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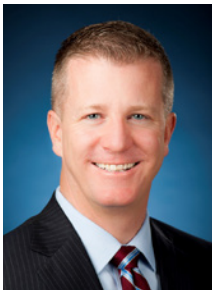
Chair's Column

# A Closer Look at New Jersey's Child Support Probation Statute, N.J.S.A. 2A:17-56.67

*by Michael A. Weinberg*



It has long been the law of this state that a child support obligation terminates upon emancipation of the child being supported. Traditionally, emancipation of a child has been reached "when the fundamental dependent relationship between parent and child is concluded, the parent relinquishes the right to custody and is relieved of the burden of support, and the child is no longer entitled to support."[1] "When a child moves beyond the sphere of economic influence and responsibility exercised by a parent and obtains an independent status on his or her own, generally he or she will be deemed emancipated."[2]

Although there remains a presumption of emancipation upon the child's reaching the age of majority, that presumption is rebuttable.[3] "The demonstrable needs of the child, not the child's age, are determinative of the duty of support."[4] Indeed, as explained by the Court in *Schumm v. Schumm*:

> It has been frequently, and erroneously, argued…that when a child reaches the age of majority he is immediately emancipated. This is not the law. There is no fixed age in the law when emancipation occurs.[5]

N.J.S.A. 2A:17-56.67 was enacted on Jan. 19, 2016, and applies to all child support orders entered in this state prior or subsequent to Feb. 1, 2017. As discussed below, the statute now provides for age 19 as the presumptive age for termination of child support, and establishes a procedure for the continuation of child support up to the child's 23rd birthday.

The statute was enacted, in large part, to address the impact of the ever-increasing number of cases requiring monitoring and enforcement by New Jersey's Probation Division, along with a declining collection rate, upon the state's eligibility for federal funding. While this goal is certainly laudable, the statute is now being misconstrued as mandating that the obligation to

pay child support terminates by operation of law when a child reaches age 23. Moreover, while the statute provides for a child who has reached age 23 to seek a court order requiring the payment of "financial maintenance," there is no specific definition of "exceptional circumstances" that would warrant the payment of same beyond the child's 23rd birthday.[6]

N.J.S.A. 2A:17-56.67 provides, in part:

> Unless otherwise provided in a court order or judgment, the obligation to pay child support shall terminate by operation of law without order by the court on the date that a child marries, dies, or enters the military service. In addition, a child support obligation shall terminate by operation of law without order by the court when a child reaches 19 years of age unless:
>
> (1) another age for the termination of the obligation to pay child support, which shall not extend beyond the date the child reaches 23 years of age, is specified in a court order;
>
> (2) a written request seeking the continuation of child support is submitted to the court by a custodial parent prior to the child reaching the age of 19 in accordance with subsection b. of this section; or
>
> (3) the child receiving support is in an out-of-home placement through the Division of Child Protection and Permanency in the Department of Children and Families.[7]

In the event a notice of proposed termination of child support is received,[8] the statute now imposes the burden upon the custodial parent to submit a written request, "on a form and within timeframes promulgated by the Administrative Office of the Courts, with supporting documentation to the court." The written request must set forth a projected future date when child support will terminate and seek the continuation of child support beyond the child's 19th birthday under the following circumstances:

> (a) the child is still enrolled in high school or other secondary program;
>
> (b) the child is a student in a post-secondary education program and is enrolled for the number of hours or courses the school considers to be full-time attendance during some part of each of any five calendar months of the year; or
>
> (c) the child has a physical or mental disability, as determined by a federal or State government agency, that existed prior to the child reaching the age of 19 and requires continued child support.[9]

The statute also provides that a custodial parent may file a motion with the court seeking to extend the child support obligation beyond the child's 19th birthday "due to exceptional circumstances as may be approved by the court."[10]

If the court determines the custodial parent has established "sufficient proof" to continue the child support beyond the child's 19th birthday, the statute directs that the court is to issue an order establishing the prospective date of child support termination. A copy of that order is to be provided to both of the child's parents. In the event the parent responsible for paying child support disagrees with the court's decision or otherwise desires to modify or terminate the child support obligation, that parent has the right under the statute to file a motion "at any time" seeking relief from that obligation.[11]

Notwithstanding the foregoing, the statute specifically provides that "the obligation to pay child support shall terminate by operation of law when a child reaches 23 years of age." However, the statute provides that it shall not be construed to:

> (1) prevent a child who is beyond 23 years of age from seeking a court order requiring the payment of other forms of financial maintenance or reimbursement from a parent as authorized by law to the extent that such financial maintenance or reimbursement is not payable or enforceable as child support as defined in section 3 of P.L.1998, c.1 (C.2A:17-56.52); or
>
> (2) prevent the court, upon application of a parent or child, from converting, due to exceptional circumstances including, but not limited to, a mental or physical disability, a child support obligation to another form of financial maintenance for a child who has reached the age of 23.[12]

Following the enactment of N.J.S.A 2A:17-56.67, the Court adopted Rule 5:6-9, entitled "Termination of Child Support Obligations," effective Sept. 1, 2017. The rule substantially tracts the provisions of the statute, and provides, in part:

> Duration of Support. In accordance with N.J.S.A. 2A:17-56.67 et seq., unless otherwise provided in a court order, judgment, or preexisting agreement, the obligation to pay current child support, including health care coverage, shall terminate by operation of law when the child being supported:
> (1) dies;
> (2) marries;
> (3) enters the military service; or
> (4) reaches 19 years of age, except as otherwise provided within this rule.
>
> In no case shall a child support obligation extend beyond the date the child reaches the age of 23.[13]

Thus, while New Jersey law has long provided that there is no automatic emancipation date for a child, the statute and court rule now provide that child support will terminate for a child who has reached age 19, unless: 1) an order specifies another age for the termination of child support, "which shall not extend beyond the date the child reaches 23 years of age"; 2) there is a written request by the custodial parent for continuation of child support beyond the child's 19th birthday; or 3) the child receiving support is in an out-of-home placement through the Division of Child Protection and Permanency in the Department of Children and Families under the statute and rule. Moreover, it is now the obligation of the parent receiving child support who receives a notice of termination from the Probation Division to submit to the court a written request for continuation "with supporting documentation and a future termination date" if the child being supported is: "(i) still enrolled in high school or other secondary educational program; (ii) enrolled full-time in a post-secondary educational program; or (iii) has a physical or mental disability as determined by a federal or state agency that existed prior to the child reaching the age of 19 and requires continued support."[14]

The potential inequity resulting from strict application of the statute within the context of a child's emancipation and a parent's continued duty of support for that child is highlighted in the recent matter of *S.E. v. B.S.B.*[15]

In *S.E. v. B.S.B*, the parties' child was born in Nov. 1993. The child was living with his mother (the plaintiff) and had no relationship with his father (the defendant). In May 2017, after receiving a notice of termination from the probation division, the plaintiff filed a *pro se* motion seeking to continue the defendant's existing court-ordered child support obligations.[16]

During the motion hearing, the trial judge preliminarily noted the defendant's court-ordered child support obligations presumptively terminated under the statute when the child reached the age of 23 in Nov. 2016, and observed that the court could order the defendant's continued financial support after the child's 23rd birthday in exceptional circumstances pursuant to N.J.S.A. 2A:27-56.67(e)(2).[17]

The plaintiff testified during the motion hearing that the child had been born with cerebral palsy, and was thereafter diagnosed with attention deficit/hyperactivity disorder. She further testified that the child had graduated from high school; was taking classes at the local community college; and had unsuccessfully applied for numerous jobs. Additionally, the plaintiff testified that she had successfully obtained Social Security Disability for the child, who was then receiving $325 per month. The defendant's testimony during the motion hearing was quite limited since he had never had contact with the child and was unaware of the child's medical conditions until 2015 or 2016.[18]

In ruling upon the matter, the trial judge found the plaintiff supplied no medical evidence "to substantiate the child's continuing need or disability of a severe nature," and that the medical records the plaintiff had supplied failed to "indicate that the child's cerebral palsy is…to a severity required for a parent to necessarily provide financial…support…beyond the age of [twenty-three]…." The trial judge thus entered an order denying the plaintiff's application, and an appeal followed.[19]

Upon review, the Appellate Division noted that N.J.S.A. 2A:17-56.67 terminates child support obligations "by operation of law when a child reaches [twenty three] years of age," unless "upon application of a parent or child," the court coverts "a child support obligation to another form of financial maintenance for a child who has reached the age of [twenty-three]" "due to exceptional circumstances including…a mental or physical disability."[20] The Appellate Division further noted that N.J.S.A. 2A:34-23(a) continues to provide:

> The obligation to pay support for a child who has not been emancipated by the court shall not terminate solely on the basis of the child's age if the child suffers from a severe mental or physical incapacity that causes the child to be financially dependent on a parent. The obligation to pay support for that child shall continue until the court finds that the child is relieved of the incapacity or is no longer financially dependent on the parent. However, in assessing the financial obligation of the parent, the court shall consider, in addition to the factors enumerated in this section, the child's eligibility for public benefits and services for people with disabilities and may make such orders, including an order involving the creation of a trust, as are necessary to promote the well-being of the child.[21]

Based upon the foregoing, the Appellate Division concluded:

> Read together, these provisions mean that "by operation of law," a parent has no continuing obligation to support an adult child after age twenty-three, unless the child or the moving parent overcomes that presumption and demonstrates the child's continuing "severe mental or physical incapacity causes" his continued financial dependence. State conversely, if an adult child suffers from a disability but is self-sufficient, he is generally considered emancipated and beyond the sphere of a parent's legal, if not moral, obligation.[22]

In affirming the trial court's decision, the Appellate Division deferred to the judge's factual findings, and found that "Plaintiff bore the burden of rebutting the presumption of emancipation as a matter of law when a child reaches the age of majority." Although the Appellate Division noted that it was "sensitive to plaintiff's concerns about [the child's] future well-being and financial security," the court noted that their review of the matter "is circumscribed."[23]

Following the Appellate Division's decision in *S.E. v. B.S.B.*, the New Jersey State Bar Association's (NJSBA's) Family Law Section proposed legislation to simplify and clarify N.J.S.A. 2A:17-56.67. The section's proposed revisions to the statute, can be summarized as follows: 1) including an exception that would extend the age of ultimate termination of child support to age 26; 2) making the presumptive age of child support termination age 23, not age 19; and 3) clarifying that the statute only relieves the probation department's obligation to collect child support and does not automatically terminate the child support obligation. Instead, under the proposed revisions, child support may continue outside of the probation department by direct payment to the custodial parent or some other means.

As chair of the section, I am pleased to report that the section's proposed revisions to the statute were recently approved by the Legislative Committee, and thereafter passed unanimously by the NJSBA Board of Trustees. As such, the section remains hopeful the statute will be amended to incorporate the proposed revisions and thereby clarify and confirm the longstanding law of this state, that there is no automatic emancipation date for a child. Instead, the determination of whether a child is emancipated should continue to depend upon the specific facts and circumstances of each case.

## Endnotes

1. *Fillipone v. Lee*, 304 N.J. Super. 301, 308 (App. Div. 1997).
2. *Bishop v. Bishop*, 287 N.J. Super. 593, 598 (Ch. Div. 1995).
3. N.J.S.A. 9:17b-3; *Weitzman v. Weitzman*, 228 N.J. Super. 346, 356 (App. Div. 1988).
4. *Patetta v. Patetta*, 358 N.J. Super. 90, 93-94 (App. Div. 2003).
5. *Schumm v. Schumm*, 122 N.J. Super. 146, 150 (Ch. Div. 1973).
6. N.J.S.A. 2A:17-56.67.
7. N.J.S.A. 2A:17-56.67(a).
8. *See* N.J.S.A. 2A:17-56.67(d).

9. N.J.S.A. 2A:17-56.67(b)(1)(a)-(c).
10. N.J.S.A. 2A:17-56.67(b)(2).
11. N.J.S.A. 2A:17-56.67(c).
12. N.J.S.A. 2A:17-56.67(e).
13. New Jersey Court Rule 5:6-9.
14. *See* N.J.S.A. 2A:17-56.67 and New Jersey Court Rule 5:6-9.
15. *S.E. v. B.S.B.*, unreported Appellate Division decision decided Oct. 3, 2018.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id., citing* N.J.S.A. 2A:17-56.67(e).
21. *Id., citing* N.J.S.A. 2A:34-23(a).
22. *Id., citing Kruvant v. Kruvant*, 100 N.J. Super. 107, 119 (App. Div. 1968).
23. *Id.*

# Inside this issue

## Editor-in-Chief's Column

# Telling Children About the Divorce

*by Charles F. Vuotto Jr.*

As family lawyers, we are not only required to know and understand family law, but also, to some degree, the emotional and psychological issues at play. This obligation becomes more necessary when dealing with children impacted by divorce. We often first meet our clients when they are on the verge of deciding whether to proceed with a divorce. They are uncertain about proceeding with such a highly disruptive decision. As such, although they may have their suspicions, it is usually the case that the children do not know that a divorce is in their future. In such situations, we, as divorce attorneys, are very often asked (or should be able to advise to some degree) about how to correctly proceed with telling children about an impending divorce in a way that causes the least harm and upset to them.

This column outlines 10 key considerations and suggestions that will help guide the family lawyer when advising a client in this situation.

1. **Speak together.** Try to avoid telling the children about the divorce independently. Presenting a united front allows the children to see that you and your co-parent still can and will work together for their best interests.
2. **Consider location, location, location**. Try to speak to the children in a quiet and safe place for them.
3. **Explain emotions.** Depending upon the age of the children, parents should understand that the children may have a suspicion that something is wrong. They may even think that a divorce is a possibility. Young children may not understand the content of the fighting; however, they can pick up on negative emotions. One negative emotion that is frequently displayed with marital discord is anger. Typically, children view anger as frightening, and don't understand what is underneath it. Anger is a secondary emotion (*i.e.*, guilt, shame, disgust, envy) of one of the primary emotions (*i.e.*, fear, sadness, joy, interest, surprise). Fear and sadness are often uncomfortable for people, making them feel vulnerable and often not in control. To avoid uncomfortable feelings, people shift subconsciously into anger mode. Without getting into the substance of the disputes, it is important for parents to explain these emotions to their children, so they can understand why mom is sad or dad is angry, as well as their own emotions. Explain that these emotions are normal, and they should feel free to express them. Research shows children who are taught about emotions from their parents form stronger friendships with other children, can regulate their moods and are able to self-soothe when they are upset.
4. **Show appropriate emotions.** It's ok to cry or get choked up. Some parents try to be 'strong' for their children by not showing any emotions while discussing divorce, as a means of protecting them. Unfortunately, it sends a message to the children that it's not appropriate to be upset about the situation. Children see how their parents display emotion and react to situations and, in turn, they imitate these behaviors.
5. **Use age appropriate terms/explanations to ensure the children understand what is being explained.**
   a. **Babies and toddlers:** Babies and toddlers do not have the ability to understand complex events, anticipate future events or understand feelings.
   b. **Preschoolers:** Preschoolers need simple, concrete explanations. Stick to the basics: which parent will be moving out, where will the child live, who will look after him or her and how often he or she will see the other parent. Be prepared for questions, and do not expect one conversation to be sufficient; several short talks are more effective.
   c. **School-aged children (six-11 years of age):** School-aged children ages five to eight will not understand the concept of divorce and may feel like their parents are divorcing them. Children ages eight to 11 need reassurance that their parents will not abandon them. With them, it is important to reiterate that the divorce is not their fault. Focusing on stable care and routines are still very important during this time.

d. **Teenagers (12-19):** It's important to be truthful, yet sparse with the details, when discussing divorce with teenagers. Too much detail about the issues that led to the divorce can often be burdensome and lead to anxiety, guilt and worry.

6. **It is imperative parents explain that they tried their best to make the relationship work and fix the issues within the marriage.** Parents need to be careful not to say, "we are divorcing because we can't get along." This sends a message that relationships can end if people simply are not getting along. If this reason is used, the children can have unrealistic expectations regarding relationships. Let them know that this is something that mom and dad have decided to do after a long time of trying to make things work better. Also, they should be told that this is an adult decision and has nothing to do with anything they said or did.
7. **Ask the children what their biggest fears are regarding the divorce.** Let the children know you care about their concerns relative to the divorce. However, let them know they can't change this by being 'better' or 'nicer.'
8. **Explain to the children what is going to happen, when they will see each parent, living arrangements etc.** A child's common worries about divorce could be: If I don't see my dad or mom, will he or she come back? If I make them upset will they come see me? Let them know that they will continue to see the other parent. If possible, tell them what the plan will be.
9. **Do not make false promises you can't follow through with just to appease the children.** Let them know you will all get through this. However, it's important to be honest. Honesty is the foundation for a healthy relationship. If they can't trust their parents, who can they trust?
10. **Don't make them feel as though they must change how they feel about each parent.** Let them know they should continue to love and show affection toward each parent. They should know that doing so will not make them appear disloyal to the other parent.

In addition to the above 10 pointers, there are five more pointers to consider in advance or following the initial discussion with your children.

1. **Advise third parties.** It might help to let close family members, healthcare providers and/or teachers know that you will be speaking (or have spoken) to the children about divorce. This may help them deal with the aftermath to the extent they encounter the children.
2. **Be sure to follow up.** A few days after you speak to the children, follow up. See how they are doing. See what they understood about what was said to them. Did they get it right? Do they have any misperceptions? If so, correct them. However, don't hound them about the issue.
3. **Treat your co-parent well.** The single most important thing in helping children through divorce is how the parents treat each other (both in and out of the presence of the children). Here are some points to consider:
   a. A custodial parent's support of the other parent's involvement is related to positive child outcomes.
   b. Joint caretaking is best when parents cooperate, live in close proximity and there are no issues of abuse.
   c. Mothers and fathers may express their involvement with children differently.
   d. Parents' adjustment influences their children's adjustment.
   e. Each parent must assume some of the other parent's 'natural style.' Children need to learn to 'read' each parent's style of nurturing and take comfort from each parent.
   f. Exposure to parental conflict and anger makes children feel insecure. Exposure to parental conflict and anger during transitions makes children feel responsible and guilty. Exposure to parental conflict and anger may be a reason why some studies show harm to children when there are frequent visits in high-conflict families.
   g. Children suffer harm when their parents have poor relationships, regardless of the parenting time arrangements.
4. **Seek assistance.** Parents should not hesitate to seek assistance from third parties to help them through this process. It may be limited to family, friends, healthcare providers, teachers or mental health professionals trained in marital disputes and children.
5. **Read.** There are many resources on this topic. Parents should be counseled to take advantage of them. ■

*The author wishes to acknowledge the substantial contribution to this column by Carly DeCotis, licensed professional counselor, MA, NCC, LPC, ACS, CCS, of Summit.*

Executive Editor's Column

# Judicus Perfectus: How to Avoid Judging the Judges

*by Ronald G. Lieberman*

As practitioners, we invariably explain to our clients the risk of going into court to have a judge make a decision. The idea of a party being in front of a judge creates enormous problems for the practitioner to explain outcomes to his or her clients. Most practitioners reading this column can understand how frustrating it is to tell or imply to your client that the law in the courtroom may not be what you painstakingly explained to him or her about the law contained in the statutes or case law. Indeed, the large volume of cases that judges have on their dockets means that they may not be deciding cases on an individual basis (on the merits) but instead with preconceived notions of outcomes.[1]

Is that situation really so surprising when one set of motions and cross motions can have a total of 12-24 (or more) items of relief? Multiply that out by the total motion volume in a given day, and a judge can be asked to rule on hundreds of different issues each day. It is truly a gargantuan task.

We explain to our clients that we cannot predict outcomes. We may even regale our clients with stories of how we went into court expecting one result and the complete opposite occurred. But what do we really know about how the judges end up judging? Understanding judicial behavior would help us help our clients make informed decisions.

Every day that a judge is on the bench, he or she is expected to be unfailingly impartial, impeccably civil to everyone, unyieldingly professional and, most importantly, correct in their judgment. Judges are expected to be detached from the raw emotions spread in front of them on a daily basis and, in fact, be infallible in the decisions rendered from the bench. Of course, that is not reality. Judges base their decisions on the information that is available to them, and how they view that information can vary, not only from courtroom to courtroom, but from day to day. That information is viewed through the prism of the judge's own eyes and personal experiences. Do we as practitioners appreciate the stresses that judges face each day? Do we understand on an intellectual level that judges remain human, even after they take their oath and put on the black robe?

Judges' lives change when they are elevated from practicing attorneys to the bench. In fact, judges report that their lives change more than they thought possible when they assume their new role. Their relationships with former peers become more distant and formal; they have to curtail political activity, they acquire a 'new first name,' and they face new pressures society places on them.[2]

Additionally, judges bring their own passions, emotions and prejudices to the bench.[3] Of course the fact that they bring their own views to the bench is hardly a new insight. In fact, Benjamin Cardozo, in 1921, wrote the following about judges:

> I have spoken of the situation which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed… deep below the consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge… I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sleep of perturbing and deflecting forces. Nonetheless, if there is anything of reality in my analysis of the judicial process, they do not stand aloof, on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.[4]

Today's judges preside over caseloads much greater than their counterparts of years' past, involving a larger

range of issues and more complex factual inquiries.[5] So in addition to a larger caseload than in the past, judges today are more involved in each case, and are faced with more complicated issues in their cases.

There are different views as to how a judge approaches his or her role on the bench. One view, called the legal model, sees the judicial role as involving an effort to follow the requirements of legal doctrine.[6] The second model, called the attitudinal model, sees judges as acting purely on the basis of policy preferences reflecting their own views.[7] The third and final model, called the strategic model, sees judges as acting to effect policy preferences with a longer view on the outcomes.[8] Those models are all what I would call a '10,000-foot perspective' of judging, and ignore completely the idea of judges being human beings.

But what about the theory that judges are concerned with others' assessment of their performance? Don't judges actually care about their standing with their colleagues and other decisionmakers?[9] As Ohio State University professor and author Lawrence Baum found, judges, being people, want to be liked.[10] Even if one suggests that judges are likely to choose personal audiences that reflect their pre-existing policy and legal positions, do they have the ability to choose the audiences in their professional lives any more so than attorneys? I do not see how that could be possible, because absent an assignment judge or a presiding judge, line judges do not choose their caseloads. Even our families, social groups, and peers are often selected for us for reasons independent of our own free choice, and personal audiences can affect behavior.[11]

Baum opines that judges who want the respect of practicing lawyers are judges who spent most of their pre-judicial careers practicing law, as opposed to judges who come to the bench from a largely political career, who do not have the same view of acceptance among professional peers.[12] All of this suggests that Baum is viewing judicial behavior as being affected by personal audiences, as opposed to being driven by more idealized notions of adherence to legal principals and policy perspectives regarding a judge's role on the bench. The idea that the interaction between judges and their colleagues (meaning the judges' personal audiences) may affect decision making was explored at length in an article 12 years ago, exploring "ideological amplification" and "ideological dampening" of judges.[13]

A 'shocking' aspect of judicial decision making is that the results of discretionary decision making are by no means uniform. I say shocking because just as individual family lawyers may view the same problem differently, individual judges may view the same legal question differently. Each discretionary decision judges make in the family law arena presents its own unique features. A judge can find evidence to either support or discredit the champion of one side or the other of a claim. This discretion does not mean a judge is acting inappropriately, because sometimes discretion produces outcomes relying more on the judge's private values as opposed to public standards. Judicial discretion is a thorny issue, to be sure.[14]

An explanation of the subjective discretion can be that the extent of judicial experience affects the manner in which judges exercise their discretion. Decisionmakers tend to gravitate toward routine decision making when repetitively confronted with the same type of cases.[15] Judges, thus, gravitate toward factual and legal norms in order to achieve consistent and efficient results.[16] Given the number of cases on a judge's docket, it is only fair to expect a judge to view cases through his or her own experiences.

There is another issue the practitioner needs to recognize with regard to judges. If a practitioner believes that judges have failed to achieve predictable and consistent outcomes in many areas of family law decision making, perhaps the practitioner needs to realize that often statutory provisions are novel. A practitioner need only think about the 2014 amendments to the alimony statute (N.J.S.A. 2A:34-23) to think about unclear outcomes. The lack of clear legislative and appellate guidance means discretionary decisions in family law are and continue to be expected. Nor can a practitioner expect that discretionary standards will become less and less the norm if there are stricter rules to follow. Rules tend to produce exceptions.[17]

Just as practitioners are susceptible to all sorts of influences and psychological processes as they provide advice, so are judges when they issue their rulings. The idea that a judge would be sitting on Mount Olympus separate and apart from all measures of life experiences and influences is just not a realistically coherent model of how judges behave. It is unfair to count on a judge to be guided by some constant underlying concept of public policy or precedent when the law itself is vague and lacking clear views of public policy.

As practitioners, we should act with a full understanding that our knowledge in the law is subject to revision, and that we will make mistakes. That is the way of

human interactions. Because judges are human, we must expect the same of them. Anything more is just not fair to the people elevated to the role of 'your honor' and not to the role of 'judicus perfectus.'

## Endnotes

1. Richard A. Posner, *Frontiers of Legal Theories* 263 (2001).
2. American Bar Association Standing Committee on Judicial Independence, Report of the Study Group on Pre-Judicial Education 15-16 (2005).
3. Wendy Nicole Duong, Law is Law and Art is Art and Shall the Two Ever Meet? Law & Literature: The Comparative Creative Processes, 15 *S. Cal. Interdisc. L.J.* 1, 7 (2005); Daniel A. Faber, Backward-Looking Laws and Equal Protection: The Case of Black Reparations, 74 *Fordham L. Rev.* 2271, 2298 (2006).
4. Benjamin Cardozo, *The Nature of the Judicial Process* 167-68 (1921).
5. Mark Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 *J. Empirical Legal Stud.* 459 (2004).
6. Lawrence Baum, *Judges: A Perspective on Judicial Behavior* 8-9 (2006).
7. *Id.* at 7-9.
8. *Id.* at 7-9; Lee Epstein and Jack Knight, *The Choices Justices Make* 10 (1998).
9. *Id.* at 4, 21.
10. *Id.* at 25.
11. *Id.* at 46-47.
12. *Id.* at 106-114.
13. Cass M. Susstein, et al., *Are Judges Political? An Empirical Analysis of the Federal Judiciary* 8-16 (2006).
14. The nature of judicial discretion requires a trial judge to determine whether to act, and if so, to render a decision "guided by the spirit, principles and analogies of the law, and founded upon the reason and conscience of the judge, to a just result in the light of the particular circumstances of the case." *Smith v. Smith*, 17 N.J. Super. 128, 132 (App. Div. 1951). "Moreover, the court must provide factual underpinnings and legal bases supporting the exercise of judicial discretion." *Slutsky*, 451 N.J. Super. at 356 (*citing Clark v. Clark*, 429 N.J. Super. 61, 72 (App. Div. 2012)). Reversal occurs only when:

    > the trial judge clearly abused his or her discretion, such as when the stated "findings were mistaken[,] or that the determination could not reasonably have been reached on sufficient credible evidence present in the record[,]" or where the judge "failed to consider all of the controlling legal principles." *Gonzalez–Posse v. Ricciardulli*, 410 *N.J. Super.* 340, 354 (App. Div. 2009); *see also Wadlow v. Wadlow*, 200 *N.J. Super.* 372, 382 (App. Div. 1985) (reversal is required when the results could not "reasonably have been reached by the trial judge on the evidence, or whether it is clearly unfair or unjustly distorted by a misconception of the law or findings of fact that are contrary to the evidence." (quoting *Perkins v. Perkins*, 159 *N.J. Super.* 243, 247 (App. Div. 1978)).
    >
    > [*Slutsky*, 451 N.J. Super. at 355–56 (alteration in original)]
15. Jerome H. Skolnick, Social Control in the Adversary System, 11 *J. Conflict Resol.* 52 (1967).
16. Richard Lempert and Joseph Sanders, *An Invitation to Law and Social Science* 75-78, 83-88 (1986).
17. Carol M. Rose, *Crystals and Mud in Property Law*, 40 *Stan P. L. Rev.* 577, 578-90 (1988) (providing detailed examples of how common law straightforward rules of property law have been muddied by exceptions and equitable second guessing).

# Living in a Social Media World: Potentials and Pitfalls for Family Law Cases and Attorneys

*by Jeffrey Fiorello and Christine C. Fitzgerald*

While social media was once looked upon as something purely social (a way to stay connected with friends), it has increasingly become an integral part of daily life. The information that is put out online can have implications far beyond staying connected with friends. This article will attempt to explore the use of social media for professional marketing purposes, and for tactical advantages in advocating for clients. There are implications, both positive and negative, that social media can have on the daily practice of family law. The goal of this article is to provoke a further exploration of social media in marketing for family lawyers and in representing family law clients.

## Potentials

Social media is a tool that can be used to assist clients in connection with divorce cases and various other related family law matters. Additionally, social media is a tool that attorneys can use to help bolster the practice of family law. However, there are several things that must be considered in the use of social media to either assist clients or to aid in marketing a family law practice.

## Statistics

Statistics show that 75 percent of male internet users are on Facebook as well as 83 percent of female internet users.[1] Additionally, according to statistics, Facebook is the most widely used social media platform, with 79 percent of American internet users.[2] Instagram is the second most widely used platform, with 32 percent of American internet users.[3] Interestingly, the third most used social media platform among American internet users, is Pinterest, with 31 percent of American internet users. Among others are LinkedIn with 29 percent of users and Twitter with 28 percent of users.[4] The statistics make it clear that people are using social media regularly. With all of this information online, how can it be used in family law practices and cases?

## Discovery

Electronically stored information (including information found on social media) is discoverable. Pursuant to the New Jersey Rules of Court, Rule 4:18-1 (a):

> Any Party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of that party, to inspect, copy, test, or sample any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, by the respondent into reasonably usable form), …[5]

If the information obtained in discovery is deemed relevant, it can be used to help bolster a family law case. Pursuant to the New Jersey Rules of Evidence, N.J.R.E. 401 provides that: "'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action."[6]

In a social media world, people post information publicly through different social media accounts, which can be used against them in their divorce proceeding. It is important to counsel clients to seek out their spouses' social media accounts to find any relevant and/or pertinent information that may bolster the case and support the various positions advocated on their behalf. For example, evidence of a subsequent relationship on social media can be used in a case to establish cohabitation, in an effort to terminate the payor's alimony obligations. Furthermore, a parties' behavior, as displayed on social media, may be used to gain an edge in a custody or parenting time dispute. Clients should be circumspect of the things they chose to make public by posting on social media, as this information may be used to the other side's benefit.

## Social Media and Procedure

But it is not just the information that can be found in a social media account that can be useful in family law proceedings (or any court proceedings for that matter). There is precedent for the use of social media as a mode of service. In the matter of *K.A. and K.I.A. v. J.L.*, the court ruled, in a chancery general equity matter, that an out-of-state party could be served through publication on Facebook.[7] In the matter of *K.A. and K.I.A. v. J.L.*, the defendant, a biological parent, who had no relationship with their biological child (who had been adopted to the plaintiffs), was attempting to contact that child, through social media.[8] The biological parent went on to post photographs of the child on their social media accounts (Facebook and Instagram), in which he identified the child as "his" biological child.[9] The adopted parents filed an application in the Chancery Division (General Equity) seeking to enjoin the defendant-biological parent from continuing to contact the child.[10] The defendant was living in Pennsylvania, and the plaintiffs were unable to effectuate service personally.[11] The court, in this matter, permitted service by publication through Facebook.[12] In issuing its opinion, the court in *K.A.* noted that:

> There are only a handful of unpublished decisions, mostly from Federal District Courts, that have addressed the issue of service of process being accomplished through social media, with there being an almost even split between those decisions approving it and those rejecting it. The cases permitting such service have done so only on condition that the papers commencing the lawsuit be served on the defendant by another method as well.[13]

In a social media world, where print media is becoming less relevant, the old standard of 'notice by publication' may no longer be sufficient. Today, social media is not only used for social purposes, but, in limited instances, for official purposes. Times change, and, along with those changes, the practice of law must evolve to keep up with technology and with relevant trends. There is e-filing in various divisions in New Jersey, something that years ago was unforeseeable and in some views unfathomable. It may only be a matter of time before social media platforms are more commonplace for purposes such as service of process and more. Family law practitioners must think outside the box to use social media as a helpful tool.

## Marketing Opportunities

With so many people using social media, it may seem that the marketing potential online is limitless. However, it is important that precautions are taken in the use of social media to promote a family law practice.

Attorneys must first look at their professional social media presence as advertising, and must seek to comply with the ethical rules restricting attorney advertising. In doing so, attorneys can successfully use social media to increase online presence in their practice, thereby bolstering their reputation within the online community and beyond. The days of pure word of mouth and searching for a lawyer in the Yellow Pages, or through other traditional publications, has become a thing of the past. More and more clients are searching for attorneys online. As such, it is important to keep up with the trends to maintain credibility while attracting clients.

In maintaining a healthy online social media presence, a careful consideration of the Rules of Professional Conduct (RPCs) is essential to ensure that the social media content will not result in any unwanted ethical issues. A few general rules should be followed in all online social media postings to avoid any issues:

1. Statements contained in social media posts must be truthful, so they comply with the requirements of RPC 4.1. This rule should be self-explanatory.
2. Attorneys must avoid holding themselves out as experts or specialists in a manner that may violate RPC 7.1 and/or 7.4. Remember the same rules that apply to a firm's websites and other forms of advertising apply to social media. RPC 7.4 provides in part "…[a] lawyer may not … state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided …" in sections b, c and d of rule 7.4.[14] Notwithstanding this rule, both LinkedIn and AVVO invite users to identify "specialties" or "expertise" in their profiles, or permit others to identify (or endorse) a user as a specialist or expert to other users. This may be problematic for lawyers as users.
3. The solicitation of clients is clearly a violation of RPC 7.3. Accordingly, lawyers must be careful, in their social media content, to avoid language that could be perceived as a solicitation.
4. Be certain not to engage in communication with a represented party, which may violate RPC 4.2, and be cautious in communications with unrepresented persons, so as to avoid issues with RPC 4.3.

5. Avoid creating an unwanted attorney-client relationship. RPC 1.18 addresses communications with prospective clients. Certain social media platforms encourage a discourse between the public (which may be a potential client) and the lawyer. If those communications rise to the level of having created an attorney-client relationship, certain obligations will attach to the relationship, which if unaddressed could have a detrimental impact on the attorney.

To successfully establish a social media presence, and avoid any issues that might give rise to ethical violations, attorneys must effectively market their law firm or themselves within the boundaries of the RPCs. Social media has become an essential element of marketing strategy for many (if not most) attorneys. It can be used to great effect.

## Pitfalls

There are many ways that social media use can create pitfalls for family law clients and for lawyers. A study published in the *Computer in Human Behavior* journal concluded that social media use increased the rate of divorce in the United States.[15] Specifically, the researchers from Boston University and Pontificia Universidad Católica de Chile studied Facebook usage and divorce in 43 of the 50 states in the United States and determined that a 20 percent increase in Facebook use in any given state correlated with a 2.2 percent increase in divorce rate for that same state. As this study and the trends of social media usage show, social media impacts families and the practice of family law.

From the start of any family law matter, practitioners need to address the litigant's social media use to ensure the litigant does not fall prey to the potential mistakes that can be made on social media. As discussed above, social media is discoverable, admissible, subject to spoliation of evidence rules, and can even constitute a domestic violence act. A litigant's poor judgment in using social media can harm his or her case before the case even begins.

## Discovery and Social Media

There are two distinct problems that clients face in dealing with social media and discovery. The first issue deals with how the client obtained the information or discovery. The second problem deals with the preservation of the social media content.

Social media content is electronically stored information that, in New Jersey, is protected by both federal and state laws, including, but not limited to, the Stored Communication Act[16] and New Jersey Wiretap and Electronic Surveillance Control Act (wiretap statute).[17] This creates the potential for a client to commit a crime by attempting to obtain evidence against his or her spouse during the divorce litigation if the client is not careful. Specifically, N.J.S.A. 2A:156A-3(a) provides that:

> a person is guilty of a crime of the fourth degree if he (1) knowingly accesses without authorization a facility through which an electric communication service is provided or exceeds an authorization to access that facility, and (2) thereby obtains, alters or prevents authorized access to a wire or electronic communication while the communication is in electronic storage.

"Without authorization" has been held to mean "using a computer from which one has been prohibited, or using another's password or code without permission."[18] In other words, when a litigant uses his or her spouse's password or code to access a social media account or computer of his or her spouse to obtain the relevant discoverable information, that litigant has potentially committed a fourth-degree crime under N.J.S.A. 2A:156-3(a). In order to prevent a client from committing a violation of the wiretap statute, family law attorneys must warn their clients, at the beginning of the litigation, about the potential pitfalls of accessing his or her spouse's electronically stored information.

Since electronically stored information is discoverable,[19] another pitfall that commonly occurs is spoliation of evidence. In New Jersey, "[s]poliation is the concealment or destruction of evidence relevant to litigation."[20] Potential remedies for the spoliation of evidence include sanctions for failure to provide discovery or the court finding an adverse inference against the party that destroyed or concealed evidence.[21] Family law attorneys should caution litigants against deleting or destroying social media content and electronically stored information, such as deleting their social media accounts.

Social media content or information can be relevant to a family law case in many contexts. Some instances may include custody, financial support, imputation of income, or adultery. In a custody proceeding, a Facebook photo of a parent at an inappropriate place with

the children could be used to indicate poor judgment as addressed previously herein. A spouse's check-in on Foursquare at a four-star resort in Bermuda could be used to show that the spouse is able to pay support. Similarly, a party's need for support can be undermined by a simple photograph showing his or her dining out at an expensive upscale restaurant, or even frequent dining at more causal restaurants. Additionally, a spouse's claim of inability to work due to lack of marketable skills can be contradicted by that spouse's own LinkedIn profile touting their many marketable skills. LinkedIn profiles also show each party's work history and skills for purposes calculating an imputation of income. Moreover, a relationship status update or photographs of a spouse with another individual may corroborate an allegation of adultery or, as stated previously, cohabitation. Merely setting a security level to private does not necessarily protect the client from the discovery of his or her social media content.

## Domestic Violence and Social Media

Another pitfall to which family law litigants often fall prey is believing their communication online or over social media is somehow protected from them being accused of harassment. In order to keep up with the ever-changing social media world, the New Jersey Legislature added the crime of cyber-harassment to the Criminal Code in 2014.[22] N.J.S.A. 2C:33-4.1 states, in pertinent part, that

> (a) a person commits the crime of cyber-harassment if, while making a communication in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person: (1) threatens to inflict injury or physical harm to any person or property of any person; (2) knowingly sends, posts, comments, requests, suggests or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his persons; or threatens to commit any crime against the person or person's property.

N.J.S.A. 2C33-4.1(a)(2) makes it clear that a person who posts about another person on social media may be guilty of cyber-harassment. Given that the majority of litigants are using some form of social media, it has become extremely vital that clients are advised to refrain from posting on social media about the proceedings, in order to avoid any potential domestic violence claims for cyber-harassment. Additionally, family law attorneys should advise clients that any communication or contact, even through social media or in electronic form, is a violation of a temporary or final restraining order unless specifically permitted by the court order.

## Ethical Considerations with Social Media for Family Law Attorneys

Attorneys have a high standard of professional responsibility, which in New Jersey is governed by the Rules of Professional Conduct. Family law attorneys deal with personal issues such as finances, children, and marital discord on a daily basis. These delicate issues make ethical principles even more important to litigants. Although social media has become commonplace for attorneys when it comes to networking, advertising and obtaining information about an adverse party, it is not without its perils. In a social media world, family law practitioners must exercise restraint when using their social media account for these purposes.

Recently, two New Jersey attorneys faced disciplinary charges over their use of social media.[23] In *Robertelli v. New Jersey Office of Attorney Ethics*, the attorneys instructed their paralegal to 'friend' an adverse party on social media in an attempt to gain information about the party.[24] The attorneys were accused of violating RPC 4.2—Communication with Persons Represented by Counsel; RPC 5.1—Responsibilities of Partners, Supervisory Lawyers, and Law Firms; RPC 5.3—Responsibilities Regarding Nonlawyer Assistance; and RPC 8.4—Misconduct.[25] The grievance was initially filed by the adverse party with the district ethics committee (DEC), which determined that, on its face, the grievance did not constitute a violation of the RPCs and declined to docket the matter.[26] The grievant appealed to the Office of Attorney Ethics (OAE).[27] The OAE determined that the allegations were serious enough to warrant further investigation.[28] The respondent attorneys challenged whether the OAE has the authority to investigate an ethical grievance when the DEC previously declined.[29] The New Jersey Supreme Court ultimately held that the director of the OAE has the authority to review a grievance after a DEC secretary has declined to docket it, and that the OAE may proceed to prosecute the alleged misconduct.[30] Although

the matter is still pending, this case highlights the need for attorneys to exercise restraint when using the social media world to gain information about an adverse party.

The use of social media for networking and personal use can also become a pitfall for family law attorneys. RPC 1.6(a)—Confidentiality provides, in pertinent part, that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d)." The exceptions noted in RPC 1.6 (b), (c) and (d) relate specifically to disclosures made to the proper authorities in order to prevent a criminal, illegal or fraudulent act, or to a person threatened in order to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

In an advisory opinion, the New Jersey Supreme Court stated "this Rule expands the scope of protected information to include all information related to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client."[31] Further, RPC 1.6 covers all information given by the client, as well as information learned from third parties or from the litigation.[32] In the plain text of RPC 1.6(a), there is no exception for the disclosure of confidential client information when the client's name is not used. Although there are currently no advisory opinions on the issue of posting client information on an attorney's personal social media account, family law attorneys should exercise restraint in posting about cases and about clients on the attorney's personal social media accounts. Such disclosure of confidential information that an attorney learns from his or her client or in the course of the litigation is a violation of confidentiality under the plain text of RPC 1.6.

## Conclusion

The social media world presents society with a unique opportunity to meet people, connect with old friends and colleagues, keep abreast of current events and trends, share professional and personal news with others, and investigate in litigation. For family law attorneys, social media provides both potentials and pitfalls. As social media usage increases, family law attorneys must exercise restraint and caution in its use to maximize the potential without falling prey to any pitfalls. ■

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## Endnotes

1. The Word Stream Blog: 40 Essential Social Media Marketing Statistics for 2018 (Mary Lister, April 18, 2018).
2. *Id.*
3. *Id.*
4. *Id.*
5. New Jersey Court Rules, Rule 4:18-1(a).
6. New Jersey Rule of Evidence Rule 401.
7. *K.A. and K.I.A. v. J.L.*, 450 N.J. Super. 247 (Ch. Div. 2016).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 254.
14. Rules of Professional Conduct, RPC 7.4(a).
15. Sebastian Valenzuela, Daniel Halpern, and James E. Katz, *Computers in Human Behavior,* July 2014; vol. 36, pp. 94-101.
16. 18 U.S.C. 2701 *et seq.*

17. N.J.S.A. 2A:156A-3
18. *White v. White*, 781 A. 2d 85, 91 (Ch. Div. 2001) *citing Sherman & Co v. Salton Maxim Housewares, Inc.*, 94 F. Supp. 817 (E.D. Mich. 2000).
19. R. 4:18-1(a).
20. *State v. Cullen*, 424 N.J. Super. 566, 587 (App. Div. 2012), *certif. denied*, 213 N.J. 397 (2013) *citing Rosenblit v. Zimmerman*, 166 N.J. 391, 400-01 (2001).
21. *Robertet Flavors, Inc. v. Tri-Form Const., Inc.*, 203 N.J. 252, 272 (2010).
22. N.J.S.A. 2C:33-4.1.
23. *Robertelli v. New Jersey Office of Attorney Ethics*, 134 A.3d 963 (2016).
24. *Id*. at 965.
25. *Id*. at 966.
26. *Id*. at 965.
27. *Id*. at 966.
28. *Id*.
29. *Id*.
30. *Id*. at 975.
31. *In re Advisory Opinion 544 of N.J. Sup. Court*, 103 N.J. 399, 406 (1986).
32. Michels, *Current N.J. Attorney Ethics*, Comment 15:2-2 on RPC 1.6 (2018) *citing* ABA Model Rules of Professional Conduct Rule 1.6 comment (2000).

# The Impact of Retirement on Alimony Pursuant to N.J.S.A. 2A:34-23(j)

*by Jeralyn L. Lawrence*

Modification of alimony upon the payor's retirement is governed by N.J.S.A. 2A:34-23(j). According to the amended statute, alimony may be modified or terminated "upon the prospective or actual retirement of the obligor."[1] The statute applies to termination or modification of an alimony obligation established after Sept. 10, 2014.[2]

Prior to enactment of the statute, the good faith retirement age was undefined by statutory or case law precedent. Judges had no definitive guideline for determining this issue, thus case-by-case analyses were required, resulting in varying outcomes. At times, even when a court found that the payor spouse retired at a "good faith retirement age," there was no presumption his or her alimony obligation would terminate. Instead, the modification and/or termination of the obligation was subject to a court's purely discretionary review. While the court maintains a level of discretion, the amended statute now provides a rebuttable presumption that alimony terminates when the payor reaches full retirement age, defined as the age of eligibility for full Social Security benefits.

Specifically, the amended statute now provides that "[t]here shall be a *rebuttable presumption* that alimony shall *terminate* upon the obligor spouse or partner attaining full retirement age, except that any arrearages that have accrued prior to the termination date shall not be vacated or annulled. The court may set a different alimony termination date for good cause shown..."[3] The intent is clear: A payor has a right to retire upon achieving full retirement age. Consequently, he or she has now been granted the opportunity to seek appropriate relief from the alimony obligations at a definitive age, and receive the benefit of the statutory presumption. However, the rebuttable presumption may be overcome if, after consideration of certain statutory factors, the court determines the obligor should continue to pay alimony.

These factors are listed in the statute, as follows:

**(a)** The ages of the parties at the time of the application for retirement;

**(b)** The ages of the parties at the time of the marriage or civil union and their ages at the time of entry of the alimony award;

**(c)** The degree and duration of the economic dependency of the recipient upon the payor during the marriage or civil union;

**(d)** Whether the recipient has foregone or relinquished or otherwise sacrificed claims, rights or property in exchange for a more substantial or longer alimony award;

**(e)** The duration or amount of alimony already paid;

**(f)** The health of the parties at the time of the retirement application;

**(g)** Assets of the parties at the time of the retirement application;

**(h)** Whether the recipient has reached full retirement age as defined in this section;

**(i)** Sources of income, both earned and unearned, of the parties;

**(j)** The ability of the recipient to have saved adequately for retirement; and

**(k)** Any other factors that the court may deem relevant.

A close analysis of these factors, especially factors (a), (b), (c), (e), and (j), suggest that the focus is predominantly on long-term marriages.

Once the court determines that the statutory presumption has been overcome, it must analyze and apply the factors set forth in N.J.S.A. 2A:34-23(b) to determine whether modification or termination of alimony is appropriate under the circumstances of the case. Further, "[i]f the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective."[4]

One of the most significant aspects of alimony reform involves applications for modification and/or termination of the alimony obligation in the context of early retirement, be it actual or prospective. Notably, prior law made no reference to 'prospective' retirement. Therefore,

many payors considering retirement found themselves in a dilemma, as there was no option to file an application seeking termination or modification of alimony prior to actual retirement. The payor had to retire and subsequently seek relief from the court, with the explicit understanding that relief was not guaranteed. Under the amended statute, however, the party requesting relief based upon early retirement merely has the burden of proving, by a preponderance of the evidence, that his or her prospective or actual early retirement is both reasonable and sought in good faith.[5]

In any application for early retirement, *both* parties must submit their respective current and prior case information statements for the court's review.[6] This modification significantly differs from prior law, which required the supported spouse to submit a case information statement only if the moving party met his or her burden of proof. The amended statute now delineates eight factors for courts to analyze when determining whether the payor has met the requisite burden showing the payor's prospective or actual early retirement is reasonable and sought in good faith. The factors include:

**(a)** The age and health of the parties at the time of the application;

**(b)** The obligor's field of employment and the generally accepted age of retirement for those in that field;

**(c)** The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

**(d)** The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

**(e)** The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

**(f)** The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

**(g)** The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

**(h)** Any other relevant factors affecting the obligor's decision to retire and the parties' respective financial positions.[7]

Similarly, the terms of N.J.S.A. 2A:34-23(j)(1) mandate that "[i]f the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective."[8] Notably, the court in *Mueller*[9] was recently tasked with analyzing an application in which the payor sought the future termination of his alimony obligation based on his prospective retirement five years in the future. In denying his application as premature, the *Mueller* court enunciated a series of guidelines courts could follow when faced with similar prospective retirement applications.[10] Specifically, the court expounded that while the statute does not set specific minimum or maximum time tables for obtaining a prospective retirement determination, the statute "inherently contemplates that the prospective retirement will take effect within reasonable proximity to the application itself, rather than several years in advance of same."[11]

The court also remarked that, in making such a determination, courts must be afforded a reasonable opportunity to review current information, "relative to the time period of proposed retirement itself," to analyze the requisite factors and equities required by the statute. Lastly, the court opined that, should a payor seeking termination or modification of alimony based on having reached full retirement age or pursuant to his or her prospective retirement, fail to retire, the statutory provisions "triggering termination or modification of alimony are inapplicable until such time as the [payor] actually retires or submits an application regarding a prospective retirement in the near future..."[12] In applying these considerations, while *Mueller* determined an application for prospective retirement brought five years in advance was premature, the court suggested such an application may be appropriate and ripe for judicial review when filed 12 to 18 months prior to a payor's desired retirement date.[13]

N.J.S.A. 2A:34-23(j)(3) is also applicable in situations where an alimony obligation or order was established prior to the statute's Sept. 10, 2014, effective date,[14] although parties in this category seeking review of their alimony obligations do *not* receive the benefit of the rebuttable presumption provided in subsection (j)(1). The payor's reaching full retirement age is instead considered "a good faith retirement age."[15] Both parties are statutorily required to submit their current and prior case information statements to the court for review.[16] In making its determination, the court must consider, in addition to

the following statutorily defined factors, the ability of the supported spouse to have saved for retirement:

**(a)** The age and health of the parties at the time of the application;

**(b)** The obligor's field of employment and the generally accepted age of retirement for those in that field;

**(c)** The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

**(d)** The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

**(e)** The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

**(f)** The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

**(g)** The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

**(h)** Any other relevant factors affecting the parties' respective financial positions.

Further, any assets distributed between the parties at the time of divorce or dissolution cannot be considered by the court for purposes of determining a payor's ability to pay alimony upon retirement.[17]

As is demonstrated above, sweeping statutory reform in the context of retirement and its effect on the payor's alimony obligation has brought about significant changes in both the law and the way matrimonial attorneys must now address these issues. The few cases that address alimony reform in the context of retirement unequivocally caution both courts and counsel to analyze and apply the appropriate statutory subsection, which depends entirely upon the type of relief sought, and the date of entry of the alimony award sought to be modified and/or terminated. ■

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## Endnotes

1. N.J.S.A. 2A:34-23(j).
2. *Landers v. Landers*, 444 N.J. Super. 315, 133 A.3d 637 (App.Div.2016). *See also* N.J.S.A. 2A:34-23(j)(1).
3. N.J.S.A. 2A:34-23(j)(1) (emphasis added).
4. *Id.*
5. N.J.S.A. 2A:34-23(j)(2).
6. *Id.*
7. *Id.*
8. N.J.S.A. 2A:34-23(j)(1).
9. *Mueller v. Mueller*, 446 N.J. Super. 582, 144 A.3d 916 (Ch. Div. 2016).
10. *Id.*
11. *Id.* at 586.
12. *Id.*
13. *Id.* at 592.
14. *Landers, supra*, 444 N.J. Super. at 323, 133 A.3d 637.
15. N.J.S.A. 2A:34-23(j)(3).
16. *Id.*
17. *Id.*

# Alimony Duration and Cohabitation: An Analysis of Facts and Circumstances Affecting the Duration of Spousal Support and the Impact of Reform on Cohabitation

*by Jeralyn L. Lawrence*

New Jersey alimony law is defined by statute, specifically N.J.S.A. 2A:34-23, entitled "Orders as to Alimony or Maintenance of Parties and Care, Custody, Education, and Maintenance of Children." In Sept. 2014, New Jersey alimony law was subject to reform that resulted in changes to the forms of alimony identified and available to litigants incident to divorce, and the enumeration of 14 specified statutory factors for the establishment, modification, and/or termination of the payor's alimony obligation. The amended statute also defines cohabitation for purposes of terminating or modifying alimony. Despite these modifications, in many respects, the spirit and intent of alimony reform remains consistent with the previous statute and the case law interpreting it. The amended statute became effective immediately upon its enactment on Sept. 10, 2014, and applies to all matters, with limited exceptions, from that date forward.

## Analyzing the Appropriate Duration of Alimony

This article will focus on the facts and circumstances New Jersey courts have analyzed and continue to analyze in determining an appropriate duration of alimony. Notably, and notwithstanding the recent retitling of 'permanent alimony' to 'open durational alimony,' a court's analysis relating to duration of support remains predominantly the same as it was prior to the Sept. 2014 amendment. A determination as to the duration of alimony remains in the sound discretion of the court based on its analysis of the facts and circumstances of any given case, and consideration of the factors set forth in N.J.S.A. 2A:34-23.[1]

To establish a term of alimony, a court must analyze *all* statutory factors, not just the duration of the marriage.[2] Every divorce is fact sensitive. Both pre- and post-amendment case law precedent confirms that a court's determination as to the payment and duration of alimony is dependent upon the facts and circumstances of the matter before it. Facts and circumstances drive the outcome of a case and the duration of an alimony award.

At its most basic, alimony "relates to support and standard of living; it involves the quality of economic life to which one spouse is entitled, which then becomes the obligation of the other."[3] This obligation stems from the principle that "marriage is a shared enterprise, a joint undertaking, that in many ways [] is akin to a partnership."[4] The New Jersey Supreme Court has reinforced this prevailing principle, enunciated in the landmark case of *Lepis v. Lepis*,[5] which emphasizes that "the goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage."[6] Pre- and post-statutory law and cases in New Jersey confirm that neither the payor spouse nor the recipient spouse has a greater entitlement to maintain the marital standard of living post-divorce than the other.[7]

With respect to the duration of an alimony award, New Jersey courts have long recognized and acknowledged that, while they must consider the duration of the marriage itself as one factor in awarding alimony, "the length of the marriage and the proper amount or duration of alimony do not correlate in any mathematical formula."[8] Conversely, "the extent of actual economic dependency...must determine the duration of support as well as its amount."[9] While courts must consider and analyze each statutory factor, they have broad and equitable discretion to determine the duration of an alimony award based on the facts and circumstances before it. However, as explained above, the duration of the marriage itself is not to be considered a controlling factor, but one of many factors a court must consider when determining an appropriate term of alimony.

Current statutory law identifies four types of alimo-

ny: open durational, limited duration, rehabilitative, and reimbursement alimony.[10] New Jersey courts are authorized to establish any one of these types of alimony, or a combination.[11] Open durational alimony, which replaced permanent alimony, is appropriate for longer-term marriages or civil unions.[12] Limited duration alimony is reserved for those situations where an economic need for alimony has been established, but the marriage or civil union was of short duration, so that open durational alimony is inappropriate.[13] Rehabilitative alimony applies in situations where it is appropriate to permit one spouse to obtain training and/or education necessary for him or her to return to the workforce.[14] Finally, reimbursement alimony is reserved for situations where one spouse has made financial contributions to the other spouse's education or professional training.[15]

In *Elrom*, the court entered a three-year limited duration alimony award under circumstances where the parties were married for five years.[16] In reaching its decision, the court not only looked to the five-year term of the parties' marriage, but based its decision "upon the differential in their earnings, Plaintiff's needs and Defendant's ability to pay."[17] Following a five-day trial, the court found the plaintiff earned approximately $175,000 per year during the parties' marriage, but had been laid off from her employment in 2008, just prior to the birth of the parties' first child.[18]

Thereafter, the plaintiff was employed intermittently on a part-time basis, due in large part to the parties' agreement that she would stay at home with the children.[19] The plaintiff subsequently obtained employment as an associate attorney earning approximately $80,000 per year. The plaintiff's employment was terminated just prior to trial. The defendant earned upwards of $193,000 annually during the marriage and, at the time of trial, had recently obtained employment earning a base salary of $120,000 per year, with the potential to earn $295,000 annually.[20]

The trial court in *Elrom* not only considered the income and earning potential of the parties, but also recognized that they had enjoyed an "upper middle class, at times, lavish lifestyle."[21] In calculating the amount and duration of alimony, the court imputed the plaintiff's income at $80,640 annually, which represented the earnings she received from her last full-time job as an associate attorney.[22] The court imputed $230,731 to the defendant, representing a three-year gross average of his earnings.[23] On appeal, the Appellate Division reversed and remanded certain aspects of the *sum* of alimony ordered, but did not disturb the duration of the award.[24]

The court in *J.E.V.* entered a 10-year limited duration award under circumstances where the parties were married for approximately nine and one-half years.[25] At the time of trial, the plaintiff was 44 years old and the defendant was 37 years old.[26] The plaintiff opened a medical practice during the marriage and earned significant wages from it. The defendant, who had a history of mental and emotional problems, earned approximately $65,000 during the marriage, but was unemployed at the time of trial.[27]

In determining the duration of alimony, the trial court considered the statutory factors in light of the parties' specific marital circumstances. The judge ultimately concluded that permanent alimony was inappropriate "in light of the intermediate term of the marriage, defendant's age, her failure to prove permanent disability, her ability to earn income in the future, and her success in past employment endeavors."[28] The court further determined that the defendant had the ability to earn a minimum of $35,000 annually and would also have the benefit of unearned income from the cash portion of equitable distribution she received incident to divorce.[29] The defendant appealed the trial court's decision, asserting that she was entitled to an ongoing alimony award.[30]

The Appellate Division affirmed the trial court's determination regarding the duration of alimony, holding:

> Here, the judge found that the parties were married for less than ten years. She correctly considered this marriage to be of intermediate duration. The judge found, and we agree, that such a term merits an alimony award because defendant was economically dependent on plaintiff for most of the marriage...Financial dependency, however, does not dictate an award of permanent alimony in all instances.
>
> In certain circumstances, the inability of the dependent spouse to ever earn enough income to maintain the marital lifestyle on her own may be an appropriate consideration...This factor, however, is relevant only in the determination of the length of the limited duration alimony.
>
> Here, the record demonstrates the need to award alimony. During the second half of the marriage, defendant became economically dependent on plaintiff. Plaintiff and defendant

> also formed a marital partnership, particularly when plaintiff formed his private practice...There is also an educational disparity between the parties that permits plaintiff to earn substantial income at levels that defendant's education and existing skills do not permit. Yet, this is still a nine-and-one-half year marriage and defendant's complete economic dependency arose only in the last half of the marriage...This marriage is intermediate in length and complete economic dependency existed for a limited time.[31]

The Appellate Division ultimately affirmed the duration of the alimony award, reasoning that the award was a "fair and equitable response to the particular facts of this case."[32] In so deciding, the Appellate Division held that:

> given the intermediate term of the marriage, defendant's age, and the limited duration of the very affluent lifestyle defendant wishes to maintain, coupled with the finding that defendant's mental health condition did not render her totally and permanently disabled, the ten-year and generous limited duration award fashioned by [the judge] is an equitable response to the circumstance of both parties.[33]

In contrast, the Appellate Division in *Hughes*[34] reversed and remanded, in part, the lower court's decision to award rehabilitative alimony under circumstances where the parties were married for a period of 10 years. The Appellate Division found an award of rehabilitative and permanent alimony was appropriate in light of the parties' specific circumstances and the lifestyle they enjoyed during the marriage.[35] More specifically, the *Hughes* court determined that an award of permanent and rehabilitative alimony was appropriate based on the defendant-wife's need for support; the plaintiff-husband's ability to pay; the defendant's age and the reality that she would require additional training based on her extended absence from the workforce; the length of the parties' marriage and the lofty lifestyle enjoyed by the family throughout the marriage; and the defendant's responsibility in predominantly caring for the minor child throughout the marriage.[36]

Notably, the Appellate Division explicitly addressed the trial court's mischaracterization of the parties' marriage as short-term:

> In this case, the judge stressed that he considered this to be a short-term marriage, justifying the brief and minimal amount of alimony, even considering the even briefer period of slightly increased rehabilitation. First, we take issue with a ten-year marriage being considered a short-term marriage. By today's standards, it is not. We must look to the particular facts of this case.[37]

The difference in the Appellate Division's analysis of *J.E.V.* and *Hughes* illustrates that the duration of alimony hinges upon the facts and circumstances of each individual case.

In *Lynn*,[38] the Appellate Division affirmed the trial court's decision to award both permanent and reimbursement alimony under circumstances where the parties were married for a period of approximately seven years.[39] Both parties were employed on a full-time basis for the first three years of their marriage.[40] The defendant earned between $11,000 and $15,000 per year during this time period, while the plaintiff pursued his medical degree and earned little to no wages.[41] However, at the time of the parties' divorce, the plaintiff was earning approximately $27,425 annually while the defendant's earnings were limited to $7,663, the total of which she received from monthly Social Security Disability payments.[42]

The Appellate Division ultimately affirmed the lower court's determination, finding that, "[b]y the time of trial...the plaintiff was a physician in private practice while his former wife had no graduate degree and was living on social security disability pay...The trial court recognized this need and fashioned an extensive award to accomplish it."[43]

Regarding its decision to maintain the duration of the award, the Appellate Division further opined:

> We stated in *Lepis v. Lepis*, 83 N.J. 139, 155, 416 A.2d 45 (1980), that "[t]he extent of actual economic dependency, not one's status as a wife [or husband], must determine the duration of support as well as its amount." Courts must consider the duration of the marriage in awarding alimony[.] However, the length of the marriage and the proper amount or duration of alimony do not correlate in any mathematical formula. Where the circumstances of the parties diverge greatly at the end of a relatively

> short marriage, the more fortunate spouse may fairly be called upon to accept responsibility for the other's misfortune – the fate of the shared enterprise. Under the facts of this case, both an initial lump-sum award of reimbursement alimony...and a separate continuing alimony obligation would be appropriate.[44]

*Lynn* and its progeny underscore the legal principle that alimony awards, which include an analysis of an appropriate duration of support, are driven by the specific facts of a case, *not* an analysis that focuses solely or predominantly on the length of the marriage itself. In *Lynn*, the parties were married for an arguably short period of time. Nonetheless, the trial court ordered and the Appellate Division maintained, an ongoing alimony award after an analysis of *all* statutory factors, case law precedent, and the circumstances of the case before it.

Similarly, the Appellate Division in *McGee*[45] reversed and remanded the lower court's award of rehabilitative alimony where the parties had been married for a period of three years, but had cohabited with one another for approximately 11 years prior to marriage. The Appellate Division determined that the parties had lived comfortably "as if they were husband and wife" prior to their actual marriage.[46] At the time of divorce, the plaintiff was 51 years old and earned approximately $216,000 as a medical doctor in private practice.[47] Conversely, the defendant was 57 years old, worked sporadically throughout the parties' relationship, did not have any post-secondary education, and suffered from minor medical problems.[48]

Following an in-depth analysis of the parties' lifestyle and the facts and circumstances surrounding their pre- and post-marital relationship, the Appellate Division reversed and remanded the trial court's award of six months of rehabilitative alimony.[49] The Appellate Division, citing *Lynn*, found that:

> [w]hile it is true that this was not a lengthy marriage, [h]ere, [defendant] lived with [plaintiff] long before the marriage and gave up her job, if not because [plaintiff] asked her to do so, at least because he was willing to support her. She became financially dependent on him... [Defendant] made many non-financial contributions to the relationship...While she is not disabled, she is at a distinct disadvantage as to employability, especially at a level which would allow her to replicate the lifestyle she and [plaintiff] shared...[50]

Ultimately, the Appellate Division remanded the case to the trial court "for a full consideration of the issues of rehabilitative and permanent alimony upon application of the proper standard."[51]

The trial court in *Jacobitti*[52] required the plaintiff to pay an ongoing alimony obligation under circumstances where the parties had been married for a term of approximately 12 years. In reaching its decision, the trial court not only considered the actual duration of the parties' marriage, but also the defendant's multiple sclerosis diagnosis and the plaintiff's concession that he had the "capacity financially to make any payment for support or alimony that the court may reasonably fix."[53] Following a thorough analysis of the parties' finances and lifestyle, the trial court ordered the plaintiff to pay alimony in the sum of $4,200 per month. The court additionally required that the plaintiff place $500,000 in trust for the benefit of the defendant due to the plaintiff's advanced age.[54]

The court in *Cerminara*[55] similarly entered an award of permanent alimony under circumstances where the parties were married for 12 years. On appeal, the Appellate Division affirmed the permanent duration of the lower court's alimony award, holding that the trial court appropriately analyzed the statutory factors and relevant case law precedent, including *Innes*, *Mahoney*, and *Lepis*:

> Applying these well-settled and fundamentally sound principles to this case, we are satisfied that the record establishes that defendant is entitled to permanent rather than rehabilitative alimony. First, plaintiff has, in light of his earning capacity and assets, the means by which to meet a modest alimony payment of $200 per month, a figure stipulated by the parties. Second, as the trial court appropriately observed, defendant is 42 years old. In order to raise her children, she has not worked consistently during her 12-year marriage. To now expect defendant to find employment that will afford her a salary comparable to her ex-husband's is impractical and unfair... [T]here is no assurance that she will find suitable employment...and that if she does find such employment, that she would earn enough

> to maintain her present lifestyle and economic social status. In sum, we are satisfied that in these circumstances, the trial court did not err in awarding defendant permanent rather than rehabilitative alimony.[56]

The parties in *Robertson* were also married for approximately 12 years before the plaintiff filed his complaint for divorce. On appeal, the plaintiff challenged the lower court's award of permanent alimony, among other unrelated issues.[57] The plaintiff argued that the trial court abused its discretion in awarding permanent alimony to the defendant, instead suggesting that the court was limited to ordering a term of limited duration alimony.[58] The Appellate Division affirmed the lower court's permanent alimony award, finding that: 1) the defendant, unlike the plaintiff, did not obtain a bachelor's degree; 2) the defendant left her career as a secretary to care for the parties' children, with the consent of the plaintiff; and 3) the defendant never made any significant income in part-time employment during the parties' marriage.[59] According to the Appellate Division, the defendant was "entitled to compensation for this 'transfer of earning power.'"[60]

Notably, the courts in *Jacobitti*, *Cerminara*, and *Robertson* entered permanent alimony awards under circumstances where the respective parties were married for a period of 12 years. However, despite this similarity, the facts of each case are unique. The court in *Jacobitti* held that an ongoing alimony award was appropriate in light of the plaintiff's financial ability to pay and the defendant's deteriorating medical condition, among other factors. Conversely, the court in *Cerminara* and *Robertson* elected to award permanent alimony in lieu of rehabilitative or limited durational alimony under circumstances where the court found that the plaintiffs had the ability to pay and the defendants had been out of the workforce for the vast majority of the parties' respective marriages.

These cases clearly demonstrate that, while the Sept. 2014 amendment provides courts with a guideline for determining an appropriate alimony term, the permissive language of the statute itself and the case law analyzing it do not bar courts from awarding open durational alimony, even under circumstances where the marriage in question lasted for a period of *less* than 20 years.[61] Rather, courts have the authority to enter an award of open durational alimony under circumstances where the term of the marriage is less than 20 years when an analysis of the factors and relevant case law precedent supports such a decision.[62] In this regard, recent alimony reform affirms the principles set forth in *Lepis* and its progeny: "The extent of actual economic dependency, not one's status as a wife [or husband], must determine the duration of support as well as its amount."[63]

An award of open durational alimony may be modified or terminated upon a showing of changed circumstances.[64] An alimony award, whether entered by a court or pursuant to agreement of the parties, "may be revised and altered by the court from time to time as circumstances may require."[65] Courts have the statutory authority to both establish and revise alimony awards as appropriate.[66] "As a result of this judicial authority, alimony and support orders define only the present obligations of the former spouses. Those duties are always subject to review and modification on a showing of 'changed circumstances.'"[67]

Courts employ a two-step process, first enunciated in *Lepis*, to determine whether there exists a change in circumstance warranting review and modification of a pre-existing alimony award. Notably, the party seeking modification bears the burden of proving that such changed circumstances exist, and that the relief sought is warranted.[68] The two-prong test is as follows:

> A prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status. When the movant is seeking modification of an alimony award, that party must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself. This requires full disclosure of the dependent spouse's financial status, including tax returns... Only after the movant has made this prima facie showing should the respondent's ability to pay become a factor for the court to consider.[69]

Thus, a court must review both parties' level of need in relation to the marital standard of living, among other factors, when modification to a pre-existing alimony award is sought.[70] To the extent that need is met by the alimony award in effect and there exist no other changed circumstances, modification is inappropriate and the current level of support should be maintained.[71] Naturally, there exists no exhaustive list of changed circumstances that would warrant a court's review and modification of alimony.

However, a decrease in earnings, loss of employment, retirement, illness and/or disability, cohabitation, and remarriage are topics frequently addressed by courts considering requests for modification of alimony.[72] Indeed, while the statute explicitly identifies retirement (actual and prospective), loss of income, and cohabitation as potential life events that may warrant a review and modification of alimony, it too recognizes that these explicitly referenced categories do not qualify as a comprehensive list.[73]

## Analyzing Cohabitation

Next, this article will analyze post-judgment modification of alimony in the context of cohabitation. Prior to the enactment of alimony reform in 2014, proving cohabitation was an elusive and difficult burden for the payor spouse to overcome. Notwithstanding reform, the New Jersey Superior Court has recently opined that these statutory provisions do not apply to post-judgment orders or agreements finalized *before* enactment of the amended statute under circumstances where the order or agreement: 1) contains an express contractual stipulation regarding the effect of cohabitation on alimony;[74] 2) affirmatively asserts that the principles enunciated in *Gayet*[75] apply;[76] and/or 3) was already the subject of "subsequent, post-judgment litigation that addressed and adjudicated the issue of alimony and cohabitation prior to the enactment of the statutory amendments."[77] Litigants with pre-amendment orders or marital agreements that fall within one of the three categories set forth above continue to confront these issues.[78]

## Analysis of Cohabitation for Pre-Amendment Orders and Agreements that Explicitly Require Application of Pre-Amendment Law

For those matters that fall outside the scope of statutory reform, the cohabitation of a recipient spouse constitutes changed circumstances requiring further review of the economic consequences of the new relationship and its impact on the previously imposed support obligation.[79] The court in *Konzelman* defined cohabitation as "an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include, but are not limited to, living together, intertwined finances..., sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle."[80]

In *Konzelman*, the court found that the evidence provided was sufficient to find the plaintiff-wife was cohabiting with her boyfriend as defined by the parties' mutually executed marital settlement agreement.[81] According to the court, the plaintiff and her boyfriend lived together the vast majority of the time;[82] the plaintiff's boyfriend paid for improvements made to her residence; the plaintiff shared a joint bank account with her boyfriend; and the plaintiff's boyfriend paid for their joint vacations.[83]

To constitute cohabitation under *Konzelman*, the relationship "must be shown to be serious and lasting."[84] Under no circumstances, however, is a "mere romantic, casual or social relationship" considered sufficient to justify termination of alimony under New Jersey law.[85] Conversely, cohabitation involves an "intimate[,]" "close and enduring" relationship, requiring "more than a common residence" or mere sexual liaison.[86] Cohabitation exists when "the couple has undertaken duties and privileges that are commonly associated with marriage."[87] In addition to long-term intimate or romantic involvement, indicia of cohabitation may "include, but are not limited to, living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle."[88] The couple's relationship "bears the generic character of a family unit as a relatively permanent household[,]"[89] is "serious and lasting[,]"[90] and reflects the "stability, permanency and mutual interdependence"[91] of a single household.

In *Ozolins*, the Appellate Division held that "a showing of cohabitation creates a rebuttable presumption of changed circumstances shifting the burden to the dependent spouse to show that there is no actual economic benefit to the spouse or the cohabitant."[92] The trial court ultimately terminated the defendant-husband's alimony obligation retroactively based on the plaintiff-wife's cohabitation and the defendant-husband's deteriorating medical condition.[93] In so deciding, the trial court determined the plaintiff received a minimal financial benefit from cohabiting with her boyfriend.[94] The Appellate Division agreed with the judge's finding that the defendant made a *prima facie* showing of cohabitation, thus shifting the burden of proof to the plaintiff to demonstrate her need, if any, for continuing support.[95] However, the Appellate Division remanded the matter to the trial court, finding the court erred in terminating, rather than modifying, the defendant's alimony obligation.[96]

When faced with the circumstance of cohabitation of

a recipient spouse under circumstances where pre-reform law applies, the court must focus on the economic relationship of the cohabitants to discern whether one cohabitant "subsidizes the other[.]"[97] Modification of alimony is warranted when the cohabitant either contributes to the dependent spouse's support or lives with the dependent spouse without contributing.[98] When a dependent spouse economically benefits from cohabitation, his or her support payments may be reduced or terminated.[99] "The inquiry regarding whether an economic benefit arises in the context of cohabitation must consider not only the actual financial assistance resulting from the new relationship, but also should weigh other enhancements to the dependent spouse's standard of living that directly result from cohabitation."[100]

In *Reese*, the court found the defendant-wife not only cohabited with her paramour, but received a substantial economic benefit from cohabitation warranting termination of the plaintiff-husband's alimony obligation.[101] Specifically, the court determined the plaintiff's paramour contributed to the mortgage and taxes; paid a large portion of their joint expenses; paid the defendant's credit card bills; provided the defendant with cars and necessary insurances; and provided the defendant with extravagant luxuries beyond those the defendant and plaintiff experienced during the marriage.[102] In reaching its decision, the trial court appropriately applied the principles established in *Gayet* and its progeny, specifically that "[t]he extent of actual economic dependency, not one's conduct as a cohabitant, must determine duration of support as well as its amount."[103] In order to rebut the presumption that the living arrangement is tantamount to marriage and has reduced or ended the need for alimony, a dependent spouse must prove he or she remains dependent on the former spouse's support.[104]

The New Jersey Supreme Court has described what constitutes cohabitation.[105] In so doing, the Court set the respective burdens of the parties when claimed cohabitation serves as a basis to modify an alimony obligation.[106] These cases hold a supporting spouse's obligation may be modified or terminated when a dependent spouse economically benefits from cohabiting.[107]

Decades ago, the Appellate Division explained:

> We have no doubt, however, that where a former wife chooses to cohabit with a paramour, whether in her abode or his...the issue may well raise whether...she has further need for the alimony. If it is shown that the wife is being supported in whole or in part by a paramour, the former husband may come into court for a determination of whether the alimony should be *terminated or reduced*....In short, the inquiry is whether the former wife's...relationship with another man...has produced a change of circumstances sufficient to entitle the former husband to relief.[108]

When examining the cohabiting household, a trial judge starts with a review of the parties' financial arrangements to discern whether the cohabitant actually pays or contributes toward the dependent spouse's necessary expenses, such as housing, food, clothing, transportation, or insurance.[109] If so, the cohabitant provides the dependent spouse with a direct economic benefit.[110] Additionally, indirect economic benefits, which benefit the dependent spouse, must be considered, including the cohabitant's payment of his or her own expenses.[111] When the parties' financial obligation arrangements are comingled, blurring the demarcation of economic responsibility, subsidization of expenses by one party for the benefit of the other may occur,[112] and the ability to prove economic independence may diminish or possibly disappear.

It is well settled that once a *prima facie* showing of cohabitation is made by the supporting spouse, there is a rebuttable presumption that shifts the burden of proof to the alleged cohabiting spouse to show that they are not cohabiting, or that there is no economic benefit from the cohabitation.[113] The reason the burden shifts to the dependent spouse after a *prima facie* case is established is that the dependent spouse and their "paramour hold all the resources, as well as the financial and social/sexual information necessary for the court to make a finding regarding cohabitation…"[114] Indeed, as the courts have noted, "it would be unreasonable to place the burden of proof on a party not having access to the evidence necessary to support that burden of proof."[115] However, while there exists a voluminous body of case law applicable to pre-amendment matters, the foregoing analysis illustrates that the criteria set forth in *Konzelman* and its progeny effectively create a formidable barrier for a payor spouse to overcome in situations where the recipient spouse is, for all intents and purposes, living in a relationship tantamount to marriage with another individual while continuing to receive alimony.

## Analysis of Cohabitation for Post-Amendment Orders, Post-Amendment Agreements, and Pre-Amendment Orders and Agreements that Fail to Define or Otherwise Address Cohabitation

To prove cohabitation pursuant to alimony reform, a payor spouse need not prove that the recipient spouse is residing with another individual. This fact is confirmed in two separate sentences within subsection (n) of the statute.[116] Cohabitation is now statutorily defined in N.J.S.A. 2A:34-32(n), which states, "alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a 'mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union *but does not necessarily maintain a common household*.'"[117] In assessing whether or not cohabitation is occurring in any given case, a court must analyze the following seven factors:

1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
2) Sharing or joint responsibility for living expenses;
3) Recognition of the relationship in the couple's social and family circle;
4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
5) Sharing household chores;
6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and
7) All other relevant evidence.

N.J.S.A. 2A:34-32(n) further provides that, "[i]n evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. *A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis*."[118]

While the Legislature borrowed language from the *Konzelman* court in defining cohabitation as a "mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union," the statute clarifies that cohabitation does *not* require the alimony recipient to actually live with another person.[119] Consequently, the barrier that once seemed insurmountable has become more attainable for the payor spouse to overcome.

Notably, the terms of the statute as set forth above explicitly allow a court to *suspend* or *terminate* alimony upon proof of cohabitation. However, the authority of the court is not strictly limited to these two options, as the statutory language does not preclude a court from *modifying* alimony if deemed appropriate under the circumstances:

> 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 the alimony or maintenance of the parties...as the circumstances of the parties and the nature of the case shall render fit, reasonable and just...[120]

The permissive language employed by the Legislature permeates the statute and allows courts to suspend, terminate, or modify alimony upon cohabitation based on the specific facts of the case, application of the law, and principles of equity. This interpretation is further supported by the court's analysis of the amended statute in *Spangenberg*:

> Recently, the Legislature adopted amendments to N.J.S.A. 2A:34-23, designed to more clearly quantify considerations examined when faced with a request to establish or *modify* alimony...Apt to this matter, the amendments include provisions regarding *modification of alimony and the effect of a dependent spouse's cohabitation*...[121]

The statutory language and case law precedent interpreting the amended statute clearly support the position that the courts have the authority to terminate, suspend, *or modify* the payor spouse's alimony obligation once cohabitation has been proven. This principle is supported by the long-established case law precedent that has been analyzed above. Specifically, an award of alimony remains subject to review and, if warranted, modification, when either party experiences a substantial change in financial circumstances.[122]

The parameters of alimony reform and its effect on cohabitation continue to evolve. The courts have similarly begun to interpret the statute and its practical applica-

tion to matters involving the enforcement of cohabitation settlement provisions. The New Jersey Supreme Court's decision in *Quinn* is particularly instructive on this issue.[123] In *Quinn*, the parties entered into a marital settlement agreement providing that alimony would terminate if the supported spouse cohabited with another.[124] Although the trial court determined that the supported spouse cohabited for a period of 28 months, the court suspended the payor spouse's alimony obligation for the period of cohabitation in lieu of terminating it.[125] In reversing the lower court's decision, the New Jersey Supreme Court held that once cohabitation is proven, the inquiry ends and the terms of a marital settlement agreement providing for termination or modification of alimony are enforceable.[126] According to the Court,

> [i]t is irrelevant that the cohabitation ceased during the trial when that relationship existed for a considerable period of time. Under those circumstances, *when a judge finds that the spouse receiving alimony has cohabited, the obligor spouse is entitled to full enforcement of the parties' agreement.* When a court alters an agreement in the absence of a compelling reason, the court eviscerates the certitude the parties thought they had secured, and in the long run undermines this Court's preference for settlement at all, including marital [] disputes.[127]

The *Quinn* court further stated that,

> [w]hen parties to a matrimonial settlement agreement have agreed to permit termination of alimony on remarriage or cohabitation, they have recognized that each are equivalent events. In each situation the couple has formed an enduring and committed relationship. In each situation, the couple has combined forces to mutually comfort and assist the other. The only distinction between remarriage and cohabitation is a license and the recitation of vows in the presence of others. *When the facts support no conclusion other than that the relationship has all the hallmarks of a marriage, the lack of official recognition offers no principled basis to treat cohabitation differently from an alimony terminating event.*[128]

Clarification of cohabitation from the Legislature and the practical application of the statute by the courts have made it easier for a payor spouse to prove he or she is entitled to terminate alimony through enforcement of a marital settlement agreement. However, notwithstanding the objective factors set forth within the reformed statute, pursuing termination of alimony based on cohabitation continues to be a difficult burden to overcome, especially under circumstances where the recipient spouse is actively concealing cohabitation.

While most other states follow an analysis similar to New Jersey when confronted with applications made by payor spouses to modify or terminate alimony based on cohabitation, the way in which states define cohabitation varies greatly. Some states, including West Virginia,[129] Maine,[130] Illinois,[131] Oklahoma,[132] North Dakota,[133] Virginia,[134] Louisiana,[135] North Carolina,[136] Pennsylvania,[137] and Florida[138] view cohabitation as a marital-like relationship. Courts in these states focus on whether or not the alleged cohabitants are assuming, for all intents and purposes, the rights and responsibilities of a married couple.[139] Other states including Delaware,[140] Alabama,[141] Georgia,[142] Massachusetts,[143] and California[144] focus more on whether or not the recipient spouse and alleged cohabitor hold themselves out to the public as a couple, and focus less on whether the relationship is tantamount to marriage.

Despite whether a state defines cohabitation as a marital-like relationship, a dating relationship, or something in between, courts typically rely upon a series of statutory or judicially created factors to determine whether or not a relationship exists between the recipient spouse and another adult that would warrant termination or modification of alimony. Whether or not the recipient spouse and alleged cohabitor reside together and/or share finances are factors most jurisdictions in the United States analyze when determining whether or not parties are, in fact, cohabiting. In Arkansas, "living together" is statutorily defined as "living full time with another person."[145] In Massachusetts, statutory law provides that individuals must maintain a "common household" for purposes of triggering cohabitation, and they do so when they "share a *primary* residence."[146] In Delaware, courts must determine whether or not the recipient spouse is "regularly residing" with the alleged cohabitor.[147]

Other states, including Illinois, North Carolina, Oklahoma, Georgia, and Texas consider "continuous" living arrangements enough to trigger cohabitation. Specifically, cohabitation is triggered in North Carolina

and Oklahoma under circumstances where the recipient spouse resides with the alleged cohabitor "continuously and habitually."[148] Illinois' statutory law requires a recipient spouse to reside with another adult "on a resident, continuing conjugal basis."[149] In Georgia, cohabitation involves "dwelling together continuously," while the cohabitation statute in Texas applies under circumstances where the recipient resides with another adult "in a permanent place of abode on a continuing basis."[150]

The duration of the alleged cohabitation is yet another factor addressed by most states. In Utah, the courts explicitly distinguish between a "temporary" and "brief" living arrangement: "[T]emporary focuses more on the couple's state of mind—that is, whether moving in together is motivated or accompanied by a desire to operate as a couple for the foreseeable future or is simply an expedient arrangement with no enduring quality—while 'brief' refers to the duration of the stay."[151] The former requires a subjective analysis while the latter involves the actual duration of time the recipient spouse and alleged cohabitor actually reside together.[152]

Notably, most states do not set forth a specific duration required to trigger cohabitation. Instead, similar to New Jersey, most jurisdictions address the concept of duration vaguely, or refer to, but fail to define the requisite period of time required to do so. Statutory law in West Virginia vaguely alludes to "the duration and circumstances under which the ex-spouse has maintained a continuing conjugal relationship with another person,"[153] while courts in Florida are similarly called upon to analyze an undefined "period of time"[154] of the alleged cohabitation. Other states, including those with automatic termination statutes, do explicitly specify a requisite duration of cohabitation. These states include Maine (12 to 18 consecutive months),[155] Virginia (12 to 18 consecutive months),[156] South Carolina (90 consecutive days),[157] Massachusetts (90 consecutive days),[158] and North Dakota (12 to 18 consecutive months).[159] Similar to New Jersey statutory law, courts in most non-automatic termination states[160] additionally evaluate financial commingling and/or contributions between the recipient spouse and the alleged cohabitor for purposes of determining whether or not the recipient spouse is cohabiting.

An analysis of case law illustrates that statutory law and relevant case law precedent provide courts with the requisite guidelines to determine an appropriate term of alimony, as well as circumstances that may require courts to terminate or otherwise modify a previously ordered or agreed-upon alimony award. However, these cases similarly demonstrate that the duration of alimony awarded will be decided based on the facts and circumstances of each case, which courts rely upon when determining an appropriate term of alimony. New Jersey statutory and case law precedent are clear; courts have exceptional authority to enter alimony awards that are fair and equitable. Thus, it is the facts and circumstances of any given case that drive its outcome. ■

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## Endnotes

1. *Gnall v. Gnall*, 222 N.J. 414, 119 A.3d 891 (2015).
2. *Id*.
3. *Id*. at 429. *See Mahoney v. Mahoney*, 91 N.J. 488, 501–02, 453 A.2d 527 (1982). *See also Khalaf v. Khalaf*, 58 N.J. 63, 67, 275 A.2d 132 (1971).
4. *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974).
5. *Lepis v. Lepis*, 83 N.J. 139, 150, 416 A.2d 45 (1980).
6. *Crews v. Crews*, 164 N.J. 11, 16, 751 A.2d 524 (2000); *Innes v. Innes*, 117 N.J. 496, 503, 569 A.2d 770 (1990).
7. N.J.S.A. 2A:34-23(b)(4). *See Crews, supra.*; *see also Weishaus v. Weishaus*, 180 N.J. 131, 141, 849 A.2d 171, 177–78 (2004): "We held that a court setting alimony must make a finding establishing the standard of living during the marriage and, as part of the court's assessment of the adequacy and reasonableness of the support award, must further determine whether the support will enable *the parties* to enjoy a lifestyle that is 'reasonably comparable' to the marital lifestyle." (emphasis added). *See also Dudas v. Dudas*, 423 N.J. Super. 69, 76, 30 A.3d 359, 364 (Ch. Div. 2011): "In many divorce cases, the reality is that when the parties separate and one household becomes two,

there is insufficient money available at the parties' prior income levels for either party to maintain the same marital lifestyle that each was previously able to afford while living together and sharing costs. Nonetheless, following a long term marriage of twenty-six years it is equitable for the court to explore the possibility of placing *both* parties—not just one party—as reasonably close to the past marital standard of living as practical under the circumstances."

8. *McGee v. McGee*, 277 N.J. Super. 1, 14, 648 A.2d 1128 (App. Div. 1994).
9. *Id*.
10. N.J.S.A. 2A:34-23(b).
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Elrom v. Elrom*, 439 N.J. Super. 424, 427-8, 110 A.3d 69 (App. Div. 2015).
17. *Id*. at 431.
18. *Id*. at 428.
19. *Id*. at 429.
20. *Id*.
21. *Id*. at 429.
22. *Id*. at 432.
23. *Id*.
24. *Id*. at 445.
25. *J.E.V. v. K.V.*, 426 N.J. Super. 475, 483, 45 A.3d 1001 (App. Div. 2012).
26. *Id*. at 480.
27. *Id*. at 481.
28. *Id*. at 484.
29. *Id*.
30. *Id*.
31. *Id*. at 489-90.
32. *Id*.
33. *Id*. at 490-1.
34. *Hughes v. Hughes*, 311 N.J. Super. 15, 709 A.2d. 261 (App. Div. 1998).
35. *Id*.
36. *Id*. at 31.
37. *Id*.
38. *Lynn v. Lynn*, 91 N.J. 510, 453 A.2d 539 (1982).
39. The Appellate Division reversed and remanded the trial court's alimony award as it related to the sum of alimony awarded by the lower court because a separate portion of the trial court's decision involving equitable distribution was vacated: "We assume that in calculating its alimony award the trial court considered that it was also awarding the defendant over $60,000 in equitable distribution of marital property. Because we are vacating that portion of the award, the trial court must redetermine a proper amount of alimony in light of the defendant's needs in the absence of equitable distribution." *Id*.
40. *Id*. at 512-13.
41. *Id*. at 513.
42. *Id*. at 514.
43. *Id*. at 516-17.
44. *Id*.
45. *McGee v. McGee*, 277 N.J. Super. 1, 648 A.2d 1128 (App. Div. 1994).
46. *Id*. at 4.
47. *Id*.
48. *Id*.
49. *Id*. at 14.
50. *Id*. 14-15.
51. *Id*. (emphasis added).
52. *Jacobitti v. Jacobitti*, 135 N.J. 571, 641 A.2d. 535 (1994).
53. *Id*. at 573.
54. *Id*. at 574.
55. *Cerminara v. Cerminara*, 286 N.J. Super. 448, 669 A.2d 837 (App. Div. 1996).
56. *Id*. at 461-2.
57. *Id*. at 202.
58. *Id*. at 206.
59. *Id*. at 206-7.
60. *Id*.; *See Cox v. Cox*, 335 N.J. Super. 465, 483, 762 A.2d 1040 (App. Div. 2000).
61. N.J.S.A. 2A:34-23(c).
62. *Id*.
63. *Lepis v. Lepis*, 83 N.J. 139, 155, 416 A.2d 45 (1980).
64. N.J.S.A. 2A:34-23.
65. *Id*.
66. *Lepis, supra*, 83 N.J. at 145, 416 A.2d 45. *See also Crews, supra*, 164 N.J. at 17, 751 A.2d 524.
67. *Lepis, supra*, 83 N.J. at 146, 416 A.2d 45.
68. *Lepis, supra*, 83 N.J. at 157, 416 A.2d 45.
69. *Id*.
70. *Crews, supra*, 164 N.J. at 29, 751 A.2d 524.

71. *Id.*
72. *Lepis, supra*, 83 N.J. at 151, 416 A.2d 45.
73. N.J.S.A. 2A:34-23.
74. *Landers v. Landers*, 444 N.J. Super. 315, 133 A.3d 637 (App. Div. 2016).
75. *Gayet v. Gayet*, 92 N.J. 149, 456 A.2d 102 (1983).
76. *Spangenberg v. Kolakowski*, 442 N.J. Super. 529, 125 A.3d 739 (App. Div. 2015).
77. *Id. See Mills v. Mills*, 447 N.J. Super. 78, 95, 145 A.3d 1105 (Ch. Div. 2016).
78. *Id.*
79. *Gayet v. Gayet,* 92 N.J. 149, 1552 (1983). *See Lepis, supra,* 83 N.J. at 151. *See also Boardman v. Boardman,* 314 N.J. Super. 340, 347 (App. Div. 1998) (explaining "cohabitation constitute[s] changed circumstances... justifying discovery and a hearing").
80. *Konzelman v. Konzelman*, 158 N.J. 185, 202, 729 A.2d 7, 10 (1999).
81. *Id.*
82. Although the actual length of time that plaintiff and her boyfriend actually resided together is unknown, defendant undertook surveillance of plaintiff's residence "seven days a week for 127 days, mostly in the evening, nighttime, and early morning hours." *Id.* at 191. Surveillance demonstrated that plaintiff's boyfriend returned to her residence "most evenings" and he left the residence "most mornings to go to work." *Id.*
83. *Id.*
84. *Id.* at 203.
85. *Id.* at 202.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Gayet, supra,* 92 N.J. at 155.
90. *Konzelman, supra,* 158 N.J. at 202–03.
91. *Id.*
92. *Ozolins v. Ozolins,* 308 N.J. Super. 243, 245, 705 A.2d 1230 (App. Div. 1998). *See Conlon v. Conlon,* 335 N.J. Super. 638, 650 (Ch. Div. 2000) (holding that the dependent spouse has the burden of proof "to address the economic consequence of the [new] relationship in order for the [c]ourt to make an appropriate assessment regarding a modification or termination of alimony").
93. *Ozolins, supra.*, at 247.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Boardman, supra,* 314 N.J. Super. at 347.
98. *Garlinger v. Garlinger,* 137 N.J. Super. 56, 64 (App. Div. 1975). In *Garlinger*, defendant-wife conceded that she resided with her boyfriend for a period of months following the parties' divorce. According to defendant, her boyfriend did not contribute anything toward the cost of food or household expenses. Nonetheless, the court found that interests of justice required suspending alimony payments for the period of cohabitation.
99. *Gayet, supra,* 92 N.J. at 155. *See Melletz v. Melletz,* 271 N.J. Super. 359, 363 (App. Div. 1994) (stating "the test for determining whether cohabitation by the dependent spouse should reduce an alimony award has always been based on a theory of economic contribution"), *certif. denied,* 137 N.J. 307 (1994).
100. *Reese v. Weiss*, 430 N.J. Super. 552, 557-58 (App. Div. 2013).
101. *Id.*
102. *Id.*
103. *Gayet, supra,* 92 N.J. at 154.
104. *Id.* at 154–55.
105. *Konzelman, supra,* 158 N.J. at 202. *See Gayet, supra,* 92 N.J. at 155.
106. *Id. See also Ozolins, supra,* 308 N.J. Super. at 248.
107. *Id. See also Gayet, supra,* 92 N.J. at 155.
108. *Garlinger, supra,* 137 N.J. Super. at 64. *See Wertlake v. Wertlake,* 137 N.J. Super. 476, 487 (App. Div. 1975).
109. *Reese, supra*, 430 N.J. Super. 552, 576 (App. Div. 2013).
110. *Id.*
111. *Id.*
112. *Boardman, supra*, 314 N.J. Super. at 347.
113. *Rose v. Csapo*, 359 N.J. Super. 53, 61 (Ch. Div. 2002). *See Ozolins v. Ozolins*, 308 N.J. Super. 243, 248-49 (App. Div. 1998). *See also Frantz v. Frantz*, 256 N.J. Super. 90, 93 (Ch. Div. 1992). *See also Grossman v. Grossman*, 128 N.J. Super. 193, 197 (Ch. Div. 1974).
114. *Rose, supra*, 359 N.J. Super. at 61.
115. *Frantz, supra*, 256 N.J. Super. at 93.
116. N.J.S.A. 2A:34-23(n).
117. *Id.* (emphasis added).
118. *Id.* (emphasis added).
119. *Id.*
120. *Id.* (emphasis added).
121. *Spangenberg, supra*, 442 N.J. Super. at 536-37.

122. *Lepis, supra,* 83 N.J. at 146 (citation omitted). *See also* N.J.S.A. 2A:34–23 (stating alimony orders "may be revised and altered by the court from time to time as circumstances may require").
123. *Quinn v. Quinn*, 225 N.J. 34, 137 A.3d 423, 425 (2016).
124. *Id*. at 38.
125. *Id*. at 38-39.
126. *Id*. at 53-4.
127. *Id*. at 55. (emphasis added).
128. *Id*. (emphasis added).
129. W. Va. Code §48-5-707(a)(1)(2016). The statute authorizes courts to terminate alimony if the recipient is involved in a "de facto marriage" with another individual. Evidence that a recipient spouse is cohabiting in a marital-like relationship with another includes "using the same last name, using a common mailing address, referring to each other in terms such as 'my husband' or 'my wife,' or otherwise conducting themselves in a manner that evidences a stable marriage-like relationship." *Id.*
130. Me. Rev. Stat. Ann. Title 19-a, §951A(12)(2015). Pursuant to the statute, cohabitation must endure for "at least 12 of a period of 18 consecutive months."
131. 750 Ill. Comp. Stat. 5/510(c)(2016). Pursuant to the statute, alimony terminates when the recipient spouse "cohabits with another person on a resident, continuing conjugal basis." In deciding whether such a relationship exists, courts analyze the following factors: "(1) the length of the relationship; (2) the amount of time the couple spends together (3) the nature of activities engaged in; (4) the interrelation of their personal affairs; (5) whether they vacation together; and (6) whether they spend holidays together." *In re Marriage of Miller*, 40 N.E.3d 206, 223 (Ill. App. Ct. 2015).
132. Okla. Stat. Title 43, §134(C)(2016). The statute defines cohabitation as a "private conjugal relationship."
133. N.D. Cent. Code §14-05-24.1(2015). The statute authorizes courts to terminate alimony if the recipient spouse has been "habitually cohabiting with another individual in a relationship analogous to marriage for one year or more."
134. Va. Code Ann. §20-109(A)(2016).
135. La. Civ. Code Ann., Article 115(2016). Courts are authorized to terminate alimony under circumstances where the recipient has "cohabited with another person...in the manner of married persons."
136. N.C. Gen. Stat. §50-16.9(b)(2016). The statute defines cohabitation as "the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include but are not necessarily dependent on, sexual relations."
137. *Miller v. Miller*, 508 A.2d 550, 554 (Pa. Super. Ct. 1986). Pennsylvania courts have defined cohabitation as a type of relationship "in which two persons of the opposite sex reside together in the manner of husband and wife, mutually assuming those rights and duties usually attendant upon the marriage relationship." *Lobaugh v. Lobaugh*, 753 A.2d 834, 836 (Pa. Super. Ct. 2000).
138. Fla. Stat. Ann. §61.14(1)(B)(2)(a)( 2016). In Florida, courts must consider the "extent to which the obligee and the other person have held themselves out as a married couple." However, instead of focusing solely on a "marital-like" relationship, the Florida statute asks whether or not the recipient spouse is involved in a "supportive relationship." *Id.*
139. *Id.*
140. Del. Code Ann. Title 13, §1512(g)(2016). Pursuant to Delaware statutory law, cohabitation is defined as "regularly residing with an adult of the same or opposite sex, if the parties hold themselves out as a couple." Further, "proof of sexual relations is admissible but not required to prove cohabitation." *Id*.
141. Ala. Code §30-2-55(2014). In Alabama, alimony is automatically terminated under circumstances where the recipient "is living openly or cohabitating with a member of the opposite sex."
142. Ga. Code Ann. §19-6-19(b)(2016). Pursuant to Georgia's statutory law, cohabitation means "dwelling together continuously and openly in a meretricious relationship with another person."
143. Mass. Gen. Laws. Ann. Chp. 208 §49(d)(1)(i)(2016).
144. Cal. Fam. Code. §4323(a)(2)(2016).
145. Ark. Code Ann. §9-12-312(a)(2)(D)(2016).
146. Mass. Gen. Laws. Ann. Chp. 208 §49(d)(1)(2016).
147. Del. Code Ann. Title 13, §1512(g)(2016).

148. N.C. Gen. Stat. §50-16.9(b)(2016). Okla. Stat. Title 43, §134(C)(2016). Ga. Code Ann. §19-6-19(b)(2016). Tex. Fam. Code Ann. §8.056(b)(2015).
149. 750 Ill. Comp. Stat. 5/510(c)(2016). In 2015, the *In re Marriage of Miller*, 40 N.E.3d 206 (Ill. Ct. App. 2015) court clarified that the living arrangement between the recipient spouse and alleged cohabitor not be an uninterrupted arrangement, but can also occur under circumstances where a couple maintains separate households.
150. Tex. Fam. Code Ann. §8.056(b)(2015).
151. *Scott v. Scott*, 368 P.3d 133 (Utah Ct.App.2016).
152. *Id*.
153. W. Va. Code §48-5-707(a)(2)(2016).
154. Fla. Stat. Ann. §61.14(1)(B)(2)(b)( 2016).
155. Me. Rev. Stat. Ann. Title 19-a, §951A(12)(2015).
156. Va. Code Ann. §20-109(A)(2016).
157. S.C. Code Ann. §20.3.150(2016).
158. Mass. Gen. Laws Ann. §49(D)(1)(2016).
159. N.D. Cent. Code §14-05-24.1(2015).
160. Illinois, Louisiana, Delaware, Alabama, North Carolina, North Dakota, Utah, Texas, Arkansas, Pennsylvania, and Virginia are considered automatic termination states.

# Navigating Non-Dissolution Matters

*by Dina M. Mikulka and Holly M. Friedland*

Most non-dissolution cases can be addressed summarily. However, sometimes non-dissolution and other summary-type cases are incredibly complex, implicating parents' access to their children and curtailing the parent-child relationship. So, while non-dissolution cases *can* be addressed summarily, this should not be taken to mean that *all* of them *should* be.

The vast majority of non-dissolution (FD) cases involve relief sought by parents who never married, regarding custody, parenting time, paternity, child support and medical support. The FD docket can also address college contribution cases for never married parents; grandparent visitation cases; relocation cases between never married parents; custody cases between parents and third parties due to the untimely death, addiction, mental health crisis, or incarceration of a parent; and psychological parent cases.

For those attorneys who do not regularly handle non-dissolution cases, FD court days may appear something akin to the Wild West. The majority of the participants are self-represented, and cases are normally heard on an accelerated schedule. To the casual observer, it would appear that rules regarding notice and evidence are non-existent. A matrimonial attorney might believe there are no rules in FD court—a grave mistake that could result in additional fees, delays and prejudice to clients. The goal of this article is to help guide practitioners around the very different practices and procedures in FD court.

## Practices and Procedures in Non-Dissolution Summary Hearings

The practices and procedures in non-dissolution cases differ significantly from matrimonial cases. These procedures, for the most part, stem from Directive 08-11, issued on Sept. 2, 2011, and the Supplement to 01-11 issued on Nov. 18, 2011. Directive 08-11 was followed by amendments to Court Rule 5:4-4 and 5:5-3. The Administrative Office of the Courts' (AOC) goals in setting forth these directives were to standardize "[e]fficient methods for processing Non-Dissolution cases."[1] The AOC noted that "self-represented litigants comprise the majority of those filing in the Non-Dissolution docket."[2] Establishing "standardized statewide practices enables all court customers to have a clear and consistent understanding and a defined process for the resolution of disputes that fall under" the FD docket, according to the AOC.[3]

All non-dissolution matters are processed, at least initially, as "summary" actions with discovery at the "discretion of the judge."[4] Appearances by the parties are generally mandatory and use of the AOC promulgated forms is required.[5] Attorneys may file a non-conforming complaint, but it "must have appended to it a completed supplement promulgated by the Administrative Director of the Courts."[6]

## Service of Initial Complaint, Modification Applications and Deadlines

After preparation of the complaint, the differences between non-dissolution and dissolution cases continue with the service of the initial complaint and "applications for post dispositional modification" (formerly known as motions, and still known as motions in dissolution cases). Service of process in summary hearings is to be made by the family part, as opposed to the party filing the complaint, which is required in dissolution matters:

> The Family Part shall mail process simultaneously by both certified and ordinary mail to the mailing address of the adverse party provided by the party filing the complaint or application for post dispositional relief.[7]

Many practitioners are surprised to learn that some vicinages only serve a notice and summons without the full pleading and supporting certification. Most vicinages will provide the complete pleading package upon request of the adverse party, but that party has to know to request the additional material.

Serving only a summons and court notice not accompanied by the pleading package on the opposing party is a potential deprivation of due process and undermines

one of the goals of Directive 08-11: "[h]aving standardized statewide practices" that enable "all court customers to have a clear and consistent understanding as a defined process for the resolution of disputes that fall under this docket type." In addition, the failure to serve a litigant with an entire complaint or doing so with insufficient time before the hearing is a potential violation of the litigant's due process rights: "[a]t a minimum, due process requires that a party to a hearing receive 'notice defining the issues and an adequate opportunity to prepare and respond."[8]

Perhaps in an effort to address this potential due process conundrum, the AOC-issued package instructs parties who elect to file written certifications to initial moving papers to serve the certifications directly on the other side.[9] However, this affirmative step is not actually required by the Court Rules. Court Rule 5:4-4 provides for service only of the initial moving application by mail by the court on the non-moving party. In addition, the Court Rules do not address service of any other submissions of parties as they relate to cross-pleadings, replies or cross-applications for relief. The different rules for service and submissions for initial moving versus non-moving or cross-moving parties creates confusion and inconsistency, again undermining the goals of "standardized statewide practices" and a "clear and consistent understanding" of the processes applicable to non-dissolution cases.[10] At the very least, the Court Rules should address service of cross-applications and responses, with package instructions mirroring those provided for in dissolution cases.

The AOC-issued package for FD applications for post-dispositional relief (formerly motions) contains the following instructions:

> You *may* file a written response to this application if you are the non-moving party. It must be filed with the court and served on the filing party at least 15 days prior to your hearing date…
>
> Page 4 of 17 Notice to Litigants. [Emphasis Added].

Since a written reply is optional, it is unclear from both the AOC-promulgated package and Rule 5:4-4, whether a litigant or counsel can simply bring evidence to court on the return date and actually be heard. The AOC form application for post-dispositional relief, at page 15 of 17, contains the following instructions:

> You may file a written response by certification opposing this application/cross application. Any written response you send to the Court must be sent to the other party. Your written response must be filed with the court and served on the other party at least 15 days prior to the hearing date. If you fail to appear, an Order granting the relief requested by the filing party may be granted although your written response, if filed, will be considered.

There is also a reference to the ability to file a written response to any opposition, but no filing deadline is set forth in the instructions.

While the instructions provided for in non-dissolution cases are similar to those included in the notice to litigants in dissolution motions as required by Rule 5:5-4(d), the failure to provide the same level of detail leaves open the possibility for due process deprivation. By comparison, the notice to litigants in dissolution motions clearly states:

> The response and/or cross motion must be submitted to the court by a certain date…A response and/or cross motion must be filed fifteen days (Thursday) before the return date. Answers or responses to any opposing affidavits and cross-motions shall be served and filed not later than eight days (Thursday) before the return date…

It would seem logical for similar instructions to be established and provided in non-dissolution cases. Unfortunately, that is not the case at this time.

As to actual service of process, Rule 5:4-4 does not address initial service by way of verified delivery services such as Federal Express or United Parcel Service, or require a certification of service, and does not require service by the parties/attorneys. Instead, service of process is the obligation of the court staff:

> The Family Part shall mail process simultaneously by both certified and ordinary mail to the mailing address of the adverse party provided by the party filing the complaint or application for post-dispositional relief.
>
> R. 5:4-4(b)(1).

It is not clear if the court would reject service by way of U.S. Postal overnight delivery, United Parcel Service or Federal Express as being valid service of a response to the moving papers served by the court. In addition, the Court Rules and AOC Directive 08-11 appear to impose different obligations for service on moving versus non-moving parties.

The dilemma for attorneys handling non-dissolution cases as the moving party is whether or not to serve the other side with their client's papers. Even though Rule 5:4-4 does not obligate the moving party to serve the adversary, it is good practice and common courtesy for attorneys handling non-dissolution matters to effectuate service beyond the barebones service often effectuated by the court. It would be a waste of the client's time and money to appear with counsel only to be told that proper service was not effectuated or that the adversary was unaware of the extent of the filing and received insufficient notice.

As for the non-moving party, a common question among attorneys is whether it is acceptable or even possible to simply show up on an FD return date and present evidence without having formally responded to moving or cross-moving papers. The answer to this question is unclear from AOC Directive # 08-11, and there is confusion and limited enforcement regarding filing deadlines set forth in the AOC-promulgated forms. As a result, it is common for a party to serve a comprehensive cross application a day or two before a scheduled FD hearing.

One way to address the confusion regarding filing deadlines is for attorneys to be proactive when they appear before the court and request that appropriate non-dissolution cases be assigned to the complex track to permit filing deadlines to be established.

## Calendars and Hearings

Many non-dissolution appearances are categorized as 'hearings.' There are no Court Rules or published directives that specifically address the calendaring of non-dissolution matters. Thus far, the AOC has not published calendars for non-dissolution matters in a manner similar to FM/dissolution motions, but it is fairly obvious to practitioners who regularly appear in family court that there are designated 'FD days,' where the Court primarily hears FD matters. It is also clear on these FD days that the goal of the court is to resolve as many cases as possible—good for the calendar, potentially bad for the litigant.

While most non-dissolution matters can be resolved summarily, such as a simple W-2 wage earner child support case, all non-dissolution cases are not appropriate for summary proceedings. FD matters such as grandparent visitation, third-party custody cases and psychological parent cases, which can significantly alter a parent-child relationship, should not be treated as 'summary' proceedings.[11] It is in these cases that scheduling issues, confusion about the rules, and the inconsistency in following them, are the most pronounced.

It is troubling that cases that can limit a parent's access to their biological children are among a category of cases considered 'summary actions.'[12] Complex non-dissolution cases may be resolved through the same summary process as a simple child support application.[13] Even issues such as parental unfitness, at least under the Court Rules and AOC directive, can be treated summarily in the context of non-dissolution cases.[14]

In cases not suited for summary disposition, practitioners can try to obtain the distinction of 'complex,' giving the case the added attention it may require. Before the first hearing, the litigant/attorney can write to the court asking for designation as a complex case or make an oral application for assignment to the complex track at the first hearing. Rule 5:4-2(j) allows for the assignment to the complex track to be made in the initial complaint or counter claim. Rule 5:4-2(j) states:

> In any non-dissolution action, any party or attorney seeking to designate a case as complex may submit that request in a verified compliant/counter claim form promulgated by the Administrative Director of the Courts or in writing to the court prior to the first hearing. The procedure for the assignment of non-dissolution matters to the complex track is set forth in R. 5:5-7.

There is a benefit to requesting complex status at or prior to the first court appearance, as it allows for case management to commence early in the litigation and can establish a discovery schedule because discovery is not granted automatically for non-dissolution matters:

> The court, in its discretion, or upon application of either party, may expand discovery, enter an appropriate case management order, or conduct a plenary hearing on any matter.
>
> R. 5:4-4(a).

However, not every case can be classified as 'complex,' even where the request has been made. Complex tracking for non-dissolution cases is reserved for:

> only *exceptional* cases that cannot be heard in a summary matter. The court may assign the case to the complex track based only on a specific a finding that discovery, expert evaluations, extended trial time or another material complexity requires such an assignment made after the initial hearing. [Emphasis Added].
>
> R. 5:5-7(c).

It is submitted that based on Rule 5:5-7(c), all disputed custody matters should at least be considered for assignment to the complex track, especially if experts are involved. Rule 5:8-6 dictates that where the court finds that "custody of children is a genuine and substantial issue, the court shall set a hearing date no later than six months after the last responsive pleading." Given this provision, it would be reasonable for the court to take a more active role in ensuring that deadlines are established and met in order to move the matter forward within the time provided. In addition, it has been established that in most cases, a hearing must be held for an initial custody award or a change in custody.[15] Similarly, the courts have established that the parties must have an appropriate opportunity to obtain assistance from experts.[16] Each of these situations would meet one of the required factual findings needed for a matter to be classified as complex.

In addition to contested custody matters, certain cases should be given greater scrutiny for assignment to the complex track, including three-party cases, psychological parent cases, grandparent custody/visitation cases and college contribution cases.[17]

Both dissolution and non-dissolution cases have their own potential procedural pitfalls. Children subject to the jurisdiction of the family part under one docket type (FM) may not be entitled to a plenary hearing on certain issues such as college contribution, while children subject to the same factual scenario but under a different docket (FD or others), may not be allowed to pursue discovery, expert involvement, and develop their case, and their factual and legal issues may be dealt with in a truncated timeframe.

## Case Information Statements

Only certain types of non-dissolution cases require a family part case information statement (CIS). The only FD cases that require a CIS are those dealing with requests for spousal support (in cases where the parties are married but there is no divorce filing) or requests for contribution towards college.[18] In addition to the CIS, applications for college contribution require proof of financial aid, scholarships, loans and grants for which the child or parent has applied.[19] However, based on the AOC forms instructing parties that written submissions are optional, it is possible that a party responding to a college application may not even know certain submissions are required.

For most FD cases, even those involving the calculation of child support, the parties will not be required to submit a CIS. Instead, the court rules provide:

> In any summary action in which support of a child is in issue, each party shall, prior to the commencement of any hearing, serve upon the other party and furnish the court with an affidavit or certification in a form prescribed by the Administrative Director of the Courts.[20]

In response, the AOC has provided the parties with a "summary financial statement."[21] The summary financial statements, like CISs, are confidential.[22] Also, like a CIS, the parties are required to attach their three most recent paystubs and most recent tax return to the statement. For a relatively straightforward child support calculation, it may not be objectionable for parties to simply bring pay stubs and tax returns to court on the day of a hearing.

The court staff notifies the non-moving party of what he or she is required to bring on the date of the hearing as part of the summons to appear. However, even in spite of this notice, if the non-moving party fails to bring the financial statement or documentation of his or her earnings to the hearing, that failure will not prevent the court from issuing an award of support. Instead, the court rules have provided that in addition to the information from the statement, the court can consider "any other relevant facts to set an adequate level of child support."[23] In these situations, it is not uncommon for the court to convert the hearing into a case management conference with a temporary support award being established without prejudice. The court can then require the parties to prepare and submit the required financial statements and specified proofs by dates certain prior to having the parties return for a final determination.

## Orders to Show Cause

The AOC has stated that emergent applications in FD court are intended to prevent irreparable harm to a child or to protect their health, safety, and welfare. By way of example, the instructions provided by the AOC for submission specifically list the following as qualifying for an order to show cause:

> emergency custody, termination of visitation or temporary prevention of relocation of a child outside New Jersey boundaries. Non-payment of spousal support, if a family is facing immediate eviction, may be an issue for an Order to Show Cause. Non- payment of child support is NOT an issue for an Order to Show Cause.[24]

As with other applications to the court in FD cases, the AOC has provided forms that *must be used* when filing.[25] If this is the initial application/complaint, litigants must file the initial application form and an emergent application form. If the order to show cause is not the initial application, an application to modify a court order form and the emergent application form must be completed. An attorney-prepared certification can be prepared to supplement the AOC forms.

Unlike with orders to show cause in the FM docket, all emergent applications in the FD docket must be made *in person*, although there is no stated requirement that the party must be present if he or she is represented by counsel. Based on local practice, court staff may present the moving party with an additional emergent hearing form to be completed by hand upon arrival at court. Once the papers have been turned in at family intake, they will be presented to the court for review and immediate ruling. The trial court may hear argument on the application immediately or may issue an order based on the papers submitted. The resulting order may schedule additional proceedings or may resolve the matter with no additional dates being set.

## Conclusion

While the non-dissolution docket may appear chaotic, there are rules (some means by which to obtain case management and practical advice that may help guide a practitioner unfamiliar with FD matters): 1) Do not assume an adversary knows the court rules or AOC directives; 2) be prepared to educate an adversary and even court personnel on the rules and AOC directives discussed above; 3) use the AOC-promulgated forms and supplement those forms as permitted; 4) if the case is complex, seek track assignment early in the litigation; 5) display courtesy and decency to the adversary by providing service of a full pleading package and ask for the same in return. If these steps are followed, a practitioner should be able to safely navigate through the 'Wild West' of non-dissolution proceedings in a smooth and efficient manner.

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## Endnotes

1. Directive #08-11.
2. *Ibid.*
3. *Ibid.*
4. *Ibid.*
5. *Ibid.*
6. R. 5:4-2(i).
7. R. 5:4-4(b).
8. *HES v. JCS*, 175 N.J. 309, 321 (2003).
9. http://www.njcourts.gov/forms/11223_fin_state_sum_support_actions.pdf.
10. Directive 08-11.
11. *See R.K. v. D.L.*, 434 N.J. Super. 113 (App. Div. 2014); *Major v. Maguire*, 224 N.J. 1 (2016).
12. R. 5:4-4(a).
13. *See* Directive 08-11.
14. *Watkins v. Nelson*, 163 N.J. 235 (2000); *VC v. MJB*, 319 N.J. Super. 103 (App Div. 1999).

15. *GC v. MY*, 278 N.J. Super. 363 (App Div. 1995); *Mackowski v. Mackowski*, 317 N.J. Super. 8 (App. Div. 2005).
16. *Kinsella v. Kinsella*, 150 N.J. 276, 318-319 (1997).
17. *Major v. Maguire*, 224 N.J. 1 (2016).
18. R. 5:5-3.
19. R. 5:5-3.
20. R. 5:5-3.
21. http://www.njcourts.gov/forms/11223_fin_state_sum_support_actions.pdf.
22. R. 1:38-3(d).
23. R. 5:5-3.
24. http://www.njcourts.gov/forms/11523_fd_emerg_app_osc.pdf.
25. http://www.njcourts.gov/forms/11523_fd_emerg_app_osc.pdf.

# Egregious Fault or Economic Foul: Knowing It When You See It; Revisiting *Reid*, *Mani* and *Clark*

*by Allen J. Scazafabo Jr.*

As a practitioner, one of the most frequent questions clients pose in the initial stages of representation is, "Am I going to have to pay alimony?" That question is usually quickly followed with a commentary and summary from the client outlining all of the ways in which the dependent spouse contributed to or caused the breakdown of the marriage. The practitioner is then invited to hear about the adultery and substance abuse issues in the marriage and the client's frustration that spousal support should not be awarded to the 'at fault' spouse. This article seeks to address certain potential areas where a *bona fide* good-faith argument can be established for challenging the calculation and the duration of alimony, based on the payor spouse establishing that the dependent supported spouse engaged in fraudulent conduct effecting the parties' finances.

The general response to that initial question by most practitioners is that a spouse's fault in causing the breakdown of the marriage is generally not a basis for challenging a *pendente lite* spousal support or alimony award. This response is based upon the principles set forth in *Mani v. Mani*,[1] and the New Jersey Supreme Court, holding that fault is not a basis to deny an award of alimony except for when it is 'egregious fault.' In fact, many practitioners throw the phrase 'egregious fault' around as if it were the only scenario available. *Mani*, however, instructs that there are two instances of egregious fault: 1. where fault has affected the parties' "economic life," and 2. in cases where fault "violates societal norms that continue in the economic bonds between the parties with confound notions of simple justice."

While these two exceptions are commonly referred to as egregious fault collectively, in order to utilize these tools correctly it is important for the practitioner to understand that there are subtle distinctions between egregious fault, economic fault, a total denial of alimony, and the use of economic fault in the 'calculation of alimony,' from leveraged positions attacking the alimony calculus.

In *Clark v. Clark,*[2] the Appellate Division provided instruction on the subtle distinction between the exceptions. Economic impact caused by the supported spouse's conduct, amorphous and vague as it may be, should not be overlooked given the frequency in which financial divorce planning occurs in matrimonial matters.

The *Mani* decision has had a profound and long-lasting impact in the area of matrimonial law for more than a decade since it was decided. Often, when cases as significant as the *Mani* decision are rendered, practitioners can be inclined over time to over generalize the main proposition of the case at the expense of nuanced distinctions and exceptions that can be pivotal in the right cases. It is not enough to simply say fault is not a basis for determining alimony without inquiring further as to whether the fault involves an economic impact on the marriage. The refrain, 'fault is not a basis to deny alimony,' has crept into the lexicon and been generically woven into the fabric of common matrimonial parlance, causing many among the bench and bar to overlook fault as it applies to alimony, or to consider *Mani* in the context of other cases and statutes. In large part, the *Mani* decision's use of the term 'egregious fault' has contributed to the notion that the concept of fault's effect on alimony is extremely limited. Practitioners and judges alike overlook that *Mani* also focused on economic fault. As practitioners, it is important to continue to be mindful that surreptitious financial hypothecation, dissipation, transmutation and concealment from a divorce planning standpoint may be a fertile ground to raise a challenge to a potential alimony obligation or the calculation of alimony.

The common fact scenario is that the moneyed spouse is the party engaging in financial divorce planning prior to the litigation. But what about instances where it is discovered that the dependent spouse has engaged in systemic and significant financial divorce planning or financial subterfuge and has either converted marital monies, hypothecated or dissipated marital monies or assets, or concealed through straw-man

tactics or other subterfuge bank accounts, spending and purchases, including but not limited to, acquisition of property and debts? What effect if any, should this have on alimony? The answer is that, this conduct, if discovered and established, may place the payor in a favorable position to challenge the calculation of alimony through negotiations and at the time of trial.

Alimony and equitable distribution are distinct but related types of relief. However, the discretionary application of the equitable maxim of unclean hands applies to matrimonial cases. It is well settled that a party "in equity must come into court with clean hands and... must keep them clean...throughout the proceedings."[3] It is axiomatic throughout every practice area in the body of law that, 'a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit.' Family court is particularly sensitive to the concept of unclean hands and the principle that 'one who seeks equity must do equity.' Consequently, equity demands that the trial court consider dishonest, illegitimate conduct, and its impact on the past and future economic security. Secretive transmutation, hypothecation, dissipation, conversion, or transfer of marital monies and property may trigger a *bone fide,* good faith position for challenging an alimony obligation, depending on the quantum, frequency, or materiality of such conduct.

So, what fault is egregious? A bright-line answer does not exist. Instead, subjectively the attack or challenge to alimony based on egregious fault, an amorphous concept, must be answered on a case-by-case basis by a trial judge. In 1964, Justice Potter Stewart, in *Jocobellis v. Ohio,*[4] famously stated in reference to obscenity and the difficulty in clearly defining it, "*But …I know it when I see it.*" Similarly, 'egregious fault' is a vague concept that requires the practitioner to see it, pursue it, and put forth the best argument to assist the trial court to see it, too. The general consensus is to intermingle 'egregious conduct' with 'economic conduct,' but to do so may be an error. The analysis is illuminated by looking at several cases that define the boundaries of egregious marital fault, as well as civil and criminal statutory violations triggered by this type of conduct in the context of several common hypothetical fact scenarios typically experienced by practitioners.

N.J.S.A. 2A:34–23(b) provides that in all divorce actions the court may award alimony, upon consideration of the following non-exclusive list of enumerated factors:

1) The actual need and ability of the parties to pay;
2) The duration of the marriage;
3) The age, physical and emotional health of the parties;
4) The standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living;
5) The earning capacities, educational levels, vocational skills, and employability of the parties;
6) The length of absence from the job market of the party seeking maintenance;
7) The parental responsibilities for the children;
8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;
9) The history of the financial or non-financial contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;
10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;
11) The income available to either party through investment of any assets held by that party;
12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;
13) The nature, amount, and length of *pendente lite* support paid, if any; and
14) Any other factors the court may deem relevant.

The word 'fault' does not appear in the statute. However, N.J.S.A. 2A:34-23(i) provides:

> No person convicted of murder... manslaughter...criminal homicide... aggravated assault…or a substantially similar offense under the laws of another jurisdiction, may receive alimony if: (1) the crime results in death or serious bodily injury to a family member of a divorcing party; and (2) the crime was committed after the marriage or civil union. A person convicted of an attempt or conspiracy to commit murder may not receive alimony from the person who was the intended victim of the attempt or conspiracy.

Critically, N.J.S.A. 2A:34-23(i) additionally provides: "Nothing in this subsection shall be construed to limit the authority of the court to deny alimony for other bad acts." While, a trial court judge cannot take into account fault or misconduct in making an equitable distribution determination, a judge may consider misconduct when determining the amount of or right to alimony in two instances: 1) when marital conduct negatively affects the economic *status quo* of the parties, and 2) where the conduct is so outrageous that the court cannot turn a blind eye to the behavior.[5] Egregious marital fault may and should be considered where an award of alimony would be unjust.

The range of financial subterfuges that many practitioners see varies, factually and in degrees of seriousness; however, there are simple and common types that always should be considered in determining the amount and length of alimony. By way of example, where the supported spouse has been divorce planning, secretly removing money from joint account(s) and placing it in straw accounts set up in the names of family members solely to shield the accounts from discovery and subpoena and conceal the monies from distribution. Another example is when a spouse obtains fraudulent loans or debts from confidants to drive up marital debts that will later be forgiven following the divorce.

Three cases set the stage for an argument that the misappropriation of marital monies, or fraud, conversion or dissipation should be utilized in analyzing the alimony calculation.[6] Additionally several civil causes of action, such as breach of fiduciary duty, constructive or actual fraud, constructive deceit, fraudulent conveyance, conversion, and criminal statutes prohibiting money laundering and impersonation provide further guidance in analyzing the spouse's conduct.

For example, in *Reid v. Reid*,[7] the trial court determined that the wife, who embezzled significant sums of money from her husband's business and dissipated marital assets, which significantly (and detrimentally) impacted her husband, was not entitled to alimony. The Appellate Division affirmed the trial court's denial of an alimony award. Prior to the divorce action, the parties, who were equal shareholders in Reid Enterprises, were adversaries in a federal bankruptcy proceeding, where the husband claimed counts of embezzlement, fraud and mismanagement against the wife. The bankruptcy court agreed with the husband's claims following trial, and entered an order for damages, including punitive damages against the wife. Judge Robert Coogan presided over the matrimonial matter, and in denying alimony chronicled the parties' lifestyle, and all of the various improper real estate dealings by the wife, and cited to the bankruptcy court judge's findings that the wife misappropriated monies and assets from the parties' jointly owned business by diverting or funneling monies and not recording "substantial cash transactions."

In upholding the findings of the trial court the Appellate Division stated instructively:

> Judge Coogan could not ignore the embezzlement by defendant and her misappropriation of marital assets which 'significantly impacted on her husband.' The judge also observed that after the misappropriation and embezzlement, defendant attempted to 'cover [her defalcations] up. We agree entirely with the Chancery judge's conclusion that this conduct should not be rewarded in a court of equity by an order entitling her to alimony.

In *Reid*, the Appellate Division, along with the trial court, clearly looked to findings of embezzlement, misappropriation and dissipation to define outrageous or egregious conduct sufficient to deny an award of alimony.[8]

In *Mani*, seven years following *Reid*, the parties were business partners working together on many ventures, similar to the wife and husband in *Reid*, except that at some point the wife received a stock from her father in a separate family-owned business, which rose significantly in value and split several times. The wife sold the stock and the parties slowly retired and lead an extravagant lifestyle. The couple spent seven years together in retirement before the wife discovered her husband was having an affair and filed a complaint for divorce alleging adultery and extreme cruelty. The wife argued the husband was not entitled to alimony as his dependency was based on his own "indolence." The court disagreed, and found alimony was appropriate.

The *Mani* Court, curiously ignoring the *Reid* decision, however, similarly found that "[t]he thirteen alimony factors listed in N.J.S.A. 2A:34–23(b) clearly center on the economic status of the parties. That is the primary alimony focus. However, the Legislature adopted...that 'fault, where so asserted as a ground for relief will be a *proper consideration* for the judiciary in dealing with alimony and support.'" Therefore, the Court held that:

> [I]n cases in which marital fault has negatively affected the economic status of the parties it may be considered in the calculation of alimony. By way of example, if a spouse gambles away all savings and retirement funds, and the assets are inadequate to allow the other spouse to recoup her share, an appropriate savings and retirement component may be included in the alimony award.
>
> ...Given the economic basis of alimony, there can be no quarrel over the notion that fault that has altered the financial status of the parties is relevant in an alimony case. The same relevance notion does not apply to the ordinary fault grounds for divorce that lurk in the margins of nearly every case and therefore those grounds should not be interjected into an alimony analysis. To do so would distort the application of the principles the Legislature has adopted to secure economic justice in matrimonial cases. Moreover, without concomitant benefit, considering non-economic fault can only result in ramping up the emotional content of matrimonial litigation and encouraging the parties to continually replay the details of their failed relationship.
>
> Thus we hold that to the extent that marital misconduct affects the economic *status quo* of the parties, it may be taken into consideration in the calculation of alimony. Where marital fault has no residual economic consequences, it may not be considered in an alimony award.

More recently, and perhaps more importantly in *Clark*, using *Mani* and *Reid* as guidance, the appellate court shed light on instances where economic misconduct can rise to the level of egregious conduct, and in doing so indicated a subtle distinction between a total denial of alimony and the consideration of fault-based economic transgressions in the alimony calculation. In *Clark*, the husband appealed an alimony award to the wife because at trial he proved that his wife secreted approximately $350,000 from their business during the marriage. As in *Reid*, the parties were equal shareholders in a business. The trial judge required the wife to pay back half of the amount, as the plaintiff's equitable distribution. On appeal, the husband argued that such conduct in secreting and concealing significant monies demonstrated "egregious fault," obviating any alimony award. The Appellate Division in *Clark* agreed, vacated the alimony and remanded the matter back to the trial court. In doing so, the *Clark* court, in *dictum*, held that even if economic fault does not rise to egregious fault, it still may be considered in the alimony determination. Moreover, the court held that where economically based misconduct is systematic, willful, and purposefully designed to deprive the other spouse of the economic benefits of the marital partnership, the acts transcend simply effecting the economic status quo.

Citing to *Mani*, the Court acknowledged the two "narrow" exceptions where fault can warrant reconsideration regarding alimony. The Court further noted that marital misconduct that affects the economic *status quo* of the parties alone, *may be taken into consideration* in the calculation of alimony, whereas egregious conduct allows a court to, as an initial ruling, determine *whether alimony should be allowed at all*. The court in *Clark* made specific note of the wife's conduct of moving monies between accounts, diversion of cash, and use of safe deposit boxes to secret marital monies, in determining that, "Defendant's conduct fell within *Mani*'s delineated 'narrow band of cases' that 'affected the parties' economic life.'" The court pointed out that there was no evidence of physical harm caused by the "thievery" but the conduct transcended "mere economic impact," and that the wife "kicked [the parties'] economic security in the teeth." The court was also mindful to note that the wife was engaged in a "scheme," which was "long-term" and was not only criminal but demonstrated a "willful and serious violation of societal norms."

Significantly, the court noted: "[f]inally, if the Court concludes [on remand] an award of alimony remains warranted, the trial judge must nevertheless assess the impact of defendant's conduct prior to affixing an amount of alimony…the...determination could include an off-set against the alimony award by the amount stolen." In other words, if the trial court follows the Appellate Division's instruction to make findings as to whether or not the conduct rose to the level of egregious fault, and determines that it does not, the trial court *must* still consider the conduct when fixing an amount of alimony. This last sentence is a clear indication that in every case where there is evidence of systematic scheming to conceal and to deprive a spouse of an economic benefit of the marital partnership through the movement of cash between accounts, dissipation of funds, hypothecation of monies, and a willful and purposeful act, courts must consider that conduct in the alimony calculus.

The most important portion of the *Clark* court's decision is the notion that the court must take into account these economic misconducts even if they do not rise to the level of egregious conduct and if established can and should offset alimony by the amounts dissipated, hypothecated or converted. Therefore, a claim that marital monies were taken, or dissipated or converted, no matter how small, should not be overlooked. In other words, any economic misconduct when discovered should be used as a mechanism to challenge alimony and to obtain an offset.

It also is imperative that such evidence be presented to the court for consideration in the overall alimony determination. A court has substantial discretion in determining whether to grant alimony and in setting the amount. A practitioner should, therefore, consider the common occurrence of intentional dissipation of assets as a means for challenging alimony. In many cases, the monies or property that have been misappropriated are now outside the reach of the other spouse or unrecoverable. The likelihood is that part of the scheme in the first place was to place the asset outside of the reach of the other spouse to shield the asset from distribution in the divorce. Dissipation is the natural argument following the misappropriation and fraudulent concealment of marital monies. In a matrimonial matter, "dissipated funds are subject to equitable distribution, as if the funds were not dissipated at all."[9]

The ultimate question regarding an intentional dissipation of assets is whether the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate.[10] Where one spouse has "dissipated the marital assets, or otherwise disposed of them in fraud of the other," a court properly imposes a debt on the dissipating "spouse in favor of the other."[11] In *Clark*, the court indicated that this 'debt' should preclude an award of alimony or at the very least be considered in the calculation. One might question: Does this include the common situation where a spouse removes marital monies in a joint account to pay back the 'loan' they received from a friend to pay for expenses during the divorce? In all likelihood, following *Clark*, it does, and an argument should be made to offset it against the alimony.

To support these positions, it is important to note that in each of these cases there were references to criminal behavior, systematic concealment, and deprivation of marital property purposefully and willfully designed to deprive the other spouse of an economic benefit. In analyzing whether or not 'egregious' economic conduct has occurred, or whether or not conduct rises to the level of challenging alimony, other sources should be considered by the practitioner, such as the New Jersey Criminal Code, Title 25 of the New Jersey Statutes relating to frauds and fraudulent conveyances, and common law causes of action for fraud, breach of fiduciary duty and misappropriation. In *Reid*, *Mani* and *Clark*, the courts focused heavily on the very same elements in the money laundering and fraudulent conveyance laws and common law breach of fiduciary duty and fraud. Accordingly, if one is in violation of criminal statutes, the behavior must be considered by the court and must be taken into consideration if it affects the *status quo* of the martial lifestyle.

N.J.S.A. 2C:21-25 and 2C:21-17, outlines the criteria for one to be found guilty of money laundering:

> e. A person is guilty of a crime if, with the purpose to evade a transaction reporting requirement of this State or of 31 U.S.C. s.5311 et seq. or 31 C.F.R. s.103 et seq., or any rules or regulations adopted under those chapters and sections, he:
>
> (1) *causes or attempts to cause a financial institution*, including a foreign or domestic money transmitter or an authorized delegate thereof, casino, check casher, person engaged in a trade or business *or any other individual or entity required by State or federal law to file a report regarding currency transactions or suspicious transactions to fail to file a report*; or
>
> (2) *causes or attempts to cause a financial institution*, including a foreign or domestic money transmitter or an authorized delegate thereof, casino, check casher, person engaged in a trade or business or any other individual or entity required by State or federal law *to file a report regarding currency transactions or suspicious transactions to file a report that contains a material omission or misstatement of fact*; or
>
> (3) *structures or assists in structuring, or attempts to structure or assist in structuring any transaction with one or more financial institutions*, including foreign or domestic money transmitters or an authorized delegate thereof, casinos, check cashers,

> persons engaged in a trade or business or any other individuals or entities required by State or federal law to file a report regarding currency transactions or suspicious transactions. "Structure" or "structuring" means that a person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading currency transaction reporting requirements provided by State or federal law.

Moreover, a companion statute is frequently charged for impersonation; theft of identity, specifically, N.J.S.A. 2C:21-17. That statute states as follows:

> a. A person is guilty of an offense if the person:
>
> (1) Impersonates another or assumes a false identity and does an act in such assumed character or false identity for the purpose of obtaining a benefit for himself or another or to injure or defraud another;
>
> (2) Pretends to be a representative of some person or organization and does an act in such pretended capacity for the purpose of obtaining a benefit for himself or another or to injure or defraud another;
>
> (3) *Impersonates another, assumes a false identity or makes a false or misleading statement regarding the identity of any person, in an oral or written application for services, for the purpose of obtaining services*;

Where a spouse is found to have utilized a straw account in the name of a family member for continued financial transactions, including withdrawals, transfers, cash deposits and general banking, as if they were that family member, the spouse arguably has violated the anti-money laundering statute as well as the criminal prohibition against impersonation. Both are generally prosecuted together. One's criminal behavior must be scrutinized by the court when it is determining if an award of alimony is warranted. If the elements in the above statutes are present, egregious behavior is evident, and it serves as a basis to use the existence of such actions in the litigation and trial. A practitioner need not prove all of these elements, but can utilize statutory elements to demonstrate that egregious behavior is occurring. Being in violation of criminal statutes is the exact behavior that qualifies as 'I'll know it when I see it' behavior to be considered egregious.

In addition to reviewing the criminal statutes, the elements of common law fraud and fiduciary duty should be considered when analyzing the behavior, and an amended pleading should be considered upon the discovery of such marital economic misconduct. In order to plead common law fraud, a litigant must show: 1) a material misrepresentation of a presently existing or past fact; 2) knowledge or belief by the defendant of its falsity; 3) an intention that the other person rely on it; 4) reasonable reliance thereon by the other person; and 5) resulting damages.[12] The defendant must act "knowingly and with an intent to deceive the plaintiffs in the course of making representations." Of course, this is exactly the type of conduct that was admonished in *Reid, Mani* and *Clark*.

A "fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship."[13] "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." The essence of a fiduciary relationship is that one party places trust and confidence in another, who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship.

The discovery of purposeful economic and financial misconduct, however sizeable in value, should be scrutinized closely where alimony is demanded by the faulting party. While marital fault related to alimony has been given a short shrift over the last decade as only being a factor in 'rare' cases, reserved for only the most substantial and egregious misconduct, it may be more legally significant than once thought following *Clark*. Despite that economic misconduct may fall short of egregious conduct, it should still be utilized by the court to assess the amount of alimony, and is a powerful tool for the practitioner. Analyzing the conduct in the context of criminal and civil statutes and common law focusing on

fraud and fraudulent activity will also assist in helping both the practitioner and court know it when they see it.

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## Endnotes

1. 183 N.J. 70, 92 (2005).
2. 429 N.J. Super. 61 (App. Div. 2012).
3. *Chrisomalis v. Chrisomalis*, 152 N.J. 226, 238 (1998).
4. 173 Ohio St. 22, 179 N.E.2d 777.
5. *Chalmers v. Chalmers*, 65 N.J. 186, 194 (1974).
6. *Reid v. Reid,* 310 N.J. Super. 12 (App. Div. 1998); *Mani v. Mani*, 183 N.J. 70 (2005); *Clark v. Clark*, 429 N.J. Super. 61 (App. Div. 2012).
7. 310 N.J. Super. 12 (App. Div. 1998).
8. This article seeks to focus economic fault as it relates to economic marital transgressions. It should be noted, however, that the Court in *Mani*, *supra*, also cautioned against alimony where to do so would violate societal norms. For reference, *D'Arc v. D'Arc*, 1164 N.J. Super. 226 (1978) denied an alimony claim based on a spouse's attempted murder of the other. This constituted egregious fault or something that violates societal norms such that an award of alimony would be unjust.
9. *Wasserman v. Schwartz,* 152 N.J. 226, 238 (1998).
10. *Kothari,* 255 N.J. Super. 500 507-509 (App. Div. 1992)(affirming the decision to compensate the wife for her interest in marital assets dissipated by her husband while he was "thinking about and planning for a divorce" where the expenditures were not made to benefit the marriage); *see also Siegel v. Siegel,* 241 N.J. Super. 12, 13 (Ch. Div. 1990) (finding that the defendant's gambling losses which occurred "pre-complaint, but when the marriage was irreparably fractured," were dissipation of funds).
11. *Kothari v. Kothari*, 255 N.J. Super. at 510.
12. *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172-73 (2005) (*quoting Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1997)). The defendant must act "knowingly and with an intent to deceive the plaintiffs in the course of making representations." *Gennari, supra*, 148 N.J. at 611. Of course this is exactly the type of conduct that was admonished in *Reid v. Reid,* 310 N.J. Super. 12 (App. Div. 1998); *Mani v. Mani*, 183 N.J. 70 (2005); *Clark v. Clark*, 429 N.J. Super. 61 (App. Div. 2012).
13. *McKelvey v. Pierce*, 173 N.J. 26, 57 (2002) (*quoting F.G. v. MacDonell*, 150 N.J. 550, 563-64 (1997)) (*citing* Restatement (Second) of Torts) 874 (1979)).

# Congress Overrides *Barr* Rule for Military Pension Division

*by Mark E. Sullivan and Kaitlin S. Kober*

On Dec. 23, 2016, and without notice to New Jersey or consultation with its congressional delegation, Congress enacted the National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) and overrode New Jersey's *Barr*[1] formula for dividing pensions, as applied to military retired pay. As NCAA 17 contains a major revision of how military pension division orders are written and operate, lawyers must take notice of the revision in order to present testimony and evidence effectively in contested pension division cases, and properly draft a military pension division order (MPDO). This new rule will require a new set of skills for lawyers.

Instead of allowing the states to decide how to divide military retired pay and determine the approach to use in dividing the pay, Congress imposed a rigid uniform method of pension division on all the states, a fictional scenario in which the military member retires on the date of divorce. Effective Dec. 23, 2016, the new rule up-ends the law regarding military pension division in New Jersey and almost every other state.

The new rule applies to those still serving (active duty, National Guard or Reserves). It is a rewrite of the terms for military pension division found in the Uniformed Services Former Spouses' Protection Act (USFSPA).[2] Commencing Dec. 23, 2016, the parties will be required to divide the hypothetical retired pay attributable to the years of service of the military member at the date of the decree of divorce, dissolution, annulment or legal separation. This is for all service members who divorce after Dec. 23, 2016, and who are not receiving retired pay at divorce. The only adjustment will be cost-of-living adjustments under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement.

There are no exceptions for the parties' agreement to vary from the new federal rule. All military retired pay will have to be divided the same way, regardless of whether the husband and wife decide to distribute the benefits another way.

## How Hard is This, Anyway?

Known as a *hypothetical clause* at the retired pay centers,[3] "frozen benefit division" is the most difficult to draft of the pension division clauses available. A government lawyer familiar with the processing of military pension orders put it this way: "…over 90% of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of…military retired pay. This legislative change will geometrically compound the problem."

Due to the difficulty of drafting such orders, the parties in a military divorce should expect higher expenses than otherwise would likely be attributable to division of a non-military pension, as lawyers may require experts to help attorneys unfamiliar with military divorce comprehend and implement the new frozen benefit rule. Without the right help and the proper wording, attorneys should expect rejection letters from the retired pay center. Since the new frozen benefit rule was written by Congress, which has no expertise in methods of dividing property and pensions in divorce, there will be numerous problems in applying it in the courts of most states.

Although the method of dividing pensions, as well as the date of valuation and classification of marital or community property, has always been a matter of state law, that will change in military cases. Since state legislatures did not have time to adjust to the change and rewrite state laws, lawyers will need to make adjustments to deal with military pension division cases that are presently on the docket or come to trial before the state legislature can act.

## Strategy for the Servicemember

The attorney for the service member (SM) will have an easier time than the lawyer for the former spouse (FS) in getting through a trial or settlement. The SM has control over all the evidence and testimony needed for either procedure.

The active-duty SM needs to provide proof of the high three retired pay base (*i.e.*, average of the highest 36 months of compensation) at the date of divorce.[4] That will usually be the most recent three years, and the data will be found in the pay records of the SM. The court also needs to know the years of creditable service of the SM.

Once the evidence has been admitted, the court will require an order to divide the pension. The attorney for the prevailing party is often required to prepare the MPDO, unless all the necessary language is placed in the divorce decree or in a property settlement agreement incorporated into the decree. The divorce attorney should obtain 'outside assistance' from an expert experienced in writing such pension orders, and *not at the last minute*.

Whenever possible, the SM should consider a bifurcation of the divorce from the claim for equitable distribution or division of community property.[5] The earlier the court pronounces the dissolution of the marriage, the lower his or her high three figure base will be for distribution of the pension.

## Strategy for the Former Spouse

The former spouse should oppose any request for bifurcation of the divorce and the property division, arguing that this would double the hearings involved and detract from judicial efficiency. The FS should also argue that Congress has joined inextricably the divorce and the division of a military pension by requiring the setting of the retired pay base (the high three) at the time of divorce.[6] As soon as appropriate, counsel for the FS should begin discovery, seeking to determine the member's high three years, the figure for that period, and how many years of creditable service the member has (or, in the case of a Guard/Reserve member, how many retirement points).

As to documents and data, the strategy of the FS will be similar to that stated above for the SM for settlement or trial. If the SM is obstinate, it can take weeks or months to obtain this information from the source (that is, the pay center) with a court order or judge-signed subpoena.[7]

There are several ways to try to work around the division of a frozen benefit for the FS. No single approach is best, and the slogan is not 'One size fits all. State law may restrict or prohibit one or more of these strategies. The FS's attorney may try out the following to even the scales in trial or settlement:

The FS can ask the court for an unequal division of the property acquired during the marriage in an attempt to even out the entire property division scheme due to the division of a truncated asset of the SM, not the final retired pay. In addition, the FS can ask for a greater share of the pension to make up for the smaller amount that will be divided. Or, the FS can request a greater share of his or her own pension to make up the difference.

The FS can also argue for a present-value division of the pension, with an expert witness setting the likely value of the retired pay, so that it can be offset by other assets given to the FS in exchange for a full or partial release of pension division. Evaluating a pension is a complex task. These complicated computations generally demand the evaluation report and testimony of an expert.

The FS can still use the standard 'time-rule' clauses pursuant to the *Barr* case and its progeny. The new law limits the 'disposable retired pay' (DRP), which the retired pay center (the Defense Finance and Accounting Service or the Coast Guard Pay and Personnel Center) will honor, limiting DRP to 'date-of-divorce' dollars in the high three (for those who are not yet receiving retired pay). The court may still enter a 'time rule' order if it complies with the rules found at Volume 7B, Chapter 29 (June 2017) of the Department of Defense Financial Management Regulation (DoDFMR) implementing the frozen benefit rule. The court should state that at the SM's retirement, only a portion of the pension-share payment for the FS will come from the retired pay center. The order would provide that the member will still be responsible for the rest, and will indemnify the FS for any difference between the two amounts. The duty to indemnify is a potential remedy for the reduction in payments to the FS, and there is statutory support in 10 U.S.C. § 1408 (e)(6), the 'savings clause' in USFSPA, which allows the courts to employ state enforcement remedies for any amounts that may not be payable through the retired pay center.[8]

As a final note, the lawyer for the FS should be sure not to use 'disposable retired pay' (DRP) in describing the apportionment to the FS. DRP means the restrictive definition in the frozen benefit rule (*i.e.*, the retired pay

base at the date of divorce) less all of the other specified deductions, such as the VA waiver and monies owed to the federal government. The best way to word a pension clause for the FS is to provide for division of total retired pay less only the SBP premium attributable to coverage of the former spouse. Regardless of the language used, DFAS will construe orders dividing retired pay as dividing disposable retired pay.[9]

## Resources

The final rules were published by the Defense Finance and Accounting Service, in June 2017. As noted above, they are at Volume 7B, Chapter 29 of the DoDFMR. While these revisions offer some clarity and guidance, there are a number of areas that remained unaddressed.

Comprehensive guidance on understanding the frozen benefit rule, dealing with its consequences, explaining the impact to the court and the client, and drafting orders that are frozen benefit rule compliant may be found in a series of *Silent Partner* infoletters. The titles are "Fixing the Frozen Benefit Rule," "All Clauses Considered: Writing the Frozen Benefit Award," "Military Pension Division and the Frozen Benefit Rule: Nuts and Bolts," and "Military Pension Division and the Big Freeze: Rules, Remedies and *Res Judicata*." How to write acceptable military pension clauses may be found at the *Silent Partner*, "Guidance for Lawyers: Military Pension Division." For the necessary terms for the MPDO, see the *Silent Partner*, "Getting Military Pension Orders Honored by the Retired Pay Center"; this guide includes the necessary elements and language for a proper hypothetical clause. All these infoletters are located at the military committee websites of the N.C. State Bar, www.nclamp.gov > For Lawyers, and the American Bar Association's Family Law Section, www.americanbar.org > Family Law Section > Military Committee.

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## Endnotes

1. *Barr v. Barr*, 418 N.J. Super. 18, 11 A.3d 875, (App. Div. 2011). The court in *Barr* held that a coverture fraction must be applied under the deferred-distribution method for marital pension division. The coverture fraction is defined as the number of years during the marriage that the employee spouse was a member of the pension plan, divided by the total number of years that the employee spouse was a member of that pension plan. The benefit paid to a non-employee is the designated percentage awarded of the product of a coverture fraction (usually 50%) multiplied by the total retirement benefit. The ex-husband argued that his former spouses' interest should be limited by his Captain's salary at the time divorce (at the time of retirement he had reached the rank of Major). The Court rejected this argument because it limited the former spouse's interest as if the pension were awarded at the time of divorce, rather than deferred.
2. 10 U.S.C. § 1408.
3. For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.
4. 10 U.S.C. § 1407. The other element for determination of retired pay is the "retired pay multiplier," which is 2.5% times years of creditable service (in an active-duty case). In a Reserve or National Guard case, the court order must also provide the applicable number of retirement points. 10 U.S.C. § 1409.
5. *See* Brett R. Turner, *Equitable Distribution of Property* (3rd Ed. & 2016-2017 Supp.), Sec. 3.2. In those states that have adopted the Federal Rules of Civil Procedure, the issue of separate trials under Rule 42 (b) deals with bifurcation of claims into separate hearings. Bifurcation is set out in N.J. Ct. R. 4:38-2(a) "Severance of Claims."
6. For an excellent summary of arguments against bifurcation of the divorce and the property division, along with case citations for state appellate decisions, *see* Brett R. Turner, *Equitable Distribution of Property* (3rd Ed. & 2016-2017 Supp.), Sec. 3.2.

7. The anticipated delay, however, may work to the FS's advantage. The longer the division of retired pay is put off, the better chance the FS will have of dividing a higher amount of retired pay. In general the FS's case usually will benefit from delay under the new rule.
8. *See also* Brett R. Turner, *Equitable Distribution of Property* (3rd Ed. & 2016-2017 Supp.), Sec. 6.4.
9. DoDFMR, Vol. 7B, ch. 29, Sec. 290601.

# Pleading 'the Fifth' in Family Law

*by Amanda S. Trigg and Paul J. Myron*

"I plead the Fifth." It's a phrase we've all heard. Most people use the phrase lightheartedly, perhaps to dodge a question that actually lacks any incriminating purpose. It refers, for ease of reference, to the Fifth Amendment of the United States Constitution, as originally included in the Bill of Rights, in 1789:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The most commonly invoked clause, in jest or in serious defense of a constitutional right, is "No person…shall be compelled in any criminal case to be a witness against himself." When a witness declines to answer a question under oath, in a deposition or trial, the right apparently creates a barrier to obtaining crucial testimony. Furthermore, when a witness or deponent constantly invokes the privilege in situations that do not call for such a privilege, it can be downright irritating.

On its face, the Fifth Amendment would not obviously apply to family law matters, but all practitioners know that sometimes criminal actions, or fear of allegation of criminal activities, arise. The sensitive issues embodied in family cases, such as child custody, support, and equitable distribution, differ tremendously from other civil cases. Matrimonial matters, moreover, usually involve parties who desire the same ultimate outcome—divorce. As such, a family part judge often should handle a party's Fifth Amendment rights differently than a civil or criminal judge if a party or witness declines to answer a question during a deposition on that basis.

## Grounds for Asserting the Fifth Amendment

Invoking the Fifth Amendment requires a colorable possibility that the deponent might incriminate him or herself by providing the testimony sought. The Supreme Court has defined this 'possibility' to mean it "need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[1] Alternatively, as long as the possibility, not necessarily probability, of criminal prosecution exists, it is appropriate to assert the privilege.[2]

In New Jersey, when adultery previously constituted a crime, the courts consistently upheld the use of the privilege when a deponent sought to avoid self-incrimination for adultery.[3] However, since the adoption of the New Jersey Code of Criminal Justice on Sept. 1, 1979,[4] adultery is no longer criminalized, and courts have held the privilege no longer applies to such conduct.[5] Elimination of that crime from New Jersey's statutes decreased the opportunities to invoke the privilege in a divorce matter, but there remain other relevant reasons to do so. For example, a spouse may be asked about possible physical abuse, misuse of marital property or failure to report income, which could lead to criminal exposure.

## Fundamentals of Evidence

As practitioners know, the Fifth Amendment does not just apply on the witness stand. An individual maintains the right whenever offering testimony, including when answering interrogatories, requests for admission, or during a deposition. All of these tools create testimony under oath. That testimony can then be used for any purpose against the opponent,[6] or to contradict the opponent's subsequent testimony at a hearing or trial.[7] It appears most dramatically in a deposition, where Rules of Evidence permit any part of a deposition to be offered into evidence, and objections to be raised.[8]

Generally, the Rules of Court require a deponent to answer every question, unless he or she objects and refuses to answer to assert a privilege, protect confidentiality or comply with a court order.[9] A deponent can also make a motion or application to the court that the deposition is being conducted or defended in bad faith.[10] Depending upon the basis of the motion or application, the court may order the attorney to cease the deposition or limit its scope.[11]

## The Adverse Inference

Courtroom dramas and cinematic depictions of legal proceedings give viewers and, therefore, litigants the false impression that the Fifth Amendment offers absolute protection from any negative consequences for exercising a constitutional right. While a litigant might not face incarceration for invoking the Fifth Amendment, even if done frivolously, exercising the privilege incorrectly or excessively may damage a litigant's case.

Courts may make negative assumptions about the witness who invokes the Fifth Amendment, possibly to the benefit of the other party.[12] The ability to draw adverse inferences against one who invokes the privilege is a "logical, traditional, and [a] valuable tool in the process of fair adjudication."[13] The court has great discretion to draw and to apply its negative inferences. In extreme situations, a defendant's invocation of the privilege in a criminal proceeding may provide "independent and additional support" of guilt."[14]

A litigant's mere invocation does not by itself allow the court to draw adverse inferences. There must be other evidence in the record that would support the trial judge's negative assumptions.[15] In criminal cases, for example, an inmate's silence alone should not support an adverse decision.[16] Likewise, refusal to submit to interrogation, without any other evidence, cannot constitute a final admission of guilt.[17] Also of interest, at least one New Jersey court has suggested that a trial judge should not draw an adverse inference against a defendant who invokes the privilege in a domestic violence case.[18]

## Tools to Combat a Deponent's Uncooperativeness

Even when properly utilized, practitioners and judges possess various ways of overcoming the initial obstacle to obtaining evidence. As with so many other things in life and in law, timing is everything, including when, during the discovery process, the party invokes the privilege. During a deposition, during regular court hours, if anticipating the invocation of the privilege and prepared to argue the legal issue with the court, consider calling the judge for an immediate ruling on whether the deponent must answer.[19]

When a deponent withholds discovery for any reason, consider seeking it by alternative means, such as by a subpoena to another witness or third-party institution,[20] seeking additional time from the court to do so, or, if necessary, pursuant to a case management order. If the invoking party or alternative source files a motion to quash,[21] that brings the pivotal issue before the court and creates an opportunity for discussion of the adverse inferences or other sanctions.

Depending upon the value of the evidence sought, and whether other sources of the same information exist, practitioners might bring an application to compel the testimony, on the grounds that the litigant attempts to unlawfully withhold information, seeking imposition of non-criminal sanctions if the court agrees the litigant is attempting to withhold discoverable information.[22]

Courts possess wide discretion to impose the sanctions permitted by the New Jersey Rules of Court for any failure to provide discovery. When a court finds that a litigant conceals crucial information, its powers enable it to protect the non-invoking litigant from being disadvantaged.[23] When a party seeking relief, such as alimony or child support, constantly pleads the Fifth Amendment, courts may dismiss that party's own pleading[24] on the basis that a party cannot simultaneously invoke the privilege and seek affirmative relief.[25] The constitutional right against self-incrimination may not operate as both a "shield" and a "sword."[26]

Courts resist using this sanction generally, and especially in family law matters.[27] Dismissing a divorce complaint or counterclaim, for example, prevents the other party from exercising his or her right to obtain a divorce and related relief that may pertain to children.[28] Throwing out a divorce matter from court could harm both parties and their children by leaving their issues unresolved and unstable. Depending upon the severity of the abuse of the privilege a court may instead strike claims for relief not related to the children, such as alimony or counsel fees.[29] Additionally, the invoking litigant risks other judicial sanctions.[30] Pre-trial hearings and motions *in limine* work to expose false claims of the Fifth Amendment privilege, shifting the burden of proof to the privilege-asserting party, who is in the best posi-

tion to provide relevant proof, and excluding testimony given at trial if the same testimony had been withheld during discovery under an assertion of the privilege to prevent "surprise, prejudice and perjury."[31]

## Conclusion

A deponent's invocation of the Fifth Amendment can be difficult to navigate for a family law attorney. Practitioners must be mindful that the invocation allows judges to draw adverse inferences based on the deponent's unwillingness to answer. If an attorney has other independent evidence of the conduct or information sought from the deposition question, the deponent's refusal to answer should not be a major issue. Unlike prosecutors, matrimonial attorneys are not interested in proving their opponent's criminal guilt beyond a reasonable doubt. The adverse inferences the court can draw in these situations can, therefore, often be as sufficient as actually soliciting the intended information from the deponent.

Of course, there will be times when the information sought will be so crucial that even the possible adverse inferences will not suffice. As is the case with so many aspects of practice, the key in these situations is to be prepared. Attorneys should expect that the individuals they depose will not voluntarily dispel potentially damaging information. When preparing for a deposition the practitioner should look over each question and ask: "Would I want to answer this?" If the answer is no expect that the deponent does not want to answer it either and prepare for the possibility that he or she will go to great lengths to avoid the question.

Matrimonial matters involve sensitive and personal issues. The nature of deposition questions can become quite invasive to the deponent's personal life. Questions may address extramarital affairs, intimate details of the relationship, or potential embarrassing behavior. Matrimonial lawyers must anticipate a struggle with their deponent when asking these questions. Fortunately, a prepared and even-keeled matrimonial attorney will know how to handle this situation.

Practitioners can petition the court for a wide variety of sanctions to compel the deponent to answer. If time is of the essence, one can even attempt to telephone the court for a timely ruling on the matter. When considering a request for sanctions, family law attorneys should be mindful of causing additional delays and hurdles to obtaining a timely divorce for their client. Thoroughly consider what the sought-after information is worth as far as the client's and the court's additional time and expense is concerned before submitting additional pleadings. ■

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## Endnotes

1. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).
2. *Payne v. Payne*, 33 Md. App. 707, 366 A.2d 405 (1976).
3. *Mahne v. Mahne*, 66 N.J. 53, 328 A.2d 225 (1974); *Levin v. Levin*, 129 N.J. Super. 142, 322 A.2d 486 (App. Div. 1974).
4. *See Lynn v. Lynn*, 165 N.J. Super. 328, 335, 398 A.2d 141 (App. Div. 1979).
5. *Simeone v. Simeone*, 172 N.J. Super. 120, 122, 410 A.2d. 1197 (Ch. Div. 1979).
6. R. 4:16-1(b).
7. R. 4:16-1(a).
8. R. 4:16-2.
9. R. 4:14-3(c).
10. R. 4:14-4.
11. *Id*.
12. *Mahne*, 66 N.J. at 62, 328 A.2d at 229.
13. *Duratron Corp. v. Republic Stuyvesant Corp.*, 95 N.J. Super. 527, 533, 231 A.2d 854, 857 (App. Div. 1967).
14. *U.S. v. Stelmokas*, 100 F.3d 302 (3rd Cir. 1997).
15. *State Dep't of Law & Pub. Safety, Div. of Gaming Enf't v. Merlino*, 216 N.J. Super. 579, 587-88 (App. Div. 1987), *aff'd*, 109 N.J. 134 (1988).
16. *Baxter v. Palmigiano Enomoto v. Clutchette*, 425 U.S. 308, 317-18 (1976).

17. *Id.; Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967).
18. *H.E.S. v. J.C.S.*, 175 N.J. 309, 331 (2003).
19. R. 4:14-4.
20. R. 4:14-7.
21. R. 4:14-7(c).
22. *Hackes v. Hackes*, 446 A.2d 396 (D.C. 1982), *citing Levin v. Levin*, 129 N.J. Super. 142, 322 A.2d. 486 (1974); *Costanza v. Costanza*, 66 N.J. 63, 328 A.2d 230 (1974).
23. *Dodson v. Dodson*, 855 S.W.2d 383 (Mo. Ct. App. 1993).
24. *Fidelity Union Bank v. Hyman*, 418 A.2d 764, 766, 214 N.J. Super. 177, 182 (App. Div. 1986); *Mahne*, 66 N.J. at 62, 328 A.2d 225 (1974).
25. *Steinbrecker v. Wapnick*, 24 N.Y.2d. 354, 300 N.Y.S.2d. 555 (1969); *Levine v. Bornstein*, 6 N.Y.2d 892 (1959).
26. *Sparks v. Sparks*, 768 S.W.2d 563 (1989).
27. *Mahne*, 66 N.J. at 62, 328 A.2d 225.
28. *Crocker C. v. Anne R.*, 2018 NY Slip Op 50182(U).
29. *Id.*
30. *Sparks*, 768 S.W.2d at 61.
31. *In re: Grand Jury*, 286 F. 3d 153 (3rd. Cir. 2002); *Duffy v. Currier*, 291 F. Supp. 810 (D. Minn. 1968).

# Major Impacts of the Tax Cuts and Jobs Act on Matrimonial Practice

*by Charles F. Vuotto Jr. and Susan Miano*

The Tax Cuts and Jobs Act (TCJA) is the most significant tax legislation in the last few decades, generating much discussion. In its wake, a flurry of ongoing clarifying guidelines are being issued by the Internal Revenue Service (IRS). The American Institute of Certified Public Accountants, along with 40 national trade associations, submitted a comment letter to the Department of the Treasury and the IRS seeking much-needed guidance regarding many muddy provisions of the TCJA. As of this writing, the IRS has provided its early-release draft of Form 1040 for 2018, but it is still unclear when over 450 revised income tax forms for fiscal year 2018 (the year the TCJA is effective), instructions, and codifications will be issued in final form by the Department of the Treasury.[1]

One thing is clear: The TCJA has as many proponents as detractors. Examples of who may be happy with TCJA include:

- Taxpayers who utilize standard deductions
- Those who use their vehicles for business
- Owners of certain pass-through entities
- Parents who send their children to private schools
- Shareholders of C corporations.

However, there are just as many who may be unhappy, such as:

- Individuals residing in states with high income and property taxes
- Those who pay financial advisors
- Future divorcing spouses who will pay/receive alimony
- Home equity debtors
- Parents with lots of kids

## Tax Rates

It is fair to assume that the U.S. Individual Income Tax Return (Form 1040) will experience a pretty significant makeover, with draft forms available for viewing at https://www.irs.gov/pub/irs-dft/f1040--dft.pdf. What is known is that while there are still seven tax rates, they have changed and will remain in effect until they 'sunset in 2025. (Please see charts on page 62.)

It is important for matrimonial attorneys to be aware of these lowered rates for a number of reasons, most importantly for projecting post-divorce net, after-tax cash flows for support purposes.

It is interesting to note that in the post-TCJA world, previously favorable head of household tax rates (as compared with single rates) have been eliminated for income at the 24 percent rate and above. Therefore, the single and head of household tax rates are identical for taxable income of $82,501 and above. However, the head of household filing status still edges out the single filer for the standard deduction ($18,000 head of household vs. $12,000 single, discussed in greater detail below).

> ***Practice tip:*** *The designation of a parent as head of household for a child or children should be expressly addressed in any marital settlement agreement. Both parents of dependent children may file as head of household if there is more than one dependent child and they identify which child is deemed their respective dependent. In cases when one child is a dependent of two taxpayers, and both are eligible to claim dependency, they may alternate years filing as head of household. Two taxpayers may not file as head of household simultaneously when only one child is their dependent.*

## Exemptions

Personal exemptions have been repealed until 2025, meaning that deductions from income in 2017 of $4,050 each for taxpayer, spouse and dependent children are no longer allowed until 2026. However, the child tax credit (effectively cash back from the IRS) has doubled from $1,000 to $2,000 per child and phase-out limits have increased from $110,000 to $400,000 (for married

taxpayers) and from $75,000 to $200,000 (for single taxpayers), resulting in this credit being available to many taxpayers who previously could not take advantage of it. These credits are dollar-for-dollar reductions of federal taxes owed; the refundable portion has increased to $1,400 (from $1,000).

## Tax Credits and Other Incentives

While on the topic of tax credits available for families with dependent children, the TCJA made no changes with respect to education credits. There are two credits available: the American opportunity tax credit (AOC) and the lifetime learning credit (LLC). The AOC allows families of undergraduates to deduct the first $2,000 spent on qualified education expenses and 25 percent of the next $2,000. To qualify for the full credit in 2018, single parents must have an adjusted gross income of $80,000 or less ($180,000 or less if married and filing jointly). This credit may be claimed for only four years, and the total credit cannot exceed $2,500. The LLC differs from the AOC in that there is no limit to the number of years the credit can be claimed, and it covers such education-associated expenses as post-graduate courses, job skill courses, or single undergraduate courses. The LLC offers up to a $2,000 tax credit on the first $10,000 of education expenses so long as adjusted gross income is $57,000 or less in 2018 for a single filer ($114,000 or less if married filing jointly).

> ***Practice tip:*** *These credits cannot be claimed if taxpayers are married filing separately. Also, taxpayers must choose one of these two credits per child.*

One important point to remember is that although dependency exemptions are eliminated, the notion of 'dependents' (also referred to as qualifying children) still exists. Dependency tests (relationship, residency, age, and support) remain in place to determine whether or not one can take advantage of the child tax credit, as well as education credits and child and dependent care credits.[2]

> ***Practice tip:*** *Head of household, dependency exemptions, child tax credits, the American opportunity tax credit and the lifetime learning credit should all be addressed in the marital settlement agreement. Even though the personal exemption has been repealed until 2025, it still should be addressed in any agreement since, depending on the age of the children, it may become relevant in the future. Further, the child tax credit, due to the increased value and heightened phase-out, is a valuable item that should also be addressed in the marital settlement agreement. In instances where two taxpayers equally share custody of dependent children, parents may alternate years of taking these tax credits.*

While on the topic of kids, the 'kiddie tax' has been modified. The kiddie tax refers to taxation (prior to 2018) of the income of dependent children at the parents' marginal tax rates. For tax years commencing in 2018 and ending in 2025, income tax rates imposed on trusts will be applied at the maximum trust rate of 37 percent beginning at $12,500, and not the maximum personal tax rate of 37 percent beginning at $400,000 for those who are married filing jointly, resulting in parents paying more taxes on interest earned on dependent children's Uniform Transfers to Minor Act (UTMA) accounts, for example.

The TCJA does attempt to provide assistance to families with children by allowing earlier access to 529 plans. The TCJA allows families to utilize moneys set aside in 529 plans to fund private primary and high school tuition up to $10,000 per child. There continues to be no limitation on 529 plan withdrawals for college costs.

> ***Practice tip:*** *When drafting marital settlement agreements in cases where 529 plans exist or are contemplated, it is now critical to identify whether these funds will be used for private primary and high school tuition up to $10,000 per child or limited to college only.*

## Deductions

The standard deduction for each filing status has nearly doubled across the board, as follows:

| | Pre TCJA | Post TCJA |
|---|---|---|
| Single or Married Filing Separately | $6,350 | $12,000 |
| Married Filing Jointly | 12,700 | 24,000 |
| Head of Household | 9,350 | 18,000 |

For certain filers, this may actually offset the loss of certain valuable deductions, such as for state and local income taxes. These standard deductions will remain in effect until 2025. Again, this is critical in determining parties' post-divorce net, after-tax cash flows for support

purposes.

The TCJA continues to provide taxpayers who incur certain expenses that are in excess of the standard deduction with opportunities to deduct them (subject to certain thresholds) from income in the calculation of income taxes. However, it is fair to assume that Schedule A (where itemized deductions are reported), will have a new look, at least through 2025, to reflect the following:

Medical and dental expenses incurred in 2017 and 2018 are still deductible to the extent that they exceed 7.5 percent of adjusted gross income (AGI); this increases to 10 percent of AGI in 2019.

The deductibility of contributions to charities is largely unchanged. These are limited to a percentage (60 percent in 2018, increased from 50 percent pre-TCJA) of the taxpayer's 'contribution base' (determined by considering things like taxpayer's AGI and the type of organization receiving the donation), resulting in increased deductibility to taxpayers from 2018 to 2025.

Taxpayers who incur mortgage and home equity indebtedness interest debt may still deduct interest, but the deductions are limited. Beginning in 2018, the deduction for mortgage interest is limited to 2018 acquisition indebtedness of $750,000. This threshold decreased from $1 million prior to 2018 and preserves deductions for 'pre-existing' mortgage loans. Also, if taxpayers refinance their existing mortgages they may deduct interest on the portion of the new loan that does not exceed the outstanding balance of the old loan; interest on the excess is not deductible. Home equity indebtedness interest (whether associated with pre- or post-TCJA) is generally not deductible except if the proceeds are used to improve an existing home or used to buy a second home.

Real estate and state and local income taxes, which were previously deductible, are now limited to a total deduction of $10,000 per return. This limitation will significantly impact New Jersey residents in affluent communities in light of the generally high real estate taxes in the state.

Miscellaneous itemized deductions such as unreimbursed employee expenses, job-related travel, union dues, job education, subscriptions, safe deposit fees, tax preparation fees, and investment-related expenses (*e.g.*, advisory fees) are no longer deductible.

> ***Practice tip:*** *These changes may result in employers paying for certain of these expenses on behalf of employees, resulting in higher taxable income due to the inclusion in gross wages.*

Finally, the phase-out of itemized deductions (known as 'Pease' limitations) for certain taxpayers who report AGI above certain amounts is eliminated. Therefore, all eligible itemized deductions appearing on Form 1040, Schedule A (Itemized Deductions) post-TCJA will be deducted to arrive at taxable income, and no longer be phased out as they were in the past for certain taxpayers.

Beginning in 2018, only active-duty members of the armed forces can deduct moving-related expenses. Further, certain qualified moving expenses paid by employers that were previously excluded from gross income are now included in AGI, except for active-duty members of the armed forces.

## Investments and Personal Assets

There are many provisions in the tax laws that remain unchanged with respect to capital assets and investments. Long-term capital gains taxation rates remain at 0 percent, 15 percent and 20 percent, depending on the taxpayer's federal tax rate. (Short-term capital gains are generally taxed at ordinary rates.) Also, no change has occurred with respect to the exclusion of the gain from the sale of a principal residence ($500,000 for joint filers and $250,000 for single). Net investment income tax of 3.8 percent and Medicare surtax (on wages and self-employment income) of .9 percent both continue (for married taxpayers filing jointly with AGI of $250,000 and above). However, losses related to casualty or theft losses will generally no longer be deductible, unless in a federally declared disaster area.

## Alimony

Arguably, for family law practitioners, one of the most dramatic provisions of the TCJA is the repeal of the taxability and deductibility of alimony payments between divorced persons. This provision, unlike the changes discussed above, which are effective Jan. 1, 2018, and 'sunset' in 2025, is permanent (unless the Legislature decides to change the law again) and is effective in tax years beginning Jan. 1, 2019. It is important to note that the Jan. 1, 2019, effective date refers to parties who have executed a marital settlement agreement on Jan. 1, 2019, or thereafter. Therefore, if divorcing parties execute a

marital settlement agreement on Dec. 31, 2018, or prior, but do not obtain a decree of divorce until some date in 2019 (or after), alimony is still taxable and deductible to the parties as it was in the pre-TCJA world. In such a case, it may be wise to state explicitly in any agreement that the alimony shall be taxable notwithstanding the TCJA. An example of such language is as follows:

"*The parties acknowledge that pursuant to the "Tax Cuts and Jobs Act of 2017" (TCJA) signed into law on December 22, 2017, Alimony is no longer taxable to the recipient or deductible as to any Agreement or Judgment entered after December 31, 2018. Since this Agreement is being executed prior to said date, the Alimony shall continue to be taxable and deductible in accordance with prior law. The parties further acknowledge that the intended tax treatment of this Alimony is an essential part of this Agreement. Should there be any change in the Internal Revenue Code or other tax laws, which affect the intended taxability of this Alimony, said occurrence shall constitute a substantial change in circumstances justifying a modification of the amount of said Alimony.*"

These new rules do not apply to existing divorces. However, as of this writing it is unclear how the new tax law applies if parties have an existing (pre-2019) divorce decree in place and alimony as set forth in their marital settlement agreement is legally modified in 2019 or thereafter. The Conference Report to Accompany H.R. 1 of the Tax Cuts and Jobs Act provides some language regarding the effective date, which reads:

> (c) EFFECTIVE DATE. —The amendments made by this section shall apply to—
>
> (1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after December 31, 2018, and
>
> (2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification.

It is fair to assume that most professionals are currently working to understand and apply these changes. Some professionals believe the above-quoted language allows the continued pre-TCJA tax treatment (*i.e.*, alimony is tax deductible to the payer and income to the recipient) if an agreement or order is entered on or before Dec. 31, 2018, and later modified provided the agreement or order does not expressly provide that the new law applies. Still other professionals believe it is unclear whether alimony related to divorce instruments executed on or before Dec. 31, 2018, and thereafter modified after Dec. 31, 2018, will be taxable/deductible.

> ***Practice tip:*** *Although this provision is a 'permanent' one, it is uncertain whether it may be repealed in the near (or distant) future. Therefore, family law practitioners may wish to include language in marital settlement agreements where the parties acknowledge that taxable alimony was modified in a post-TCJA world and that the parties wish the tax treatment to continue. An example of such language is as follows: "The parties acknowledge that pursuant to the "Tax Cuts and Jobs Act of 2017" (TCJA) signed into law on December 22, 2017, Alimony is no longer taxable to the recipient or deductible as to any Agreement or Judgment entered after December 31, 2018. Since this is an Agreement to modify taxable Alimony agreed upon prior to enactment of the TCJA, the parties expressly agree herein that the modified alimony provided for herein shall continue to be taxable to the payee and deductible by the payer in accordance with prior law. The parties further acknowledge that the intended tax treatment of this Alimony is an essential part of this Agreement. Should there be any change in the Internal Revenue Code or other tax laws, which affect the intended taxability of this Alimony, said occurrence shall constitute a substantial change in circumstances justifying a modification of the amount of said Alimony."*

Strategies for negotiating alimony must change regarding any agreement or judgment addressing alimony entered after Dec. 31, 2018, (that is not modifying a pre-TCJA agreement/judgment). To the extent rules of thumb were used (contrary to case law[3]), they cannot apply any longer. It is suggested that parties' post-divorce, after-tax cash flows (after considering child support) must be computed and analyzed in conjunction with the statutory factors under N.J.S.A. 2A:34-23 (b).

Also, practitioners may wish to include a statement by the parties that they have consulted with their tax advisors with respect to this issue.

## Taxation of Businesses

Besides the sweeping changes to individual taxation, the TCJA also addresses businesses—whether they are C corporations filing Forms 1120 that are taxed at the entity level, or pass-though entities (*e.g.*, S corporations, limited liability companies, and partnerships) that file Form 1120S or Form 1065.

The corporate tax rate is permanently fixed at a flat 21 percent and the corporate alternative minimum tax (AMT) has been repealed for tax years after Dec. 31. 2017.

The deduction for net interest expense incurred by businesses with annual gross receipts of more than $25 million is now limited to the sum of business interest income, 30 percent of the business's adjusted taxable income and floor plan financing interest (generally pertains to auto dealers). Before Jan. 1, 2022, adjusted taxable income is defined as taxable income exclusive of items not allocable to a trade or business, business interest income and deductions, depreciation, amortization, and depletion. For tax years beginning on or after Jan.1, 2022, depreciation, amortization and depletion are included in the calculation of adjusted taxable income. A taxpayer may elect to be excluded from the interest deduction limitation provision if he or she is engaged in real property trades or businesses (*e.g.*, real property development, construction, rental, management, leasing, brokerage trade or business). Disallowed interest expense may be carried forward indefinitely.

Businesses who entertain their clients, prospects and business associates will feel some TCJA-related discomfort. The deductibility of the 'two-martini lunch' has long been limited to a 50 percent deduction when associated with a trade or business. These meals are differentiated from fully deductible costs of food and beverages provided, for example, to employees for the convenience of the employer (*e.g.*, the working lunch.). The TCJA now limits deductibility of these "de minimis fringe benefits" to 50 percent. Further, the TCJA repeals the deductibility of entertainment and recreation expenses directly associated with conducting business, eliminating deductions for activities considered entertainment, amusement or recreation, and membership dues for recreational or social clubs. Therefore, in the post-TCJA world, only the dinner portion of the dinner and a show with clients is deductible (at 50 percent). It is not clear whether the IRS considers the hot dogs purchased at the ballpark an inextricable part of attending opening day at Yankee Stadium with clients (clearly entertainment) and, therefore, no longer deductible as a meal.

> ***Practice tip:*** *While meals and entertainment deductions will be shrinking, businesses may redirect spending toward fully deductible employee incentives such as 401(k) and SEP contributions.*

Section 179 of the Internal Revenue Code allows businesses to deduct the entire cost of depreciable business equipment the year it is acquired, instead of capitalizing it and depreciating the asset over the years of its useful life. This is offered as an incentive to businesses to purchase new equipment and grow their businesses. The TCJA increased the maximum annual Section 179 deduction to $1 million (from $500,000) and increased the phase out threshold to $2.5 million of total amount of equipment purchases (from $2 million in 2017).

The TCJA also increases the depreciation limitations for passenger cars placed in service after Dec. 31, 2017, to $41,360 over the first four years.

Finally, the TCJA has enacted a new deduction for certain pass-through entities, which are subject to expire in 2025, that is particularly complex and has many practitioners scratching their heads while waiting for guidance and clarification from the IRS. This new provision generally allows an individual to deduct 20 percent of his or her "qualified business income" from a partnership, S corporation or sole proprietorship, subject to limitations. This deduction generally applies to all pass-through income that does not exceed $315,000 (for married filers). However, if the business exceeds this income threshold (subject to a brief phase-out) and is engaged in certain "specified trades or business" whose "principal asset is reputation or skill" such as accountancy, healthcare, law, consulting and financial services, it is ineligible. Two exceptions to this rule are businesses engaged in engineering and architecture, which are eligible. Eligible businesses may take the 20 percent pass-through deduction limited to the lesser of (a) 20 percent of the taxpayers' combined qualified business income, or (b) the greater of 50 percent of the wages paid by the company related to the qualified business *or* 25 percent of the wages paid by the company related to the qualified business plus 2.5 percent of the unadjusted basis (cost) of qualifying fixed assets (depreciable tangible property that

is used in the qualified business).

Please note that New Jersey's governor signed a bill during early July 2018, that will create state income tax adjustments that will disallow this deduction for New Jersey personal income tax purposes.

> ***Practice tip:*** *After-tax cash flows to owners of certain 'qualifying' pass-through businesses can vary greatly in a pre- and post-TCJA world. Further, two businesses with identical pass-through income as reported on their respective K-1 forms may yield vastly different after-tax income (cash flow) to the owners depending upon the trade or business in which a company is engaged. For example, an accountant and an architect with otherwise identical income tax returns (both having been issued similar K-1 forms with net income of $500,000) would have the same tax liability in 2017. However, in 2018, if the architect's business qualifies for the pass-through deduction, total taxes due may be significantly less, resulting in greater after-tax cash flow as compared with her accountant counterpart. Therefore, litigants' professions and associated tax consequences are to be considered for purposes of support (after-tax cash flows) and equitable distribution (valuation of the business).*

## Business Valuation

Practitioners must consider the impact the TCJA will have on business valuation, the extent of which is difficult to generalize. The permanent reduction of the corporate income tax rate (from a maximum of 35 percent to a flat 21 percent) may, all things held equal, result in an increase in business values across the board. However, there are other aspects of the TCJA that may counter the impact of new tax rates. For example, the reduced corporate tax rate may change after-tax cost of debt and resultant weighted average cost of capital. Changes to the depreciation thresholds and deductibility of interest expense may affect corporate policies with respect to investments in capital assets. When employing a market approach, care must be taken to consider that pre-TCJA guideline valuation multiples (such as price-to-net income) and sales transactions may not reflect the impact of new tax rates, and, all else being equal, may produce an unreliable estimate of value. Obviously, methodologies for tax-affecting pass-through entities must be carefully considered. Therefore, there are many new factors that must be considered when valuing a business in the post-TCJA world; those presented here representing only a brief list of factors that must be considered. A more expansive analysis, beyond the scope of this article, is necessary to fully address the TCJA and its impact on business valuation.

## Conclusion

The foregoing is a sampling of the comprehensive changes set forth by the Tax Cuts and Jobs Act. There is no doubt that the Internal Revenue Service has challenges ahead of it as it begins to provide guidance, clarification and, ultimately, administration, of this tax code makeover. The challenge for family law professionals is to gain a comprehensive understanding of these changes, adapt to them, and continue in the role of well-informed, well-prepared and trusted professionals.

## DISCLAIMER

Professional accounting and legal services are necessarily fact-sensitive, particularly in a litigation context. Therefore, readers are encouraged to apply their expertise to particular fact patterns that they encounter, or to seek competent professional assistance as warranted in the circumstances. Views expressed in this article do not necessarily reflect the professional opinions or positions that the authors would take in an actual litigation matter. Nothing contained in these written materials shall be construed to constitute the rendering of professional legal or accounting advice. ■

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| Married Taxpayer Filing Jointly | | | |
|---|---|---|---|
| 2017—Prior Law | | 2018—New Law | |
| Tax Rate | If taxable income is: | Tax Rate | If taxable income is: |
| 10% | $0 to $19,050 | 10% | $0 to $19,050 |
| 15% | $19,051 to$77,400 | 12% | $19,051 to$77,400 |
| 25% | $77,401 to $156,150 | 22% | $77,401 to $165,000 |
| 28% | $156,151 to $237,950 | 24% | $165,001 to $315,000 |
| 33% | $237,951 to $424,950 | 32% | $315,001 to $400,000 |
| 35% | $424,951 to $480,050 | 35% | $400,001 to $600,000 |
| 39.6% | $480,051 or more | 37% | $600,001 or more |

| Married Taxpayers Filing Separately | | | |
|---|---|---|---|
| 2017—Prior Law | | 2018—New Law | |
| Tax Rate | If taxable income is: | Tax Rate | If taxable income is: |
| 10% | $0 to $9,525 | 10% | $0 to $9,525 |
| 15% | $9,526 to $38,700 | 12% | $9,526 to $38,700 |
| 25% | $38,701 to $78,075 | 22% | $38,701 to $82,500 |
| 28% | $78,076 to $118,975 | 24% | $82,501 to $157,500 |
| 33% | $118,976 to $212,475 | 32% | $157,501 to $200,000 |
| 35% | $212,476 to $240,025 | 35% | $200,001 to $300,000 |
| 39.6% | $240,026 or more | 37% | $300,001 or more |

| Head of Household | | | |
|---|---|---|---|
| 2017—Prior Law | | 2018—New Law | |
| Tax Rate | If taxable income is: | Tax Rate | If taxable income is: |
| 10% | $0 to $13,600 | 10% | $0 to $13,600 |
| 15% | $13,601 to $51,850 | 12% | $13,601 to $51,800 |
| 25% | $51,851 to $133,850 | 22% | $51,801 to $82,500 |
| 28% | $133,851 to $216,700 | 24% | $82,501 to $157,500 |
| 33% | $216,701 to $424,950 | 32% | $157,501 to $200,000 |
| 35% | $424,951 to $453,350 | 35% | $200,001 to $500,000 |
| 39.6% | $453,351 or more | 37% | $500,001 or more |

| Single | | | |
|---|---|---|---|
| 2017—Prior Law | | 2018—New Law | |
| Tax Rate | If taxable income is: | Tax Rate | If taxable income is: |
| 10% | $0 to $9,525 | 10% | $0 to $9,525 |
| 15% | $9,526 to $38,700 | 12% | $9,526 to $38,700 |
| 25% | $38,701 to $93,700 | 22% | $38,701 to $82,500 |
| 28% | $93,701 to $195,450 | 24% | $82,501 to $157,500 |
| 33% | $195,451 to $424,950 | 32% | $157,501 to $200,000 |
| 35% | $424,951 to $426,700 | 35% | $200,001 to $500,000 |
| 39.6% | $426,701 or more | 37% | $500,001 or more |

## Endnotes

1. Early release drafts can be found at IRS.gov/LatestForms.
2. In order to qualify as a dependent a qualifying child must meet the following tests:
    1. Relationship: son, daughter, stepson or stepdaughter.
    2. Age: either under 19 at end of year, or under 24 and a full time student. A person who is disabled satisfies the age test.
    3. Abode: the child must have the same principal place of abode as taxpayer for more than half the year. (School, vacation, illness or military count toward residency.)
    4. Support: the child must not provide more than one-half of his or her own support. For this purpose, if the individual is the taxpayer's child and is a full time student, amounts received as scholarships are not considered support.
3. "It goes without saying that the final alimony order in this case should take into consideration the real facts and circumstances of each party's financial situation including actual income, expenses, support from other sources and potential earning capacity. Income should not be imputed where real figures are available. No rule of thumb or percentage should be applied." *Di Tolvo v. Di Tolvo,* 131 N.J. Super. 72, 328 A.2d 625 (App. Div. 1974). Such mechanisms have no place in judicial decision making." *Connor v. Connor*, 254 N.J. Super. 591, 604 (App. Div. 1992).