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Chair's Column

Fattore v. Fattore—A Cautionary Tale

by Michael A. Weinberg

On Feb. 5, of this year, the Appellate Division decided the matter of *Fattore v. Fattore*. At issue was whether a trial court has the authority to direct the indemnification of a payee spouse when the payor spouse waives a military pension after the divorce and thereafter receives veteran disability retirement benefits.[1]

Factual Background of *Fattore*

In *Fattore*, the parties were married for 35 years. At the time of the divorce, in 1997, both parties were 55 years of age. The divorce was amicably resolved, and the parties' settlement terms were memorialized in a consent dual final judgment of divorce (FJD).[2] Included within the FJD was a one-line mutual waiver of alimony, which provided: "Plaintiff and defendant both each hereby waive alimony as to the other party now and in the future."[3]

With regard to equitable distribution, the FJD provided for Mr. Fattore to retain the former marital residence subject to the existing mortgage, and directed that he pay Ms. Fattore $55,000 as her share of the equity. Pursuant to the terms of the FJD, each party retained his or her bank accounts and automobiles, and each party agreed to be responsible for his or her credit card debt.[4]

At the time of the divorce, Mr. Fattore was serving full time in the Army National Guard and had accumulated a military pension that was subject to equitable distribution. As to Mr. Fattore's military pension, the FJD provided:

> [Ms. Fattore] shall be entitled to receive fifty percent…of defendant's military pension which was accumulated during the marriage…via a Qualified Domestic Relations Order to be prepared by attorneys for [Ms. Fattore]. [Ms. Fattore] shall not be entitled to any post-judgment, pre-retirement cost of living increases related to said pension.[5]

Consistent with the foregoing, a qualified domestic relations order (QDRO) of Mr. Fattore's military pension was completed in 1999. Mr. Fattore continued to serve in the Army National Guard until he became disabled in 2002 and began to collect his pension and disability benefits. He also received Social Security benefits, and opted for disability benefits at some point after 2002, which he could receive tax free.

The parties had limited contact after the divorce as to the status of Mr. Fattore's pension benefits or otherwise. In 2010, Ms. Fattore contacted the Army to inquire why she had not received any pension payments. The following response was received:

> Please be advised that a portion of [Mr. Fattore's] pay is based on disability. Therefore, it cannot be divided under the USFSPA [Uniformed Services Former Spouses Protection Act, 10 U.S.C. §1408]. The disability amount is used as an authorized deduction. In this case, when the disability amount is deducted from his gross pay along with the survivor portion, there's nothing left for the community property.[6]

The Trial Court's Ruling in *Fattore*

In 2016, Ms. Fattore filed a motion in the family part to compel Mr. Fattore to compensate her for her share of the military pension consistent with the terms of the FJD.[7] Following a two-day plenary hearing, the trial judge found that Mr. Fattore's disability had forced him to retire, and determined his income to be comprised of the following: "military disability retirement $3,400; VA disability benefit $3,100; and Social Security $1,800." Although the trial judge found that Mr. Fattore had not intentionally sought to deprive Ms. Fattore of her share of his military pension, she held:

> [Mr. Fattore] took an incredibly unreasonable position, in that, looking at the statute *per se*, a QDRO could not be implemented whereby…[Ms. Fattore] could no longer receive her [fifty] percent of the coverture value of…[Mr. Fattore's] military pay, because now it's been converted to [one-hundred] percent non-taxable VA benefits that are exempt.
>
> That doesn't mean that she loses the interest. Even…[Mr. Fattore], when questioned…by this [c]ourt…didn't think it was fair, and neither does the [c]ourt.[8]

In light of the foregoing, the trial judge appointed a pension appraiser "to determine the value of [Ms. Fattore's] coverture interest in…[Mr. Fattore's] pension at the time the parties executed their…judgment of divorce." Additionally, the trial judge directed Mr. Fattore to make interim payments of $1,800 per month to Ms. Fattore, noting that the payments were "not to be considered an alimony payment…but rather…an equitable distribution payment and, therefore, said payments are not deductible by…[Mr. Fattore] nor taxable to…[Ms. Fattore]."[9]

In reaching her decision, the trial judge relied upon *Whitfield v. Whitfield*, in which the Appellate Division affirmed a post-judgment order requiring a payor spouse who had served in the military "to compensate his former wife directly for the decrease in his pension occasioned by his voluntary election [of disability benefits] after the divorce."[10] In so holding, the court in *Whitfield* explained:

> We are mindful of a military retiree's entitlement under federal law to take advantage of tax-free benefits for his or her service-related disability. While defendant certainly had the legal right to receive disability benefits, his doing so effected a reduction of the whole of his retirement benefits, including a reduction in the thirty percent to which his wife had a vested interest. Strong public policy considerations militate against permitting a retiree to unilaterally convert, for his own economic benefit, a portion of his military pension to VA disability and defeat his former spouse's prior equitable distribution award.
>
> The equities are particularly strong in a case such as this, where the retiree's silence prevented his former wife from bringing to the court's attention the possibility that her husband's retirement benefits would be decreased, and her monthly payment reduced, if and when he applied for disability benefits. Had that been raised as an issue at the outset, the court could have awarded wife an increased percentage of husband's remaining pension payments or made some other adjustment to equitable distribution to compensate wife for her share of the marital asset.

> It is important to emphasize the procedural posture of this case. The issue is one of enforcement of a prior equitable distribution award, not a present division of assets. Wife does not seek to divide her former husband's disability benefits in violation of Mansell. Nor does she seek a greater percentage of her husband's military pension than she originally received at the time of his retirement pursuant to court order. Moreover, wife does not seek to alter the terms of her veteran-spouse's retirement plan or to compel the Department of Defense to make direct payments to her in excess of those permitted by federal law. The remedy she seeks, and that to which she is entitled, is an enforcement of the original order which was in effect before her former husband retired and unilaterally elected the waiver. Judge Bowen appropriately accomplished that result by requiring husband to make up the shortfall in his former wife's equitable distribution award occasioned by his actions.[11]

Relying upon the court's rationale in *Whitfield*, the trial judge directed Mr. Fattore to indemnify Ms. Fattore for the loss of her share of equitable distribution of the military pension, which was waived as a result of Mr. Fattore's post-judgment receipt of disability benefits. In so holding, the trial judge specifically denied Ms. Fattore's request that Mr. Fattore be compelled to pay her alimony given the mutual waiver of alimony provision set forth in the FJD.[12]

The Appellate Division's Ruling in *Fattore*

On appeal, Mr. Fattore asserted that the trial judge erred by requiring him to pay Ms. Fattore her share of the military pension from another source, noting that that type of relief was preempted by *Howell v. Howell*.[13] In her cross-appeal, Ms. Fattore argued that even if the indemnification was preempted by federal law, the trial judge should have awarded her alimony "given the substantial change in circumstances both by the judgment of divorce…and the current circumstances of the parties giving full consideration to the contemplation of…[Ms. Fattore] receiving the pension benefits of…[Mr. Fattore]."[14]

Order Directing Mr. Fattore to Indemnify Ms. Fattore Dollar-for-Dollar for Her Interest in the Pension from Other Assets is Preempted by Federal Law

Upon review, the Appellate Division noted the trial judge did not have the benefit of the *Howell* decision, which was decided approximately three months after her decision in *Fattore*. However, given the United State Supreme Court's holding in *Howell,* as discussed below, the Appellate Division concluded the trial judge erred in requiring Mr. Fattore to indemnify Ms. Fattore for her interest in the pension "dollar-for dollar from another asset belonging to defendant…[with the decision being] erroneous as a matter of law."[15]

In so holding, the Appellate Division cited the Uniformed Services Former Spouses Protection Act (USFSPA), which was enacted prior to *Howell* and "permitted state courts to treat 'disposable net pay' as subject to equitable distribution, but excluded any pay waived in order to receive veteran's disability benefits from equitable distribution."[16] The Appellate Division also cited *Mansell v. Mansell*, in which the United States Supreme Court held that pursuant to USFSPA, state courts may not treat military retirement pay waived by the retiree in order to receive veteran's disability benefits as property divisible upon divorce.[17]

Notably, within this context, the *Mansell* Court explained:

> …Veterans who became disabled as a result of military service are eligible for disability benefits….The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired….
>
> In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay….Because disability benefits are exempt from federal, state, and local taxation…, military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common.[18]

Moreover, while the *Mansell* Court held that state courts lack the power to treat as divisible upon divorce

military retirement pay that has been waived to receive veteran's disability benefits, it cautioned:

> We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.[19]

Approximately 12 years following its decision in *Mansell*, the United States Supreme Court rendered its decision in *Howell v. Howell*.[20] Similar to the issue before the court in *Fattore*, the parties' Arizona divorce decree in *Howell* provided for the wife to receive one-half of the husband's Air Force retirement pay. One year after the divorce, the husband retired from the Air Force, and the wife began to receive her share of the military pension. Thirteen years later, as a result of the husband having been declared partially disabled, the husband began to collect disability benefits with a corresponding waiver of retirement pay, thereby reducing the wife's share of the retirement pay. The wife filed an application with the Arizona family court seeking to enforce the parties' divorce decree and restore the sums she lost from the husband's retirement pay following his having been declared partially disabled. The trial court held that the wife had a vested interest and right to receive her full one-half share of the pension, which holding was subsequently affirmed by the Arizona Supreme Court.[21]

On review, the United Stated Supreme Court reversed the Arizona Supreme Court, explaining:

> This Court's decision in *Mansell* determines the outcome here. In *Mansell*, the Court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible community property.…Yet that which federal law pre-empts is just what the Arizona family court did here.…
>
> The Arizona Supreme Court, like several other state courts, emphasized the fact that the veteran's waiver in *Mansell* took place before the divorce proceeding; the waiver here took place several years after the divorce proceedings.… Hence here…the nonmilitary spouse and the family court were likely to have assumed that a full share of the veteran's retirement pay would remain available after the assets were distributed.
>
> Nonetheless, the temporal difference highlights only that [the husband's] military retirement pay at the time it came to [the wife] was subject to later reduction (should [the husband] exercise a waiver to receive disability benefits to which he is entitled). The state court did not extinguish (and most likely would not have the legal power to extinguish) that future contingency. The existence of that contingency meant that the value of [the wife's] share of military retirement pay was possibly worth less—perhaps less than [the wife] and others thought—at the time of the divorce. So too is an ownership interest in property…worth less if it is subject to defeasance or termination upon the occurrence of a later event….
>
> We see nothing in this circumstance that makes the reimbursement award to [the wife] any the less an award of the portion of military retirement pay that [the husband] waived in order to obtain disability benefits. And that is the portion that Congress omitted from the Act's definition of "disposable retired pay," namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse.…That the Arizona courts referred to [the wife's] interest in the waivable portion as having "vested" does not help. State courts cannot "vest" that which (under governing federal law) they lack the authority to give.…Accordingly, while the divorce decree might be said to "vest" [the wife] with an immediate right to half of [the husband's] military retirement pay, that interest is, at most, contingent, depending for its amount on a subsequent condition: [the husband's] possible waiver of that pay.
>
> Neither can the State avoid *Mansell* by describing the family court order as an order requiring [the husband] to "reimburse" or to "indemnify" [the wife], rather than an order that divides property. The difference is semantic and nothing more. The principle reason the state

> courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, i.e., to restore the portion of retirement pay lost due to the post-divorce waiver. And we note that here, the amount of the indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted.[22]

Notably, as it had done in *Mansell*, the Court in *Howell* noted:

> We recognize…the hardship that congressional pre-emption can sometimes work on divorcing spouses….*But we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or…take account of reductions in value when it calculates or recalculates the need for spousal support*….[23]
>
> (Emphasis added).

Based upon the foregoing, the Appellate Division in *Fattore* concluded that the trial court's order requiring the calculation of the hypothetical pension benefit waived as a result of Mr. Fattore's post-judgment receipt of disability benefits, and payment of the amount from other assets belonging to Mr. Fattore, was preempted by federal law and therefore reversed.

Disability Waiver was a Substantial and Permanent Change in Circumstances Warranting Consideration of an Award of Alimony

Despite its holding that the trial court's order directing Mr. Fattore to indemnify Ms. Fattore dollar-for dollar for her interest in the pension from other assets was preempted by federal law, the Appellate Division in *Fattore* did not find Ms. Fattore to be without a remedy.

Upon review of the matter, the Appellate Division found that "offset or reallocation of equitable distribution" were not available remedies to Ms. Fattore since the parties had been divorced for several years and "equitable distribution is final and not subject to a change in circumstances."[24] However, the Appellate Division found an alimony award to be a "potential remedy" to Ms. Fattore, and referenced the New Jersey Supreme Court's confirmation that "support payments are intimately related to equitable distribution." Further, the Appellate Division explained that family part judges have a "broad supervisory role in determining the fairness of agreements between spouses," noting:

> trial judges…have the utmost leeway and flexibility in determining what is just and equitable….In each case the court must determine what, in the light of all the facts presented to it, is equitable and fair, giving due weight to the strong public policy favoring stability of arrangements.[25]

Similarly, the Appellate Division noted that while an agreement resolving a matrimonial dispute is indeed a contract, "the law grants particular leniency to agreements made in the domestic arena" and "vests judges greater discretion when interpreting such agreements."[26] The Appellate Division explained, "…contract principles and equity and fairness are not mutually exclusive. Moreover, apart from a judge's role to assure fairness, the parties owe a duty of fairness to one another."[27]

Within this context, the Appellate Division addressed whether the alimony waiver agreed upon prior to Mr. Fattore's retirement and disability could "withstand the inequity created by unforeseeable circumstances." In so doing, the Appellate Division noted that the definition of 'waiver' is an "intentional relinquishment of a known right," which "must be supported by an agreement founded on valuable consideration."[28]

Furthermore, the Appellate Division noted that N.J.S.A. 2A:34-23 specifically empowers courts of this state to award alimony "as the circumstances of the parties and the nature of the case shall render fit, reasonable and just." Moreover, as articulated in *Crews v. Crews*, the courts have the equitable power to establish alimony and support orders not only during a pending matrimonial action, but also "after a judgment of divorce or maintenance."[29]

In light of the above principles, the Appellate Division determined the alimony waiver set forth in the FJD "was not a bar to a consideration of a post-judgment

award of alimony" to Ms. Fattore, noting that "the record readily demonstrates [Ms. Fattore] gave valuable consideration for the waiver of alimony in exchange for the promise of the future ability to share in [Mr. Fattore's] military pension." Noting that Mr. Fattore's earnings were approximately 34 percent greater than Ms. Fattore's earnings at the time of the parties' divorce, the Appellate Division found:

> [T]here was valuable consideration given by [Ms. Fattore] in exchange for the alimony waiver, and the unforeseeable loss of the bargained for pension benefit was a substantial and permanent change in circumstances, which invalidated the waiver. Upholding the alimony waiver in these circumstances would be wholly unfair.

Based upon the foregoing, the Appellate Division held that Ms. Fattore's alimony waiver could not "withstand such a substantial change in circumstances," and that it would be "neither fair nor equitable to uphold such a waiver."[30] Noting that there was not a "full record" created to address the amount of alimony to be awarded to Ms. Fattore, the Appellate Division remanded the matter to the trial court, and concluded:

> The gravamen of the trial judge's decision addressed the parties' dispute through the lens of equitable distribution. [Mr. Fattore] cites his age as a reason why alimony is inappropriate. Although we draw no conclusion on that account, we note the court may consider [Mr. Fattore's] assets, or income from assets, as a potential source for an alimony award as long as it is not a dollar-for-dollar indemnification. See *N.J.S.A.* 2A:34-23(b)(10) and (11).
>
> Moreover, we agree with [Ms. Fattore's] argument that [Ms. Fattore's] alimony claim is primarily tethered to the former marital lifestyle. The trial judge characterized the parties' marital lifestyle as "frugal." Even so, this does not obviate an award of alimony to [Ms. Fattore] because an alimony determination requires an assessment of "the quality of economic life during the marriage, not bare survival." Moreover, the Legislature has stated an alimony determination shall consider "[t]he standard of living established in the marriage...and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other." In light of the lost pension benefit, and [Ms. Fattore's] inability to meet her "bare bones" lifestyle with her income, we are not convinced she is capable of meeting the quality of the marital standard of living without alimony.[31]

Conclusion

As discussed herein, existing federal law preempts state courts from treating waived military retirement pay as divisible property between former spouses. Thus, it is now clear that until and unless Congress amends the law, state courts are prohibited from ordering a payor spouse, without prior written consent, to indemnify the payee spouse for the loss of that payee spouse's allocated benefit caused by the payor spouse's waiver of retirement pay to receive veteran disability retirement benefits.

In such post-judgment circumstances, however, the Appellate Division's thoughtful analysis in *Fattore* provides a possible alternative remedy to the payee spouse through the family court's use of its broad equitable powers. Indeed, while it is now clear that, absent prior consent in writing, a state court may not indemnify a payee spouse when the payor spouse waives a military pension post-divorce, and thereafter receives veteran disability benefits, *Fattore* provides that the family court "is free to treat the pension waiver as a change in circumstances and may award the payee alimony or modify it."[32]

Within this context, however, it must be recalled that the Appellate Division in *Fattore* specifically noted that Mr. Fattore's earnings were 34 percent greater than Ms. Fattore's at the time of the divorce, and thus concluded that "there was valuable consideration given by [Ms. Fattore] in exchange for the alimony waiver…." It is not clear whether a family court would find an alimony award to be a potential available remedy if the parties were found to have had comparable incomes at the time of the divorce.

Nor is it clear that *Fattore* or the federal case law cited above (*i.e., Mansell* and *Howell*) preclude spouses at the time of the divorce from reaching a consensual agreement as to remedies available to the payee spouse for the potential future loss of his or her portion of a military

pension due to the payor spouse's post-judgment waiver of retirement pay to receive veteran disability retirement benefits. Indeed, the Court in *Howell* specifically noted that the family court, "when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or…take account of reductions in value when it calculates or recalculates the need for spousal support."[33]

Within this context, it must be recalled that the law of the state favors the enforcement of consensual agreements as explained by the New Jersey Supreme Court in *Konzelman v. Konzelman*:

> New Jersey has long espoused a policy favoring the use of consensual agreements to resolve marital controversies. Voluntary agreements that address and reconcile conflicting interests of divorcing parties support our "strong public policy favoring stability of arrangements" in matrimonial matters….The prominence and weight we accord such arrangements reflect the importance attached to individual autonomy and freedom, enabling parties to order their personal lives consistently with their post-marital responsibilities…(recognizing that divorcing parties are free to bind themselves to arbitrate disputes over alimony). Thus, it "would be shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal matrimonial problems that have been advanced by the parties themselves" ….For these reasons, "fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed" ….The very consensual and voluntary character of these agreements render them optimum solutions for abating marital discord, resolving matrimonial differences, reaching accommodations between divorced couples, and assuring stability in post-divorce relationships…(stating that "separation agreements...are generally favored by the courts as a peaceful means of terminating marital strife and discord so long as they are not against public policy").
>
> Divorce agreements are necessarily infused with equitable considerations and are construed in light of salient legal and policy concerns…. The interpretation, application, and enforceability of divorce agreements are not governed solely by contract law. "[C]ontract principles have little place in the law of domestic relations"….Thus, settlement agreements, if found to be fair and just, are specifically enforceable in equity….[34]

Thus, while there are seemingly no ironclad or guaranteed solutions to address the post-judgment risk of loss to the payee spouse of a military pension as discussed herein, and each matter must be evaluated based upon its specific facts and circumstances, two sample provisions to consider when drafting a written settlement agreement at the time of divorce and/or appropriate form of consent court order dividing a retirement account are as follows:

First Sample Draft Provision

The payor spouse shall release, hold harmless and indemnify the payee spouse for any actions he/she takes which reduces the payee spouse's allocated benefits. The trial court will retain continuing jurisdiction to modify the pension division payments or the property division specified herein, or to award compensatory alimony or damages, if the payor spouse should waive military retired pay in favor of disability payments or take any other action (such as receipt of severance pay, bonuses or an early-out payment) which reduces the amount or share the payee spouse is entitled to receive. In addition, the trial court will retain authority over this award to ensure the following:

- That the payee spouse shall receive his/her agreed upon share of the allocated benefits;
- That such other remedies as may be necessary are still available to the payee spouse;
- That the payor spouse acts in good faith in carrying out the terms of this agreement/order;
- That the payor spouse indemnifies the payee spouse in the event of any reduction of the payee spouse's share of the allocated benefits due to the actions of the payor spouse; and
- That the intent of this agreement/order will be carried out by both parties in full.

Second Sample Draft Provision

An integral part of this Agreement is the parties' intention and agreement that the payee spouse receive his/her allocated benefits as set forth herein. As such, in the event of a future reduction or loss of the payee spouse's allocated benefits as the result of the payor

spouse's waiver of retirement pay to receive veteran disability retirement benefits, the payor spouse shall pay to the payee spouse alimony in a sum equal to the amount of the reduction or loss of the payee spouse's allocated benefits. This alimony obligation of the payor spouse shall not be modifiable regardless of any change in circumstances, whether foreseen or unforeseen. The payor spouse shall pay and hold the payee spouse harmless and indemnify the payee spouse completely and totally for all costs, fees, payments, and/or other expenses incurred in order to abide by the Order in any Court or other forum which acts to modify the terms of this provision. The payor spouse agrees and acknowledges that there is adequate and sufficient bargained for consideration for his/her agreement as set forth herein.[35]

Endnotes

1. *Fattore v. Fattore*, 2019 N.J. Super. *Lexis* 16 (App. Div. 2019).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. The trial judge rejected Mr. Fattore's contention that Ms. Fattore has "at sat on her rights" and was precluded from seeking relief, finding that Ms. Fattore has "limited funds" and was not able to hire counsel in 2010. The trial judge determined Ms. Fattore's income from all sources to total $22,848 per year, and Mr. Fattore to have "tax free income of over $80,000 per year…." *Id.*
8. *Id.*
9. *Id.*
10. *Whitfield v. Whitfield*, 373 N.J. Super. 573 (App. Div. 2004).
11. *Id.* at 582.
12. *Fattore*, 2019 N.J. Super. Lexis 16 (App. Div. 2019).
13. *Id.*, *citing Howell v. Howell*, 137 S. Ct. 1400 (2017).
14. *Id.*
15. *Id.*
16. *Id.*, *citing* the USFSPA, 10 U.S.C. §1408(c)(1) and (a)(4)(11).
17. *Id.*, *citing Mansell v. Mansell*, 490 U.S. 581 (1989).
18. *Mansell*, 490 U.S. at 583-584.
19. *Id.* at 594.
20. *Howell v. Howell*, 137 S. Ct. 1400 (2017).
21. *Id.* at 1404.
22. *Id.* at 1405-1406.
23. *Id.* at 1406.
24. *Fattore*, 2019 N.J. Super. Lexis 16 (App. Div. 2019).
25. *Id.*, *citing Smith v. Smith*, 72 N.J. 350, 360 (1977).
26. *Id.*, *citing Quinn v. Quinn*, 225 N.J. 34, 45 (2016).
27. *Id.* (Internal citations omitted).
28. *Id.*, *citing W. Jersey Title & Guar. Co. v. Indus. Tr. Co.*, 27 N.J. 144, 152-53 (1958).
29. *Id.*, *citing Crews v. Crews*, 164 N.J. 11, 24 (2000) and *Lepis v. Lepis*, 83 N.J. 139, 145 (1980).
30. *Id.*
31. *Id.* (Internal citations omitted).
32. *Id.*
33. *Howell*, 137 S. Ct. at 1406.
34. *Konzelman v. Konzelman*, 158 N.J. 185, 193-194 (1999).
35. The two draft provisions set forth above are intended to be demonstrative in nature only. There are no warranties or guarantees as to whether or not the proposed language in either or both sample draft provisions will be specifically enforced by a court, tribunal, or other governmental authority.

Inside this issue

Editor-in-Chief's Column

Are More *Pro Bono* Assignments on the Horizon for Family Law Attorneys Due to *Kavadas v. Martinez*?

by Charles F. Vuotto Jr.

Due to the Herculean efforts of one of the family law community, David Perry Davis, and the wise decision of a member of the bench, the Honorable Mary Jacobson, A.J.S.C., arguably a problematic aspect of the law is in the process of being corrected. However, with good always comes a little bad. Along with all the other obligations imposed upon the family law attorneys of this state, this new decision may possibly impose a further burden.

In *Kavadas v. Martinez*, the plaintiffs challenged the constitutionality of the automatic suspension of driver's licenses when a bench warrant is issued for non-payment of child support in accordance with N.J.S.A. 2A:17-56.41(a) (the New Jersey Child Support Program Improvement Act).[1] The lawsuit essentially sought to expand upon the procedural safeguards mandated by the New Jersey Supreme Court in the seminal case of *Pasqua v. Council*, pursuant to which indigent parents at risk of incarceration at child support enforcement hearings are entitled to the assignment of counsel.[2]

Attacking its constitutionality, the plaintiffs in *Kavadas* challenged the child support enforcement procedures implemented in accordance with the act on both procedural and substantive due process grounds. The plaintiffs argued that the procedures in place fail to provide adequate notice and opportunities to be heard prior to the automatic suspension of a driver's license;[3] are arbitrary in nature; and fail to provide indigent obligors with legal representation in such proceedings. The plaintiffs further contended that poor obligors are disparately impacted, compounding their financial struggles by limiting their ability to work, and cited several circumstances under which the procedures harm the non-custodial children the statute was designed to protect. As an alternative to their constitutional challenges, the plaintiffs advanced arguments of statutory interpretation to contest the suspension procedures. In turn, the defendants countered with public policy considerations, arguing the prospect of a license suspension serves to deter obligors from defaulting on their child support obligation; encourages compliance with the associated bench warrant that triggered the license suspension; and coerces obligors to make payment towards their arrears as a precondition to restoring their licenses. In addition, the defendants disputed the suggestion of inadequate notice and the notion of a right to counsel in connection with a temporary loss of driving privileges in a civil child support matter.

Following three-and-a-half years of litigation, the case culminated in competing motions for summary judgment. The orders entered by Judge Jacobson were supported by a comprehensive 187-page opinion. The court prefaced its legal analysis with a thorough review of the act and its legislative history, the procedures enacted by various state agencies in accordance with the act, and a review of certain statistics on the suspension of driver's licenses and the resulting impact on obligors of different economic and racial groups. Transitioning to its disposition of the issues raised, the court rejected the plaintiffs' statutory interpretation and substantive due process arguments.[4] As to the latter, using a rational basis standard of review, the court concluded the plaintiffs failed to demonstrate the statutory provisions are arbitrary considering the public policies cited by the defendants.

The plaintiffs did, however, find success in their procedural due process arguments, as the court found that "the procedural due process guarantees of the New Jersey Constitution and this State's doctrine of fundamental fairness require that delinquent child support obligors be provided with advance notice and an opportunity to be heard when [the] Probation [Division] seeks to impose driver's license suspensions as a child support enforcement mechanism."[5] The court further required that obligors be notified of a date certain on which the suspension of their license will take effect, and provided the affected state agencies a period of 120 days to draft

new procedures consistent with its decision.[6]

Finally, and of particular concern to the family law bar, the court held that attorneys must be appointed to represent indigent obligors in enforcement hearings in which an obligor's license may be suspended, citing the New Jersey Supreme Court's decisions in *Pasqua*, *Rodriguez v. Rosenblatt*, and *State v. Moran*.[7] The court provided a general overview of the authority and procedures in place for appointing counsel to indigent persons facing "consequences of magnitude" in municipal and state criminal courts, as well as in termination of parental rights cases. The court then noted that "[t]here is no equivalent infrastructure for most proceedings in the state civil or family court systems," and that where the Legislature has made no provision for the Office of the Public Defender to represent indigent defendants entitled to counsel, "the Assignment Judge of each vicinage must assign pro bono counsel using a list of licensed attorneys known as the '*Madden List*.'"[8]

Following its analysis of the relevant case law, the court held as follows:

> This court finds that both due process and fundamental fairness require courts to provide counsel to indigent obligors at any hearing at which a hearing officer may recommend a driver's license suspension to a court, or at any hearing when the family court itself is considering a driver's license suspension. Essentially, the court is directing that the *Pasqua* model be followed when Probation is seeking to impose a driver's license suspension for failure to pay child support.[9]

The court's decision in *Kavadas* does not seem to be clear on the precise protocol to be followed in the event a litigant is deemed indigent when faced with the potential of a driver's license suspension. The decision definitively provides that such indigent litigants are entitled to legal representation; however, it is unclear whether courts are instructed to appoint counsel from the *Madden* list, or whether courts are prevented from suspending an indigent obligor's driver's license unless and until the Legislature addresses the issue (*i.e.*, by statutorily mandating the appointment of the Office of the Public Defender).

As indicated in the quote above, the court directed "that the *Pasqua* model be followed" in hearings entailing the possible suspension of a driver's license. In *Pasqua*, the New Jersey Supreme Court held that counsel must be appointed for indigent obligors in hearings in which incarceration is under consideration.[10] In regard to the procedure for appointing counsel, the Court deferred to the Legislature:

> We realize that unless there is a funding source for the provision of counsel to indigent parents in *Rule* 1:10-3 proceedings, coercive incarceration will not be an available sanction. *We will not use our authority to impress lawyers into service without promise of payment to remedy the constitutional defect in our system*. The benefits and burdens of our constitutional system must be borne by society as a whole. In the past, the Legislature has acted responsibly to provide funding to assure the availability of constitutionally mandated counsel to the poor...We trust that the Legislature will address the current issue as well.[11]

In essence, absent the enactment of the necessary legislation, incarceration may not be used to coerce compliance in cases where an indigent obligor requests counsel. This is reflected in the official note regarding the 2007 amendment to Rule 5:3-4 (addressing the right to counsel in family law matters), which provides as follows:

> Pertaining to actions brought under Rule 1:10-2 for noncompliance with child support orders, the Supreme Court in Pasqua v. Council, 186 N.J. 127, 146, 149 (2006), established a due process right for the obligor to be advised of the right to counsel. *Where counsel is requested, and the obligor is found to be indigent, counsel must be assigned before incarceration may be used to coerce compliance. The Court determined that pro bono attorneys would not be appointed in these cases, referring the issue to the Legislature*. Currently, Administrative Office of the Courts Directive #18-06 promulgates statewide standards and procedures relating to the use of warrants and incarceration in child support enforcement.[12]

In light of the holding in *Pasqua*, and given that the court in *Kavadas* instructs to follow the model established in *Pasqua*, one interpretation of Judge Jacobson's decision is that suspension of a driver's license may not be used as

coercive measures until counsel is legislatively provided. Yet, in its decision in *Kavadas*, the court made several references to appointing *pro bono* counsel, giving the impression that its holding directs the use of the *Madden* list. By way of example, the court noted that in cases "in which courts consider ordering license suspensions as punitive or coercive measures, the same procedure for *appointing pro bono counsel to indigent obligors* as is required by *Pasqua* should be followed," and in the preceding paragraph in its decision, further suggested that it "does not anticipate the need for *many more pro bono counsel being appointed* at the pre-suspension hearings required by this decision."[13] Further clouding the court's intent in its decision is its reference to the New Jersey Supreme Court's decision in *In re Adoption of J.E.V.*, where the Court held that indigent litigants in contested adoption cases are entitled to legal representation and opined that "[u]ntil the Legislature acts, *we may need to assign counsel through the Madden list,* which is not an ideal solution."[14]

Perhaps due to this uncertainty, during the case management conference that followed the court's decision in *Kavadas*, the Administrative Office of the Courts (AOC) requested clarification of its obligation to provide counsel.[15] This was addressed in paragraph 6 of the court's case management order, wherein the court issued the following directives:

> Counsel for Defendant, AOC, shall submit to Plaintiffs' counsel a proposed mechanism for appointing counsel for indigent child support obligors facing driver's license suspensions by February 8, 2019. In the interim, the parties shall confer to determine if a temporary mechanism regarding appointments of counsel for indigent obligors facing driver's license suspension can be incorporated into the consent order referenced in paragraph 5 of this Order.[16]

Thus, even with the court's otherwise thorough decision, it appears the long and winding road to appointing counsel to indigent child support obligors facing driver's license suspensions stretches on.[17]

The ongoing dispute over implementation of the court's decision regarding the right to representation begs the question: Should the court (a) defer to the Legislature and effectively prohibit suspension of an unrepresented indigent obligor's driver's license until such time as the issue is addressed statutorily by providing funding to assure the availability of constitutionally mandated counsel to the poor (*Pasqua*); (b) employ use of the *Madden* list in the interim (*J.E.V.*); or (c) take another approach? It is this author's opinion that the use of the *Madden* list for these hearings may result in an unreasonable burden on the family law bar and continue a disconcerting trend. It is also unfair to the litigants, as they will be assigned to attorneys who are not proficient or familiar, or practice regularly, in this area of the law.

The *Kavadas* decision comes on the heels of the New Jersey Supreme Court's denial of the Family Law Section's request for attorneys who volunteer substantial time, skill and knowledge each year as panelists in the Matrimonial Early Settlement Program (ESP) to receive *pro bono* (*Madden*) credits. Had this request been approved, attorneys volunteering a certain fixed number of hours (*e.g.*, 25 hours per year) to this program would be excluded from the *Madden* list and exempt from *pro bono* case assignment the following calendar year.

Compounding the Court's decision not to grant a *pro bono* exemption to ESP panelists is the fact that Rule 5:5-6 requires mandatory economic mediation, and that participant mediators provide two free hours of service. Many of these family law mediators also volunteer their time as ESP panelists.

Further still, family law attorneys are called upon for *pro bono* representation in other, more complex matters. Case in point, the Court's decision in *J.E.V.*, where Chief Justice Stuart Rabner and a unanimous Court ruled that litigants have a right to appointed counsel in contested adoption cases.[18] In *J.E.V.*, the Court specifically noted that until some state funding occurs, the bar association and family law attorneys would bear the brunt of these assignments. The Court stated:

> The very reasons that call for a lawyer to be appointed also *favor the appointment of attorneys with the experience to handle these matters*. Contested adoption proceedings raise important substantive issues and can lead to complicated and involved hearings. The Office of Parental Representation in the Public Defender's Office has developed expertise in this area from its fine work in state-initiated termination of parental rights cases. Without a funding source, we cannot direct the office to take on an additional assignment and handle contested cases under the Adoption Act.

> In the past, as we noted in *Pasqua*, "the Legislature has acted responsibly" and provided counsel for the poor when the Constitution so requires. For example, after *Crist*, the Legislature enacted N.J.S.A. 30:4C-15.4(a), which directs judges to appoint the Office of the Public Defender to represent indigent parents who ask for counsel in termination of parental rights cases under Title 30. Once again, we trust that the Legislature will act and address this issue.
>
> In the interim, we have no choice but to turn to private counsel for assistance. We invite volunteer organizations to offer their services, as *pro bono* attorneys have done in other areas. *Until the Legislature acts, we may need to assign counsel through the Madden list, which is not an ideal solution.*[19]

The family law practice is a noble one, and practitioners should be proud of the service they provide to society. Still, as officers of the court, family lawyers realize that they have a reasonable obligation to go a step further and perform *pro bono* service that goes along with the privilege of having a law license;[20] however, the burden of *pro bono* service appears to fall disproportionately on family law attorneys. Sadly, for the most part, the good work of ESP panelists and other volunteer family law attorneys goes unrecognized in a meaningful way.[21]

Even more, there does not appear to be an end in sight to the growing list of circumstances under which private attorneys will be mandated to represent indigent litigants.[22] While *pro bono* service is certainly a justifiable and honorable cause, the suggestion that reliance on the *Madden* list as a stopgap measure until the Legislature acts may ignore the realities of politics. By 'temporarily' resolving such issues by defaulting to private attorneys until addressed by the Legislature, courts may be unintentionally removing an incentive or sense of urgency that would have otherwise prompted timely enactment of such legislation and the *status quo* of mandatory service by the family bar will unfortunately become the norm.

Therefore, it is the author's opinion that the Legislature should statutorily fund and require legal services organizations or the Office of the Public Defender to fulfill the mandate arising from Judge Jacobson's sound decision in *Kavadas v. Martinez* and *J.E.V.* Until such time, suspension of an unrepresented indigent obligor's driver's license should not be utilized as a method of enforcement until representation is provided by statute. The burden to represent indigent obligors under the circumstances delineated in the *Kavadas* opinion, the author believes, should not fall upon private attorneys, particularly the family law bar, which is already overburdened with such services.

Subsequent to the writing of this column, the author has been advised of a letter from Gregory J. Sullivan, deputy attorney general, dated March 29, 2019, to Judge Jacobson indicating to the court that the state will cease the practice of automatic suspensions of driver's licenses when a warrant issues for non-payment of child support as of April 1, 2019.[23]

The author wishes to thank Rotem Peretz of LaRocca Hornik Rosen Greenberg & Crupi, LLC in Freehold, and Jeralyn Lawrence of Lawrence Law, LLC in Watchung, for their contributions to this column.

Endnotes

1. *Kavadas v. Martinez*, No. MER-L-1004-15 (Law Div. Dec. 7, 2018) (slip op. at 4), http://www.dpdlaw.com/Kavadas_Decision.pdf. The court emphasized that, as indicated by the plaintiffs' counsel, the lawsuit did not challenge the issuance of bench warrants and automatic license suspensions for obligors' failure to appear at child support enforcement hearings. *Id.* at 92.
2. *Pasqua v. Council*, 186 N.J. 127, 149 (2006).
3. Senator Shirley K. Turner has introduced a bill, S-3424, which removes from the statute the sentence that required the automatic suspension of a driver's license upon the issuance of a child support-related bench warrant. The bill has been referred to the Senate Judiciary Committee.
4. The court also dismissed one of the named plaintiffs, Alisha Grabowski, as a party to the case due to lack of standing. The court reasoned that Grabowski was not a New Jersey resident when the complaint was filed and, more notably, did not maintain a New Jersey driver's license. Due to the latter point, Grabowski was not affected by and did not experience harm as a result of the New Jersey laws and processes in question. *Kavadas*, slip op. at 93-98.

5. *Id.* at 185.
6. This deadline was extended following the case management conference held on Jan. 8, 2019. *See* Case Mgmt. Order, *Kavadas*, Jan. 8, 2019, http://www.dpdlaw.com/KavadasCMO8Jan2019.pdf.
7. *Pasqua*, 186 N.J. at 141-49; *Rodriguez v. Rosenblatt*, 58 N.J. 281, 294-95 (1971); *State v. Moran*, 202 N.J. 311, 325-27 (2010).
8. *Kavadas*, slip op. at 178 (*citing Madden v. Delran*, 126 N.J. 591 (1992); *In re Adoption of J.E.V.*, 226 N.J. 90, 113 (2016)).
9. *Id.* at 181.
10. *Pasqua*, 186 N.J. at 149.
11. *Id.* at 153-54 (emphasis added).
12. Pressler and Verniero, Current N.J. Court Rules, Official Note Regarding 2007 Amendment of R. 5:3-4 (2018) (emphasis added); *see also* the comment to the rule, which provides, in relevant part, as follows:

    > If an indigent party is entitled to counsel and there is no publicly funded source for representation, the court may make pro bono assignments as provided by paragraph (a). This paragraph of the rule, however, *excepts child support enforcement proceedings from pro bono counsel assignment*. As the Official Note explains, *this exception follows Pasqua v. Council*, 186 N.J. 127 (2006), and the implementing Administrative Directive, #18-06, *pursuant to which indigent child-support obligors may not be incarcerated unless they are represented and excepting such representation from the pro bono program*.

    Pressler, cmt. 2.1 on R. 5:3-4 (emphasis added).
13. *Kavadas*, slip op. at 181 (emphasis added).
14. *Id.* at 178 (*quoting J.E.V.*, 226 N.J. at 113).
15. It should be noted that the plaintiff's counsel, Davis, has indicated to the author that he consistently opposed the use of the *Madden* list for these matters.
16. Case Mgmt. Order, *Kavadas*, Jan. 8, 2019, http://www.dpdlaw.com/KavadasCMO8Jan2019.pdf.
17. On Feb. 22, 2019, the AOC filed a motion for reconsideration of the court's directive that the AOC devise a mechanism for the appointment of counsel. The crux of the AOC's legal argument is that, absent a statutory provision or a delegation of the authority by the Supreme Court of New Jersey, only the Supreme Court may decide how to appoint constitutionally required counsel. As such, it appears to be the AOC's position that it lacks the authority to comply with the court's directive.
18. *J.E.V.*, 226 N.J. at 111 ("Given the fundamental nature of the right to parent that may be lost forever in a disputed adoption hearing…[we] hold that indigent parents who face termination of parental rights in contested proceedings under the Adoption Act are entitled to have counsel represent them under Article I, Paragraph 1 of the State Constitution.").
19. *Id.* at 113 (citations omitted) (emphasis added).
20. The total amount of time Davis spent on *Kavadas* over the years (complaint filed in May 2015) is 852.9 hours. This has not been his only substantial *pro bono* work. In *Pasqua*, he spent 613 hours over a six-year period through five different courts. In *Leonard v. Blackburn*, he spent 245 hours in the trial and appellate courts. In *Ricks v. Fowler*, he spent 78 hours. In *W.M. v. Carchman*, he spent 15 hours. In *Occupy Trenton v. Zawacki*, he spent 10 hours. Thus, the total time over the last 19 years that Mr. Davis spent on these cases totals a whopping 1,813.9 hours (*Kavadas*—852.9, *Pasqua*—613, *Leonard*—245, *Fowler*—78, *W.M.*—15, *Occupy*—10). Of all of these cases, the trial court in *Kavadas* was the first (and only) to grant Davis's application to be compensated for the 852.9 hours of services rendered in the case, and the issue is currently being addressed in mediation.
21. *See* McGoughran, What are We? Chopped Liver?, 37 *New Jersey Family Lawyer*, 1, Nov., 2016.

22. *See also Parness-Lipson v. Parness*, No. A-2221-13 (App. Div. June 6, 2014) (slip op. at 7). In this unpublished decision, the Appellate Division held as follows:

> Based on the record before us, we conclude that, solely for purposes of appointment of counsel at the *Matthei* hearing, defendant should be deemed indigent....Lastly, because the issue is whether defendant should continue to be incarcerated, and he has been in jail for five years, we choose to err on the side of caution. Hence, we remand this matter to the trial court with direction to appoint counsel to represent defendant. It may be appropriate to use the same process that would be employed to appoint counsel for an indigent defendant in a child support enforcement proceeding. *See Pasqua v. Council,* 186 N.J. 127 (2006).
>
> In addition, the *Madden* list is routinely used to appoint counsel to indigent litigants charged with violation of domestic violence restraining orders, municipal appeals, and parole revocation hearings.

23. www.dpdlaw.com/KavadasStopSuspensions29MAR2019.pdf.

We Owe You 15 Years of 'Thank You's'

Dear Cindy:
I just wanted to thank you both again for helping me and [my daughter] get into our new home. As you both knew, I was very nervous and so unsure of myself during this process-however you both reminded me of what it means to have amazingly competent professional women surround you during crazy times-success! I remain extremely grateful. Let this brief email remind you of how important your work is.....

EJM (12/29/2017)

Hi Cindy,
Thanks for sharing the survey. We appreciate you taking care of our client JB. She's a lovely person. We continue to refer to you and Len because you're the best. Enjoy the beautiful day.

MAB, Esq. (10/5/2017)

The above is shared with you, the members of the NJSBA Family Law Section, with the vision of helping you to decide on the very best Home Loan Specialist to refer your cases to, or for your own personal mortgage financing. Our team has experience helping families going through divorce with mortgage lending options and can help your clients too.

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Have a Happy, Healthy & Prosperous New Year!

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EQUAL HOUSING LENDER

Executive Editor's Column

Exceptional Circumstances May Not Be So Exceptional

by Ronald G. Lieberman

Practitioners are aware that under the alimony statute, N.J.S.A. 2A:34-23(c), for marriages less than 20 years, the duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage. The statute then goes on to provide eight factors, seven of which are specific, with the eighth one being a catch-all to define what exceptional circumstances would be. Those factors are as follows:

1) the ages of the parties at the time of the marriage or civil union and at the time of the alimony award;
2) the degree and duration of the dependency of one party on the other party during the marriage or civil union;
3) whether a spouse or partner has a chronic illness or an unusual health circumstance;
4) whether a spouse or partner has given up a career or a career opportunity, or otherwise supported the career of the other spouse or partner;
5) whether a spouse or partner has received a disproportionate share of equitable distributions;
6) the impact of the marriage or civil union on either party's ability to become self-supporting, including but not limited to either party's responsibility as primary caretaker of a child;
7) tax considerations of either party; and,
8) any other factor or circumstances that the court deems equitable, relevant and material.

The question becomes—what are those exceptional circumstances that would warrant an award of alimony longer than the length of the marriage? The author could find no reported case law on that topic. There is one recent unreported decision that required a hearing on whether the disability of one party would be an exceptional circumstance.[1] The question raised by the *Friel* case and under the statute is: Are practitioners recognizing that exceptional circumstances may, with creative advocacy, be the exception that swallows the rule regarding the length of alimony?

The author ventures to say that most practitioners have dealt with cases where the supported spouse had a drug addiction or substance abuse issue. Is not that an exceptional circumstance warranting an adjustment to the duration of alimony? What if that supported spouse was the 'classic' homemaker and/or individual who sacrificed his or her career for the other party?

Those seven factors constituting exceptional circumstances overlap the factors in the alimony statute itself. The similarity is not a coincidence. The factor "the ages of the parties" is already a statutory factor under N.J.S.A. 2A:34-23(b) for determining an alimony award. The earning capacity and length of absence from the job market are further separate factors in determining an alimony award. The financial or non-financial contribution to the marriage is an alimony factor, as is the impact of the marriage on either party's ability to be self-sufficient. The equitable distribution ordered is an alimony factor, and so is the tax treatment and consequences.

The reason the author points out the same or substantially similar language in alimony statute N.J.S.A. 2A:34-23(b) and the exceptional circumstance language in N.J.S.A. 2A:34-23(c) is because if the factors are being reviewed to determine the actual alimony award under subpart (b), then by inference those same factors should be looked at under subpart (c) to determine if the length of alimony should exceed the length of the marriage. After all, the dependency of the party on the marriage and the loss of an earning capacity or career and the impact of the marriage on a party's ability to earn are highly relevant under either determination. The loss of those earning years can never be made up, no matter what the length of alimony. The supporting spouse continues to move along in his or her career while the supported spouse is left to pick up the proverbial pieces.

If the supported spouse sacrificed a career or accepted a lesser-paying career track because of the marriage, then certainly factor two regarding dependency on one party and factor four about giving up a career and career opportunity would be met.

There is a tremendous amount of focus these days on the opioid crisis. If a party had a substance abuse issue, would not the party then fall under the "chronic illness or unusual health circumstance"? Just by a cursory review a practitioner can see that exceptional circumstances are truly not so exceptional.

Hopefully, the practitioner will realize that the phrase "exceptional circumstances" as found in subpart (c), should not dissuade the attorney from raising an argument that the length of alimony should exceed the length of the marriage. After all, the experienced practitioner is analyzing the same or substantially similar factors in subpart (c) as he or she would analyze in subpart (b) to determine the type and the amount of alimony in the first instance.

Endnote

1. *Friel v. Braun-Friel*, 2018 N.J. Super. Unpub. *LEXIS* 501 (App. Div. 2018); Docket No. A-4996-15 T3.

A Tribute to My Colleague and Friend, John E. Finnerty

by Robert T. Corcoran

I was honored to be asked to write this tribute about our colleague, John E. Finnerty, who passed away unexpectedly recently. To me, John was more than just a colleague, he was also my friend. It is with deep sorrow and great sadness that I write this tribute.

I had the privilege of knowing John for more than 30 years. He was a mentor to me in my early days as a matrimonial lawyer. As years passed, I would continue to seek out his advice on occasion when faced with complicated legal issues, and he was always eager to help. John had a brilliant legal mind and his knowledge of the law was second to none. He taught me to push the envelope as it related to new family law concepts and theories. He challenged me to be a better lawyer and, although I never had the chance to tell him, he is deserving of some credit for the success I have achieved.

John was a formidable adversary and a tenacious litigator. If you had a case against him, you had to be prepared to work hard, as John was tireless, fearless and non-compromising. In other words, he was a pain in your butt, to put it mildly. When you had a case against John, it was also a learning opportunity, as John was an intellectual thinker, legal strategist and innovator. It is these attributes, coupled with his tireless work ethic, which made him an icon in our profession.

John was passionate about the law. He was more concerned about achieving justice or victory for his clients or about changing or improving the law than he was about billable hours or making money for himself. Many would be thinking about retirement at his stage of life, but that was not John, and he died still doing what he loved.

During his distinguished career, John received many accolades, including being the recipient of the Saul Tischler award in 1998 for his contributions to the advancement of family law. He also litigated many legal precedent-setting cases and was one of the principal drafters of the revisions to the New Jersey alimony statute that were adopted on Sept. 14, 2014. John had many other accomplishments, and he made many other contributions to family law, which are too numerous to mention. His passing is a great loss for the New Jersey State Bar Association, Bergen County Bar Association and the rest of the legal community.

While John gave much to his work, he was also a devoted husband to his wife, Barbara, and a loving father to his two daughters, Lindsay and Haley, whom he adored. I would like to extend my deep condolences to his family at this difficult time. My thoughts and prayers are also with his work family (including his work wife Adrianne), who I know are also struggling with the loss of their beloved leader. I think I can speak for all of the members of the family bar when I say we share in their grief.

Years ago, John and I, the two Irishmen, commuted together to the state bar Family Law Section Executive Committee's monthly meetings from Bergen County to New Brunswick and back. It was initially our intention to alternate the driving. The inside of my car was and is always in pristine condition, whereas John's car was like a toxic waste dump, and I was afraid I was going to contract something when sitting in it. After a few rides in John's car, I made up some excuse and told him I would drive from then on. He wouldn't have understood if I told him the truth anyway, as keeping his car clean was not something he cared about. During those car rides, we were able to discuss much more than the law, and we formed a bond as more than just colleagues. From that time forward, I was known as "Bobby" to him and he was "Johnny" to me. We shared our daughters' interests in basketball and often discussed their games as well as the NBA games, including his favorite team, the Knicks.

Basketball was another one of John's passions. He also had a great sense of humor, and I enjoyed listening to the funny stories he would tell during our commutes. I will forever cherish those memories.

Although John dedicated his life to the practice of family law, he was more than just a lawyer. He was genuinely a good, decent, and caring person. Indeed, when I was writing this, I was reminded about the time he showed a lot of kindness and caring to one of my associates when she was going through her own marital issues years ago, and he often gave her his expert advice as well as some fatherly words of wisdom. It is this character, and his commitment to the law, that made him well respected by both the bench and the bar.

Recently, I learned something about John I never knew—that he loved to dance. Apparently, this is another interest we shared. I also understand that John thought the best way to dance was to move only your arms and upper body, while keeping your feet planted in place, and that sometimes John would be performing his signature moves in the back of the store at CVS. I would have paid anything to witness that! While I will no longer get that opportunity, it makes me laugh when I try to envision it.

John will be sorely missed, but he will never be forgotten by the people who were fortunate to know him. I bid farewell to my colleague and friend until the day we meet again.

Rest in peace Johnny (but keep on dancing) and may Godspeed.

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Where is My Witness? Out of State? Use of *De Bene Esse* Depositions in Family Law Matters

by Rita M. Aquilio

During a hearing or trial, it may become necessary for a family law practitioner to utilize the deposition testimony of a witness who is unavailable to appear at the proceeding occurring in a New Jersey courtroom. Simply put, the testimony of a lay witness or expert who is located outside of the state of New Jersey may be offered via the process known as *de bene esse*. While this scenario may create a challenge or add complexity to a matter, guidance into the process can be found in the New Jersey Court Rules.

De Bene Esse Depositions

Testimony *de bene esse* is defined by *Black's Law Dictionary* as "a deposition taken from a witness who will likely be unable to attend a scheduled trial or hearing." Further, *Black's* notes that "if the witness is not available to attend trial, the testimony is read at trial as if the witness were present in Court."[1]

New Jersey Court Rules outline the use of depositions and how a party may use the testimony of a witness who is unavailable to appear at the trial or hearing.

The Court Rule

Rule 4:16-1 addresses the use of depositions in a proceeding. It states:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used in accordance with any of the following provisions:
>
> (a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Rules of Evidence.
>
> (b) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent, or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose against the deponent or the corporation, partnership, association or agency.
>
> (c) Except as otherwise provided by R. 4:14-9(e), the deposition of a witness, whether or not a party, may be used by any party for any purpose, against other party who was present or represented at the taking of the deposition or who had reasonable notice thereof if the court finds that the appearance of the witness cannot be obtained because of death or other inability to attend or testify, such as age, illness, infirmity or imprisonment, or is out of state or because the party offering the deposition has been unable in the exercise of reasonable diligence to procure the witness's attendance by subpoena, provided, however, that the absence of the witness was not procured or caused by the offering party. The deposition of an absent but not unavailable witness may also be so used if, upon application and notice, the court finds that such exceptional circumstances exist as to make such use desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.
>
> (d) If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce any other part which ought in fairness be considered with the part introduced, and any party may offer any other parts.[2]

The Rules of Evidence

N.J.R.E. 804(a)(4) defines an unavailable witness as "one who is absent from the hearing…and the proponent of the statement is unable by process…to procure the declarant's attendance." As the comment outlines, this rule essentially follows the provisions of the Federal Rules of Evidence and, additionally incorporates some of the provisions of the former evidence rule, N.J. Evid. R.62(6), which set forth a definition of the term "unavailable as a witness" for the purpose of certain hearsay exceptions. Specifically, the rule defines a declarant unavailable as a witness if the declarant:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the statement; or
>
> (4) is absent from the hearing because of death, physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial, and, with respect to statements proffered under Rules 804(b)(4) and (7), the proponent is unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at trial.[3]

The Practical Application of the Rules and Relevant Case Law

A *de bene esse* deposition is vital if a witness is out of state, or for some legitimate reason (such as health or age) is unable to appear at the trial or hearing. The key to admissibility of the testimony is the unavailability of the witness. The use of the sworn testimony from a deponent who is "absent but not unavailable" under subsection (c) of Rule 4:16-1 may be used "upon application and notice." The standard the court applies upon such an application is whether exceptional circumstances exist, such that the deposition testimony is permitted "in the interest of justice." When the proffering party reads the testimony orally "in open court," and only part of the testimony is read, then the adverse party has the ability to require the offering party to introduce any other part, under subsection (d) of Rule 4:16-1, which ought to be considered. This allows the full picture and scope of the testimony to be considered by the court, rather than the narrow focus of only one party for its sole purpose and intent. Rule 4:16-1 "represents the 'modern and more liberal counterpart of the former practice of testimony *de bene esse*....'"[4]

Case law addresses the use of *de bene esse* depositions at trial. While this type of deposition is taken for potential use at trial, "it is not part of the trial itself, until so used."[5]

When objections to *de bene esse* testimony are made, the courts have held that a motion must be made for a ruling.[6] The objection does not then remain pending and "[c]ounsel should not expect a discovery objection…to remain viable at trial if there was a fair opportunity in the intervening time to move for a ruling on the objection, pursuant to R. 4:14-9(f)."[7] Following the filing of a motion for a ruling, the "judge considering such a motion is not limited to granting or denying the objection made at the deposition, but may fashion a fair remedy suggested by all of the circumstances…"[8]

In sum, the use of a *de bene esse* deposition pursuant to the Court Rules, may be a more cost-effective alternative for litigants, more convenient for a witness or expert and more efficient for the court in conducting a hearing or trial.

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Endnotes

1. *Black's Law Dictionary*, 412 (8th ed. 2004).
2. R. 4:16-1.
3. N.J.R.E. 804(a)(4).
4. *Avis Rent-a-Car, Inc. v. Cooper*, 273 N.J. Super. 198, 202 (App. Div. 1994) (*quoting Ross v. Lewin*, 83 N.J. Super. 420, 423-24 (App. Div. 1964)).
5. *See Genovese v. New Jersey Transit Rail Operations*, 234 N.J. Super. 375, 382 (App. Div.), *cert. denied*, 118 N.J. 195 (1989).
6. *Mellwig v. Kebalo*, 264 N.J. Super. 168, 171 (App. Div. 1993).
7. *Id.* at 172.
8. *Id.*

Social Security Benefits/Analysis—Don't Ignore It in Your 'Gray' Divorce

by Cynthia Ann Brassington and Francis C. Thomas

Baby boomers are retiring today and divorces among Americans are on the rise. According to the Pew Research Center, the divorce rate for people 65 and older has "roughly tripled since 1990, reaching six people per 1,000 married persons in 2015."[1] With the increase of these 'gray' divorces, it is imperative that family law practitioners have a general understanding of Social Security benefits and how they affect clients on support-related matters.

Decisions regarding Social Security (SS) can be extremely complicated. There are thousands of rules, thousands of additional codicils to clarify the rules, annual changes, and recent legislation—the Bipartisan Budget Act of 2015 (BBA)—which drastically modified the planning landscape. Each day over 10,000 baby boomers reach retirement age and many other individuals of pre-retirement age make critical choices impacting their potential SS benefits. These decisions involve when to claim benefits, what kind of benefit to request, and when to marry, divorce, or remarry. It is essential that the family law practitioner consider the value of SS when evaluating alimony. This article provides an overview of the SS benefits to assist the family law practitioner to better advise his or her clients in understanding the financial impact of divorce, alimony, and remarriage.

How are the SS Benefits Calculated?

It is imperative for the family law practitioner to understand the significance of full retirement age (FRA), a client's earnings record, and benefit options. The obligee must receive an accurate analysis of their 'need' and the payment obligation of the obligor in their analysis of their ability to 'pay.'[2] SS is a valuable resource providing 90 percent of the cash flow for one-third of the retirees, including up to 28 percent of the cash flow for high-income retirees.

How does Social Security work? To receive retirement income, a worker who is born after 1928, must have at least 40 quarters of coverage (QC) credited to his or her work history,[3] with a maximum of four quarters per year. Credits are a function of dollars earned and *not* calendar quarters worked. The QC requires that the worker earn at least the equal required minimum, which is adjusted annually for inflation.[4] In 2018, the worker must have earned $1,320 per quarter, or $5,280 for the year.[5]

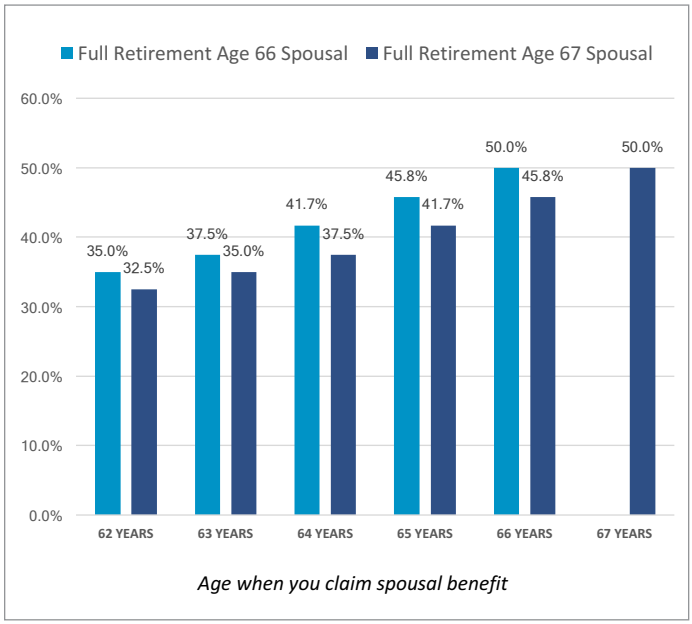
The Social Security Administration (SSA) calculates a worker's benefits using a multipart formula that first converts annual income earned over a worker's career into today's dollars. The annual income used is the lower of what the worker earned for the year or the maximum Social Security base wage for that year. The maximum SS base, which adjusts annually, is $128,400 in 2018. The SSA selects and totals the 35 highest inflation-adjusted yearly earnings. The sum is divided by 420 (35 years times 12 months per year). The result is the average indexed monthly earnings (AIME), which is used to calculate the primary insurance amount (PIA). The PIA is the monthly benefit a worker will receive at full retirement age. The benefit formula is progressive (low earners receive a greater proportion of the pre-retirement income) with three tiers. The first $885 of PIA is multiplied by 90 percent, the next chunk up to $5,336 is multiplied at 32 percent, and the amount over $5,336 up to the annual maximum is multiplied by 15 percent. In 2018 the PIA is $2,788.

Full retirement age is based on the worker's year of birth. If the individual is born before 1938, he or she reaches full retirement age at 65. Individuals born between 1943 and 1954 reach full retirement age at 66. The following table reflects full retirement age for persons born after 1954:

1955	66 years and 2 months
1956	66 years and 4 months
1957	66 years and 6 months
1958	66 years and 8 months
1959	66 years and 10 months
1960 and forward	67 years

Understanding the credits is one part of understand-

ing Social Security. The amount of the Social Security benefit that will be received by an individual varies not only by their individual work history, but also by the work history of their spouse, and when they take the benefit. For example, an individual who is eligible for full retirement at age 66 can elect to take a reduced benefit as early as age 62. If an individual who would reach full retirement age at age 66 takes his or her benefit at age 62, the reduction is 25 percent. The chart below shows the earliest age to claim benefits the maximum reduction for filing early.



It is recommended that counsel and/or his or her client obtain a copy of their SS statement of benefits by visiting the website at www.ssa.gov/myaccount. Taking SS benefits before FRA results in a reduced benefit, while delaying retirement beyond FRA up to age 70 increases the benefit, as the worker accrues a delayed retirement credit (DRC).[6] By way of example, by delaying collecting SS post FRA, the worker accrues a DRC for each month until reaching age 70. The DRC is 2/3 percent per month or eight percent per year (not compounded). For those born from 1943 to 1954, forgoing benefits until age 70 increases worker benefits and survivor benefits by 32 percent. The life expectancy for a 66-year-old male is 84.5 years, with the life expectancy for a 66-year-old female being 86.9 years. As such, the deferral of benefits can have a substantial impact over the recipient's lifetime. There is no advantage to waiting to commence benefits beyond age 70, as the PIA does not increase beyond age 70.[7] The decision when to commence collecting SS benefits is a function of a great many variables. The most important factors are sufficient retirement assets and life expectancy. The current PIA maximum SS at age 70 is $3,698 per month.

Eligibility for Spousal Benefits

Married and qualified divorced individuals are eligible for benefits based upon their own records, as well as spousal and survivor benefits. If claimed at FRA, spousal benefits are equal to 50 percent of the PIA of the worker, and survivor benefits can be equal to whatever the worker was collecting at the time of death. As previously stated, the PIA is basically the worker's FRA benefit amount. A current spouse needs to be married for at least one year to qualify for spousal benefits, and the worker needs to have filed for benefits. In order for an ex-spouse to qualify for spousal benefits, they must be unmarried, their ex-spouse needs to be eligible for retirement benefits or disability benefits, the marriage needs to have lasted for at least 10 consecutive years, and they must have been divorced for a least two or more years or the ex must have filed for retirement or disability benefits. Survivor and ex-spouse survivor benefits can start at age 60 or at age 50 if disabled. For survivor benefits the ex-spouse needs to be unmarried unless the remarriage was after age 60.[8]

SS has created a strong motivation to stay married for the required 10 years. If a client is close to the 10-year mark, it may assist both parties by delaying the finalization of the divorce until the marriage goes beyond 10 years in duration. If the former spouse claims his or her Social Security benefit before reaching full retirement age, at age 62 for example, and the worker spouse has not yet reached full retirement age, it will reduce the spousal benefit by the actuarial reductions from the 50 percent share if he or she has not reached full retirement age.

Deeming and the Bipartisan Act (BBA) of 2015

'Deeming' is another obstacle for individuals filing for worker and spousal benefits before FRA. This rule requires a claimant to collect the higher of the benefits based upon their own record or eligible spousal benefits. This means that a spouse or ex-spouse cannot file a restricted application to collect spousal benefits while their own worker benefits grow via DRCs. Deeming originally only applied to recipients age 62 to FRA. However, the BBA of 2015 extended the deeming rule from FRA to age 70 for individuals who had not attained age 62 by Jan. 1, 2016.

Another aspect of the new law (for those individuals not grandfathered under the prior law) is that a current spouse can collect spousal benefits only if his or her spouse applies and collects worker benefits. If the working spouse is at FRA and attained age 62 by Jan. 1, 2016 (not subject to deeming rule since reaching FRA), they have the option to collect worker's benefits based upon their own record or spousal benefits. Choosing the latter option requires filing what is called a 'restricted application' and permits their own worker benefits to grow via the DRCs. Spousal benefits do not increase by DRCs and they do *not* increase by the worker's DRCs. Therefore, they should be taken no later than FRA. 'File and collect' has replaced 'file and suspend' since the passage of the BBA 2015. Workers who filed and suspended prior to April 30, 2016, are grandfathered. Understanding the implications of spousal benefits is extremely important in order to maximize benefits.

The *Panetta* Offset

There are workers employed in government positions who do not pay into the Social Security System, such as federal workers employed in the Civil Service Retirement System (CSRS), hired in 1983 or before, and police officers of some municipalities, for example. When representing these clients, consider including in the marital settlement agreement the anticipated offset that may arise upon full retirement for both parties, if one of the parties will receive SS benefits. For example, assume the parties are in a long-term marriage, and the husband is employed by Atlantic City as a police officer. He has an excellent pension and does not pay into SS, and there is no question that his defined benefit plan is completely marital. Further assume that his wife is employed in a job with no pension and she pays into SS. Both parties are 58, and the husband retires. He commences collecting his pension, now in pay status. The wife continues to work. The parties divorce when they are both 60, and a domestic relations order (DRO) is entered that provides the wife receives 50 percent of the coverture fraction of the husband's defined benefit plan pension.[9] The wife was born in 1954 and, therefore, she is eligible for FRA at age 66. Here is the inequity: The husband has 50 percent of his pension; the wife has 50 percent of the husband's pension *and* 100 percent of her SS benefits upon her retirement at age 66. Therefore, the wife has greater retirement benefits than the husband.

In these cases, the SS benefit may be offset by the pension by a formula. This is the issue that arose in *Panetta v. Panetta,* wherein the plaintiff-husband, Anthony Panetta, was employed in the private sector for 19 years and then went to work for the federal government in 1977.[10] He had retired and was receiving both a federal pension and $530 a month in SS benefits. The defendant-wife, Carolyn Panetta, was not yet retired, employed in the private sector for the length of the marriage and earned SS benefits. The parties had included in their judgment of divorce the following language: "It is understood by the parties that the evaluation of plaintiff's pension reflects an adjustment for imputed SS benefits as it is a civil service pension. This reduced valuation shall be utilized for division of plaintiff's pension and the application of a Qualified Domestic Relations Order unless New Jersey Courts dictate law to the contrary prior to plaintiff's retirement."[11]

In *Panetta*, the appellate court held that the valuation date for an individual's SS benefit, like a federal pension, cannot be determined at the time of separation or at the time the final judgment of divorce is signed. Both benefits are variable, and are contingent upon many factors, such as age, salary, mortality, and years of service. Therefore, the proper time to value a federal pension on the one hand, and SS benefits on the other hand, is at the time the parties begin to receive the benefits. Just as in calculating the coverture fraction for a defined benefit plan "actual retirement benefit is multiplied by the coverture fraction and divided by two."[12] The court held that since "the plaintiff contributed to SS during the marriage, the defendant who did not, was entitled to an offset against her share of his federal pension."[13] Therefore, "[i]n calculating the amount of the offset, the *Marx* formula is applied to the private employee's actual SS benefit based upon her lifetime earnings. That amount is then deducted from her share of the federal employee's pension."[14] The offset is not calculated until the recipient commences to receive the SS benefit.[15]

Panetta had an additional complication in that the plaintiff-husband received $530 per month in SS benefits. The appellate court held, "[t]he fairest and most equitable means is to deduct plaintiff's actual SS benefit, $530 per month, from the defendant's actual SS benefit when she begins to collect it, and then offset the remainder, subject to the *Marx* formula, against defendant's share of plaintiff's pension. In other words, the partial participant's actual SS benefit is deducted from the full participant's benefit and the remainder, subject to the *Marx* formula,

is offset against the full participant's share of the partial participant's pension." [16]

In the unpublished case *Arce v. Agosto*, the appellate court denied the application of a former police officer to offset the former wife's share of his pension against the marital share of her SS benefits.[17] The parties' agreement was silent on whether there should be an offset. In denying the former husband the relief, the appellate court relied on New Jersey courts having "long espoused a policy favoring the use of consensual agreements to resolve marital controversies." Consequently, absent 'unconscionability, fraud, or overreaching in negotiations of the settlement,' a trial court has 'no legal or equitable basis' to alter matrimonial agreements."[18]

Conclusion

This article points out fundamentals in dealing with a 'gray' divorce, which include: 1) current spouses need to be married for nine months to collect survivor benefits; 2) one year to collect spousal benefits; 3) ex-spouses need to be married for at least 10 years to collect spousal and survivor benefits; 4) an ex-spouse cannot be re-married when applying for spousal benefits on the record of a previous spouse; remarriage before the age of 60 disqualifies an ex-spouse from collecting survivor benefits on a former spouse's record; and 5) always include the *Panetta* offset in marital settlement agreements where one spouse has a pension and did not pay into SS and one spouse did pay into SS, to insure that the parties' division of these benefits is equitable.

Finally, it may be helpful to have an experienced SS expert advising the practitioner and client in addressing the factors under N.J.S.A. 2A:34-23(b). This article is an introduction and does not replace utilizing a SS expert. Within SS, there are exceptions upon exceptions not stated herein.[19]

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Endnotes

1. Renee Stepler, Led by Baby Boomers, divorce rates climb for America's 50+ Population. March 9, 2017.
2. N.J.S.A. 2A:34-23(b)(1).
3. 42 U.S.C. § 414(a)(2).
4. 42 U.S.C. § 413(a)(2)(A).
5. Social Security Benefits Planner, https://www.ssa.gov/planners/credits.html.
6. 42 U.S.C. § 402(w).
7. https://www.ssa.gov/cgi-bin/longevity.cgi.
8. 42 U.S.C. § 416(d)(1).
9. *Marx v. Marx*, 265 N.J. Super. 418, 428 (Ch. Div. 1993) defined the formula to allocate a defined benefit plan:
   1. The total accrued benefit is to be determined when plaintiff is permitted to move her share of the benefit to pay status pursuant to the plan requirements.
   2. The plan administrator is to determine the coverture fraction and multiply the total accrued benefit by the coverture fraction.
   3. The product of the total accrued benefit times the coverture fraction is to be divided in half in accordance with plaintiff's equitable share.
10. *Panetta v. Panetta*, 370 N.J. Super. 486 (App. Div. 2004).
11. *Panetta*, 370 N.J. Super. at 491-492.
12. *Panetta*, 370 N.J. Super. at 496.
13. *Panetta*, 370 N.J. Super. at 499.
14. *Ibid.*
15. *Ibid.*
16. *Panetta*, 370 N.J. Super. at 500. The plaintiff-husband was denied the offset because he failed to comply with the parties' agreement, memorialized in their Sept. 22, 1998, consent order. He failed to designate his former wife as the survivor beneficiary, and not his former wife as they had agreed, irrevocably precluding her from that benefit.
17. *Arce v. Agosto*, T-1891-13T4 (App. Div. 2014).
18. *Arce* at *11.
19. The *Policy Operation Manual* for SS is online at https://secure.ssa.gov/apps10.


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A Guide for Spotting and Avoiding Common Ethical Pitfalls When Practicing Family Law

by Bonnie C. Frost

The practice of family law is a hot bed of ethical pitfalls, which can cause numerous problems for a practitioner unless one is alert to them and familiar with the Rules of Professional Conduct (RPCs). The RPCs are the starting point for analyzing any ethical question. They appear in Section I of the New Jersey Court Rules and are also on the Judiciary's website.[1] In addition, on the Judiciary's website, one can access all of the ethics opinions issued, including the published cases and the opinions of the Disciplinary Review Board (DRB) the Supreme Court has adopted as its own when imposing discipline.[2]

To put ethics matters in perspective, there are 36,993 attorneys who actively engage in private practice in New Jersey out of the 98,396 who are registered. Generally, less than 10 percent of matters from which attorney discipline arises are related to family law. By contrast, approximately 36 percent of fee disputes are related to matrimonial matters.

In 2017, the most frequent reason attorneys were disciplined was for dishonesty, fraud, deceit and misrepresentation (*i.e.*, 26 of the 156 attorneys disciplined). The fifth most frequent reason for discipline in 2017 was for gross neglect/lack of diligence/incompetence (*i.e.,* 14 of the 156 cases). And the ninth most frequent cause of discipline was lack of communication between the attorney and his or her client.

Usually, ethics violations do not arise in a vacuum. More often than not, an attorney has violated more than one ethical rule when discipline is imposed. Therefore, if one sees an attorney has been disciplined, and thinks what the attorney has done is a minor infraction of the RPCs, it may be that the attorney has violated other RPCs, which has increased the amount of discipline.

What are Some Ethical Scenarios Family Law Attorneys May Face?

1. An Attorney Must Avoid a Failure to Communicate.

Time and again, attorneys are advised to communicate with their clients. If a practitioner has a client who drains him or her and whose file or phone call he or she dreads picking up, a practice tip would be to investigate whether the practitioner can exchange his or her file with another attorney in the firm. This would minimize the client's ability to complain that his or her file has been neglected. Clients do not understand delay. Failing to communicate does not occur in a vacuum. Usually, it is coupled with lack of diligence. A frequent example of the two violations are instances of a complaint having been dismissed or a motion not being answered and then, compounding the problem, the client is ignored. Remember if a practitioner has made a mistake, most mistakes are curable as long as one owns up to it and takes action.

If an attorney fails to communicate with his or her client, disciplinary sanctions range from an admonition to a suspension depending on an attorney's disciplinary history and the consequences of the failure to communicate with the client.

Communicating is also important if a grievance is filed against a practitioner. Failure to cooperate with disciplinary authorities, in and of itself, can constitute a violation and grounds for temporary suspension.[3]

In *In re Kivler,*[4] the Court held that "failure to cooperate with the ethics authorities and failure to respond when summoned to appear before this Court are considerations that may, when coupled with serious infractions, even call for disbarment." In *Kivler*, the attorney's refusal or failure, without excuse, to appear in compliance with the Court's order was unacceptable behavior and, as such, it was concluded that it was appropriate to enhance the disciplinary sanction. As a result, Kivler was suspended for three years.

Although most grievances do not result in discipline,[5] an attorney facing a grievance must cooperate expeditiously. A grievance hanging over an attorney's head is not pleasant, but it must be addressed immediately. More often than not, the grievance is the result of a disgruntled litigant who simply did not like the result in his or her case. In such a circumstance, eventually, such a grievance is dismissed.

2. An Attorney Must Avoid Conflicts of Interest.

Starting at the beginning of a representation of a client, the attorney should ascertain that no conflict exists (*i.e.*, that no one else in the firm has consulted with the adverse party in the matter[6] and/or that the attorney or firm did not represent both parties previously in a matter where the conflict cannot be waived). It may be that the practitioner can represent a client who was adverse to the attorney or firm previously, as long as the prior representation was not in a 'substantially related matter' and the information the attorney received during the consultation was not 'significantly harmful' to the former prospective client in the now adverse matter.

Potential knowledge of facts, depending on what they are, cause the conflict. The applicable RPCs are: RPC 1.7, which refers to conflicts in general; RPC 1.8, which refers to conflicts with current clients and RPC 1.9, which refers to duties to former clients.

Each section of the RPCs that prohibits representation because of a conflict may also permit the representation if the affected client gives informed consent in writing and waives the conflict. A few examples where conflicts could occur might be helpful.

- An attorney is permitted to serve as a closing attorney on the sale of the marital home for divorcing parties, as their interest in selling the home is not in conflict and the conflict is waived in writing.[7]
- An attorney is permitted to represent a wife in a divorce action even though he or she had previously handled a purchase of real estate for the husband prior to his marriage.[8]
- Rule 5:3-5(b) expressly prohibits a lawyer from taking a security interest in a client's property interests to assure payment of the fee in a family action, but only while the litigation is ongoing. After the conclusion of the representation, the lawyer may take such a security interest as long as the requirements of RPC 1.8(a) are satisfied.
- A loan from a client may pose a conflict, as it can be viewed as either a business transaction or the acquisition of an interest adverse to the client. In *In re Frost*, the attorney solicited a $79,000 loan from a personal injury client.[9] The court concluded that the attorney had engaged in a business transaction with his client without appropriate safeguards, in violation of RPC 1.8 (a). The court stated that the attorney had taken advantage of an unsophisticated client whose trust he had gained during his representation.
- The case of *A. v. B.* poses an interesting conflict question and demonstrates what can happen when a law firm inputs, in error, the names of the parties into the firm's conflict system.[10] In *A. v. B.*, the husband and wife wanted the law firm to draft reciprocal wills for them and signed a 'waiver of conflict of interest' for the representation, which provided that confidential information of one spouse became available to the other. One possible conflict was that such a testamentary transfer permitted the transferee to dispose of property as he or she sees fit, rather than keep it in the family. In *A. v. B.*, the husband had a child of whom the wife was unaware and, thus, the child was an heir or an 'issue' in the will. Depending on the language in the will, the estate of the husband could be materially depleted to the detriment of the wife as a result of a support obligation to the undisclosed child. Thus, the interest of the uninformed spouse in formulating a satisfactory financial plan might conflict with the interest of the other spouse in keeping the child's existence a secret. The superior court ordered the husband to reveal the existence of the child but not the child's name.
- A lawyer who serves as a third-party neutral such as a mediator must inform the parties that he or she is not representing either party and explain the difference in the roles of a mediator and a lawyer. A lawyer who serves as a mediator in a divorce matter may be engaging in a form of limited representation within the meaning of RPC 1.2 and, thus, the lawyer/mediator must comply with certain requirements of the informed consent rule and disclose the requirements of the rule.[11]
- An attorney cannot serve as a mediator and guardian *ad litem* in the same case.[12]

3. An Attorney Should Be Wary and Avoid Personal Relations With a Client.

Personal relationships with litigants can also raise conflicts. In general, friendship with an adverse party or witness does not rise to the level of a conflict unless it impairs one's ability to exercise professional judgment on behalf of the client.[13]

It should be noted that having a sexual relationship with a client does not automatically preclude representation. However, if a lawyer has become involved sexually with a current client and the current client then has felt pressured to accept the lawyer's advice whether or not it is in his or her best interest, that can create a conflict. *In the Matter of Harry Pinto*, a lawyer represented a client who had been the victim of domestic violence.[14] He pressured her into having sexual relations with him in order for his representation to continue. He was reprimanded. It is likely the discipline for his behavior would be much more severe in today's environment.

In the Matter of Michael Resnick, the lawyer, while representing a woman who was a victim of domestic violence, began a consensual, sexual relationship with her.[15] He consulted RPC 1.7 and decided his client was "not vulnerable" and, therefore, a relationship with her would not violate the RPCs. He also represented her in her municipal court matter against her husband, and in her divorce. The litigant testified she felt her attorney was an authority figure and she was in his debt for her legal representation. To add to his inappropriate behavior with this litigant, when she threatened ethics charges against him, he had an *ex-parte* conversation with the presiding family part judge, who permitted him to withdraw without notice to his adversary or the client. The DRB recommended a censure but the court imposed a reprimand. The lawyer was subsequently disbarred for taking another client's funds.

Becoming a witness in a client's lawsuit is also forbidden in RPC 1.7(b) and 3.7(a). In *In re Fornaro*, the attorney was intimately involved with a divorcing husband, babysat his child, attended parent conferences for the child, and participated in other activities with the child.[16] She, however, lied to three judges about her relationship with the husband and denied she was the woman the child talked about as "Babe," thus compromising the husband's custody suit by covering up her own behavior. She was suspended from the practice of law for three years.

Ordinarily, a reprimand is the measure of discipline for an attorney who engages in a conflict of interest.[17] If the conflict involves "egregious circumstances" or results in "serious economic injury to the clients involved," discipline greater than a reprimand is warranted.[18]

4. An Attorney Should Have a Signed Retainer Before He or She Begins Work.

The lack of a signed retainer in and of itself can be an ethical violation.[19] Moreover, Rule 5:5-3(a)(5) requires a signed retainer in all family matters. In fee disputes in civil matters, if there is no signed retainer, the lawyer is permitted fees based on *quantum meruit*.[20]

When the time comes for fee arbitration, clients frequently will argue that they do not have to pay any fees because there was no signed retainer. So, while the Court Rules require a signed retainer, when faced with an appeal from a fee arbitration determination that has denied fees to an attorney because of no retainer, the DRB has permitted the award of reasonable fees based on *quantum meruit*. To not do so would treat family law attorneys differently than civil attorneys.

A frequent problem the DRB sees in fee arbitration appeals is attorneys who do not present bills to their clients every 90 days, as required by court rule. This puts the client in the position of not knowing as the litigation proceeds, what the amount of the bill is (even though the client knows that work has been done) and thus, making an informed decision of whether to continue the legal strategy in effect or change attorneys or represent him or herself in order to manage finances during the litigation. That concern strikes a sympathetic chord because not billing regularly is not consistent with the rule, and it also demonstrates a lack of communication with the client, which could result in an attorney taking advantage of an unsuspecting client.

Another issue that frequently poses dilemmas in fee arbitration determinations is the lack of specificity in the bills.[21] The burden to prove fees are reasonable is on the attorney, and this burden cannot be met without specificity in billing.

5. An Attorney Cannot Overreach on Fees.

Lawyers deserve to be paid for their work. For the ethics system, the question of 'overreaching' often involves overbilling, which borders on fraud. In *In re Wok*, an attorney was disbarred for vastly overstating his services where he claimed in one instance that he worked 33 1/4 hours in one day.[22] In *In re Day*, the attorney was suspended for three months for submitting false billing for depositions he did not attend, which the clients then were billed for and paid.[23]

In the Matter of Kenneth Denti, while a partner at two different firms the attorney (Denti) had falsified entries in the respective law firms' time-keeping systems.[24] Denti indicated he had performed legal services for numerous clients who were clients of his prior employer in order to

mislead his employers to ensure the continuation of his agreed-upon compensation. While a partner at a subsequent firm, Denti submitted vouchers for meals with individuals who, he alleged, were either potential clients or potential sources of client referrals when they were for women he was dating. He was disbarred.

In the Matter of Vincenti, the court deemed his billings to be overreaching when he collected $500 from an indigent client and then billed her $130,000 in an effort to collect his fees.[25]

In a more recent case, *Segal v. Lynch*, the Supreme Court was clear that an attorney cannot charge a client for services to collect his or her fees when he or she is *pro se* in the collection efforts.[26]

6. An Attorney Cannot Not Sue His or Her Client for Fees While Still Representing the Client.

While many practitioners may shake their heads at this heading, believing it to represent common knowledge, unfortunately some attorneys sue their clients for fees while still representing the client. In *In re Simon*, the Supreme Court imposed a reprimand on an attorney who was representing a criminal client on a murder charge and whose family stopped paying his bill as trial neared.[27] After not being permitted to be relieved as counsel and telling the family members that if he were not paid, he would file suit, he sent a 30-day collection letter to his client. The trial court found this action placed him in an adverse position to his client, in violation of RPC 1.7(a)(2); removed him from the case (exactly what he wanted to have happen) and adjourned the trial. So, while the attorney got out of the case, as he wanted, he also placed himself in ethical hot water.

This issue continues to arise. For example, *In the Matter of Logan Terry* involved an attorney defending a man who faced over 200 years in prison if found guilty as a result of charges of sexual assault of four minors under the age of 13.[28] In the days leading up to trial, he advised his client the he could not "provide an adequate defense" unless his fees were paid. Further, he stated he would not prepare for trial during the weekend prior to trial unless he was first paid. Then, he wrote the client: "HAVE FUN IN PRISON." This attorney lost his motion to be relieved as counsel but nonetheless took matters into his own hands and engineered his removal right into ethical trouble. He violated RPC 1.7(a) by placing his personal interest in obtaining a fee above his client's interest in receiving the best possible defense. He was censured as a result.

While both these cases are criminal cases, they apply to all attorneys' behavior. The practice tip is to stay on top of client billing.

7. An Attorney Must Maintain the Professional Code of Ethics in His or Her Personal Life.

A practitioner's personal conduct can result in discipline even though no clients are involved or there is no attorney-client relationship. The court's ability to regulate an attorney's conduct extends to a panoply of matters.[29] To the public, an attorney is always an attorney, whether he or she acts in a representative capacity or otherwise.[30] The behavior of the attorney in *In re Hasbrouck* is a good example of these policies.[31] Hasbrouck, an attorney, burglarized doctors' homes to obtain keys to their offices in order to obtain prescription drugs. She stole cash, jewelry and address books in order to find addresses of other doctors so she could rob them to obtain drugs. As a result of this conduct, she was disbarred.

An attorney who is convicted of a crime will be disciplined. However, there is no formula for the degree of discipline in those circumstances. An important criterion is whether the behavior "reveals a lack of a good character and integrity essential to an attorney."[32] The court will deal most harshly with crime that deals with dishonesty, since these "touch upon a central trait of character that members of the Bar must possess."[33]

In the Matter of Jay Bagdis, the lawyer assisted clients in creating convoluted corporate transactions to render it difficult if not impossible for the IRS to trace the flow of his and his clients' money, rendering the sources and uses of the funds not directly traceable to the individual clients or their Social Security numbers.[34] In addition, Bagdis had not filed tax returns for 26 years, since 1990. He was disbarred.[35]

Likewise, violent behavior is treated seriously by the court. For example, an attorney exhibiting road rage has resulted in discipline. *In the Matter of Christopher J. Buckley*, the attorney pleaded guilty to simple assault.[36] A taxi driver agreed to drive Buckley to Jersey City from New York City for $63. Upon arriving in Jersey City, Buckley informed the driver he had only $9 and asked him to drive him to his apartment so he could obtain additional money. The driver refused, and locked the doors to prevent Buckley from exiting. Buckley kicked at a door and window of the taxi. The driver unlocked the doors. Buckley grabbed the driver's face and struck him. As a result of the assault, the driver sustained lacerations

to his forehead and upper lip; his glasses were broken; he had blood on his shirt; and he reported pain in his nose and mouth. Buckley received a three-month suspension.

In the Matter of John Collins, the attorney, Collins, pleaded guilty to two counts of simple assault and one count of criminal mischief.[37] Here, Collins, angered by the actions of another driver, exited his vehicle, retrieved a baseball bat from the trunk, and struck the driver's vehicle multiple times. He broke the windshield and side mirror and caused the driver and a passenger to be in fear of bodily injury. Although he did not make contact with the victims, he nonetheless terrorized them. He received a three-month suspension.

In the Matter of Steven French, the attorney, French, robbed a bank by handing the cashier a handwritten note to place money in the bag quickly and naturally so everyone would be safe.[38] He indicated he had a gun. Here, the court held "some conduct is so utterly incompatible with the standard of honesty and integrity that we require of attorneys that the most severe discipline is justified by the seriousness of the offense alone." He was disbarred.

In re Costill, the Court reprimanded a deputy attorney general who pled guilty to an accusation of child abuse and neglect after he left his infant children unattended and asleep in a locked car for an hour, after dark, in winter, while he was in a bar.[39] *In the Matter of Margrabia*, the Court suspended the lawyer for three months after he was been found guilty of domestic violence.[40] This level of discipline has consistently been applied to attorneys who have been guilty of domestic violence since this case.

8. An Attorney Cannot Bargain Away an Ethics Charge Nor Can an Attorney Threaten a Client with Criminal Prosecution to Obtain Payment of the Attorney's Bill.

In *In re Welch*, the attorney threatened not to sign the marital settlement agreement or to resolve the case unless the adverse client withdrew an ethics grievance against him and gave him a full release.[41] He was reprimanded.

In the Matter of Ledingham, the attorney was charged with an overreaching fee ($50,000+) and for threatening a criminal action to collect his fee when he tried to collect from the single mother who ran a Sylvan Learning Center.[42] He wrote the following:

> I wish to inform you that the facts of your case indicate to me that you have committed a crime in New Jersey under New Jersey statute 2C:20-8, which is entitled 'Theft of Services.'...If you do not pay the bill in full by..., I will then contact the Bergen County Prosecutor's Office to report this as a crime, which the facts support...I will also notify the lawyer for Strategies for Success, Inc., which may very well accelerate the note by making the entire balance due and payable due to the Seller's rights to protect its security under the note payable. That will be a problem for the Landlord, also. In addition, concerning your principal residence, a snowball effect will develop thereby possibly causing an acceleration on the note payable related to the residence, once the bank is notified regarding these facts. In addition, I will notify Sylvan Learning Center of the pending prosecution and they may immediately revoke your license, which will end your income from the enterprise. Moreover, your license to teach in the State of New Jersey may be revoked or suspended upon notification.

He was suspended from the practice of law for three months.

Other ethical violations have involved attorneys whose behavior has involved sexual misconduct with minors. In *In re Frye*, the attorney was disbarred as he pleaded guilty to endangering the welfare of a child in Vermont and failed, for 15 years, to report his conviction to the New Jersey ethics authorities.[43] Thus, he practiced law during that time in New Jersey. Frye had been entrusted with the care of a minor girl, whom he improperly touched, and violated his probation over the period of 15 years by failing to attend mandatory outpatient sexual offender therapy. He was disbarred as a result of his improper conduct.

In re Cunningham involved an attorney who was also disbarred.[44] On three occasions, he communicated on the internet with a person he believed to be a 12-year-old boy, describing, in explicit detail, the sexual acts he wished to engage in with him. Then, when summoned before the Supreme Court, he failed to appear.

In the *Kenyon*, *Legato* and *Walter* cases, the court distinguished between online and personal contact when determining discipline where the intended victims were children ranging in ages from 9-12.[45] Legato and Kenyon were given indeterminate suspensions, as they had only online or phone contact with their victims, whereas

Walter was disbarred because he had personal contact with a nine-year-old with whom "he became too comfortable...physically."

9. An Attorney Can Never Take Money From His or Her Trust Account, Which Belongs to His or Her Client.

Family law matters, from time to time, require an attorney to deposit money into a trust account. If an attorney knowingly takes money from his or her trust account, which is not his or hers to take, he or she will be disbarred.[46] Moreover, the court makes no distinction between trust funds that belong to a client and escrow funds that belong to a third party if they are taken and retained for the benefit of the attorney.[47]

In the Matter of Soriano, the court disagreed with the DRB's recommendation of disbarment, instead suspending an attorney for two years for turning over $211,000 in mortgage proceeds from a closing to his clients rather than satisfying the mortgage, which was required.[48] This situation was distinguishable as the attorney did not take the escrow funds and use them for his benefit, but rather disbursed the money to his clients.

Attorneys who steal from their partners will also be disbarred. *In the Matter of Steven Siegel*, the attorney fabricated disbursement requests by submitting false expenses against a client's accounts and, thereafter, used the 'reimbursement' money to pay his mother-in-law's mortgage, tennis club fees, dental bills and landscaping costs.[49] The attorney was disbarred.

The recent case of *In re Stephen Landkenau* involved a matter of reciprocal discipline from Delaware and posed a different factual scenario.[50] Landkenau, an associate, admitted he misappropriated law firm funds and that this behavior constituted theft when he accepted cases he knew his firm would not accept and retained the fees for himself, unbeknownst to his firm. The DRB believed that, as an associate, he did not have a fiduciary duty to his firm and thus, should not be disbarred, unlike Siegel who was a partner and had a fiduciary duty to his firm. The Court imposed a two-year suspension.

Even if an attorney 'borrows' a client's money temporarily, intending to return it and then actually does return the money, the attorney is nonetheless very likely to be disbarred. *In the Matter of Blumenstyk*, the attorney was disbarred.[51] He borrowed money from his trust account to fund a trip to Israel for his son's bar mitzvah, knowing he was coming into an inheritance and would return it (which he eventually did). The improper borrowing was discovered in a random audit. The Supreme Court said that "restitution does not alter the character of knowing misappropriation and misuse of client's funds."[52] An attorney's intent is irrelevant, as the mere taking of the money knowing it is not the attorney's money to take is enough.[53]

While one might worry that an inadvertent mix-up in a trust account may result in the most severe discipline, that is not the case. Lawyers are not disbarred because they are bad bookkeepers.[54] Nonetheless, a negligent misappropriation as a result of failing to abide by the recordkeeping rules may result in a reprimand or censure. *In the Matter of Kasdan*, the attorney was censured because she comingled her personal funds in her trust account with clients' funds; she performed no monthly reconciliations; there was no running balance kept in the checkbook; the deposit slips were not sufficiently detailed and earned attorney's fees were not timely withdrawn from the trust account.[55]

10. An Attorney Must Not Make a False Statement to a Tribunal, a Client or a Disciplinary Authority.

RPC 3.3 requires that a "lawyer cannot knowingly make a false statement of material fact or law to a tribunal." "The lawyer's duty is of a double character. He owes his client a duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession."[56]

In *In re Malvone*, the attorney, who was a gambling friend of his client and who represented him during his divorce, agreed to hide money his client had given him to defraud his wife and the court.[57] The attorney was disbarred because he then misappropriated the money he was hiding for his client for his own use.

In re Trustan, the Court imposed a three-month suspension on an attorney who, in a domestic violence trial among other things, submitted to the court a client's case information statement that falsely asserted the client owned a home.[58] He also drafted a false certification for the client.

In *In re Howard Weber*, an attorney was censured where, despite having an unblemished career of nearly 40 years, he circumvented an IRS levy on his attorney business account by intentionally allowing the business account to lie dormant for years and using his trust account for both business and trust matters in violation of RPC 1.15(a) and RPC 8.4(c).[59]

In *In re D'Arienzo*, the Court suspended the attorney for making multiple misrepresentations to a judge regarding the reason for his tardiness and failures to appear at court appearances.[60]

Misrepresentations to a client or a disciplinary authority result in, at a minimum, a reprimand. If misrepresentations have been made to multiple parties, a censure will result.[61]

11. An Attorney Must Act Professionally to an Adversary, Even in 'the Heat of the Moment.'

In the Matter of Joel S. Ziegler, after a contentious matrimonial motion, the attorney angrily said to his adversary and the adverse client, "I'm going to cut you up into bits and pieces; put you [into] a box and send it to India and your parents won't recognize you."[62] At the ethics hearing, Ziegler denied saying he "would cut her up" but stated that his outburst was "a manifestation of [his] frustration [at] her appalling behavior." He thought his comment might make her "stop lying" and it was intended to "dissuade her from filing anymore false, fraudulent, misleading, scurrilous certifications." Further, in correspondence to the wife's attorney, he called the client an "unmitigated liar" and advised her attorney that she should take his comments "very seriously," as he would file ethics charges against her.

The *Ziegler* matter is a perfect example of an attorney becoming too emotionally involved with the client. He was found to have violated RPC 8.4(d), as his comments were meant to intimidate an adversary during the litigation. The Disciplinary Review Board found that his comments, in the aggregate, crossed the bounds of "aggressive advocacy;" the comments also violated RPC 3.2; and making such statements in "the heat of the moment" was no excuse. He was reprimanded.

12. An Attorney Must Pay His or Her Obligations.

An attorney should diary or set a reminder to pay his or her annual assessment for the Client Security Fund so he or she does not end up in a situation where he or she is practicing law while ineligible to do so. When an attorney practices law while ineligible, an admonition will be imposed if he or she is unaware of the ineligibility or advances compelling mitigating factors.[63]

If an attorney has been disciplined, he or she should make sure to pay the administrative costs against him or her. Failure to do so can result in a suspension as well as a civil judgment that would carry a substantial rate of interest.[64]

If a fee arbitration award is against the attorney, he or she must pay what he or she owes within 30 days, otherwise the Office of Attorney Ethics will apply for the attorney to be temporarily suspended from the practice of law. If that occurs, the attorney will also be required to pay sanctions up to $500.[65] If an attorney fails to pay his or her support obligations or fails to pay his or her student loans, the attorney can be suspended.[66]

The bottom line is that attorneys are expected to meet their financial obligations, and if they do not, they may be disciplined.

13. An Attorney Must Advertise His or Her Services Truthfully.

Advertising has become necessary, and an attorney's diligence in advertising truthfully is even more important when the internet has put at a litigant's fingertips a large range of options.

The Committee on Advertising monitors how attorneys portray themselves, not only in written form but also on the internet. The concern is that attorneys do not raise "unjustified expectations." RPC 1:7.1(a) and RPC 7.5(b) provide that a lawyer shall not make "false or misleading communications about the lawyer, the lawyer's services or any matter in which the lawyer has or seeks a professional involvement."

In *In re Ty Hyderally*, the Supreme Court addressed the attorney's website, which improperly displayed the seal of the New Jersey Board on Attorney Certification.[67] The Supreme Court dismissed the grievance, even though the seal was improperly displayed, because Hyderally's cousin was the one who put the seal on the site. The Court admonished all attorneys to frequently review their websites for compliance with the RPCs.

In another case involving Hyderally, the lawyer was suspended for three months for assaulting a person he was dating.[68] His attorney argued he should not have to take his name off of his firm during his suspension, which is required by Rule 1:20-20, because there were attorneys in his firm who could take over the case load. He argued that taking his name off the firm during the three-month suspension would mean clients would take their cases elsewhere and his employees would lose their jobs. In a ruling that is a first of its kind, the court permitted the firm to continue to operate as Hyderally &

Associates as long as all clients were notified in writing of his suspension and a notice of his suspension was put on his website.

In 2012, *In the Matter of William DiCiurcio, II*, the attorney was reprimanded for violating Attorney Advertising Guidelines 2(a) (March 2, 2005) and Opinion No. 35 of the Committee on Attorney Advertising.[69] DiCiurcio sent out letters soliciting clients who had been charged with traffic violations. Three different solicitation letters referred to the possibility of "jail" and the possible loss of a driver's license for a traffic ticket. Even after being notified by the Committee on Advertising to change the written solicitation letters, DiCiurcio did not do so.

In *In the Matter of Joseph Rakofsky*, Rakofsky misrepresented in ads that he worked on criminal cases, which he listed, and had experience in defending people charged with serious crimes.[70] His letterhead also did not distinguish that members of his firm were not licensed to practice in New Jersey. He was censured.

In *In the Matter of Joseph Mezrahi*, an attorney "ghost wrote" pleadings for his clients so they "could go the less encumbering route."[71] Ghost writing is specifically disapproved as violating aspects of RPC 3.3 and RPC 8.4.[72] He was admonished.

It is important to read the recent opinion on the use of the words 'expertise,' 'expert' and 'specialize,' which defines when such words can be used in advertising.[73]

Conclusion: The Rules of Professional Conduct are Important

The Rules of Professional Conduct give lawyers direction in how to conduct their professional and personal lives. The purpose of the disciplinary system is to protect the public and "preserve the confidence of the public in the integrity and trust worthiness of lawyers in general."[74]

The maxim 'better safe than sorry' should guide attorneys if they have any questions about the implications of a certain course of action. When in doubt, refer to the ethics hotline at 609-815-2924 for assistance as to how to handle prospective conduct.

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Endnotes

1. *See* https://njcourts.gov/attorneys/assets/rules/rpc.pdf.
2. To access those opinions, click on "attorneys" on the home page. On the right drop down menu, click on "opinions" under the heading of "Resources," then click on "attorney discipline," also on the right, which will bring one to the Disciplinary Review Board home page where one can identify specific issues. *See also* http://drblookupportal.judiciary.state.nj.us/RecentDisciplinedCases.aspx.
   One can also search by the RPCs, which can bring up opinions that may be helpful if one does not know an attorney's name.
3. *See In re Rennie*, 162 N.J. 44 (1999).
4. *In re Kivler*, 193 N.J. 332, 342-344 (2008).
5. Of the 1318 grievances filed in 2017, only 156 resulted in discipline.
6. *But see O Builders & Assoc. v. Yuna Corp.*, 206 N.J. 109 (2011).
7. N.J. Advisory Comm. on Professional Ethics Op. 100 (Oct. 27, 1966)
8. N.J. Advisory Comm. on Professional Ethics Op. 531 (May 17, 1984).
9. *In re Frost*, 171 N.J. 308, 321 (2002).
10. *A. v. B.*, 158 N.J. 51, 54 (1999).
11. N.J. Advisory Comm. Op. 699 (Dec. 12, 2005).
12. *Isaacson v. Isaacson*, 348 N.J. Super. 560, 576-578 (App. Div.), *certif. den.*, 174 N.J. 364 (2002).
13. N.J. Advisory Comm. on Professional Ethics Op. 699 (Dec. 12, 2005).
14. *The Matter of Harry Pinto*, 168 N.J. 111 (2001); DRB 00-049 (Oct. 19, 2000).
15. *In the Matter of Michael Resnick*, 219 N.J. 620 (2014); DRB 13-413 (June 17, 2014).
16. *In re Fornaro*, 175 N.J. 450 (2003), DRB 01-260 (March 26, 2002).
17. *In the Matter of Berkowitz*, 136 N.J. 134 (1994).
18. *In re Guidone*, 139 N.J. 272, 277 (1994).
19. RPC 1.5(b).
20. *Starkey, Kelly, Blaney & White v. Estate of Nicolayson*, 172 N.J. 60 (2002).

21. *Mayer v. Mayer*, 180 N.J. Super. 164 (App. Div. 1981).
22. *In re Wok*, 82 N.J. 326 (1980).
23. *In re Day*, 217 N.J. 280 (2014); DRB 13-244 (Dec. 20, 2013).
24. *In the Matter of Kenneth Denti*, 204 N.J. 566 (2011); DRB 09-346 (May 12, 2011).
25. *In the Matter of Vincenti*, 152 N.J. 253 (1998).
26. *Segal v. Lynch*, 211 N.J. 230, 260-262 (2012).
27. *In re Simon*, 206 N.J. 306 (2011).
28. *In the Matter of Logan Terry*, DRB No. 17-417 (June 8, 2018) 2018 WL 5778900.
29. RPC 8.4.
30. *In re Gavel*, 22 N.J. 248, 265 (1956).
31. *In re Hasbrouck*, 140 N.J. 162, 167 (1995).
32. *In the Matter of Leahey*, 118 N.J. 578, 581 (1990).
33. *In re Riva*, 157 N.J. 34, 39 (1999).
34. *In the Matter of Jay Bagdis*, 228 N.J. 1 (2017); DRB 16-069 (Dec. 1, 2016).
35. Note that also the failure to intentionally file tax returns and, thus, being guilty of tax fraud usually results in a two-year suspension. *See In re Rubin*, 227 N.J. 229 (2016).
36. *In the Matter of Christopher J. Buckley*, 226 N.J. 478 (2016); DRB 15-148 (Dec. 15, 2015).
37. In *the Matter of John Collins*, 226 N.J. 514 (2016); DRB 15-140 (Dec. 15, 2015).
38. *In the Matter of Steven French*, 227 N.J. 532 (2017); DRB 16-118, (Nov. 10, 2016).
39. *In re Costill*, 174 N.J. 563 (2002); DRB 02-195 (Oct. 22, 2002).
40. *In the Matter of Margrabia*, 150 N.J. 198 (1997); DRB 95-462 (Sept. 11, 1997).
41. *In re Welch*, 208 N.J. 377 (2011); DRB 11-117 (Oct. 6, 2011).
42. *In the Matter of Ledingham*, 189 N.J. 298 (2007); DRB 06-235 (Dec. 18, 2006).
43. *In re Frye*, 217 N.J. 438 (2014).
44. *In re Cunningham*, 192 N.J. 219 (2007); DRB 06-250 (Dec. 21, 2006).
45. 229 N.J. 173 (2017).
46. *In re Wilson*, 82 N.J. 451 (1979).
47. *In re Hollendonner*, 102 N.J. 21 (1985). In this matter, the attorney was suspended for one year, but the Supreme Court gave notice to the bar in that opinion that the future knowing misappropriation of escrow funds would result in disbarment.
48. *In the Matter of Soriano*, 232 N.J. 457 (2018); DRB 17-179 (Nov. 29, 2017).
49. *In the Matter of Steven Siegel*, 122 N.J. 162 (1993).
50. *In re Stephen Landkenau*, 234 N.J. 261 (2018); DRB 16-442 and 17-143 (Dec. 14, 2017).
51. *In the Matter of Blumenstyk*, 152 N.J. 158 (1997).
52. *Id.* at 162.
53. *In the Matter of Noonan*, 102 N.J. 157, 160 (1986).
54. *In re Wright*, 163 N.J. 133, 136 (2000).
55. *In the Matter of Kasdan*, 195 N.J. 181 (2008); DRB 07-336 (June 10, 2008).
56. *In re Turner*, 83 N.J. 536, 538 (1980)(*quoting People v. Beattie*, 27 *N.E.* 1096, 1103 (Ill. 1891)). *See also Baxt v. Liloia*, 155 N.J. 190, 210-211 (1988) for a discussion about an attorney's conduct during discovery which the court characterized "as an object lesson in unprofessional behavior."
57. In *In re Malvone*, 216 N.J. 10 (2013); DRB 12-139 (Oct. 25, 2012).
58. *In re Trustan*, 202 N.J. 4 (2010); DRB 09-132 (Dec. 3, 2009).
59. *In re Howard Weber*, 205 N.J. 467 (2011); DRB 10-341 (March 1, 2011).
60. *In re D'Arienzo*, 158 N.J. 448 (1998); DRB 97-302 (July 27, 1998).
61. *In re Otlowski*, 220 N.J. 217 (2015); DRB 14-067 (Sept. 17, 2014). *See also In re Schroll*, DRB 12-204 (Dec. 4, 2012), 213 N.J. 391 (2013), wherein a censure was imposed on an attorney who misrepresented to the District Ethics Committee secretary that the personal injury matter in which he was representing the grievant was pending even though he knew that the complaint had been dismissed more than a year earlier. For the next three years, he continued to mislead the district secretary that the case was still active (and thus the ethics proceeding against him would not proceed) and he misrepresented to the client's former lawyer that he had obtained a default judgment against the defendants. He was found guilty of gross neglect, lack of diligence, and failure to reply to the client's numerous attempts to obtain information about her case.
62. *In the Matter of Joel S. Ziegler*, 199 N.J. 123 (2009); DRB, 08-344 (June 2, 2009).
63. *In the Matter of Jonathan A. Goodman*, DRB 16-436 (March 22, 2017).
64. R. 1:20-17(e).
65. R. 1:20-15(k).
66. R. 1:20-11A and R. 1:20-11B.
67. *In re Ty Hyderally*, 208 N.J. 453 (2011).

68. 233 N.J. 595 (2018); DRB 17-228 (Dec. 20, 2017).
69. *In the Matter of William DiCiurcio, II*, 212 N.J. 110 (2012); DRB 12-025 (Sept. 18, 2012).
70. *In the Matter of Joseph Rakofsky*, 223 N.J. 349 (2015); DRB 15-02 (Nov. 4, 2015).
71. *In the Matter of Joseph Mezrahi*, DRB 12-265 (Jan. 25, 2013).
72. *See* Advisory Committee on Professional Ethics Opinion 713, *191 N.J.L.J. 302* (Jan. 28,2008) on ghost writing.
73. Committee on Advertising Op. 45 (Nov. 8, 2018).
74. *In re Wilson*, 81 N.J. 456.

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The Intersection of Elder Abuse and Family Law

by Cassie Murphy

In cases involving elder abuse, family law practitioners should consider all available remedies. While the remedies provided by the Prevention of Domestic Act (PDVA) may immediately come to mind, practitioners should be aware that other options exist that may more appropriately meet the needs of the elder client, depending on the circumstances of the case. The purpose of this article is to examine those lesser-known options.

What is Elder Abuse?

In general, elder abuse refers to the mistreatment of an older person committed by someone with whom the elder has a special relationship (for example, a spouse, sibling, child, friend, or caregiver).[1] 'Elder' is defined differently depending on the source, but it typically refers to a person aged 60 or older, a person who has reached the age of retirement, and/or a person who can no longer continue his or her family or employment role due to physical decline.[2]

Elder abuse can take any of the following forms:

- **Physical Abuse:** inflicting or threatening to inflict, physical pain or injury on a vulnerable elder, or depriving them of a basic need
- **Emotional/Psychological Abuse:** inflicting mental pain, anguish, or distress on an elder person through verbal or nonverbal acts
- **Sexual Abuse:** non-consensual sexual contact of any kind, or coercing an elder to witness sexual behaviors
- **Financial Abuse/Exploitation:** illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder
- **Neglect:** refusal or failure by those responsible to provide food, shelter, healthcare or protection for a vulnerable elder
- **Abandonment:** the desertion of a vulnerable elder by anyone who has assumed the responsibility for care or custody of that person[3]

The most frequently substantiated form of elder abuse, comprising half or more of the confirmed cases, is self-neglect. Here, issues of personal freedom and competency are often at odds; state social services agencies are reluctant to intervene in self-neglect or may be constrained in doing so. However, self-neglect can be a risk factor for elder abuse by others.[4] Today, the fastest rising form of elder abuse is financial exploitation.[5]

Abuse of older people by others can be an overt act or it can be an act of omission; similarly, it can be an intentional act or an unintentional act. All 50 states have some form of elder abuse prevention laws.[6] Abuse committed by a spouse or partner is also referred to as 'intimate partner violence' or 'domestic violence in later life.'[7]

Elder abuse can affect anyone, regardless of gender, ethnicity, or social status. The majority of elder abuse cases implicate family members.[8] It is often more difficult for a victim of elder abuse to leave an abusive relationship because of the physical or mental impairments that may result from old age.[9] In addition, an abuser is often the abused elder's only form of companionship, thereby rendering it even more difficult for the elder to take action.[10]

What Should Practitioners Do in Cases of Elder Abuse?

The Adult Protective Services Act[11] was created to provide protections to vulnerable adults living in a community setting, as further defined in the act and herein. Adult Protective Services (APS) is the New Jersey government institution that receives and investigates reports of suspected abuse, neglect, and exploitation of these adults. Healthcare professionals, law enforcement officers, firefighters, paramedics, and emergency medical technicians are required to report suspicions of abuse, neglect, and exploitation.[12]

Pursuant to the act, the following definitions[13] are relevant:

- **Abuse** is defined as "the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation of services which are necessary to maintain a person's physical and mental health;"
- **Neglect** is defined as "an act or failure to act by a

vulnerable adult or his caretaker which results in the inadequate provision of care or services necessary to maintain the physical and mental health of the vulnerable adult, and which places the vulnerable adult in a situation which can result in serious injury or which is life-threatening;"

- **Exploitation** is defined as "the act or process of illegally or improperly using a person or his resources for another person's profit or advantage;"
- **Vulnerable adult** is defined as "a person 18 years of age or older who resides in a community setting and who, because of a physical or mental illness, disability or deficiency, lacks sufficient understanding or capacity to make, communicate, or carry out decisions concerning his well-being and is the subject of abuse, neglect or exploitation;" and
- **Community setting** is defined as "a private residence or any non-institutional setting in which a person may reside alone or with others, but shall not include residential health care facilities, rooming houses or boarding homes or any other facility or living arrangement subject to licensure by, operated by, or under contract with, a State department or agency." (Thus, this definition does not include institutional settings such as nursing homes and assisted living facilities).

Based on the definitions set forth above, it is clear that the definitions of elder abuse as identified in the Adult Protective Services Act have significant overlap with the definitions of domestic violence as identified in the PDVA. Consider, for example, the following definition of abuse in the Adult Protective Services Act:

> the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation of services which are necessary to maintain a person's physical and mental health[.]

Now compare that definition with the following definitions in the PDVA:

- **Assault:** "A person is guilty of assault if he attempts to cause or purposely, knowingly or recklessly causes bodily injury to another…",
- **Harassment:** "A person commits a petty disorderly persons offense if, with purpose to harass another, he makes…a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm…", and
- **False imprisonment:** "A person commits a disorderly persons offense if he knowingly restrains another unlawfully so as to interfere substantially with his liberty").[14]

All involve the exertion of power and control over a victim. In fact, many experts in the gerontology field view domestic violence of the elderly as falling under the broader umbrella of 'elder abuse.'[15]

Therefore, a practitioner should be facile with the different remedies available to his or her client depending on the particular circumstances of the case. Most family law practitioners are familiar with the procedures, rights, and remedies set forth in the PDVA, but are less familiar with the components of the Adult Protective Services Act.

A referral to APS results in an investigation of the potentially abused adult within 72 hours of the referral, involving a private interview between the abused party and a social worker.[16] The APS worker may also interview other parties as may be warranted, and review documents such as bank and medical records.[17] Following an investigation, a determination is made as to the need for ongoing protective services, which may include "providing or arranging for appropriate services, obtaining financial benefits to which a person is entitled, and arranging for guardianship and other legal actions."[18] The APS worker can petition the court in the event a vulnerable adult's caretaker interferes with the attempt to provide the protective services sought by the vulnerable adult.[19] The APS worker can also make a referral to law enforcement officials for criminal acts perpetuated against the abused party, and can refer the case to the Division of Developmental Disabilities or the Division of Mental Health and Hospitals in the Department of Human Services, if the abused person is in need of specialized care because of a developmental disability or mental illness.[20]

Unlike the APS model, domestic violence programs and protections do not investigate allegations of abuse. Instead, they rely upon the self-reporting of the victim. Moreover, the PDVA does not protect against violence perpetrated by an abuser who is or was not the significant other or household member of the victim, and its definitions of domestic violence are arguably narrower than the definitions of abuse, neglect, and exploitation in the Adult Protective Services Act. However, domestic violence programs and protections may be appropriate

in circumstances where an elderly adult does not qualify for services pursuant to the Adult Protective Services Act, but nonetheless needs assistance with the abuse he or she is suffering. Pursuant to the PDVA, remedies for a domestic violence victim include a prohibition on contact or communication between the victim and abuser; the removal of the abuser from the victim's residence; and monetary compensation and/or the payment of support from the abuser to the victim.[21]

Special Problems Confronting Cases of Elder Abuse

In evaluating the remedies available to a client, practitioners should be aware of special problems confronting cases of elder abuse. A key risk factor for elder abuse is elders with cognitive or memory impairments, such as dementia.[22] Research has found that there exists worldwide a greater level of abuse in families where Alzheimer's disease is present.[23] In fact, individuals with disabilities are generally more prone to experience abuse than non-disabled persons.[24]

In the event of the abuse of a client who suffers from a cognitive impairment such as dementia, the client may not only be unwilling but he or she may be unable, to testify in a domestic violence proceeding regarding the abuse. A client with a cognitive impairment may be unable to recall important facts, may be viewed as an unreliable witness, or may be unable to withstand the pressures of a court proceeding. In circumstances in which an elderly victim is unwilling or unable to proceed with a domestic violence complaint, a practitioner should consider a referral to APS, which has specialized skills in assisting victims with diminished mental capacity.

In particular, practitioners should consider a medical assessment to determine mental capacity or the necessity of a guardian, in appropriate circumstances, through the assistance of APS or otherwise. Pursuant to the Adult Protective Services Act, APS may apply to the court for an order authorizing the provision of protective services if the vulnerable adult is unable to consent to such services.[25] In that event, the court can order a psychological examination to assess the vulnerable adult's capacity.[26] In addition, the Adult Protective Services Act authorizes APS to initiate a guardianship or conservatorship proceeding on behalf of the vulnerable adult.[27]

Similarly, the New Jersey Court Rules provide the parameters for a guardianship proceeding.[28] In relevant part, any complaint for the appointment of a guardian that is filed by someone other than the elderly client shall be accompanied by affidavits from at least two medical professionals. The affidavits shall include, among other things:

> the affiant's opinion of the extent to which the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs and shall set forth with particularity the circumstances and conduct of the alleged incapacitated person upon which this opinion is based, including a history of the alleged incapacitated person's condition.[29]

If a practitioner suspects cognitive decline in his or her client, the American Bar Association recommends the practitioner first conduct an informal discussion with the client regarding current events.[30] If the client cannot "answer basic orientation questions or has been diagnosed with moderate- or severe-state Alzheimer's," a medical evaluation is likely appropriate.[31] Should the medical evaluation conclude that the client lacks capacity, a guardianship proceeding is likely the next step.

Above all, a practitioner faced with the unusual circumstance of an elderly client with questionable mental capacity should consult with professionals and experts who specialize in this area of practice.

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Endnotes

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2. Carolyn J. Hildreth, Alison E. Burke and Richard M. Glass, Elder Abuse, *Journal of the American Medical Association* Patient Page (Aug. 5, 2009), https://jamanetwork.com/journals/jama/fullarticle/184344; accord Rosalie Wolf, Lia Daichman and Gerry Bennett, World Health Organization World Report on Violence and Health 125 (2002).
3. Hildreth, *supra* note 2.

4. XinQui Dong, Melissa Simon and Denis Evans, Elder Self-Neglect Is Associated With Increased Risk for Elder Abuse in a Community-Dwelling Population, 25 *Journal of Aging and Health* 1 (2013).
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6. Adult Protective Services: Facts and Fiction, Division of Aging Services, New Jersey Department of Human Services, http://www.nj.gov/humanservices/dmahs/home/Adult_Protective_Services_Training.pdf (last visited Jan. 10, 2018).
7. *See, e.g.* Sara Aravanis, Late Life Domestic Violence: What the Aging Network Needs to Know, National Center on Elder Abuse Issue Brief (Feb. 2006), https://ncea.acl.gov/resources/docs/archive/Late-Life-Dom-Violence-Need-to-Know-2006.pdf.
8. Elder Abuse Facts, National Council on Aging, https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/ (last visited Jan. 18, 2018).
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10. *Id.*
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12. N.J.S.A. 52:27D-409.
13. N.J.S.A. 52:27D-407.
14. N.J.S.A. 2C:12-1 (assault), N.J.S.A. 2C:33-4 (harassment), and N.J.S.A. 2C:13-3 (false imprisonment).
15. Aravanis, *supra* note 7.
16. N.J.S.A. 52:27D-410.
17. *Id.*
18. N.J.S.A. 52:27D-407.
19. N.J.S.A. 52:27D-412.
20. N.J.S.A. 52:27D-411, N.J.S.A. 52:27D-419.
21. N.J.S.A. 2C:25-29(b).
22. Hildreth, *supra* note 2. Accord Wolf, *supra* note 2, at 130.
23. Wolf, *supra* note 2, at 141.
24. Domestic Violence and People with Disabilities, The National Domestic Violence Hotline, http://www.thehotline.org/is-this-abuse/domestic-violence-disabilities/ (last visited Jan. 10, 2018).
25. N.J.S.A. 52:27D-414.
26. *Id.*
27. N.J.S.A. 52:27D-416.
28. R. 4:86-1 *et. seq.* Practitioners should note that this rule is wholly separate and apart from R. 5:8B, which controls the appointment of a guardian *ad litem* in a custody proceeding.
29. R. 4:86-2(b)(2)(F).
30. Suspect a Client with Cognitive Impairment? What's Next, Your ABA E-news For Members, https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/suspect-a-client-with-cognitive-impairment--whats-next.html (last visited Jan. 10, 2018).
31. *Id.*

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Commentary:

Is a Family Law Attorney Obligated to Convey Information on the Tax Implications of a Divorce Proceeding?

by Katrina Vitale

When an attorney is serving his or her client who is going through a divorce, meeting financial goals is often a top priority. For example, a divorce client will set goals in maximizing the equitable distribution outcome, establishing just and proper child and spousal support, and preserving estate planning options, while balancing the costs of litigation. Underlying these goals are often unstated goals also focused on a fair financial outcome, such as achieving fair tax results of the divorce. A family law attorney should be able to recognize the tax aspects of divorce before he or she can address what may be his or her obligation(s) to inform a client on the subject matter. This article will not go into depth with the myriad of tax issues that may arise in family law matters. Instead, this article will focus on the crucial question as to the family lawyer's obligation to advise his or her client regarding the tax issues.

Common tax issues the family lawyer may confront include: filing status, exemptions, utility of trusts, alimony tax phase out, property transfers, capital gains, pensions and annuities, fringe benefits and deferred income, injured spouse, innocent or injured spouse rules, under-reported income, audit issues, and changes in the tax laws. This is not an exhaustive list and should not be construed as such. The New Jersey State Bar Association hosts annual seminars relating to tax updates for the family lawyer, and the *New Jersey Family Lawyer* has published previous articles addressing the tax implication arising out of family law matters. Another good source on the subject matter for review is the website of the American Institute of Certified Public Accountants, at www.AICPA.org, which includes updated publications and various podcasts.

What precisely are the duties of the divorce attorney in advising a client of tax implications of their claims and settlement issues through a divorce? Is it enough to refer the client to a tax expert, or is there some additional duty to advise? The answer will turn on the Rules of Professional Conduct. The analysis would begin with RPC 1.1, the rule of competence, which states:

> A lawyer shall not: (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence. (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

By accepting representation of a client during a divorce, the attorney is accepting the responsibility to advise that client as to any and all claims asserted, as well as the litigation and settlement issues surrounding those claims. It becomes highly likely that the divorce attorney will address tax implications, as expressly demonstrated by statute[1] and established case law.[2]

A lawyer is expected to be familiar with well-settled principles of law as they relate to his or her client's case.[3] In addition, the lawyer must use a reasonable level of skill in advancing and defending claims on behalf of the client.[4] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter; the lawyer's general experience; the lawyer's training and experience in the field in question; the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence on the subject matter. Often, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances and will likely be required in circumstances where the lawyer advises the client on the subject matter.

As such, the author believes an attorney's failure to advise his or her client of the need to confer with a tax expert on subject matters involving tax implications is a certain acceptance of the role as the advisor. It also potentially assumes the divorce attorney will advise on the tax implications and possess the requisite level of skill and knowledge to do so properly. Where the lawyer is not familiar with the tax implications, the attorney likely needs to refer his or her client to a tax expert. It can be good practice to place this referral in writing and have the writing acknowledged by the client. If the client declines to consult with or otherwise rely on a tax expert after the referral has been made, the author believes the lawyer should firmly abstain from taking on the assumed role of a tax expert.

The client's acknowledgement of the referral by his or her attorney for tax advice should be more defined than a general disclaimer provision in the marital settlement agreement or a general form letter. It may be appropriate to have such an acknowledgment on each and every issue involving tax implications. The skill required here is the ability to identify the existence of a tax implication regarding the matter in dispute. The most serious problem lies with the attorney providing the legal services that may result in a tax consequence *without* identifying the tax issue to enable the client to make an informed decision based on those tax implications.[5]

Depending on the circumstances, the competency requirement may impose on the divorce attorney a duty to research and investigate when the lawyer is confronted with a matter involving the impact of tax law on the divorce. Adequate investigation is a component of competent representation.[6] The scope of the investigation will depend on the tax issue. For example, when confronted with the issue of maximizing relative net incomes of the divorcing parties and allocation of tax deductions, the investigation may require an analysis of the separate returns, a matter that can be referred to an accountant or tax expert. However, when confronted with the issue of under-reported income, the investigation is likely to require a survey of accounts and spending patterns, requiring extended discovery before performing an income analysis.

The competency requirement can also be met by associating with another attorney experienced on the tax matter and perhaps possessing a Master of Laws in taxation. But this association can also be satisfied by meeting with another qualified tax expert, such as a certified public accountant competent in the family law arena. Stated otherwise, the author believes a lawyer who considers taking a matter involving an unfamiliar area of law should decline the matter, or else acquire the competence necessary for the matter either by conducting legal research or by associating with an experienced lawyer.[7] This is so, even when the unfamiliar tax review arises during the course of the divorce and was not contemplated at the time of accepting the client. Once the issue arises, the lawyer should confer with an experienced attorney or other qualified tax expert.

When tax implications arise in divorce litigation, a divorce attorney will be required to address those issues with competence. Therefore, the author believes every divorce attorney should have a confident plan in place to properly meet his or her client's need to be informed about the tax implications as needed.

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Endnotes

1. *See* N.J.S.A. 2A:34-23b.12 (one mandatory factor for alimony consideration is "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"); N.J.S.A. 2A:34-23c.7 (a mandatory factor for the determination of alimony duration are the: "[t]ax considerations of either party").

2. *Painter v. Painter*, 65 N.J. 196, 212-213 (1974). ("[I]t will not be improper for a judge to give appropriate heed to legitimate tax considerations...where the most equitable disposition of property interests can thereby be best attained."); *Dugan v. Dugan*, 92 N.J. 423 (1983) ("[P]otential federal tax consequences should be considered in determining equitable distribution."); *Gwodz v. Gwodz*, 234 N.J. Super. 56 (App. Div. 1989) (recognizing "the legal right of the trial court to equitably enforce an allocation of tax exemptions between the parties"); *Heinl v. Heinl*, 287 N.J. Super. 337 (App. Div. 1996) (recognizing the court authority to allocate tax deductions to maximize the net income of the divorcing parties); *Kruger v. Kruger*, 139 N.J. Super. 413, 421-422 (App. Div. 1976), modified on other grounds 73 N.J. 464 (1977) (reviewing tax treatment of husband's military retirement pension to establish equitable result of division); *Orgler v. Orgler*, 237 N.J. Super. 342, 356 (App. Div. 1989) (recognizing court authority to deduct from asset value "the tax consequences resulting from a court-ordered sale of marital assets, or of a contemporaneous sale of assets by an ex-spouse necessary to meet his or her equitable distribution obligation"); *Shayegan v. Baldwin*, 237 N.J. Super. 47 (App. Div. 1989).
3. *See Newell v. Hudson,* 376 N.J. Super. 29 (App. Div. 2005) (litigant estopped from asserting malpractice claim based on incompetence where the litigant previously testified to understanding the settlement).
4. Comment [1] to Model Rule 1.1 provides guidance with regard to the necessary level of both skill and knowledge.
5. *See In re Wallace*, 518 A. 2d 740 (N.J. 1986) (lawyer disciplined for "seriously deficient" drafting of promissory note that "did not include a due date, a default or acceleration clause, or even an address for the borrower").
6. *People v. Moskowitz*, 944 P.2d 76 (Colo. 1997) (lawyer censured for failing to investigate case to ascertain that petition for involuntary bankruptcy was without legal or factual basis); *In re Guy*, 756 A. 2d 875 (Del. Super. Ct. 2000) (lawyer violated Rule 1.1 by failing to contact any of four potential defense witnesses identified by his client); *Florida Bar v. Sandstrom*, 609 So. 2d 583 (Fla. 1992) (60-day suspension for criminal defense lawyer who failed to properly investigate and present evidence that cause of death of client's wife was medical malpractice and not actions of client); *Maryland Attorney Grievance Comm'n v. Christopher*, 861 A.2d 692 (Md. 2004) (probate lawyer disciplined under Rule 1.1 for failing to investigate personal representative's suspect expenditures from estate's account); *Toledo Bar Ass'n v. Wroblewski*, 512 N.E. 2d 978 (Ohio 1987) (lawyer for estate made no attempt to determine if any next of kin survived, and did not properly complete inventory); District of Columbia Ethics Op. 341(2007) (if document is transmitted to lawyer electronically and "constitutes tangible evidence, or potential tangible evidence," Rule 1.1 may require lawyer to investigate content of document's "metadata").
7. *See In re Yetman*, 552 A. 2d 121 (N.J. 1989) (finding violation of Rule 1.1 where "respondent adopted a 'head-in-the-sand' attitude and neglected to bring the matter to a quick resolution by turning it over to new counsel"); *State ex rel. Counsel for Discipline v. Orr*, 759 N.W.2d 702 (Neb. 2009) (lawyers should not take on "cases in areas of law with which they have no experience, unless they are prepared to do the necessary research to become competent in such areas or associate with an attorney who is competent in such areas"). Note, however, that an inexperienced lawyer's reliance on a more experienced attorney's advice does not necessarily exculpate the lawyer from responsibility for his own breach of duty.