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Chair's Column

Adios Amigos, and Thank You!

by Timothy F. McGoughran

On May 19, 2016, I was sworn in as chair of this great section, and on May 18, 2017, I assumed the most coveted of positions—immediate past chair. Now that I am writing my farewell column, I think of all that has transpired over the last year and, quite frankly, it was a lot busier than I expected. I have led several bar organizations in my career and this, by far, has been the most challenging, rewarding and educational. The energy of the members of our section and executive board never ceased to amaze me. There are too many people to thank in this column for all their hard work and tireless effort. Our members volunteer enormous time to make our practice a little saner, to sharpen our skills and to create a more collegial environment.

In June 2016, I appointed an early settlement panel (ESP) *ad hoc* committee, with Amy Shimalla as chair, along with Dennis W. Winegar and Patricia Voorhees, both of whom are currently on the section's Executive Committee and also ESP coordinators for their respective counties. Our ESP committee is considering suggestions and/or rule changes for some 'compensation' for the hard work of ESP panelists throughout the state, either by way of *pro bono* credit, continuing legal education (CLE) credit or actual compensation, similar to civil arbitrators. I hope this work continues going forward because we, as family law practitioners, should be treated equally with other practitioners in the courthouse.

Our young lawyers, led by Cassie Murphy and Thomas Roberto, did a great job with quality networking events throughout the year, including a wonderful holiday party that raised over $8,000 for the Legal Aid Society of Monmouth County.

Our CLE this year consisted of an October seminar in Amsterdam, where we were tilting windmills discussing general family law topics in a spectacular location. In November we enjoyed a hot tips panel at the Law Center, led by Michael A. Weinberg. Once again, the pinnacle of our CLE was on Jan. 27 and 28 this year, when we had our annual Family Law

Symposium at the Hyatt Regency in New Brunswick. As chair of this section, I had the privilege of coordinating and moderating this year's symposium.

On Friday evening of the symposium, we had a quality program, attended by almost 200 people, reviewing the 45th anniversary of the New Jersey equitable distribution statute. John F. DeBartolo led the discussion and moderated a panel that discussed the history of the equitable distribution statute, the statute's 16 factors, and the importance of reviewing the factors and not focusing on any single factor when formulating argument as to equitable distribution of assets acquired during the marriage.

On Saturday of the symposium, almost 700 people watched over 35 speakers discuss various topics in an in-depth fashion. I was very proud of and wish to thank the Judiciary members who attended to provide their expertise, including Judge Marie E. Lihotz, P.J.A.D., Judge Lisa P. Thornton, A.J.S.C., Judge Hany A. Mawla, P.J.F.P, Judge Lisa F. Chrystal, P.J.F.P., and Judge Terry Paul Bottinelli, J.S.C., all of whom provided valuable insight to the topics presented.

Our Executive Committee moderated panels at the symposium throughout the day, doing a thorough and thoughtful job. Amanda S. Trigg led a panel discussing current issues and updates on domestic violence in New Jersey. Sheryl Seiden led a panel on alimony. Frank Louis gave a lecture on spousal duties and creative arguments to be made. Michael A. Weinberg moderated a panel discussing the underpinnings of the *Brown*[1] case discussing the interplay between equitable distribution and support issues. Ronald G. Lieberman ran a panel discussing child support guidelines and other child support issues relating to older children still living at home. Stephanie F. Hagan directed a panel as to issues of the modern family, marriage equality, and the rights of those not married at all.

Of course we had the always relevant and entertaining John J. Paone Jr. beginning the day's discussions with "the 10 most important family law cases reported in 2016," and later a new favorite, Megan Murray, finishing the day with not unimportant New Jersey 2016 family law unpublished cases.

For the last two years I have been co-chair of the NJSBA Legislative Committee, and I have been pleased with the segment at the symposium that provides the legislative update. While we can never be certain what law will be passed, it is certainly nice to know what might be coming around the corner, so we can plan accordingly in our agreements and resolutions.

The enthusiasm of all of the speakers at the Family Law Symposium is simply astounding. Having the honor of coordinating those individuals to create such a great program was a valuable experience. Of course, again we had standing room only with regard to the sponsors and vendors, who work with us to create quality products for our clients.

Our final CLE was in March at the Annual Family Law Retreat held in Cancun at the JW Marriot. We had three wonderful seminars coordinated by Jamie Von Ellen, which highlighted our sponsors and judges, and 'added value' to our practice. Our retreat also included three great receptions, beach Olympics and numerous networking opportunities. If you were there, I hope you enjoyed the retreat as much as I did.

On the legislative front, we continue to monitor our state bar-drafted relocation and college bills under the leadership of our Legislative Committee chairs—Robin Bogan and Francesca O'Cathain. Of interesting note was the Supreme Court's interest in our thoughts on relocation and our position on the *Baures*[2] standard. I had the opportunity to argue the NJSBA *amicus* position in the *Bisbing*[3] case on March 29. When people ask me why I get involved in so many bar activities I can now point to the fact that in one week I am hosting our section in Cancun and the very next week arguing the NJSBA *amicus* position before the Supreme Court. My involvement allowed for these wonderful and educational experiences.

The section has been monitoring and participating in discussions regarding additional 'reforms' to our alimony laws, specifically bill A-3947/S-2391, which seeks to clarify the applicability of the statutory presumption concerning an alimony payor's retirement and alimony termination where the court has entered a prior judgment or final order, which does not specifically address conditions for the termination of alimony upon retirement. As always, our section continues to monitor any attempts to undermine the fairness of the alimony laws and has been actively maintaining a seat at the table on these important issues.

We recently endorsed a proposed statute to strengthen protection for pets under the Prevention of Domestic Violence Act. Our section continues to monitor sensitive issues and have input on legislation that has the capacity to help our profession and our clients.

It has been my great joy this year to co-chair the NJSBA Legislative Committee with Jeralyn Lawrence, our

former chair, who is now secretary of the New Jersey State Bar Association and who will, in a few short years, be president of the NJSBA. The Family Law Section remains a vibrant leading voice in the NJSBA, with 11 section members on the Board of Trustees.

This year we had a number of other items to review, including proposed rule changes in the family part, alternative dispute resolution, Rule 1:38, and adoption practice, as well as the Biennial Report. The changes relating to the automatic termination of child support through the Probation Department has been a significant concern for many of our clients, and we have sent our views and concerns to the Administrative Office of the Courts.

Last, but certainly not least, I want to thank my fellow officers—Amanda Trigg who has now taken on the role leading the New Jersey chapter of the AAML, Stephanie Hagan, Michael Weinberg, Ron Lieberman, and Sheryl Seiden. This year the support, hard work, and competence of the Executive Board helped make this job much easier, and I could not have asked for better colleagues on my 364-day journey leading our section. I wish Stephanie the best of luck as she leads us for the next year, and can assure you that the section is in good hands under her leadership.

Endnotes

1. *Brown v. Brown*, 348 N.J. Super. 466 (App. Div. 2002).
2. *Baures v. Lewis*, 167 N.J. 91 (2001).
3. *Bisbing v. Bisbing*, 445 N.J. Super. 207 (App. Div. 2016), *certif. granted, Bisbing v. Bisbing*, 227 N.J. 262 (2016).

Inside this issue

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

Editor in Chief Column

Confidentiality of Family Court Records—Is Change Coming?

by Charles F. Vuotto Jr.

As we all know, family court records for the most part are open to the public pursuant to Rule 1:38.[1] Although there are some limited exceptions under the rule,[2] they still do not provide full protection to the privacy and sanctity of our families, especially the children who find themselves involved in family court proceedings.[3] This had been hotly debated when the original report from the Supreme Court Special Committee on Public Access to Court Records Report was issued by Justice Barry T. Albin in Nov. 2007. The committee attempted to balance the public's general right to know and the individual's limited right of privacy within our court system. In addressing family part records, the committee determined the public's and the bar's right to know how cases are decided and ensuring the integrity of the court proceedings trumped the individual's right to privacy interests and concerns.

Since then, public access of family court records has been an issue under consideration by the NJSBA Family Law Section. Along those lines, one of our past section chairs, Amanda S. Trigg, created a subcommittee to address the issue and make recommendations. She appointed Lizanne J. Ceconi as the chair of the subcommittee, which also included Michele E. D'Onofrio, Christine C. Fitzgerald, Richard M. Sevrin, Abigail M. Stolfe, Sandra Starr Uretsky and Sheryl J. Seiden.

In a Feb. 21, 2017, memo to the Family Law Executive Committee (FLEC) the subcommittee reported on Rule 1:38 and the recommendations by the Supreme Court Advisory Committee on Public Access.[4] The NJSBA Family Law Section strongly believes the private lives of divorcing and non-dissolution litigants should not be open to public access.

With respect to Rule 1:38, the committee, together with the Supreme Court Advisory Committee on Public Access, recommended five amendments to the present court rule. Rule 1:38-3 lists court records that are specifically excluded from public access. The first amendment, Rule 1:38-3(d)(1), was to expand the list to include "settlement agreements incorporated into judgments or orders in dissolution and non-dissolution actions." The subcommittee wholeheartedly supports this amendment, which will provide litigants with the confidence that their agreements containing detailed information and personal information will be protected. The subcommittee also believes that non-consensual orders and court rulings, if publicly accessible and containing personal identifiers, information culled from a case information statement or personal information regarding children, should be redacted before any protected information is released.

The second proposed amendment expands Rule 1:38-3(d)(a)(1) to include "Notices required by R. 5:5-10 including requisite financial, custody and parenting plans." Again, the subcommittee supports this amendment because it includes detailed financial and personal information, often identical to information contained in a family case information statement (CIS).

The third proposed amendment expands Rule 1:38-3(d)(13) to include "parenting time and visitation plans" pursuant to court rules, including Rule 5:8-5. The subcommittee supports this amendment, as it is intended to protect children whose personal information will be included in these documents.

The fourth proposed amendment recommended that Rule 1:38-3(a) establish a "good cause" standard for the release of documents after review and recommendation from the Supreme Court Advisory Committee on Public Access. The subcommittee also supports this recommendation.

Finally, the Public Access Committee recommended that Rule 1:38-1 clarify that "Restrictions on access shall not apply to named parties in any litigation." The subcommittee also supports this recommendation, but with a further clarification/amendment. In family

part matters, third parties can be named for discovery purposes, such as business partners or entities in which a party may have an interest. In matters where adultery is pled as a cause of action for divorce, the co-respondent is a named party. Therefore, the subcommittee does not believe these named parties should be given unfettered access to the family part file. Accordingly, they suggest that in family part matters, a third-party plaintiff or defendant should only be permitted unfettered access to the causes of actions directly related to that party's case.

Overall, the subcommittee was very pleased with the recommendations made by the committee in expanding confidentiality to litigants in the family part. The subcommittee and this author share the committee's concerns of the harm that can occur if the personal information sought to be protected is used improperly by unauthorized third parties, including identity theft. We also share the committee's concerns in protecting children whose detailed personal information will be included in documents filed with the courts.

Recognizing that the desire to protect the privacy of children and prevent identity theft for litigants are important goals, the subcommittee and this author believe the proposed amendments do not go far enough in addressing these concerns. Our initial proposal was that all family part pleadings; affidavits; certifications; case information statements; findings of fact; conclusions of law; judgments of divorce; orders, both *pendente lite* and final; written agreements and memoranda of understanding, including any attachments, shall not be distributed to any person not a party or the attorney or counsel of a party, absent good cause shown. We remain committed to this goal as the only practical means of protecting family part litigants from excessive intrusion into their personal lives. At a minimum, if orders and judgments are publicly accessible, they should be redacted to remove personal identifiers, information culled from the case information statement and, most importantly, personal information regarding children. Of course, once the issue of redactions arises, who will be given the responsibility for such a sensitive task?

Our present motion practice, in both dissolution and non-dissolution courts requires litigants to share with the court their lives' stories. Litigants must be candid with the court without fear of their private dealings being made public. Whether it is *pendente lite* or non-dissolution, the matters before the court involving support, custody and/or equitable distribution require a recitation of the fitness of the parties, the needs of the children, the past and present economic circumstances of the family, the medical conditions of the parties and their children, and a narrative explaining the case information statement, among other personal information. Even though Rule 1:38-3(a) provides that if documents deemed to be confidential are attached to non-confidential documents the attachments remain confidential, it is hard to imagine this rule will be properly and effectively administered to ensure the privacy rights recognized in the rule.

The subcommittee and this author believe it is crucial to expand the confidentiality of family part pleadings as a result of the advent of e-filing and internet access to the courts making the distribution and dissemination of matters in the family part more accessible to the public than ever before, through anonymous means.

With e-filing and access to records over the internet, children would be able to access their parents' divorces. Neighbors, classmates and school personnel would be able to read about the most personal aspects of someone's life for purely prurient reasons. Prospective employers would be able to access past earnings, marital history, net worth and medical history. Mere allegations of spousal abuse, mental illness, drug addiction or infidelity could wreak havoc on a person's prospective employment and ability to move on with his or her life post-divorce.

In 2005, in the case of *Smith v. Smith,*[5] the court ruled against third parties to a matrimonial action who sought to seal the record of their daughter's matrimonial proceedings. The Hon. Jack M. Sabatino, J.S.C., then a trial court judge and now elevated to the Appellate Division, found that the third party's personal interest did not suffice to overcome the strong presumption of open judicial proceedings. The court, however, stated the following:

> The day may come, and perhaps it will be soon, when all courthouse filings are routinely harvested in data banks and instantly transmitted around the world via the internet. Electronic filing is rapidly becoming the norm in Federal Court and our state courts are not far behind. The digital storage of such filings may well make them far easier to retrieve by outsiders. It is not hard to imagine that each scurrilous allegation contained in some court filing could eventually turn up in a "Google search." Such broadcasted diatribe has the capacity to defame not only celebrities and public officials, but also

> average citizens whose backgrounds could be researched on the World Wide Web by prospective employers, business associates, loan officers, government regulators, social clubs, and perhaps even would-be Saturday night dates. Those looming technological developments may warrant the judiciary to reconsider prospectively, the current balance of interest in favor of open court proceedings.[6]

There is some recent evidence that this haunting prediction is closer than we think. In the current news, we hear that the U.S. House of Representatives has just approved a "congressional disapproval" vote of privacy rules, which gives your internet service provider the right to sell your internet history to the highest bidder. This follows the same vote in the Senate in the prior week. Just prior to the vote, a White House spokesman said the president supported the bill, meaning that the decision will soon become law. This approval means that whoever you pay to provide you with internet access—Comcast, AT&T, Time Warner Cable, etc.—will be able to sell everything they know about your use of the internet to third parties without requiring your approval and without even informing you.[7] With such laws, the risk of widespread dissemination of private family court filings is more possible.

The Family Law Executive Committee believes the time predicted by Judge Sabatino is soon, and, accordingly, must be addressed in a way that protects children, family part litigants and all those third parties involved in their lives. For these reasons, we ask the committee to continue its expansion of the protections afforded family part litigants and their children in preventing harm to them through unwanted disclosure. With today's technology and the daily concerns regarding cyber-stalking, cyber-harassing and hacking, without these protections we may be creating a two-tiered justice system where those with the financial means will seek relief outside the court system to avoid potential exposure of their personal lives. ■

The author wishes to thank Lizanne J. Ceconi and other members of the NJSBA Family Law Section Subcommittee on Public Access to Family Court Records for their excellent report, which forms the basis of this column.

Endnotes

1. R. 1:38.
2. R. 1:38-3.
3. Effective Sept. 1, 2009, Rule 1:38 was replaced and renamed "Public Access to Court Records and Administrative Records." The new rule shifts the emphasis from "confidentiality" toward a presumption of "public access." It states that all court and administrative records within the custody and control of the Judiciary will be available for public inspection and copying unless the record is expressly exempted under one of the 38 exceptions listed in R. 1:38-3 (court records) or R. 1:38-5 (administrative records). The rule was designed to provide practitioners with an all-inclusive, single point of reference to enable them to easily determine which records were confidential and which would be available to the public—without having to consult a myriad of court rules, statutes and case law. The vast majority of exempted records, 30 out of 38, pertain to family matters and criminal matters. See https://www.law360.com/articles/164404/rule-1-38-and-presumption-of-public-access-to-records.
4. The report stated that the Supreme Court Family Practice Committee "Committee" issued its report for the 2015–2017 Rules Cycle on Jan. 20, 2017. This report was in response to a request for comments by Judge Grant, as acting administrative director of the courts.
5. 379 N.J. Super. 447 (Ch. Div. 2005).
6. *Id.* at 458-459.
7. https://www.theregister.co.uk/2017/03/28/congress_approves_sale_of_internet_histories/.

Executive Editor

How to Achieve a Reduction in the Number of Self-Represented Litigants

by Ronald G. Lieberman

In 2011, New Jersey Chief Justice Stuart Rabner established the Supreme Court Advisory Committee on Access and Fairness, in part because Justice Rabner recognized "the continued increase in the number of self-represented litigants…."[1] Also in 2011, the New Jersey State Bar Association, guided by then-President Susan Feeney, created a *pro bono* task force that, at its core, was designed to "encourage and expand pro bono legal services by the private bar."[2] In the task force's report, there was a belief that more and more individuals approaching the court system were unable to afford legal services as a result of the economic downturn.[3] The state bar's focus was on how to provide legal services to self-represented litigants who had unmet legal needs.

Although both the Supreme Court and the state bar were well meaning and made clear that there were certain legal needs that were not being met because individuals could not afford legal services, there is a bigger question. Are self-represented litigants self-represented because they cannot afford lawyers or because they cannot find lawyers they trust?

Individuals can find lawyers just about anywhere. The real questions are can a litigant obtain the information he or she would need in order to retain the lawyer and feel that there is a lawyer that can help him or her? It cannot simply be that the increase in self-represented litigants, as recognized by Chief Justice Rabner and the New Jersey State Bar Association, is merely a function and exclusively the result of the fact that litigants cannot afford lawyers. The issue requires some thought by practitioners regarding whether we are doing enough to help litigants find us, providing them with the information they need to feel comfortable retaining us, and making that information readily available to litigants who are searching for lawyers.

Family law attorneys are, at their core, problem solvers devoted to resolving intra-family dilemmas. It can be exhausting work, but those who practice in it find it is the most rewarding area of the law. Practitioners know from being present in court that the number of litigants who are self-represented seems to grow year after year. Does that mean the consumer is not finding a practitioner because the practitioner is unknown to the consumer? Are the consumers engaged with the legal market? Are the legal service providers transparent about what they are offering to allow the consumers to make informed purchasing decisions? The answers to these questions may not only shed light on why there are so many self-represented litigants, but may help reduce their numbers.

Anyone reading this article has made purchases of goods or services by presumably researching the quality, costs, and service provider itself. Why should the availability of the same information be different when it comes to a client seeking to hire an attorney?

It is this author's view that the unmet legal needs of the consumers bear some relationship to the lack of transparency or relative lack of information regarding an attorney's price, service, and advice. Removing these barriers to entry by consumers may allow for the expansion of attorneys' legal practices, driven by a consumer-based approach to offering legal services.

Family Law is a Unique Area of Law

In the family law arena, more so than in other areas of law, legal services tend to be based on one-off transactions rather than longer-term contracts for repeated services. In other words, few family law clients will come back over and over again once their initial legal services have been concluded. So, a consumer needs to be provided information about price, quality of service (such as the timeliness and responsiveness of service delivery to a client) and the quality of advice, because he or she will likely lack the experience to know how to obtain those facts on their own.

Family law is not a homogenous practice, nor can it be considered process-based like other areas of law, where it is easier for legal service providers (attorneys) to be more transparent about their offerings and for consumers (potential new clients) to compare those offerings. In the family law arena, every single case is different, making it difficult for consumers to determine the quality of the legal services, which can lead them to rely heavily on personal recommendations regarding legal service providers. Such referral sources may lack information about price, service, or advice regarding the attorney.

Clients routinely retain a family lawyer in distressed situations. While they may be able to make sophisticated choices in other circumstances, they may find it more difficult to seek alternate offers in the legal services arena when there is the added stress of the need to resolve an urgent family law matter.

Costs of Legal Services

How many practitioners have had clients ask for a price for a divorce or if the attorney will reduce his or her hourly rate or really needs the established retainer amount? These interactions should not be seen as barriers to retaining a client, but instead should be seen as a reflection of the lack of awareness consumers have about price, service, and advice.

The layperson who is not well-versed in the law may not understand the range of legal services available to him or her, or even the terminology being used. Clients retain attorneys for the resolution of a legal problem and for a diagnosis of what services need to be provided. When a practitioner meets with a potential new client, the attorney often learns that not only is there a family law issue, but there may be issues regarding the sale of a home, estate planning or will drafting, life insurance or other insurance coverages, tax issues, or even criminal problems. The need to purchase legal services is approached by the consumer with some trepidation and an innate feeling of a lack of knowledge.

Once a consumer has identified that he or she has a legal need, the consumer will then come to the attorney with a set of facts for which he or she would like assistance, while not necessarily knowing how the solution will unfold, and perhaps not knowing what specific relief they require. This imbalance of information, coupled with the lack of transparency on price, service, and advice, may cause the consumer not to engage in retaining legal services at all.

In addition to the sense by consumers that legal services are varied and difficult to understand, there is a general perception by consumers that these services are expensive, which then leads to their well-grounded concerns about cost and affordability. The perceptions of unaffordability and lack of readily accessible information about price, service, and advice contribute to consumers not seeking formal legal advice in the first place, which brings the author back to the current problem of the vast numbers of self-represented litigants.

Price Information

Practitioners should make it easy for consumers to learn about price, service, and advice. For starters, law firms' websites should be easily navigable, and such information should be readily available, so consumers can compare attorneys. This means having information available to the consumer at their research stage rather than at the point of engagement. It must be accurate in telling the consumer that the ultimate price will be decided by an understanding of the legal services needed and the extent of those services.

Practitioners know family law is highly dependent on individual circumstances, which need to be revealed before an attorney can offer accurate price information. But, information about price need not be confusing. It should be clearly stated so the consumer knows what to expect if he or she retains an attorney.

Creating and maintaining transparency about price upfront and on a website should not cause consternation in the legal community. After all, there is transparency in advertising to allow consumers to receive accurate information. Practitioners cannot tell a client how many hours it is going to take to resolve their divorce or other family law matter. Fact-finding is needed before any reasonable range of cost can be provided. Litigation strategy is driven by the strategy adopted by both sides, and there is the lack of knowledge about what the other side is likely to do. So long as the attorney ensures the consumer understands that the price is dependent upon the individual circumstances, having information about price makes it easier for consumers to understand and to compare the price offering among attorneys.

There is a salutary effect for attorneys in providing price information at the research stage, namely informing the first-time user of legal services what to expect from the attorney. In so doing, the attorney may be able to avoid potential fee arbitration or other billing

disputes later on. Retainer agreements spell out in detail the hourly rate to be charged, how time is charged, and other costs and fees that might be involved. But, the lack of consistency among attorneys in supplying price information, as well as the imbalance in knowledge that a consumer has about the law relative to the attorney, can make it difficult or create a minefield for a consumer seeking to retain a legal services provider.

Quality of Service and Quality of Advice

There needs to be discussion between the lawyer and consumer about the quality of service and the quality of the advice. The quality of service is the experience the clients receive, including communicating with the clients in layman's terms, offering alternatives to face-to-face meetings, and being responsive to questions. The attorney should commit to deliver such service. The quality of advice relates to technical quality, which is largely unobservable to consumers and probably, therefore, more difficult for them to gauge.

Despite the quality of advice being difficult to measure, no doubt most practitioners have spoken to clients whom, when deciding to switch attorneys, have stated that the legal services provided were not of the quality they wanted based on a gut feeling or a lack of trust in the other attorney. But when making the choice to initially retain the provider, most consumers likely cannot make the quality judgment up front.

So, what can a consumer use as a mechanism for determining quality of advice? There are published sites—Martindale-Hubbell, Super Lawyers, Avvo.com—that, unfortunately, are fraught with mischief, because even one bad review, no matter how unfounded, can turn off potential clients. There are accreditation opportunities, such as being certified by the New Jersey Supreme Court, which would signal a higher level of quality and the development of recognized experience. There are private legal organizations, which promote high standards in legal services and help consumers identify legal practitioners with a proven competency in family law.

Conclusion

Providing price information at a consumer's research stage will hopefully avoid the first significant hurdle for consumers in retaining legal service providers. Consumers likely want access to customer feedback about the attorney just as the readers of this article would like to have customer feedback before they make their own purchases of goods or services. The difficulties in understanding what legal services are available in the disparate family law arena, what the quality of the service will be, and the quality of advice that will be supplied make it less likely that consumers will retain an attorney, let alone compare among them.

All attorneys unfailingly subscribe to the Rules of Professional Conduct, which dictate that the client's needs are first and foremost. Attorneys should do what they can to avoid difficulties with clients regarding fee disputes and uncomfortable billing questions. Attorneys should strive to spend their time on furthering their client's interests and the overall interests of the practice of family law. By eliminating barriers to information about legal services, attorneys help consumers (future clients) understand what they do, what they charge, and how they provide quality legal services. Everyone will gain, and no one will be harmed, by a more consumer-driven approach to supplying legal services. ■

Endnotes

1. http://www.njcourts.gov/access/accessfairness.html.
2. htpps://tcms.njsba.com/personifyebusiness/portals/0/njbsa.pdf/resourcemainpage/probonotask forcereport.pdf.
3. *Ibid*. at 7.

Third-Party Intervention by Children in Divorce

by Marisa Lepore Hovanec

The vast majority of family law practitioners' cases are binary. That is, most of them involve just two parties, typically a set of divorcing spouses. Of course, there is the occasional need to implead a paramour or add to the action a friend or relative seeking payment of a 'loan' made to one or both parties during the marriage. However, these types of multi-party cases are most certainly the exception, rather than the rule. Given their relative infrequency, whenever such a case presents itself it often requires the practitioner open the rule books to remind him or herself of the procedural hurdles and steps involved.

Perhaps the most elusive of the multi-party actions a family law practitioner might face during his or her career is when a child of the parties seeks to become a third party to the action. In fact, the circumstances under which such an intervention is appropriate are so specific and limited it is quite possible a family law practitioner might go through his or her entire career without ever encountering a fact pattern that fits the mold. For that reason, this article is intended to serve as a primer for the family law practitioner to quickly discern those matters in which third-party intervention by a child in his or her parents' divorce may be appropriate from those matters in which it is not. And, in those matters where intervention is determined to be appropriate, to identify the procedural requirements associated with making the application to intervene.

Third-Party Intervention in General

Third-party intervention in an existing action is accomplished by way of motion to intervene. Motions to intervene come in two different forms: 1) intervention as of right, and 2) permissive intervention.[1]

Motions to intervene as of right are governed by Rule 4:33-1, which provides that:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[2]

In other words, an application to intervene must be granted as of right if the movant meets the following four criteria: 1) he or she claims "an interest relating to the property or transaction which is the subject of the action;" 2) he or she is "so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest;" 3) he or she demonstrates an interest that is not "adequately represented by existing parties;" and, 4) he or she makes a "timely" application to intervene.[3] This rule is not discretionary, so a court must approve an application for intervention as of right if the four criteria are satisfied.[4]

Where intervention of right is not allowed, one may seek to obtain permissive intervention. Applications for permissive intervention are governed by Rule 4:33-2, which provides that:

> Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.[5]

Permission to intervene is to be liberally construed in appropriate cases.[6]

Intervention By a Child in His or Her Parents' Divorce

New Jersey cases discussing the appropriateness of a child's application to intervene in his or her parents' divorce are few and far between. Even rarer are New Jersey cases granting a child's application to intervene in his or her parents' divorce. That said, the 1998 trial court decision in the matter of *White v. White* provides useful guidance in that regard.[7]

The relevant facts of *White v. White* are as follows: Mr. and Mrs. White were married for more than 29 years prior to their divorce.[8] There were two children born of their marriage, Brian and Laura. In the judgment of divorce dated May 10, 1995, the trial judge noted that Brian was 22 years old at the time, and emancipated.[9] Laura was not emancipated at the time of the divorce and the trial court granted Mr. White primary physical custody of her.[10] Mrs. White was ordered to pay Mr. White child support for Laura in the amount of $75 per week, and the parties were each required to contribute toward Laura's college expenses in proportion to his or her income.[11]

Several years after the parties were divorced, Brian, then 25 years old, and Laura, then 18 years old, filed a joint application to intervene in the matter post-judgment to pursue claims against Mrs. White.[12] The stated purpose of Laura's application to intervene was to require Mrs. White to pay her child support directly while she attended college full-time, and to further require Mrs. White to produce the appropriate financial information to determine what that direct child support amount should be.[13] The stated purpose of Brian's application to intervene was to have himself declared unemancipated and require Mrs. White to pay child support to him directly to help defer the cost of his attendance at county college.[14]

The trial court analyzed Brian and Laura's applications to intervene in their parents' divorce separately, by applying the four-prong test set forth in Rule 4:33-1 for intervention as of right, as well as the doctrine of permissive intervention (Rule 4:33-2), to the fact patterns offered by each of them. In doing so, the trial court came to opposite conclusions regarding Laura and Brian.

With respect to Laura, the court found that she was not entitled to intervene in her parents' divorce, either as of right or through permissive intervention.[15] As to intervention as of right, the trial court determined that Laura's rights were adequately represented by Mr. White, as her custodial parent.[16] As to permissive intervention, the trial court concluded it would prejudice the rights of one of the original parties, Mrs. White, because the very issues Laura sought to revisit were resolved by way of the parties' judgment of divorce.[17] And, even if Laura had asserted that the determinations in the judgment of divorce were rendered inequitable or unfair due to a change in circumstances (which she had not), the application to modify the judgment would be more appropriately raised by custodial parent Mr. White.[18] Finally, the trial court opined regarding third-party intervention by unemancipated children in divorce as a whole by quoting the Appellate Division's determination five years earlier in the matter of *Martinetti v. Hickman,*[19] that "so unseemly a course [as third-party intervention by a child] should be avoided wherever possible."[20]

As for Brian, the trial court granted his application to intervene, relying on his status as emancipated at the time of the divorce as the primary distinguishing factor.[21] More specifically, the court found that Brian's status as emancipated due to active service in the Navy at the time of the divorce did not foreclose him from thereafter seeking to be unemancipated due to his full-time attendance at college.[22] However, in view of Brian's legal status as emancipated, his parents were not authorized to act on his behalf in the existing litigation.[23] Accordingly, Brian's request to intervene was granted so his right to seek unemancipation could be adequately represented.[24]

Based on the foregoing, it is clear that in most scenarios a child who is unemancipated will not be allowed to intervene in his or her parents' divorce as of right. This is mainly so because that child's interests are assumed to be adequately represented by his or her parents in the divorce. Alternatively, in the event the child's interests are for some reason not adequately represented by the parents, the court, as *parens patriae*, has the responsibility to adequately represent them.[25] As to whether permissive intervention of an unemancipated child might be allowed, the answer is less clear given the case law available. However, in light of the clear preference at all levels of the Judiciary to avoid intervention "wherever possible," it is hard to envision a scenario where intervention not available as of right might be permitted nonetheless.[26]

On the other hand, the interests of a child who is or has been emancipated are, by definition, not represented in his or her parents' divorce. As such, intervention as of right is a possibility under the right circumstances. One such set of circumstances is the fact pattern set forth in *White*, where an emancipated child is seeking to be

unemancipated or otherwise create a support obligation to him or her on behalf of the parents. Another such fact pattern, recently encountered by the author, involved an emancipated child seeking to enforce a promise by his parents to repay the student loans he incurred during his undergraduate education when one parent declined to acknowledge them as a marital debt during her divorce from the other. In each of these fact patterns, the child demonstrated an interest relating to the divorce that could be impacted by the disposition of the divorce or post-judgment matter but was not adequately represented by the parties to the divorce (*i.e.*, his parents) due to his status as emancipated. As such, intervention as of right was appropriate.

Third-party intervention in divorce by an emancipated child may also be more palatable to a court than intervention by an unemancipated child. Presumably, the policy of avoiding intervention by children in divorce "wherever possible" is associated with the youth and impressionability of the child.[27] As such, when the child seeking to intervene is emancipated, and likely older and more experienced, the court may be less concerned about the emotional damage the intervention could cause him or her, and, therefore, less inclined to disallow the intervention for policy reasons.

Procedural Requirements for Application to Intervene

Once the circumstances giving rise to intervention by the child have been ascertained, the court rules provide that the person desiring to intervene shall file and serve on all parties a motion stating the grounds for intervention, as well as a proposed pleading setting forth the claim for defense for which intervention is sought.[28] Rule 4:33-3 also provides that a case information statement pursuant to Rule 4:5-1(b)(1) (for civil actions or foreclosure matters) should be submitted with the motion to intervene.[29] However, insofar as family matters generally do not involve such case information statements, this requirement would not apply to a child seeking to intervene in divorce. It is also required that the motion be submitted not only with the filing fee associated with filing a motion, but also with the filing fee associated with filing the proposed pleading.[30] However, the filing fee for the pleading will be returned if the motion to intervene is denied.[31]

As a final matter, although not required by the court rules, the best practice would also be to prepare and submit a detailed letter brief with the motion to intervene. Due to the infrequency of such applications in the family part, many family judges, and their law clerks, could understandably be unfamiliar with the law and procedural requirements of such applications.

Conclusion

The circumstances under which third-party intervention by a child in his or her parents' divorce is considered appropriate are extremely limited. Thus, careful consideration should be given to the specific facts of the case, including the child's emancipation status, before recommending such a course of action. That said, if or when the right fact pattern presents itself, the family law practitioner should be prepared to meet the procedural requirements associated with the motion to intervene, and also educate the family law judge and his or her law clerk on the relevant legal standard given the relative infrequency of such applications in the family law context. ■

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Endnotes

1. *See* R. 4:33-1 and R. 4:33-2.
2. R. 4:33-1.
3. *Meehan v. K.D. Partners, L.P.*, 317 N.J. Super. 563, 568 (App. Div. 1998) (*quoting Chesterbrooke Ltd. P'ship v. Planning Bd.*, 237 N.J. Super. 118, 124 (App. Div. 1989), *certif. denied*, 118 N.J. 234 (1989)).
4. *Id.*
5. R. 4:33-2.

6. *Atlantic Employers v. Tots and Toddlers*, 239 N.J. Super. 276, 280 (App. Div. 1990), *certif. denied*, 122 N.J. 147 (1990).
7. *White v. White*, 313 N.J. Super. 637 (Ch. Div. 1998).
8. *Id*. at 639.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*. at 640.
14. *Id*.
15. *Id*. at 640-41.
16. *Id*. at 641 (*citing Johnson v. Bradbury*, 233 N.J. Super. 129, 136 (App. Div. 1989), which held that the right to seek or enforce a parental obligation for college expenses "is enforceable not only at the instance of a custodial parent against a non-custodial parent, but at the child's instance as well").
17. *Id*.
18. *Id*.
19. 261 N.J. Super. 508, 513 (App. Div. 1993), wherein the Appellate Division admonished the trial court's suggestion that a child proceed against either parent for his or her fair contribution toward college expenses whereas either parent has the right to proceed on behalf of an unemancipated child for relief in that regard.
20. *Id*.
21. *Id*. at 643.
22. *Id*. at 643-44.
23. *Id*. at 643.
24. *Id*.
25. *See Vannucchi v. Vannucchi*, 113 N.J. Super. 40, 47 (App. Div. 1970*), certif. denied*, 58 N.J. 163 (1971).
26. *Johnson*, 233 N.J. Super. 129, 136.
27. *Id*.
28. R. 4:33-3.
29. *Id*.
30. *Id*.
31. *Id*.

Black v. Black: Anticipating College Expenses for All Children When Deciding Parents' Obligations for One Child

by Amy L. Miller and Allison Heaney Lamson

Divorcing parties, particularly those with young children at the time of their divorce, are often unable (or unwilling) to determine and agree upon their respective obligations to contribute to their children's post-secondary educational expenses.[1] To postpone a precise determination, a marital settlement agreement may contain boilerplate language indicating the parties' intent to contribute to college without articulating any further details. By postponing this determination, parties may generate further litigation down the road, forcing them to ask the court to determine the extent of each parent's obligation when the issue is finally ripe.

In a published Chancery Division decision from Judge Lawrence Jones, the case of *Black v. Black*[2] emphasizes the importance of considering younger siblings' college aspirations and needs in connection with the analysis of the parents' obligation to contribute to an older child's college expenses. Just as an intact family's budget and spending on each child would be influenced by the needs (and number) of children, *Black* encourages family law practitioners to avoid analyzing each child in a vacuum. Further, *Black* provides a framework for allocating limited funds among all of the children at the time the first child will be attending college. This approach strikes a balance between the parents' obligation to contribute and their ability to do so for all of the children.

Background Case Law

To determine the extent of a parent's obligation to contribute to post-secondary education expenses, family courts consider the factors articulated in the seminal case of *Newburgh v. Arrigo*,[3] including:

1) whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education;
2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education;
3) the amount of the contribution sought by the child for the cost of higher education;
4) the ability of the parent to pay that cost;
5) the relationship of the requested contribution to the kind of school or course of study sought by the child;
6) the financial resources of both parents;
7) the commitment to and aptitude of the child for the requested education;
8) the financial resources of the child, including assets owned individually or held in custodianship or trust;
9) the ability of the child to earn income during the school year or on vacation;
10) the availability of financial aid in the form of college grants and loans;
11) the child's relationship to the paying parent, including mutual affection and shared goals, as well as responsiveness to parental advice and guidance; and
12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.

The breadth of these factors allows the court latitude to apply other equitable considerations. *Black*[4] details three more specific considerations for the *Newburgh* analysis, as follows:

Absent a compelling reason to the contrary and "when there is a damaged relationship between a college-aged student and a parent,"[5] a court may order a college-aged student and his or her parent to engage in joint counseling as a condition of that child receiving contribution from the parent toward college tuition.

The potential for the child to attend a state college or a less-costly college is a relevant consideration, rather than simply looking to the child's first choice.

While the *Newburgh* factors shall still be considered in determining a parent's college contribution, a case may

present circumstances for the court to consider other relevant factors, such as whether the child/student has younger siblings who are also likely to attend college. If so, a plan may need to be established to allocate funding resources for all of the children, not just exhausting those resources on the child who is first to attend college.

The focus of this article is on the third consideration detailed in *Black*: How does the existence of younger siblings, particularly those who are "relatively close in age," impact a parent's obligation to contribute to the college expenses of the older child? Although the existence of younger siblings is not a factor that is specifically articulated in *Newburgh*, Judge Jones aptly found equity requires the court to consider all of the children in the family.

The court further observed that the relationship between college tuition costs and younger siblings has rarely been addressed, citing only one nearly 30-year-old reported opinion. In *Enrico v. Goldsmith*,[6] the Appellate Division criticized the trial court for failing to consider the parties' younger daughter, who would similarly aspire to attend college. The appellate court viewed the trial court's failure to "evaluate or anticipate" the age differential between the parties' children, which might result in both children being in college at the same time, to be flawed.

As planning for younger children's college expenses may inevitably limit how much a parent is able to contribute on behalf of the eldest college-attending child, Judge Jones called attention to this factual consideration that may not have received sufficient attention in case law to date.

Looking at the Other Children

The *Black* court acknowledged an additional factor, "which was not expressly addressed by the *Newburgh* court, but which was material" in the facts presented in the *Black* matter.[7] This factor, which is likely a frequent issue, may not be given sufficient consideration:

> When there are other, younger children in the family, who are good students and who are relatively close in age to an older, college-age sibling, this can be a relevant factor in determining how much money the parents should apply towards the oldest child's college education.[8]

Notably, the *Newburgh* factors do not include a catch-all term, like the alimony statute, to indicate "Any other factors the court may deem relevant."[9] However, Judge Jones' reasoning adds a factor for courts to consider without specifying to which *Newburgh* factor it applies, and leaves room for trial courts to contemplate other, commonsense factors.

Judge Jones could have easily couched the consideration regarding younger children in the analysis of "the ability of the parent to pay" or "the financial resources of both parents," as saving for the younger children's college expenses may inevitably limit how much a parent is able to contribute on behalf of the eldest child. However, his decision to specifically address this issue, which was not addressed in *Newburgh,* suggests it is of such import that it warrants consideration as a stand-alone factor.

It is worth noting the potential for future litigation based on the inherent contrapositive of the holding: If there is only one child who is likely to attend college, then perhaps a parent has a greater obligation to contribute because the existence of younger children need not be considered.

Institution of an *Ad Hoc* "College Savings Program"

Although the issue of a younger sibling's post-secondary schooling expenses may not be ripe at the time an application is made regarding college contribution for an elder sibling, the *Black* court suggests a framework for trial courts to holistically and fairly budget so funds are available for the younger sibling(s). Notably, in *Black* this "college savings program"[10] was instituted by the trial court after the parties' eldest child had already commenced college and the parties had not independently saved in anticipation of the children's college expenses.

In determining a college savings program, the *Black* court first looked at the age of all three children and anticipated the parties would be making contributions to post-secondary education for a total period of eight years, assuming each child would attend a four-year institution. Next, the court looked at the parties' ability to contribute, and found "the parties have the reasonable ability to contribute a limited, combined total of $7,500 per year [for eight years], allocated between three college savings plans to be established and specifically earmarked for all three children's potential college costs."[11] Then, the court determined each party's respective share of the $7,500 annually while acknowledging the source of the funds will need to be determined by the parties and may come from income,[12] assets, and other resources, including parent loans.

Lastly, the court determined that each parent's monthly contribution should be divided between three college savings accounts in such a manner to allow each account to be equally funded. The court noted if college for a particular child is less than the amount set aside for each child's college costs, then the remaining funds may be refunded to the parents or reallocated. However, while each child would receive the same total amount of funds toward his or her college tuition/costs, the court took the determination further; it created a detailed chart fixing each party's monthly payment, and then allocated the funds to the children in different amounts at different times so each child would, over time, yield the same amount toward his or her college expenses.

Benefits of Establishing This Type of Savings Plan

Not only did Judge Jones further the *Newburgh* determination for future practitioners, but he further articulated the benefits of instituting this type of plan:

Budgeting: By creating this "systematic and manageable college savings program between divorced parents,"[13] it allows the parties to contribute the same, fixed amount each month, regardless of how many children are in college at any given time. Thus, implementing this plan provides security to the parents as they will know exactly how much the obligation is every month, throughout all of the children's matriculation in college.

Equal Treatment of All Children: The children are treated equally from the start of the first child attending college, rather than the first child receiving all the present and future available funds, leaving little to nothing left for any child who follows.

Provides Guidance to the Child: The child can now know in advance how much he or she shall receive, in total, from parent contributions. The child can take this into consideration along with how much will be received from grants, loans and scholarships, and can then determine how much he or she may have to contribute. This advanced knowledge allows the child to make his or her decision as to the choice of school, having full information at the outset, and thus the child may decide he or she cannot attend the 'first choice.'

Mitigation of Return to Court: By creating a plan for college contribution for all children before the first child attends college, and by creating a plan for a fixed, monthly contribution, the likelihood of the parties returning to court for college contribution issues should be mitigated. Certainly, there may be a substantial change in circumstances in the future that could warrant a return to court (*i.e.*, a parent's financial circumstances significantly change for the better or for the worse), but creating a plan that takes into consideration all children's college expenses should still lessen the likelihood of a return to court.

Practical Application in Drafting Matrimonial Settlement Agreements

The situation that arose in *Black* was characterized as one in which the parties were unable or failed to save for their children's post-secondary education expenses. The court indicated:

> [T]his example helps underscore the economic reality that when parents save nothing for college until their oldest child's senior year of high school, and then at the last minute hurriedly pull from all available economic resources such as surplus income, assets, and loan capacities solely to help fund their first child's education, they may in fact be potentially sacrificing the educational opportunities of the younger children solely for the sake of the oldest child.[14]

The approach for contributing to college set forth in *Black* could easily be incorporated into a matrimonial settlement agreement, even if the total contribution or the distribution between the parties is unknown at the time of the divorce. Of course, the parties could attempt to define the amount they are able to contribute toward the children's college expenses in advance, for example, by articulating that each party should be required to pay a certain percentage of his or her gross annual income.

If the plan cannot be created at the time of divorce, then before the first child attends college the parties could attempt to create a financial plan using the approach in *Black* as their guide and taking into consideration *all* children, rather than just the first college-attending child.

Future Applications of the *Black* Holding

Given the limited attention the issue has garnered to date, there are a variety of future applications that can be anticipated. For example, what if the younger siblings are from a different relationship? Does the same holding apply? Judge Jones alludes to this concept by analogizing

the consideration of younger children's college expenses to the use of an other dependent deduction in a child support calculation. However, the contractual nature of matrimonial settlement agreements may suggest that a spouse's agreed upon obligation to provide for his or her children should not be impinged upon by his or her decision to have additional children.

Another interesting aspect of the *Black* case is the court's indication that the existence of younger siblings "can be" a relevant factor. Under what circumstances is the presence of younger siblings who are good students and relatively close in age *not* relevant? Perhaps with an increase in the parties' combined income, the existence of several children close in age becomes decreasingly relevant.

Perhaps the most consequential aspect of the *Black* case is its demonstration that the analysis of college contribution should be elastic and able to account for facts that may not easily fall under one of the *Newburgh* factors. By reading in an additional factor, the *Black* court has firmly rooted its analysis in equitable considerations and elevated the status of the particular consideration of multiple, college-bound children.

Conclusion

The *Black* court noted that a parent cannot provide all financial resources to the child who is first in line to attend college. The court stated, "a family court order which essentially requires parents to exhaust all reasonably available funding resources on the oldest child's tuition may be causing a significant inequity and disservice to the younger children in the collegiate pipeline."[15]

In determining the amount to be contributed to that first college-attending child's tuition and expenses, one must also look to whether there are younger siblings, whether those younger siblings are good students, and whether they are close in age to the first college-attending child, and thus will soon be attending college as well. These facts will help determine how much money is, and is not, available to be provided to the first child who is attending college. ■

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Endnotes

1. For the sake of brevity, the terms 'college' and 'post-secondary education' are used interchangeably. The application of this case would likely differ had the parents anticipated a nontraditional form of post-secondary education, such as trade school. In that event, the cost and length of schooling may likely differ.
2. *Black v. Black*, 436 N.J. Super. 130 (Ch. Div. 2013).
3. *Newburgh v. Arrigo*, 88 N.J. 529, 545 (1982).
4. *Ibid*.
5. *Black*, 436 N.J. Super. at 134.
6. *Enrico v. Goldsmith*, 237 N.J. Super. 572, 577 (App. Div. 1990)
7. *Black, supra*, 436 N.J. Super. at 152.
8. Ibid.
9. N.J.S.A. 2A:34-23 (a)(10).
10. *Black, supra*, 436 N.J. Super. at 157.
11. *Id*. at 156.
12. *Id*. (noting income can include the alimony received by the ex-wife).
13. *Id*. at 157.
14. *Id*. at 153.
15. *Id*. at 153.

Family Law Arbitration: Yes, There Really are Court Rules

by Noel S. Tonneman

In 2009, the New Jersey Supreme Court decided *Fawzy v. Fawzy*,[1] which was soon followed by *Johnson v. Johnson*.[2] These cases directed the New Jersey Supreme Court Family Practice Committee to develop forms and procedures for the arbitration of family law matters pursuant to the Uniform Arbitration Act (UAA)[3] and the Alternative Procedure for Dispute Resolution Act (APDRA).[4]

After six years of effort, first by the Supreme Court Family Practice Committee and then by the Supreme Court *Ad Hoc* Committee on the Arbitration of Family Matters (the committee), the Supreme Court adopted the report of the committee, with virtually no changes, in the 2016 edition of the Rules of Court. Despite the passage of 21 months since the report was adopted, there are lawyers and judges who are unaware of the existence of court rules that define the process of arbitration in family part matters.

This article will focus on the court rules regarding arbitration, the application and misapplication of these rules, the rules that work and those that need to be fine tuned, and the manner in which the bench and bar can work together to achieve the maximum benefit from this powerful alternative dispute resolution (ADR) tool.

To understand the rules for family arbitration, one must first realize these rules exist.

There are four rules that address family law arbitration: Rule 4:21A-1(f), Rule 5:1-4, Rule 5:1-5, and Rule 5:3-8. Rule 4:21A-1 addresses civil arbitration and specifically directs that arbitration of family part matters shall be governed by Rule 5:1-5.

Rule 5:1-4 provides for an arbitration track assignment, while Rule 5:1-5 sets out the requirements that must be satisfied to arbitrate a family law matter. Rule 5:3-8 sets forth the bases to confirm or set aside the award.

The Arbitration Track

Rule 5:1-5(a) provides that virtually any issue in dispute between parties to any proceeding heard in the family part may be submitted to arbitration. The very limited exceptions to arbitrable issues are listed in that rule.[5]

There are three documents that must be executed: the agreement to arbitrate, the arbitration questionnaire, and the arbitrator disclosure form. Forms for each of these required documents are found in the appendix to the rules at Appendix XXIX-A through XXIX-D.

There is no requirement that all issues in dispute must be submitted to arbitration. The agreement to arbitrate must identify the issues to be arbitrated, and it will only be those issues that the arbitrator will have jurisdiction to decide. The agreement to arbitrate will outline the procedures to be used and will address the right of review of any arbitration award.

The arbitration questionnaire must be executed by each party. By executing the questionnaire, the parties acknowledge they are waiving or otherwise limiting certain significant rights. These rights include a waiver of the right to trial by a judge of the issues in dispute and a limitation on the right to review by the Appellate Division. The parties also acknowledge their understanding of the very limited circumstances under which a challenge to the arbitration award can be made. By executing the questionnaire, and thereby acknowledging an understanding of the arbitration process in which they are about to participate, the integrity of the process is upheld.

The final document is the arbitrator disclosure form. It is a very detailed questionnaire the arbitrator must complete, identifying any and all possible connections the arbitrator, including his or her law firm and his or her household members, might have with any of the participants in the arbitration. The conflicts, whether actual or not, may be waived. The arbitrator is under a continuing duty to update his or her responses should circumstances so require, and failure to do so may be grounds to vacate the award.

There is no rule that requires the filing of the agreement to arbitrate or related documents. However, unless these documents have been signed, any effort to confirm an arbitration award will be unsuccessful if challenged. If the matter is not in litigation, the executed docu-

ments may be presented with the motion to confirm the award.[6] If the matter is in litigation, it is best to attach the agreement to arbitrate, with the executed questionnaire attached, to a consent order. By doing so, the court is aware of the issues being arbitrated, which are no longer under the jurisdiction of the court.

Once the agreement to arbitrate and the arbitration questionnaires are executed, the case may be placed on the arbitration track. The arbitration track was first provided for in the 2016 rules, and is found in Rule 5:1-4.

Unlike other track assignments, assignment to the arbitration track shall only be with the consent of the parties and counsel. A case cannot be assigned to the arbitration track by the court. Similarly, once assigned to the arbitration track, the matter cannot be reassigned to another track unless all parties agree. This rule underscores the fact that arbitration is a voluntary process in which the parties have agreed to participate, and the court may not override that agreement if the required documents have been executed.

The track assignments of Rule 5:1-4 control calendaring issues and discovery deadlines. Depending upon track assignment, discovery deadlines are imposed pursuant to Rule 5:5-1(e).

Unlike other track assignments, which are to be made "as soon as practicable" after the earlier of the filing of case information statements (CISs) or the first case management conference, Rule 5:1-4(a)(5) provides that the assignment to the arbitration track may occur at any point in the proceeding. Once on the arbitration track, the arbitration is to proceed pursuant to Rule 5:1-5. Issues that are not resolved in arbitration shall be addressed in mediation or by the court after the disposition of the arbitration. This reflects the fact that not all issues before the court need to be submitted to arbitration.

Rule 5:1-5(c) then provides that any action pending when the agreement or consent order to arbitrate is reached shall be placed on the arbitration track "for no more than one year following Arbitration Track assignment, which term may be extended by the court for good cause shown. Cases assigned to the Arbitration Track should be given scheduling consideration when fixing court appearances in other matters." There is no authority for the dismissal of a case when it enters arbitration. There is also no mention of any discovery deadline for matters on the arbitration track in Rule 5:5-1(e).

At this juncture, the case should be off the court's radar and calendar, at least regarding the issues the parties agreed to arbitrate, and the issues should now be under the control of the arbitrator.

The Arbitration Process and Confirmation of the Award

The next step is to arbitrate the issue(s) agreed upon in the agreement to arbitrate. In general, the arbitrator controls the process pursuant to the agreement to arbitrate. Upon conclusion, the arbitrator issues an award. Since the arbitrator cannot enter an order or judgment, the arbitration award is now presented to the court for confirmation as an order. That process is controlled by Rule 5:3-8.

If the matter is pending in court, the application is to be made by motion. However, the court rule specifically provides that the return date for the motion may be shortened by the court. Past practice has been for arbitration awards, especially interim arbitration awards, to be submitted by way of consent order. Although the rule is silent on that procedure, there seems to be no reason why a court would not file a consent order that simply stated the attached arbitration award "shall be and the same is hereby entered as an order of the court."

If the matter is not in litigation, confirmation is requested summarily pursuant to Rule 5:4-1. Again, although the court rule is silent, there should be no objection to the submission of a post-judgment consent order to confirm an arbitration award.

There will be circumstances when a party will object to confirmation. In most cases, the bases to modify or vacate an arbitration award will be clearly set forth in the agreement to arbitrate. The court's role is to either confirm, vacate, modify or correct the award pursuant to the parties' agreement to arbitrate. However, Rule 5:3-8(b) and (c) set forth additional grounds to vacate an arbitration award that involve parenting time, custody or child support, although these terms should be included in the agreement to arbitrate.

An award of child custody or parenting time shall be confirmed unless the court finds a record of documentary evidence has not been kept; no detailed findings of facts or conclusions of law were made; a verbatim record of the proceedings was not made; or there is evidential support establishing a *prima facie* case of harm to a child.

If no verbatim record had been made, the award is subject to vacation and review *de novo* by the court. If a *prima facie* case of harm is established, the court shall conduct a hearing. If there is then a finding of harm, the

award is vacated and the court determines *de novo* the child's best interest; if there is no finding of harm, the award is confirmed.

With regard to a child support award, the award shall be confirmed unless the court finds there is evidential support establishing a *prima face* case of harm to a child. In that event, the court conducts a hearing. If, after the hearing, there is a finding of harm, the court shall vacate the award and determine *de novo* the child's best interest.

It should be clear that under all circumstances the burden to set aside an award from a properly conducted arbitration is high.

Arbitration provides advantages for all involved. The court is relieved of a case that would consume time on the calendar; the clients can achieve confidentiality and control over scheduling; the lawyers can tailor presentations beyond the limitation of customary courtroom procedure; and a more prompt resolution can be obtained for the benefit of all.

Why, then, has there not been a universal embrace of the family law arbitration process by the bench, bar, and public? There are many reasons, and they depend upon the role of the player.

Concerns of the Participants and the Court

For the attorneys, the negotiation of the agreement to arbitrate pursuant to the requirements of Rule 5:1-5 is, at times, a Herculean feat. All too often the negotiations fail, and no agreement is reached.

There are form arbitration agreements in the appendix to the court rules. Appendix XXIX-B is the form arbitration agreement based upon the UAA, while Appendix XXIX-C is based upon the APDRA. The attorneys must first understand the major differences between these two statutes in order to decide which form to use.

One of the more difficult issues to agree upon is the extent of review of an arbitration award. This issue is one of the more significant distinctions between the UAA and APDRA. Under the APDRA, there are more extensive written submissions by counsel and the umpire (the APDRA does not use any form of the word 'arbitrate'). The award of the umpire shall be in writing and "shall state findings of all relevant facts, and make all applicable determinations of law."[7] As a result, an award may be modified or vacated if it is found that the rights of the complaining party "were prejudiced by the umpire erroneously applying law to the issues and facts presented for alternative resolution."[8] Once an award under the APDRA is confirmed by the trial court, there is no further statutory right to further appeal or review.[9]

No such comparable level of review at the trial court level is found in the UAA. Pursuant to the UAA, the arbitrator is not obligated to state reasons for its award, or to apply the law of the state of New Jersey. The award of the arbitrator must simply be "in writing."[10] Modification or vacation of the award is based upon extremely limited grounds.[11] However, a trial court's order confirming or denying confirmation of the award or from a final judgment entered can be appealed pursuant to the UAA.[12]

While the UAA and APDRA are the statutory authorities in New Jersey that authorize arbitration, Rule 5:1-5 does not limit litigants to the confines of these statutes. The rule provides that a litigant may proceed under "any other agreed upon framework for arbitration or resolution of disputes between and among parties to any proceeding heard in the family part...."[13] Thus, you may choose to start with one of the form agreements and add provisions from the other form to create an agreement that works best for the case. The rule provides the attorneys with the ability to craft an agreement tailored to the needs of the parties and the issues, but this, in and of itself, is often the cause of conflict. No one form is suitable for all cases. The bottom line is that it takes a lot of time and effort to create the required agreement to arbitrate.

From the clients' perspective, there are several concerns that may result in a resistance to arbitration. For example, a client may be wary of his or her perceived limitation on the right of review in the event he or she disagrees with the decision. A client may express discomfort that 'someone in a black robe' will not be rendering a decision. The cost of arbitration is also a concern of the client. A client must pay an arbitrator for its work, but not the judge. Each of these concerns can and must be addressed by the attorney.

The bench has its concerns. There is a plethora of case law in this state regarding family law arbitration. In each, the court was asked to determine the viability of the arbitration award or the process. This often resulted in the need for a plenary hearing, requiring the court to spend almost as much time trying to determine whether an award should be upheld as it would have spent trying the entire case.[14] These cases pre-date the new court rules.

Fawzy confirmed the right to arbitrate family law disputes, including custody. *Fawzy* also set out the procedural safeguards for the arbitration of custody disputes, which were further expanded in *Johnson* and *Minkowitz*.

Indeed, it was the pronouncements made in *Fawzy* and subsequent case law that led to the creation of the current family part arbitration rules.

The most obvious concern of the bench is that there is no 'code' for the arbitration track. Therefore, cases that are in arbitration but are more than one year old according to the docket are now 'aged.' This affects a judge's reportings and statistics, and places unnecessary pressure on the judge to whom the case has been assigned.

The court rules do not explicitly state that issues in arbitration are under the exclusive jurisdiction of the arbitrator, except for review of awards. That appears to be the root cause of some courts continuing supervision of matters that are in arbitration. However, the arbitration process envisions a 'hands-off' approach from the court. Indeed, the APDRA provides that the court shall stay the court action involving any issue subject to arbitration,[15] while the UAA states that any judicial proceeding that involves a claim subject to arbitration shall be stayed, on just terms.[16] While the form agreements do not track that language, both do provide that the issues in arbitration "shall be subject to the jurisdiction of and determination by the arbitrator."[17] The arbitration questionnaire makes it clear the client will waive the right to trial by proceeding with arbitration. Thus, while it may be presumed that sole jurisdiction of the issues being arbitrated rests with the arbitrator, the rule is not explicit.

These concerns often result in required court conferences while the arbitration is proceeding in order to 'report back' on the status of the arbitration proceeding, which may occur the day the arbitration is scheduled. This is inconsistent with the concept of arbitration. When attorneys are called in for conferences after being placed on the arbitration track, it may be difficult to explain this conference to a client, since one of the advantages of arbitration is the avoidance of court time and its attendant costs.

A reasonable justification for the court to require attorneys to report back on the progress of arbitration during its one-year track assignment occurs when the case has been 'dual tracked.'

Rule 5:1-4(c) allows for the assignment of certain issues to the arbitration track while the balance of the issues are assigned to a different track under the court's control. The solution appears to be a dual designation of the arbitration and complex tracks, so the court can manage the various aspects of the case. This seems intuitively logical, but there appears to be no ability to report that dual tracking based upon the statistical reporting that is now required of judges.

The last sentence of Rule 5:1-4(a)(5) states that "[i]ssues not resolved in arbitration shall be addressed in a separate mediation process or by the court after disposition of the arbitration." This statement leaves room for interpretation of how to proceed.

By definition, arbitration is a resolution of the issues. The logical conclusion is that the only issues not resolved by arbitration would be those not submitted to arbitration.

It may not be necessary to wait until the end of the arbitration process to resolve the other issues. For example, if the issue in arbitration is the validity of a prenuptial agreement, then the parties may proceed through the court to resolve another issue, such as custody. Admittedly, financial issues, such as support and equitable distribution, may need to await the resolution of arbitration of the validity of the prenuptial agreement. However, this would not preclude moving forward with the judicial resolution of custody.

The rules do not provide the court with clear direction on how to handle the bifurcation of the issues, a problem that is compounded by its reporting requirements.

Perhaps the most difficult role in the process is that of the arbitrator. An arbitrator is not a judge. An arbitrator may not be bound to apply the rules of evidence. An arbitrator may direct the presentation of witnesses, or take greater control of the proceedings than a judge might otherwise do. An arbitrator has a greater duty to disclose potential conflicts as a result of the all-encompassing arbitrator disclosure form. But, like a judge, an arbitrator is a neutral decision-maker, not a mediator.

The task of making significant decisions that will affect a family's future is a difficult one. Maintaining the role of neutral decision-maker may strain a friendship, and ruling against a colleague's client on a hard-fought issue may destroy the friendship. Before accepting appointment as the arbitrator, these concerns should be fully explored. Once the role has been accepted, it is incumbent upon the arbitrator to maintain control of the proceedings and render a decision promptly.

Reconciling the Concerns

Each participant in the arbitration process has a different role, but the goal should be the same: fair and expeditious out-of-court resolution of disputes.

It is incumbent upon the attorneys to enter into the arbitration process with a thorough understanding of the rules. If there is an issue that belongs in arbitration, the

client should be made aware of it immediately. The client needs to be educated about the process and involved in the discussions concerning the details of any proposed agreement to arbitrate. The attorney should begin to draft the agreement to arbitrate in consultation with the adversary, sooner rather than later. Even a limited issue arbitration may have complicated procedural issues, which may take time to resolve.

Often, the first issue counsel and the parties focus on is the right of review of the arbitration award. The suggestion, however, is to first focus on the issue or issues in dispute.

There is no requirement to arbitrate every issue that is otherwise before the court. For example, the parties may agree to arbitrate the validity of a prenuptial agreement, the value of a business, or a spouse's entitlement to the other spouse's interest in a premarital business. Alternatively, the parties may agree to arbitrate issues of custody or parenting time of the children only. Perhaps it is a post-judgment issue of credits and debits upon the sale of the marital home. The issues to be arbitrated may dictate many other terms of the agreement.

For example, finality may be the goal for a single-issue arbitration such as the credits and debits on sale of the marital home. As a result, a limited right of review, or perhaps no right of review except for correction of clerical errors, may be appropriate. Findings of facts and conclusions of law may not be necessary, reducing the cost of the arbitration process.

For more complex or multiple issues, the parties may choose to add 'mistake of law' as a reviewable event pursuant to an agreement under the UAA. The parties may agree to a private appellate arbitrator or private appellate panel. Indeed, providing for such further review of an arbitrator's decision often removes one of the client's strongest objections to the arbitration process. Requirements for a reviewable award may include a provision that a record of the underlying process has been maintained, something that is not otherwise required unless arbitrating a parenting time or custody issue.

If the parties are in the middle of the divorce process, consider whether there is an unresolved issue that is preventing settlement. For example, if there is no agreement on the value of a business, arbitrate that issue only. Not only will it be able to be arbitrated before a decision-maker who is familiar with business valuation concepts, but the court will appreciate the resolution of an issue that would otherwise consume extensive trial time. Once the business is valued, settlement negotiations will be more productive and a settlement more likely to be achieved.

A request for placement on the arbitration track should never be made or granted unless there is a signed agreement to arbitrate and the required arbitration questionnaires have been signed. It is not a process that can be rushed. If the attorneys and litigants are present in court for a pretrial conference, and the concept of arbitration has been accepted but not yet confirmed in writing with a detailed agreement to arbitrate, counsel should be given a limited period of time to submit the required documents. Unless the litigants have sufficient time to discuss and consider the terms and ramifications of the arbitration process into which they are going to enter, the court may be faced with the application to deny confirmation of any resulting award. If the case is approaching trial time, perhaps the scheduling order might require the filing of trial briefs by a date certain if the required arbitration documents are not submitted prior to that time. This would encourage the parties to either resolve the agreement to arbitrate or confirm that arbitration will not proceed without further delaying resolution on the court's calendar.

Once on the arbitration track, the arbitrator needs to control the process, in discovery, scheduling, and the hearing. This may mean the arbitrator must tell his or her colleague there will be no more adjournments, that certain evidence will or will not be admitted, or that certain penalties may be imposed if deadlines are not met. One of the goals of arbitration is often an expeditious resolution of the issues. By adhering to the schedules fixed by the arbitrator, even the more complex arbitrations should be resolved within the one-year track assignment. If the deadlines and hearing dates have all been met and held as scheduled, the 'good cause' exception for extension of the one-year track assignment is more likely to be granted.

Unless the case is 'dual tracked,' there should be no further court-initiated actions while the case is on the arbitration track. To resolve the jurisdictional issue, consider adding to the agreement to arbitrate specific language stating that the issues in arbitration shall be under the exclusive jurisdiction of the arbitrator, except for confirmation, modification, correction or vacation of an award, and that all judicially initiated actions concerning the issues in arbitration shall be stayed while the issues are in arbitration. This will then become a court order when incorporated into a consent order filed with the court.

As a courtesy, voluntarily advise the court of the status of the arbitration. This can easily be accomplished by submitting interim awards of the arbitrator to the court for confirmation. This allows the court to track the status of the arbitration without the necessity of spending court time on conferences. For example, submitting an award setting arbitration dates to the court in the form of a consent order that grants peremptory status to those arbitration dates not only advises the court the practitioner is proceeding with a hearing, but potentially minimizes scheduling conflicts with other matters. Arbitration events should be given the same level of respect as a court event.

For cases that are dual tracked, there may be no need for the court to wait until after the arbitration process to address the remaining issues, as a literal reading of Rule 5:1-4(a)(5) suggests. For example, there may be no need to delay resolving parenting time or custody issues while a business valuation is being arbitrated. Both issues can proceed simultaneously. In all events, improved methods for tracking cases in arbitration appear to be needed.

If the litigants are in a post-judgment situation, consider arbitration before going to court. An application for college contribution or support modification often results in post-judgment mediation and/or early settlement panel (ESP) before returning to court for resolution. By arbitrating the issue first, the requirement for post-judgment mediation and/or ESP is eliminated, which will expedite resolution of the dispute and provide cost-savings for the client.

Conclusion

By complying with the 2016 rules, the number of objections to confirmation of arbitration awards and resulting plenary hearings should be greatly reduced. The rules were enacted in response to the case law that had developed prior to the enactment of the rules, and the lack of clear guidance on the procedural requirements for family part arbitration (which are different than traditional civil arbitration requirements), primarily as a result of the court's *parens patriae* role. The rules lay out all the requirements for successful arbitration, and clearly set forth the grounds for denying confirmation of an award. There are more procedural requirements for the arbitration of issues concerning the support and custody of children. As a result, any effort to vacate or modify an award is more difficult, if the rules are followed.

The burden on the court that may have existed before the 2016 rules were enacted should now be lifted. The burden is clearly on the attorney to carefully craft the agreement to arbitrate pursuant to the rules, and fully explain the process to the client.

The court rules for family part arbitration are comprehensive and designed to safeguard the rights of all participants while allowing for a more expeditious and client-centered dispute resolution process. The arbitration process can alleviate a significant burden on the court system while better accommodating the needs of the litigants and attorneys. Arbitration is a powerful ADR tool when other settlement efforts fail. Knowledge of the rules and an understanding of the process is a necessary tool in the attorney's arsenal. As the court, counsel, and litigants become more aware of and familiar with the process, the full potential of this alternative dispute resolution process may be reached. ■

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Endnotes

1. 199 N.J. 456 (2009).
2. 204 N.J. 529 (2010).
3. N.J.S.A. 2A:23B-1 *et seq.*
4. N.J.S.A. 2A:23A-1 *et seq.*
5. R. 5:1-5(a) excludes from arbitration certain limited family part issues: the entry of the final judgment of annulment or dissolution; actions involving DCCP; domestic violence actions; juvenile delinquency matters; family crisis actions; and adoption actions.

6. If confirmation is being obtained by attaching the award to a consent order, there is no requirement to submit any of the three otherwise-required documents.
7. N.J.S.A. 2A:23A-12.
8. N.J.S.A. 2A:23A-12(d).
9. N.J.S.A. 2A:23A-18. Case law, however, has carved out certain exceptions. *See, e.g., Mt. Hope. Dev. Assocs. v. Mt. Hope Waterpower Project, L.P.*, 154 N.J. 141 (1998); *Morel v. State Farm Ins. Co.*, 396 N.J. Super. (App. Div. 2007).
10. N.J.S.A. 2A:23B-19.
11. N.J.S.A. 2A:23B-20 and -23(a).
12. N.J.S.A. 2A:23B-28(a).
13. R. 5:1-5(a).
14. *See, for example, Fawzy v. Fawzy*, 199 N.J. 456 (2009); *Johnson v. Johnson*, 204 N.J. 529 (2010); *Minkowitz v. Israel*, 433 N.J. Super. 111 (App. Div. 2013).
15. N.J.S.A. 2A:23A-8.
16. N.J.S.A. 2A:23B-7g.
17. Appendix XXIXB, ¶ 2(A); Appendix XXIXC, ¶ 2(A).

New Law: Termination of Obligation to Pay Child Support

by Katrina Vitale, Abigale Stolfe, Lisa P. Parker and Daniel M. Serviss

On Jan. 19, 2016, the New Jersey Legislature enacted a new statute regarding termination of a parent's obligation to pay child support. N.J.S.A. 2A:17-56.67 formally went into effect on Feb. 1, 2017. The new statute applies to all awards of child support, whether entered prior to or subsequent to its enactment, and establishes age 19 as the presumptive age for automatic termination of child support for children of divorced and separated parents.[1] This article summarizes the legislative history of N.J.S.A. 2A:17:56.67, the implementation of the new law, its exceptions and where the new law leads in the future.

Legislative Backdrop for the Enactment of New Child Support Legislation

The enactment of N.J.S.A. 2A:17:56.67 followed years of legislative efforts to join the 48 preceding states that decline to presumptively provide child support for youth over the age of 18 years. The majority of states use age 18 as the age of majority (in cases where the child is still in high school, the age of majority may extend beyond 18). Some states hold no duty to support beyond the age of 18 years,[2] while other state laws empower their courts to award support beyond the age of majority.[3] New Jersey is included among the latter, granting the courts the power to award child support under certain circumstances, including, for example, full-time college enrollment and qualifying disability.[4] Alternatively, there are a few states that are silent on the issue, having declined to affirmatively enact legislation either relieving or holding parents responsible for college support.

Although New Jersey's new child support law establishes an automatic termination of support upon a child reaching age 19, as discussed herein, there are built-in mechanisms for continuing support for those who are diligent about responding to the court-generated notices. Continuing support beyond the age of 18 is often dubbed 'college support,' as the majority of the cases in which support is continued presupposes the child is enrolled in college on a full-time basis.

The focus of the legislation is a child's presumptive age for ending child support. Senator Shirley K. Turner, who was interviewed for this article, first introduced the legislation in 2002. Senator Turner recalls the primary motivation behind the initial legislative efforts was to relieve the court's administrative burden of recordkeeping and enforcement due to lack of an established age for emancipation. The child support probation system was faced with an ever-growing docket of cases requiring monitoring and enforcement, as well as a declining collection rate as compared to other states.[5] Consequently, this has an impact on federal funding, which is based on cost effectiveness. With removal of stale cases from the probation system, it is expected that the state will receive additional federal funding.[6]

Regarding her involvement in the initiation and support for bill S-1046 (2014-2015), Senator Turner states, "it was the right thing to do…considering terminating a child support obligation becomes a more costly endeavor than necessary because many people are intimidated by the court and wind up paying an attorney to represent them." These are valorous motives, but does the burden merely shift from payor to payee to continue support where otherwise appropriate? With 68.6 percent of New Jersey children going on to college,[7] there remains a strong need for judicial involvement with continuing college-related support.

In considering this legislation, the question arises: What impact does the early termination have upon the payee who continues to support their college student? Might it be said that the payee assumes "the more costly endeavor than necessary because many people are intimidated by the court and wind up paying an attorney to represent them." In this case, one may expect that a payee parent may similarly be intimidated by the court, either failing to initiate a timely action to continue

support prematurely resulting in a lapse of support or instead incurring legal fees choosing to retain an attorney to navigate through the process.

There is likely to be a resulting reduction in the average length of child support probation involvement, and there will potentially be a temporary decline in probation cases. Indeed, this result is favorable to the probation system, and likewise the court system. The burden had been a heavy one. As of year-end 2016, there were approximately 297,541 matters monitored through the New Jersey probation system,[8] with a steady rise since its original expansion with Title IV-D in year 1975.

The new legislation does not revisit the model established in year 1986,[9] nor does it revisit the statutory factors for a child support analysis under N.J.S.A. 2A:34-23a. New Jersey continues to follow the income shares approach. This approach is based on the concept that the child should receive the same proportion of parental income that child would have received if the parents stayed together. In an intact family, the income of both parents is generally pooled and is available to benefit all members of the household. Thirty-nine states use the income shares approach.[10] Moreover, New Jersey continues to rely upon the 10 delineated factors for calculating child support for the benefit of youth over age 18.

What's more, the new legislation does not expressly overturn the 1982 substantive law enunciated in *Newburg v. Arrigo*,[11] which establishes a presumption of emancipation with a consequential termination of the duty to support at age 18 years unless the child is disabled or a full-time student.[12] There remains an argument that child support may be terminated at age 18, in the absence of disability, if indeed other qualifying circumstances are in place, such as graduation from high school without enrollment in higher education. New Jersey case law establishes age 18 as the age of majority.[13] Instead, in case of a sooner graduation, the burden remains on the payor to bring such application.

In support of this proposition, one may rely upon the New Jersey Supreme Court itself, stating, "in the absence of a clear manifestation to the contrary, we shall not impute to the Legislature an intention to change established law."[14]

Implementing the New Law: What is Known

It is clear the implementation of the new child support law will have a large impact on family law practitioners and clients. It has been the longstanding law of New Jersey that there is no automatic emancipation or termination of child support. This has made New Jersey unique among many other states in the country that provide for automatic termination upon a child reaching the age of majority in the given state. The question now becomes how does the statute effect what is known and how is practiced? In this section, three important questions practitioners may have when incorporating the new statute with common practice will be discussed.

Does the new statute apply to all child support obligations, even if not paid through probation?

The new statute does apply to all child support obligations, even those not paid through probation.[15] However, parties making direct payments have the obligation to be aware of the new statute and make their payments accordingly. This is in contrast to payments made through a county's probation department, which will automatically terminate at age 19, absent the affirmative action of the recipient parent.

Under the new statute, a probation department is required to send two notices to the parties before the termination of child support, with the first notice being sent 180 days prior to the parties' child's 19th birthday.[16] This will give the receiving party the opportunity to make the appropriate application with the court for the continuation of child support if the child meets the enumerated criteria under the statute.[17] The notice will provide the parties with the steps they will have to take in order for child support to continue past the child's 19th birthday. If no application is made by a party within 90 days, a second notice will be sent to the parties.[18] If a party successfully wins an application to extend child support past 19 and until age 23, the probation department is required to send a notice 90 days prior to the termination of the latter date for child support.[19]

Does the new statute change the law regarding emancipation? If so, how?

For family law practitioners in New Jersey, there are several events that often necessitate the emancipation of a child. It is not uncommon that in a party's property settlement agreement emancipation would occur if the child marries, joins the army, begins full-time employment, or reaches a specified age. "It [was] firmly established that there [was] no specific age at which the emancipation of a child occurs."[20] In fact, "[a]ge alone [was] not dispositive of emancipation."[21] The court was required to make a fact-sensitive inquiry under the circumstances of each matter.[22] Analysis was required by the court to

determine whether the child "moved beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status of his or her own."[23]

Under the new statute, automatic emancipation of a child occurs at age 19, when the child marries, dies or enters military service.[24] There are several circumstances under the new statute where child support will not automatically terminate upon a child reaching the age of 19.[25] Perhaps one of the most important exceptions is if another age for the termination of child support is specified in a court order.[26] This exception creates an avenue for practitioners to extend the term of child support consistent with a statutory analysis and not the mere anniversary of birth.

The change in the law has also created a shift in the burden of the parties. Previously, the burden was on the party paying child support to make an application with the court seeking emancipation. This served the underlying public policy of the state that child support belonged to the child, not the parents. Under the new statute, the burden has shifted to the party receiving child support to stop the automatic termination so long as they meet the enumerated criteria.[27] The custodial parent must submit a written request form with supporting documents to the court.[28] If a successful application is made, a court's order now is required to list a prospective date of child support termination, most likely the date of the child's 23rd birthday.[29] If the payor disagrees with the court's findings, they are required to file a motion with the court.[30] This is a clear shift in the burdens of the parties, and appears to weaken the public policy of the state by shifting the burden to the receiving party, at least initially. There is nothing within the statute to state whether or not the written request form is accompanied by a filing fee, which would be an additional cost and burden to the receiving party.

Does the statute change the presumptive age of emancipation from 18 to 19?

Under previous New Jersey case law, a presumption arose in favor of emancipation once a child reached the age of 18.[31] Case law held, "[g]enerally, a rebuttable presumption against emancipation exists prior to the attainment of the age of majority which is eighteen."[32] Under the statute, there is an automatic termination of child support when a child reaches the age of 19. The statute does not change the presumption that an adult is emancipated; instead, it cures the systemic problem of aged and dead collection cases by compelling activity by the party seeking to continue child support under existing law.

Assuming support for the child was continued past the legal age of 18 and administrative age of 19, the final important age under N.J.S.A. 2A:17-56.67 is 23. A parent's "obligation to pay child support shall terminate by operation of law when a child reaches 23 years of age."[33] Upon reaching age 23, the burden shifts to the child to seek "a court order requiring the payment of other forms of financial maintenance or reimbursement from a parent as authorized by law to the extent that such financial maintenance or reimbursement is not payable or enforceable as child support."[34] If exceptional circumstances exist, such as a mental or physical disability, the court is not prevented from converting the "child support obligation to another form of financial maintenance."[35] Under subsection (e)(2) of the statute, either the parent or child may file such an application with the court.[36]

The Exceptions: When Child Support Continues Beyond Age 19

When nearing a child's 19th birthday, or upon receipt of a notice of proposed termination of child support,[37] a custodial parent seeking a continuation of child support may petition the court to extend the obligation to pay child support until a projected date in the future if the dependent child is: 1) still attending high school or other secondary program; 2) is attending college, vocational or graduate school on a full-time basis; 3) has a physical or mental disability; or 4) by agreement between the parents. In addition, an application to request to extend a child support obligation beyond a child's 19th birthday may be granted by the court upon a finding of 'exceptional circumstances.' These exceptions to the automatic termination of child support do not deviate from the customary practice employed by family law practitioners for years preceding the enactment of the new statute.

Under the revised statute, a parent's child support obligation is not relieved during the period "while a child is enrolled full-time in a post-secondary education program." This aspect of the new statute is somewhat inconsistent with the fact that the New Jersey child support guidelines do not apply once a child commences college. Therefore, the issue of a parent continuing to pay child support for a college-age child remains unsettled. Of course, an exception to the application of the new statute is any agreement reached by the parties to voluntarily extend the payment of child support beyond the age of 19. As such, it is anticipated that family law practitioners

will continue to encourage clients, where applicable, to enter into agreements that anticipate and provide for continuing support of children attending college.

While prior to the enactment of the new child support law there was no specific emancipation age in New Jersey, it was customary for support to terminate upon a child's completion of post-secondary education. Under the new law, child support shall terminate by operation of law when a child reaches age 23. However, the statute also provides that it was not to be construed to "prevent a child who is beyond 23 years of age from seeking a court order requiring payment of other forms of financial maintenance or reimbursement from a parent as authorized by law to the extent that such financial maintenance or reimbursement is not payable or enforceable as child support." Accordingly, once a child reaches the age of 23, he or she may petition the court seeking financial support independent of child support. How the courts will apply this provision of the new statute remains to be seen. In particular, whether there should be financial maintenance for a child over the age of 23 who is still attending college or, possibly graduate school, will be a fact-sensitive determination made on a case-by-case basis.

In the recent unreported case of *J.C. v. A.C.*,[38] Judge Lawrence Jones considered a case involving a dispute over whether a non-custodial parent had an obligation to pay child support or other financial maintenance for a child who had just graduated college and had elected to attend graduate school. The child was 22 years of age but was turning 23 prior to the effective date of the new statute. The application was brought by the child's mother and not by the child herself, and it was unclear whether the child independently wanted further financial support from her father. Judge Jones ordered a plenary hearing on the issue of the child's emancipation to determine whether the child objected to emancipation and/or was seeking independent continued financial maintenance from her father. In the case of the latter, Judge Jones determined the child would be required to carry the burden of proof and the court would then determine whether it would be equitable to continue the father's financial obligation. Judge Jones also determined the court may impute an income to the daughter for support or maintenance purposes.

In making this determination, Judge Jones considered the import of the new child support statute:

> …the Act does not expressly set forth why the age of 23, instead of another age, was specified as the mandatory cut-off for "child support" as opposed to other alternate forms of financial maintenance. At least one reasonable interpretation of the statute, however, may include the following logical possibility and conclusion: Specifically, the statute references a possible extension of child support from the age of 19 to 23 because these are the most likely age parameters when a child may be a full time college student pursuing either an undergraduate degree or otherwise enrolled in a similar course of education or training following high school…. Overall, while both prior case law and the new child support statute technically permit a graduate student to seek financial maintenance and contribution from a parent, there is no law requiring or presuming that any such application must be granted, or that a graduate student cannot be emancipated for purposes of mandatory child support or parental maintenance…. To the contrary, fairness and equity more logically require that if an adult child and college graduate is claiming that he or she should not be emancipated, and that a parent should be obligated to continue financially assisting on a mandatory basis, then the burden of proof and persuasion rests on the applicant to demonstrate good cause for a ruling against emancipation and independence rather than the other way around, and to further show why an order for continued maintenance would be appropriate, fair and equitable not just to the student, but also to the applicable parent, under the factual circumstances of the case.

As stated, how and when the exceptions to the new statute will be applied remains to be determined. While the new child support statute provides far greater guidance in certain areas, others remain unsettled.

Shaping the Future Law: What the Statute Does not Address

New Jersey's recent legislation addressing the automatic termination of child support falls short of its intended goals. Indeed, while the new law seeks to impose an absolute cut-off date for child support, at the

same time it allows parents or children to seek some form of support beyond 23 years of age in "exceptional circumstances." However, not only does the statute fail to address the definition of exceptional circumstances, the statute's provisions severely limit the circumstances under which support may be sought, and further limits the type of support that can be sought. Attorneys in this state will need to assist their clients in planning ahead, providing mechanisms for ensuring the continued support of their clients' children.

In seeking to impose a bright line rule for the termination of child support at 23 years of age, the recent legislation does not address circumstances where a child has not completed college before his or her 23rd birthday. This factual scenario may occur through various circumstances, including a child's brief hiatus in matriculation from high school to college. Moreover, the child's completion of college may be delayed due to a brief hiatus during college, preventing the child's graduation within the timeframe prescribed by the New Jersey Legislature. Lastly, college graduation may be delayed due to a child's change in courses or a declared major, thereby extending the age of the child in completing their college studies.

The new legislation further fails to address voluntary support obligations for children in graduate schools. Recent cases in New Jersey have extended parents' obligations to pay for graduate schools in unique circumstances. The recent enactment appears, on its face, to limit parties' ability to contract for obligations to support their children beyond 23 years of age. N.J.S.A. 2A17-56.57 (a) states, in relevant part, "a child support obligation shall terminate by operation of law without order by the court when a child reaches 19 years of age unless: another age for the termination of the obligation to pay child support, *which shall not extend beyond the date the child reaches 23 years of age*, is specified in a court order."

This limiting language seeks to prevent support beyond the child's 23rd birthday, notwithstanding agreement by the parties or order by the court. Moreover, section (e) of the new legislation further curtails parties' abilities to provide support to their children wherein it states: "Nothing in this section shall be construed to: (1) prevent a child who is beyond 23 years of age from seeking a court order requiring the payment of other forms of financial maintenance or reimbursement from a parent as authorized by law *to the extent that such financial maintenance or reimbursement is not payable or enforceable as child support* as defined in N.J.S.A. 2A:17-56.52."

According to N.J.S.A. 2A:17-56.52, child support is defined as:

> the amount required to be paid under a judgment, decree, or order, whether temporary, final or subject to modification, issued by the Superior Court, Chancery Division, Family Part or a court or administrative agency of competent jurisdiction of another state, for the support and maintenance of a child, or the support and maintenance of a child and the parent with whom the child is living, which provides monetary support, health care coverage, any arrearage or reimbursement, and which may include other related costs and fees, interest and penalties, income withholding, attorney's fees and other relief.

Thus, the new law prohibits parents from agreeing to the payment of monetary support or even healthcare coverage for their children beyond 23 years of age, even if the child remains in college or graduate school.

In addition, by limiting the types of support a child or parent may seek beyond 23 years of age, the New Jersey Legislature prohibited parents from agreeing to maintain health insurance coverage for their children as provided for by the federal government. Specifically, under current healthcare laws, parents may provide healthcare coverage for their children up to the age of 26. The new law, however, prohibits the obligation to pay the child's healthcare coverage beyond the age of 23.

Aside from the limitations on the type of support a child may seek beyond the age of 23, the new statute does not address the obligation to pay child support arrearages after the child's 23rd birthday. By limiting the type of support a child may seek beyond 23 years of age in section (e), the law creates a safe harbor for parents who owe child support and restricts the ability to pursue child support arrears that may have accrued prior to the child's 23rd birthday. Specifically, under N.J.S.A. 17-56.67(e), the type of "financial maintenance or reimbursement" a child over the age of 23 may seek may not include "monetary support, health care coverage, any arrearage or reimbursement..." Thus, the statute appears to prohibit the collection of child support arrearage beyond the age of 23.

Lastly, while the new legislation seeks to leave open a parent's or child's ability to convert a child support

obligation to "another form of financial maintenance" due to exceptional circumstances, the law does not specify the types of financial maintenance that are permissible. Are direct payments of a monthly amount acceptable? How does one differentiate a child support obligation imposed prior to a child's 23rd birthday from an obligation to support a child after the 23rd birthday? Does the financial need of a child change magically once a child reaches the age of 23? Why should a parent's financial obligation change or be re-characterized simply because a child reaches the age of 23?

Despite the limitations and loopholes created by the new legislation, parents are not without the ability to provide for the obligation to support their children. Just as courts are imbued with the power to create orders "as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just," parents similarly are empowered to determine the needs of their children, and their shared sense of obligation to support their children. Indeed, parents are uniquely qualified and vested in the financial protection of their children.

Parents have the right to contract, including the right to agree to provide for the care of the children beyond their 23rd birthdays. This legislation cannot, and does not, limit parents' abilities to enter into agreements that provide for the support of their children, even if their intentions to support their children are contrary to the limitations imposed by the new law.

Attorneys have a responsibility to assist their clients in fashioning agreements that reflect their wishes and intentions. Further responsibilities include advising clients of the laws in this state, including this law, and helping craft agreements that accomplish their goals. To fulfill these duties, attorneys should negotiate and prepare consent judgments that address the issues raised in this article as part of the overall global resolution of the divorce litigation. These consent judgments should not only provide for the extension of child support obligations beyond a child's 19th birthday, but also address the possible extension of support beyond a child's 23rd birthday. Moreover, attorneys should assist their clients to prepare, in advance, for the continuation of child support after the child's age of 19, specifically formulating a document to be completed and filed once the child graduates from high school. These advanced actions and arrangements will assist the parents in ensuring the financial protection of their children beyond the age limitations imposed by the new legislation. ■

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Endnotes

1. N.J.S.A. 2A:17-56.67, *et seq.* "The bill clarifies certain circumstances under which the obligation to pay child support terminates and provides that such termination would occur by operation of law." Comments to N.J.S.A. 2A:17-56.67.
2. *Solomon v. Findley*, 167 Ariz. 409 (1991); *Towery v. Towery*, 285 Ark. 113 (1985); *H.P.A. v. S.C.A.*, 704 P. 2d 205 (Alaska 1985); *Ex parte Christopher* (Ala. Oct. 4, 2013); Colo. Rev. Stat. §14-10-115(1.6); *Dalton v. Clanton*, 559 A.2d 1197 (DE 1989); *Nelson v. Nelson*, 548 A.2d 109, 111 (D.C. 1988); *Slaton v. Slaton*, 428 So. 2d 347 (Fla. DCA 1983). *See* Cal. Fam. Code § 3910; *Noble v. Fisher*, 126 Idaho 885 (1995); Ind. Code § 31-16-6-6(c); Ind. Code § 31-16-6-2.
3. *See* Conn. Gen. Stat. § 46b-56c (through age 23); O.C.G.A. § 19-6-15e; Hawaii Rev. Stat. § 576E-14; Hawaii Rev. Stat. § 584-18 (if full-time enrollment); Ill Rev. Stat. ch. 750, sec. 750, sec. 5-513; Iowa Code § 598.1(8); Iowa Code §598.1(9); Iowa Code § 598.21f.
4. N.J.S.A. 2A:17-56.67.
5. Payments to States for Child Support Enforcement and Family Support Programs, Department of Health and Human Services, Administration for Children and Families (2015).
6. 42 U.S.C. § 458.

7. http://www.higheredinfo.org/dbrowser/index.php?submeasure=63&year=2010&level=nation&mode=data&state=0.
8. Statistic based on Interview of Pete McAleer, Communications Manager, Office of Communications and Community Relations, NJ Administrative Office of the Courts (6/01/2017).
9. *See* N.J. Ct. R. 5:6A.
10. Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming, Guam, and Virgin Islands.
    The approaches can be broken down into three main models—Income Shares, Percentage of Income, and the Melson Formula.
    Cf. The Percentage of Income Model, followed by 14 states, sets support as a percentage of only the non-custodial parent's income, while the custodial parent's income is not considered.
    Cf. The Melson Formula, followed by 3 states, is a more complicated version of the Income Shares Model, which incorporates several public policy judgments designed to ensure that each parent's basic needs are met in addition to the children's.
11. *Newburg v. Arrigo*, 85 N.J. 479 (1980).
12. *Id*.
13. *See Ort v. Ort,* 428 N.J. Super. 290, 296-97 (Ch. Div. 2012) (reviewing many statutes defining who is and isn't an adult).
14. *Oches v. Twp. of Middletown Police Dep't*, 155 N.J. 1, 5 (1998) (*citing State v. Dalglish*, 86 N.J. 503, 512 (1981).
15. N.J.S.A. 2A:17-56.67(1)(d).
16. *Id*.
17. *Id*.
18. *Id*.
19. N.J.S.A. 2A:17-56.67(1)(e).
20. *Bishop v. Bishop*, 287 N.J. Super. 593, 597 (Ch. Div. 1995).
21. *L.D. v. K.D.*, 315 N.J. Super. 71, 75 (Ch. Div. 1998); *see also Bishop v. Bishop*, 287 N.J. Super. at 597.
22. N.J.S.A. 9:17B–3.
23. *Filippone v. Lee*, 304 N.J. Super. 301, 308 (*citing Bishop*, 287 N.J. Super. at 598).
24. N.J.S.A. 2A:17-56.67(1)(a).
25. N.J.S.A. 2A:17-56.67(1)(a)(1)-(3).
26. N.J.S.A. 2A:17-56.67(1)(a)(1).
27. N.J.S.A. 2A:17-56.67(1)(b)(1)(a)-(c);(1)(b)(2);(c).
28. N.J.S.A. 2A:17-56.67(1)(b)(1).
29. N.J.S.A. 2A:17-56.67 (1)(c).
30. *Id*.
31. *Bishop*, 287 N.J. Super. at 597; *see also Newburgh v. Arrigo*, 88 N.J. at 543.
32. *Bishop*, 287 N.J. Super. at 597.
33. N.J.S.A. 2A:17-56.67(1)(e).
34. N.J.S.A. 2A:17-56.67(1)(e)(1).
35. N.J.S.A. 2A:17-56.67(1)(e)(2).
36. *Id*.
37. Child support obligations which are administered by the Probation Division require that both the payor and the payee receive written notification of a proposed termination of child support at least 180 days prior to the proposed date of termination. *See* N.J.S.A. 2A:17-56.67(1)(d).
38. *J.C. v. A.C.*, Superior Court of New Jersey, Ocean County, Chancery Division (Oct. 7, 2016).