:8B.
38. N.J.S.A. 9:6B-1 *et seq.*
39. *K.J. v. Div. of Youth & Family Servs.*, 363 F. Supp. 2d. 728; 742 (D.N.J., 2005).
40. *Id.*
41. *K.J. v. Div. of Youth & Family Servs.*, 363 F. Supp. 2d. 728 (D.N.J. 2005).
42. Duquette, Donald, Haralambi, Ann, Sankaran, Vivek, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases,*3rd Edition (National Association of Counsel for Children, 2016), page 442; N.J.S.A. 30:4C-61.2.
43. N.J.S.A. 30:4C-61.2.
44. N.J.S.A. 9:6B-4 (l).

Common Mistakes When Referencing Trusts in Marital Settlement Agreements

by Laurie A. Hauptman and Yale S. Hauptman

An important role that attorneys perform in any legal dispute is to assist the parties in resolving their differences. A settlement agreement must address as many contingencies as possible to provide certainty to the parties and reduce the need for future litigation. A marital settlement agreement (MSA) is no different. It must resolve the issues in the dispute and must cover possible and/or expected changes in the future. Trusts are often necessary to help cover those future contingencies.

The resolution of a divorce typically involves ongoing payments by one party to the other in the form of alimony and/or child support. The court permits orders regarding the payment of alimony and child support for the care, custody, education and maintenance of the children, and may require security for the enforcement of such orders, including the creation of trusts.[1] These payments may be intended to last for years, and an important consideration is, therefore, what happens if one or both parties die? Life insurance plays an important role in addressing that potential problem.[2] It can provide instant cash to cover alimony or child support payments that are lost when a party dies and the supported party no longer has the income stream from which to cover those payments.[3]

Is it simply enough to insert language in the MSA that says, "each party shall purchase life insurance to be held in trust for the benefit of the children with the other spouse to act as trustee"? Without a clear understanding of what a 'trust' is, one might think so. This one sentence with nothing more, however, does not accomplish the goal.

While trusts come in many shapes and sizes, there are some basic commonalities. The creation of a trust is the creation of a legal entity for the purpose of holding assets.[4] Every trust has a settlor (also referred to as a grantor or trustor), a trustee and a beneficiary.[5] The grantor establishes the trust and usually funds it. The trustee carries out the purposes of the trust. The beneficiary is the person(s) for whose benefit the trust was created.[6]

The trust is created by way of a written agreement.[7] Within that agreement are contained the aforementioned designations, the purpose of the trust and more specific details. In the example above, what are the terms of the trust? Are there restrictions on how the money is to be used? Do the children gain access to the money at a certain age? What if the spouse is not available or able to serve as trustee? Who acts as trustee then? Do the parties—or the attorneys for that matter—understand that they must take additional steps to make this trust arrangement happen, and that involves more than simply purchasing the insurance (*i.e.*, the creation of a trust agreement)? What happens if the parties don't take those steps and one party dies?

Let's look at a hypothetical case. The husband and wife divorced and had language in their MSA requiring them to provide life insurance in trust for their two children. When the wife died, the husband discovered that while she had purchased and kept in force a life insurance policy in the agreed upon amount of $1,000,000; she did not set it up in trust. There was no written trust agreement. She designated her children as beneficiaries. It turns out the husband didn't leave his policy proceeds to a trust either. He designated the wife as the beneficiary, thinking that was sufficient. Neither accomplished what was intended.

So what happens now that the wife has died? Life insurance is contract property.[8] The premium is paid, and if the insured dies while the policy is in force, the insurance company will pay the person designated on its beneficiary form.[9] The wife designated her children as beneficiaries. That is whom the insurance company will pay. Each child will receive $500,000 outright. If they are minors—under the age of 18—a court could order a protective arrangement.[10] Such an arrangement could include payment, delivery, deposit or retention of the funds, entering into an annuity contract or adding to or establishing a suitable trust.[11] The court will consider the interests of creditors and dependents of the minor and

whether he or she needs the protection of a guardian.[12] Each child will be entitled to the money upon reaching his or her 18th birthday.[13]

Clearly, this isn't what the parties contemplated in their MSA. If the husband survived the wife, he may be able to control the proceeds until the children turn 18 to the extent there is no other court-ordered protective arrangement; however, the children will receive a sizable amount of money when they turn 18. They can decide to spend it any way they see fit. The husband can try to steer them down the right path, but he has no ability to prevent them from utilizing the funds for purposes other than what the parents may have wanted.[14] This is a real concern that estate-planning clients express when discussing how they wish to leave their nest egg, and similarly leads to a discussion of trusts.

The husband and wife did try to set up a trust. Where did they and their attorneys fail? In part, they failed in the execution and in part in the details. First of all, simply stating in the MSA that the life insurance should designate the children as beneficiaries and the other spouse as trustee won't do the trick. There needs to be a written agreement regarding the trust terms.[15] Is the money intended to replace child support? Is it to be used for college? What happens if a child doesn't go to college? What can the money be used for then? When is a child entitled to his or her share? How much discretion does the trustee have to make decisions? Will there be one 'common pot' trust from which all expenses of the children will be paid or will there be a separate trust for each child?

Not only did they not properly create a trust, they didn't 'connect' the life insurance to the trust. No one informed the life insurance company that the death benefit was meant to be held in trust.[16] The life insurance policy proceeds need to be directed to that trust by completing the beneficiary forms correctly.[17] Instead, the wife instructed her insurance company to pay the children directly. The husband instructed his insurance company to pay the wife.

So what's the big deal, you may ask? Can the insurance company pay the death benefit to the trust? No, because insurance is contract property.[18] The insurance company must contractually pay the designated beneficiary.[19]

If the children are the beneficiaries and are over age 18, it is their money. They can refuse to give it to the parent to manage. If they are under age 18 then, if the amount is greater than $5,000, the funds may be received by the husband on behalf of his children unless a court determines that a protective arrangement is necessary.[20] Once the children reach age 18, however, they will be entitled to the funds.

If the husband had died and named the wife as beneficiary, he would avoid the possibility of a protective arrangement and court intervention. He would also prevent the children from receiving the proceeds at age 18. The wife would be able to use the funds for the children's benefit; however, she would also be free to use the funds for other purposes. She is the beneficiary, not the children. If she remarries and places those funds in a joint account with her new spouse he would have access to the monies as well.

Where did the parties and their attorneys go wrong? Most matrimonial attorneys, when drafting MSAs, understand the advantages to the parties of obtaining life insurance to cover future financial obligations. Some may understand that the proceeds need to be held 'in trust.' A properly drafted trust agreement by an attorney experienced in trust and estate matters is necessary to make sure the intentions of the parties are carried out. A separate trust agreement—separate and apart from the basic MSA—can avoid future conflict and legal battles for parties and attorneys alike.

Trusts can also be helpful in other divorce situations, such as where a party is currently receiving or may in the future be eligible for needs-based government benefits because of a disability.

Consider another example.

The wife has multiple sclerosis and is wheelchair bound. Once divorced from the husband, she may not be able to live alone without needing the assistance of home aides. She may also need to consider an assisted living facility or nursing home now or in the future. The structure of the MSA as it relates to alimony and a split of the marital assets could very well impact her ability to obtain needs-based government benefits, such as Medicaid.[21] At the same time, those assets may not be sufficient to meet her long-term care needs.

A special needs trust may be the solution that allows her to qualify for government benefits to help pay for the care she needs and, at the same time, have the benefit of the assets from the divorce settlement to pay for other needs not covered by those benefits.[22] Just like the life insurance example, more than a sentence in the MSA is required. A special needs trust agreement, separate and

apart from the MSA, and drafted by a knowledgeable special needs planning attorney, is what the wife needs.

A third area where trusts can be useful is in planning for the long-term care needs of an aging client going through a divorce. The cost of long-term care, on average about $150,000 per year for 24/7 nursing-level care, can bankrupt all but the wealthiest segment of the population. Consideration should be given in the MSA to cover the payment of long-term care insurance. This can be done through the use of trusts, and sometimes through the purchase of asset-based long-term care products. An elder law attorney knowledgeable in the area of long-term care can be of great assistance when considering these issues.

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Endnotes

1. N.J.S.A. 2A:34-23 (pending any matrimonial action or action for dissolution of a civil union brought in this state or elsewhere, or after judgment of divorce or dissolution or maintenance, whether obtained in this state or elsewhere, the court may make such order as to alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders, including, but not limited to, the creation of trusts or other security devices, to assure payment of reasonably foreseeable medical and educational expenses.
2. *Id*.
3. *Id*.
4. *Black's Law Dictionary*, Fifth Edition.
5. N.J.S.A. 3B:31-18 establishes the method by which a trust is created and N.J.S.A. 3B:31-19 the requirements to create a trust. Effective July 17, 2016, New Jersey adopted, with some modifications, the Uniform Trust Code, which has been adopted by approximately 30 other states. It establishes a body of law that attempts to provide uniformity and consistency with respect to the law governing trusts amongst the states that have adopted the UTC. N.J.S.A. 3B:31-6 further states that the common law of trusts and principles of equity may also apply to the extent not modify by the UTC.
6. N.J.S.A. 3B:31-3.
7. N.J.S.A. 3B:31-18.
8. *Prudential Ins. Co. of America v. Douglas*,110 F. Supp. 292 D. N.J. 1953). The designated beneficiary's interest in a life insurance policy is a vested property right. As long as the beneficiary survives the insured, he is entitled to the proceeds.
9. *Id*.
10. N.J.S.A. provides that if it is established that a minor has a property interest which may be wasted the court may, without appointing a guardian of the estate, authorize, direct or ratify a protective arrangement.
11. N.J.S.A. 3B:12-2.
12. *Id*.
13. N.J.S.A. 3B:12-54.
14. *Newburgh v. Arrigo*, 88 N.J. 529, 545 (1982). A court may consider, among other factors, the financial resources of a child in addressing a parent's obligation to pay for college. The court specifically addressed considerations of assets held by a child as being utilized for that purpose.
15. N.J.S.A. 3B:31-20.
16. *See Prudential Ins Co. of America v. Douglas*, *supra*.
17. *Id*.
18. *Id*.
19. *Id*.
20. N.J.S.A. 3B:12-1 *et. seq.*
21. Medicaid is a combination federal and state needs-based program that restricts benefits to applicants who fall under prescribed asset and income limitations. Federal law is codified in Title 42 of the United States Code. New Jersey Medicaid regulations are found in Title 10 of the New Jersey Administrative Code.
22. 42 U.S.C. 1396p(d)(4)(A) and N.J.S.A. 3B:11-37.

Commentary

The Misuse and Abuse of the Five-Day Rule When Submitting QDROs to the Court

by Christopher Rade Musulin

At this very moment, there are likely numerous qualified domestic relations orders (QDROs) sitting on the desks of superior court judges awaiting entry. It is highly likely that many of these QDROs were submitted for entry and filing under Rule 4:42-1(c), which is commonly known as the five-day rule. In the author's opinion, a careful review of the five-day rule should result in the Court declining to sign and enter these QDROs. The author believes such a result is warranted because a court order can only be entered by consent or as a product of judicial determination in either a contested or default proceeding based upon appropriate findings of fact and conclusions of law pursuant to Rule 1:7-4. The author further believes that a party is not permitted to submit an order to the court containing terms or provisions unilaterally selected. However, this is *exactly* what some practitioners do when submitting QDROs to the court for entry under the five-day rule.

When Rule 4:42-1(c) is scrutinized, it becomes apparent that it was not intended to obviate consent or appropriate judicial determination regarding the complex language contained in most QDROs. Submitting QDROs with provisions that have not been agreed upon or otherwise the subject of findings and conclusions by the court is improper and arguably unethical. Though commonplace, the submission of a QDRO under the five-day rule is a practice the author believes all experienced matrimonial attorneys should avoid.

Rule 4:42-1, Origins and Purpose

Rule 4:42-1 (c) provides as follows:

> Settlement on Notice. In lieu of settlement by motion or consent, the party proposing the form of judgment or order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party not in default together with a notice advising that unless the judge and the proponent of the judgment or order are notified in writing of specific objections thereto within 5 days after such service, the judgment or order may be signed in the judge's discretion. If no such objection is timely made, the judge may forthwith sign the judgment or order. If objection is made, the matter may be listed for hearing in the discretion of the court.

Rule 4:42-1(c) was adopted to address the situation, by neglect or design, where an order or judgment is submitted to opposing counsel and languishes with no response or reply.[1] This often occurs at the conclusion of trials, plenary hearings or, prior to modern motion practice with tentative dispositions or court-prepared orders, after oral argument on motion applications. Prior to the adoption of Rule 4:42-1(c), it was necessary to file another application, typically including a copy of the transcript, for the court to settle the form of judgment or order. This additional application constituted a waste of judicial resources and was viewed as a disservice to both the bench and the public at large.[2]

The five-day rule was added to Rule 4:42-1 as paragraph (c) to address the languishing order phenomenon. Given the existence of findings of fact and conclusions of law made by the court, an order prepared consistent with the record and thereafter submitted pursuant to the new rule provision created a logical, pragmatic approach to resolving the languishing order phenomenon. By virtue of the rationale underlying the adoption of the five-day rule, it is clear that an order should never be submitted or signed unless it accurately memorializes a judicial determination and correlates to Rule 1:7-4 findings of fact and conclusions of law.[3]

The Complexity of QDROs

QDROs or other specialized court orders providing for the division of retirement accounts represent an additional and often complicated step in the divorce process. The preparation and finalization of QDROs often follows lengthy and expensive litigation. Many times, litigants are emotionally and financially exhausted by the time the QDRO is to be drafted. The attorneys are often eager to bring the file to a conclusion. Unfortunately, it can take weeks or months for experts to draft the form, effectuate the preapproval process, and for counsel thereafter to review the work, approve it, and provide the final form to opposing counsel for review and consent.

In these situations, it is tempting to simply submit what one attorney believes is the correct form of QDRO to the court under the five-day rule, especially when adverse counsel ignores the proposed form of order. However, the utilization of Rule 4:42-1(c) under these circumstances is highly problematic. This is true because QDROs often contain critical provisions not specifically bargained for or otherwise included in settlement agreements or judgments.

For example, QDROs may need to address qualified joint and survivorship annuity designations, qualified preretirement survivorship annuity designations, costs related to survivorship elections, the divisibility of post-judgment enhancements to benefits, entitlement to cost of living adjustments, subsequent modifications or conversions of pensions to disability status, the impact of early retirement elections, reversions upon death of the alternate payee, in future elections and other provisions frequently not included in the marital settlement agreement. In fact, most plan administrators will not accept the form of order absent clarity and agreement as to these provisions.

An alternative is to confer with an expert prior to drafting the provisions of the marital settlement agreement and agree upon the specific language to be included in the QDRO, which can even be executed concurrently with the marital settlement agreement. If this is not possible, a notice of motion to settle the form of QDRO or the scheduling of a conference with the court represent other viable options in lieu of the five-day rule in the absence of consent and cooperation.

Ethical Considerations

RPC 3.3 addresses candor toward the tribunal. It specifically prohibits the affirmative disclosure of false or misleading information to the court, or omission of material facts to the court. Submitting a QDRO to the court containing unilaterally imposed terms or omitting material provisions appears to directly violate this RPC.[4]

Conclusion

QDROs, domestic relations orders (DROs), court orders acceptable for processing (COAPs), and other similar forms of order for the division of retirement accounts can be among the most complicated and technical documents attorneys prepare. Unfortunately, some of the plan requirements or technicalities might not be evident until expert involvement during the preparation of the initial draft of QDRO or at a later time upon review by the plan administrator during the approval process. If either party submits a proposed form of QDRO under the five-day rule that includes language not specifically agreed to between the parties or otherwise the subject of judicial determination, the author believes that such a submission constitutes an improper utilization of Rule 4:42-1. A careful review of the history of the rule, as well as the conduct it was drafted to resolve, informs the author's belief. ■

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Endnotes

1. *See* Rule 4:42-1 and the comments contained therein.
2. *Elliot v. Elliot*, 97 N.J. Super. 10 (Ch. Div. 1967).
3. *City of Jersey City v. Roosevelt Stadium*, 210 N.J. Super. 315, 331 (App. Div. 1986). a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or (5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

Commentary

The Certification and Verification of Non-Collusion: A Thing of the Past

by Alexandra K. Rigden

No matter the grounds, in order to file a complaint or counterclaim for divorce in New Jersey, a client must sign the certification of verification and non-collusion under Rule 5:4-2(c). The 'non-collusion' aspect of the rule requires a client to certify that he or she has not 'colluded' with anyone in making the allegations in the complaint or counterclaim.[1] Of course, New Jersey courts do not want litigants colluding to make sworn statements. But, if establishing grounds for a divorce is as simple as alleging six months of irreconcilable differences with no reasonable prospect of reconciliation, with whom would one need to collude? Similarly, if pleading adultery no longer requires corroboration of it,[2] there is no need to collude, much less to certify not having done so. These observations aside, the author never spent more than a few passing moments wondering about the utility or necessity of this certification until, while reading a biography about a famous American divorcée, its roots became clear. It soon became even clearer, from the author's perspective, that the non-collusion aspect of New Jersey's certification of verification and non-collusion has no place in modern-day divorce pleadings.

The biography in question, written by Anne Sebba, was *That Woman: The Life of Wallis Simpson, Duchess of Windsor.* Edward VIII, the former King of England, was so enamored of Wallis Simpson, an American divorcée, that he abdicated the throne in 1936 to marry her.[3] Simpson, a commoner who would eventually become the Duchess of Windsor, was married to her second husband when she began a relationship with the then-king.[4] She and her husband eventually divorced so that she could marry Edward VIII. However, in England in 1936, much like in the United States at that time, it was not nearly as easy to obtain a divorce as it is today.[5]

From 1857, when it was first legalized, until the passage of the 1937 Matrimonial Clauses Act, divorce in England was only available to a wife in cases of her husband's adultery, and it was a two-stage process.[6] First, a decree *nisi* would be issued.[7] A decree *nisi* is a provisional decree that will later be made absolute unless cause is shown why it should not.[8] Following the entry of a decree *nisi*, a decree of absolute divorce would (hopefully) be issued six months later, but only *after* a government official investigated the allegations of the petition to ensure their veracity.[9] The husband's adultery had to be proven, and the petitioner's 'innocence' also had to be proven (*i.e.*, that the wife did not cheat on the husband she was trying to divorce).[10] Unless and until adultery and innocence were proven, a couple could not divorce.[11] To get around this, in cases where there was no adultery, some couples would agree to a story and 'collude' in order to prove a claim for adultery to the king's proctor, the government official in charge of divorce investigations.[12] Colluding with each other and alleging adultery was the only way for some couples to get out of a marriage in a society where divorce was highly frowned upon.[13]

At a different time, across the pond in New Jersey, divorces were similarly harder to obtain than they are today, and any allegation of adultery had to be corroborated.[14] Until 1971, New Jersey required, under N.J.S.A. 2A:34-7, that

> [i]f it appear[s] to the court that the adultery complained of shall have been occasioned by the *collusion of the parties*, and done with an intention to procure a divorce, or that the party complaining was consenting thereto, or that both parties have been guilty of adultery not condoned, no divorce shall be adjudged. (emphasis added).

In 1971, that language was replaced with the following, which is still in effect today:

> [r]ecrimination, condonation and the clean hands doctrine are hereby abolished as defenses to divorce from the bonds of matrimony or from bed and board…."

In the legislative history of R.S. 2A:34-1, *et seq.*, for the "Divorce and Nullity of Marriage 1970 Revision," the proposed language of N.J.S.A. 2A:34-7, abolishing certain defenses, initially included the words "connivance" and "collusion," but they did not make the final cut.

Aside from New Jersey, the author could not find any other state with a blanket requirement that a certification of verification and non-collusion, or something similar, be signed and included with every divorce pleading. In fact, the vast majority of states make no mention of collusion at all in their statutes, but for a few exceptions.

In Tennessee, a divorce 'petitioner,' is required to swear or affirm that the facts stated in the divorce pleadings are "true to the best of the complainant's knowledge and belief for the causes mentioned in the bill," *except* in cases where the grounds for divorce are irreconcilable differences.[15] The statute further provides that "[i]f the issue of whether the affidavit contains the complainant's verification that the complaint is not made out of levity or in collusion with the defendant is not raised at trial, each party waives the right to contest such issue on appeal...."[16]

Another quasi-exception to the general rule of states not requiring a non-collusion certification is Mississippi, which, like Tennessee, draws a distinction between pleadings based on irreconcilable differences and those on fault-based grounds:

> [I]n all cases, except complaints seeking a divorce on the ground of irreconcilable differences, the complaint must be accompanied with an affidavit of plaintiff that it is not filed by collusion with the defendant for the purpose of obtaining a divorce, but that the cause or causes for divorce stated in the complaint are true as stated.[17]

Mississippi's non-collusion affidavit requirement makes sense, as Mississippi's divorce statute specifically states that adultery is a ground for divorce "unless it should appear that it was committed by collusion of the parties for the purpose of procuring a divorce."[18] New Jersey has no such statutory *caveat*.

Sebba's biography clarified for the author that while the certification of verification and non-collusion, specifically the non-collusion aspect, at one time did indeed serve a purpose, it no longer does. It is a vestige of old, a throwback to a time when divorce was much more difficult to obtain and, in fact, discouraged, as a scourge on society. Now, in a time when divorce pleadings require little else than alleging, in effect, that the parties do not get along and probably never will, the author believes a certification addressing non-collusion simply should not be a requirement for divorce pleadings in New Jersey. Its utility has been chipped away by various legislative amendments, including in 2007 when pleading on grounds of "irreconcilable differences" came into effect.[19] The author believes the non-collusion aspect of the certification of verification and non-collusion is unnecessary and redundant when a pleading, in and of itself, is a sworn statement. Notably, there is no attendant requirement in civil or criminal pleadings of this state that a party certify to not having colluded with anyone in making allegations, even in what some would consider 'high-stakes' civil and criminal causes of action, which are often significant and impactful.

The certification of verification and non-collusion has stayed under the radar and remained a part of New Jersey divorce pleadings despite what the author believes is the end of its useful life. There is always room for improvement in the form and substance of pleadings. While the certification takes up no more than few paragraphs, there appears to be no reason to include any mention of non-collusion when there appears to be no legal necessity for it, especially in light of the 1971 amendments.

The Legislature removed any mention of collusion in N.J.S.A. 2A:34-1, *et. seq.*, 45 years ago, and the author believes it is time to similarly amend the New Jersey Rules of Court to reflect societal changes. ■

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Endnotes

1. R. 5:4-2(c).
2. R. 5:7-3.
3. Anne Sebba, *That Woman: The Life of Wallis Simpson, Duchess of Windsor* (2013).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. http://thelawdictionary.org/decree-nisi/.
9. Anne Sebba, *That Woman: The Life of Wallis Simpson, Duchess of Windsor* (2013).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Garrett v. Garrett*, 86 N.J. Eq. 293 (Ch. 1916).
15. Tenn. Code Ann. § 36-4-107 (2016).
16. *Id.*
17. Miss. Code Ann. § 93-5-7 (2016).
18. Miss. Code Ann. § 93-5-1 (2016).
19. N.J.S.A. 2A:34-2(i).

Commentary

A Constitutional Challenge: Should New Jersey Law Require Parents in Non-Intact Families to Contribute to Their Children's College Tuition and Expenses?

by Kenneth A. White

This article seeks to answer whether New Jersey courts should have the authority to compel parents of non-intact families to contribute to the college tuition and related expenses of their children while imposing no such obligation on parents of intact families. New Jersey is in the minority of states in which there is a legal basis for a parent to be legally compelled to contribute to his or her child's college tuition and related expenses. When the issue of satisfying college expenses for a child of divorce arises, family law practitioners often commence their analysis with a consideration of how much each parent should be required to pay. This author, however, submits that the analysis *should* start with whether a litigant going through a divorce or who was previously divorced should have *any* obligation to contribute to the satisfaction of his or her child's college expenses if he or she does not wish to make a voluntary contribution. Since an intact family is not required to provide a debt-free, or parent-subsidized education to a child, this author wonders whether it is appropriate to treat divorced families differently.

This author submits that there are sound arguments against requiring divorced or unmarried parents to contribute to their children's college expenses. This article will set forth those arguments. Moreover, if courts truly conducted the financial analysis required by *Newburgh v. Arrigo,*[1] this author wonders whether any parent outside of a rare, high-income earner, can afford to pay for or contribute to his or her child's private college expenses.

A child support determination includes an analysis of the "need and capacity of the child for education, including higher education…"[2] What had started out as one of 10 enumerated factors to consider when determining the support to be paid by a parent for his or her child grew by way of *Newburg v. Arrigo* into a determination that support for unemancipated children of divorced families can include a contribution toward the costs of a college education, even though the child had attained the age of majority.[3] The *Newburgh* Court then provided a non-exhaustive list of 12 factors a court should consider in evaluating a claim for contribution toward the costs of higher education. Today, after years of numerous reported and unreported decisions, it has become commonplace for family law practitioners to presume that parents who are unmarried, either by divorce or by choice, are required to contribute to the college expenses of their children, absent exceptional circumstances. Thus, as a matter of practice, the courts of the state of New Jersey have seemingly bestowed a right upon children of parents who are unmarried, either by divorce or otherwise, to a debt-free, or reduced-cost college education that children of intact families do not enjoy.

While this author recognizes that his viewpoint does not coincide with the current state of the law of New Jersey, he respectfully submits that there is a constitutional argument against requiring divorced or unmarried parents to satisfy their child's college education expenses when no such burden can be imposed by the state upon a married parent. Alternatively, this author submits that there is a constitutional argument against a child of divorced parents being *entitled* to a college education when no such entitlement exists for children of intact families. The differentiation between children of intact families and children of divorced families relative to this issue is inherently unfair.

This author encourages family law practitioners to vigorously advocate on behalf of their clients who object to being required to satisfy expenses associated with

their children's college educations. Based on this author's discussions with other members of the bar and bench over the past several years, such arguments will be carefully and fairly considered.

Furthermore, an opening (if not an invitation) to challenge the constitutionality of current interpretation of the law requiring divorced or unmarried parents to satisfy college expenses was left open by the New Jersey Supreme Court when it decided *Gac v. Gac* in 2006. In *Gac*, the Court indicated it would not decide the issue of whether it was a violation of the United States or New Jersey constitutions to compel divorced parents, but not married parents, to pay for their children's college educations, as the issue had not been raised before the trial court.[4]

This author contends that the unfair treatment of married versus divorced or unmarried parents with respect to college contributions violates the equal protection clause of the 14th Amendment of the United States Constitution and Article One, Paragraph One, of the New Jersey Constitution. These contentions will be explored below.

Equal Protection for Unmarried Parents

The equal protection clause of the 14th Amendment provides, "No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Similarly, the New Jersey Constitution states, "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."[5] Although the words "equal protection," are not expressly stated, it is recognized that this expansive language within the New Jersey Constitution guarantees the fundamental constitutional right to equal protection under the law.[6]

Under federal law, a three-step approach is applied when analyzing equal protection claims.[7] If the statute that allegedly violates the equal protection clause implicates a fundamental right or a suspect class, courts are to apply strict judicial scrutiny.[8] If the statute that allegedly violates the equal protection clause implicates a 'semi-suspect' class or "substantially affects a fundamental right in an indirect manner," the statute is subject to intermediate scrutiny.[9] All other statutes that are challenged on the basis that they violate the equal protection clause are subject to rational basis review, in which a court must determine whether the statute is "'rationally related to legitimate government interests.'"[10]

The New Jersey Constitution does not mirror the United States Constitution, but rather employs a more flexible approach.[11] In New Jersey, courts examine whether there is an appropriate governmental interest that is furthered by the differential treatment of the individuals involved.[12] New Jersey courts have attempted to strike a balance between the nature of the affected right, the extent to which the government restriction imposes on that right, and the public need for the restriction.[13] Although, equal protection claims are treated differently under New Jersey's balancing test than under the United States Supreme Court's rational basis test, "the two approaches are substantially the same and will often yield the same result."[14]

The question, therefore, becomes, should New Jersey courts have the authority to compel parents of non-intact families to contribute to the college education of their children while simultaneously allowing parents of intact families to be free of the same obligation? If the court closely scrutinizes the finances of unmarried parents and compels them to contribute to college, should not the court also examine a married couple's decision on how or whether to finance a child's college expenses?

In *Ricci v. Ricci*, the Appellate Division reiterated the fundamental liberty interest of all parents in the right to rear their children, as well as the fact that the "Federal and State Constitutions protect the inviolability of the family unit."[15] The *Ricci* court referenced the New Jersey Supreme Court's decision in *Fawzy v. Fawzy*, in which the Court stressed that there must be "deference to parental autonomy" and the state was restricted from "second-guess[ing] parental decision making or interfer[ence] with the shared opinions of parents regarding how a child should be raised."[16]

The constitutional arguments made by the litigants in *Ricci* involved the due process clause instead of the equal protection clause. This author, therefore, suggests that litigants should consider making equal protection arguments at the trial court level in order to seek appellate review of the issue of whether being required to contribute to a child's college tuition violates the United States and/or New Jersey constitutions. The issue may be ripe for judicial review.

Looking to neighboring jurisdictions, in *Curtis v. Kline*, the Pennsylvania Supreme Court analyzed the constitutionality of an act that authorized the courts to

order parents who are separated, divorced, unmarried, or otherwise subject to an existing support obligation to financial contribute to the educational costs of their child.[17] Ultimately, the *Curtis* Court "could conceive of no rational reason why those similarly situated with respect to needing funds for college education, should be treated unequally."[18] While the focus of the *Curtis* Court's analysis was the different treatment of children needing funds for college, the same reasoning can and should be applied to the different treatment of parents in New Jersey with children needing funds for college.

This author contends that there may not be a rational and legitimate governmental interest in requiring parents who are separated, divorced, unmarried, or otherwise subject to an existing support obligation to contribute toward their child's higher education expenses when no requirement exists for parents remaining married. Further, under New Jersey's equal protection analysis, it would not appear that any governmental interest is furthered by the different treatment of married as compared with unmarried/divorced parents.

There are philosophical as well as financial considerations that affect parents' decisions about college contribution. Arguably, they should be accorded due deference no matter what the marital status of the parents happens to be.

Although the state may have a legitimate purpose in encouraging *all* parents to provide support to children seeking higher education, the state cannot differentiate between parents based on marital status, based on the reasoning that *some* non-intact families have parents who are unwilling to provide support to children seeking higher education, while others may not want to provide that support or are otherwise unable to do so.

In applying New Jersey's equal protection analysis, no governmental interest is furthered by the differential treatment of married vs. unmarried/divorced individuals. This author submits the state cannot identify a government interest in requiring some parents to pay for their children's post-secondary educations and not requiring others to do so.

The nature of the affected right is significant. In New Jersey, citizens (children) do not have a right to a higher education, much less the right to funding for that higher education. The nature of the right to spend money on a child is significant because allowing the court to choose how individuals spend their money impacts one's basic constitutional rights to life, liberty, and property.

Additionally, the extent to which the government restriction imposes on that right is substantial. The cost of a college education in this country could easily exceed $200,000, depending on the educational institution.[19] As a result of the current application of the law, divorced parents can be forced to liquidate assets or incur debt in the tens or perhaps hundreds of thousands of dollars to pay for a child's post-secondary education, while parents in intact families are not obligated to incur any liabilities or debt.

Moreover, there is no public need for unmarried and/or divorced individuals to be obligated to contribute to the educational expenses of their children. At 18 years old, an individual is already considered an adult, having reached the age of majority. In making the adult decision to pursue a college education, that individual should be responsible for the costs associated with that college education. No public need exists that would require some parents to contribute while other parents would not be obligated.

In New Jersey, parents are currently being treated unequally as a result of their marital status. Some parents are forced to pay for their child's education, while others are not. An analysis should be commenced as to whether this practice violates the equal protection clauses of the United States and New Jersey constitutions, as differential classes of parents are treated differently. This author contends that this difference (married versus unmarried parents) is not rationally related to a legitimate governmental purpose, as the government cannot show how compelling unmarried parents to pay for higher education and not imposing the same requirement on married parents furthers a legitimate government purpose. Considerations, including the nature of an adult parent's right to spend his or her money, the significant cost of contributing to college expenses, and the lack of public need, further support the argument that the unequal treatment of parents may be unconstitutional. Quite simply, it would appear to be unconstitutional to hold that children of intact families have no right to have a college education funded by their parents, while children of divorced parents have such a right.

A Related Issue: The Amount of Financial Support for College-aged Children Often Required of Parents

Many readers may disagree with this author's contention that it is unconstitutional to require divorced parents to pay for their child's college expenses. Giving due

consideration to such opposition, this author respectfully suggests that the family court may require too many litigants to satisfy the costs and expenses associated with their children's college education. Stated differently, even if there is no constitutional violation, courts should be much more selective when compelling parents to contribute to their child's college educational expenses.

Such a result is supported when the permissive, not obligatory, language of *Newburgh* is scrutinized. Specifically, a parent's ability to afford "the significant cost of college must be examined; it is not presumed."[20] The *Newburgh* Court noted, "Some parents cannot pay, some can pay in part, and still others can pay the entire cost of higher education for their children. In general, financially capable parents *should* contribute to the higher education of children who are qualified students."[21] 'Should' does not equate to 'must,' and yet, even though this distinction should be self-evident, trial courts and practitioners have often interpreted *Newburgh* as including mandatory rather than permissive language.

Should unmarried parents who may already be struggling to provide for their own daily expenses or retirement be compelled to contribute to the continuing education of their children? More often than not, this author's experience is that they are, and there is a fundamental misunderstanding and misapplication of the *Newburgh* factors that requires attention by the bench and the bar.

Unmarried families may or may not have children who require financial assistance for higher education, just as intact families may or may not have children who require financial assistance. As each family's financial situation varies, the courts and Legislature cannot make the over-reaching assumption that children of non-intact families will fare worse than children of intact families, and must necessarily be afforded additional protections. While married individuals have the freedom to allocate their finances as they deem fit and not provide payment for college expenses for children, those who are unmarried are unfairly and inequitably ordered by the courts to provide considerable support despite the child(ren)'s aptitude or personal, supposedly autonomous decision to not do so.[22]

The Appellate Division's decision in *Ricci v. Ricci* illustrates this argument. The holding in *Ricci* is restricted to determining the "interplay between emancipation and a parent's obligation to provide for a child's support in the form of college tuition, when the child has left the parent's home."[24] *Ricci* stems from a consent order entered by divorced parents emancipating their daughter, Caitlyn, and Caitlyn intervening in her parents' divorce litigation. Caitlyn and her parents had vastly different opinions regarding her emancipation and her dependency upon them. She sought to vacate the consent order, which served to emancipate her, compel her parents to satisfy the expenses associated with her full-time community college education costs, provide financial assistance to acquire a new car, continue her health insurance coverage and pay counsel fees and costs.[25]

When the trial judge granted Caitlyn's motion to intervene, he deemed Caitlyn "un-emancipated [sic] solely for the purpose of a potential contribution from [her parents] as it relates to college costs."[26] The trial court also initially obligated Caitlyn's parents to pay for one year of community college after having applied for scholarships and grants and, for the years thereafter, directed the parties to "exchange tax returns and the three (3) most recent paystubs in regards to determining a child support percentage for each party." Accordingly, the judge made a finding that the parents would be obligated to pay for their daughter's college costs seemingly regardless of their financial circumstances. Notably, the trial court did *not* hold a plenary hearing regarding emancipation and did not make findings under the 12 *Newburgh* factors for college contributions. There was no inquiry into the financial circumstances of the parties.

When Caitlyn later transferred from a community college to a university, her total college expenses increased considerably. So, too, did the total contribution of her parents based upon their percentage obligations to contribute.

In its review, the appellate court found that only after "Caitlyn proves she was unemancipated must a *Newburgh* analysis commence."[27] The court acknowledged that this decision should look into the facts and circumstances "surrounding the requested college contributions, including the scope and cause of ongoing estrangement and non-communication" whereby the court referred directly to *Gac v. Gac*.[28] And lastly, after an "affirmative showing college contribution is warranted, the inquiry turns to the amount of the financial obligation itself."[29] The *Ricci* court reiterated what this author believes to be an often-forgotten principle, that the inquiry into the financial obligation "encompasses parental ability to pay," which other courts have found is the most important among the *Newburgh* factors.[30]

It is imperative that due consideration be given to the financial ability of parents to pay for their child's college

costs and expenses. The household median average income in New Jersey is $72,222.[31] Per the Economic Policy Institute, people are not putting away significant or sufficient percentages of their income on a regular basis to support themselves in their retirement.[32] If divorcing couples with only one spouse working are only earning approximately $72,222 per household, and the court is already directing that this income support two households instead of one, how could that income also support contributing to college tuition for a student/child when the total tuition cost for a year can exceed $10,000, $20,000, or more?

This author submits that it should be the exception, as opposed to the rule, to direct divorced or unmarried parents with an average income to contribute to the college education expenses of their children. In circumstances where both parents are high-income earners, a different result may be mandated.

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Endnotes

1. *See Newburgh v. Arrigo*, 88 N.J. 529 (1982).
2. N.J.S.A. 2A:34-23(a)(5).
3. *Newburgh*, 88 N.J. at 543.
4. *Gac v. Gac*, 186 N.J. 535 (2006). The door to a constitutional challenge was once again opened in 2017, in *Ricci v. Ricci*. In *Ricci*, the Appellate Division discussed parental autonomy under the due process clause of the U.S. Constitution. The ultimate holding, however, did not rest on due process protections, as a predicate finding of emancipation was required.
5. N.J. Const. Art. I, ¶ 1.
6. *New Jersey State Bar Ass'n v. State,* 387 N.J. Super. 24, 40 (App. Div. 2006).
7. *Id.* at 41.
8. *Sojourner v. N.J. Dep't of Human Servs.,* 177 N.J. 318, 330 (2003).
9. *Barone v. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., Etc*, 107 N.J. 355, 365 (1987).
10. *Sojourner*, *supra,* 177 N.J. at 330, (*quoting Washington v. Glucksberg,* 521 U.S. 702, 728 (1997)).
11. *New Jersey State Bar Ass'n v. State*, 387 N.J. Super. 24, 41-42 (App. Div. 2006).
12. *Ibid.*
13. *Ibid. See also Barone,* 107 N.J. at 368.
14. *Brown v. State,* 356 N.J. Super. 71, 79 (App. Div. 2002).
15. For federal purposes, the New Jersey support statute and case law do not implicate either a fundamental right or a suspect class. Likewise, the law does not implicate a semi-suspect class. Thus, the law should be reviewed in terms of the rational basis test. *New Jersey State Bar Ass'n v. State*, 387 N.J. Super. at 42-43.
16. *Ricci v. Ricci*, 448 N.J. Super. 546, 568 (App. Div. 2017), *citing In re Adoption of a Child by W.P. & M.P.*, 308 N.J. Super. 376, 382 (App. Div. 1998) (*citing Stanley v. Illinois*, 405 U.S. 645, 651 (1972), vacated on other grounds, 163 N.J. 158 (2000).
17. *Ibid. Citing Fawzy v. Fawzy*, 199 N.J. 456, 473-74 (2009)(*quoting* Janet Maleson Spencer and Joseph P. Zammit, Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents, 1976 *Duke L.J.* 911, 913 (1976)).
18. 542 Pa. 249 (1995).
19. *Id.* at 260.
20. Per the National Center for Education Statistics, for the 2014–15 academic year, average annual current dollar prices for undergraduate tuition, fees, room, and board were estimated to be $16,188 at public institutions, $41,970 at private nonprofit institutions, and $23,372 at private for-profit institutions. (https://nces.ed.gov/fastfacts/display.asp?id=76).
21. *Ricci*, 448 N.J. Super. at 573.
22. *Newburgh*, 88 N.J. at 544. (Emphasis added.)

23. *See Ricci*, 448 N.J. Super. at 569, *quoting Fawzy*, 199 N.J. at 473-74, "parental autonomy includes the 'freedom to decide wrongly.'"
24. Although this case raised constitutional concerns (addressed in this article), the Court does not rule based upon the constitutionality argument, in part because it was not raised in the trial court, and also because the issue of emancipation required factual findings be made.
25. *Ricci*, 448 N.J. Super. at 556.
26. *Id.* at 561.
27. *Id.* at 580.
28. *Id.* at 581.
29. *Id.*
30. *Id.*, *see also Weitzman v. Weitzman*, 228 N.J. Super. 346, 357 (App. Div. 1988), stating among the *Newburgh* factors, parents' ability to pay is clearly the most significant.
31. Study: Ranks of N.J. millionaires growing, Samantha Marcus, *Star Ledger*, Sunday March 12, 2017, page A9.
32. "Nearly half of families have no retirement account savings at all. That makes median (50th percentile) values low for all age groups, ranging from $480 for families in their mid-30s to $17,000 for families approaching retirement in 2013. Almost nine in 10 families in the top income fifth had savings in retirement accounts in 2013, compared with less than one in 10 families in the bottom income fifth." (http://www.epi.org/publication/retirement-in-america/#charts).