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CHAIR'S COLUMN

Civility In the Practice of Law—Does It Exist?

by Andrea Beth White

All of us would like to believe that in the noble profession we have chosen—the law—there is always civility among us. After all, the Rules of Professional Conduct (RPCs) are very clear on the *requirement* of civility in our practice. The question posed is—are we treated with civility by everyone involved in the legal process?

More often than not, *we do* encounter civility and understanding among our peers, as well as the bench. The camaraderie between matrimonial lawyers is unparalleled. We have a unique practice and profession. There is a keen awareness of the difficulty that each and every one of us encounters in representing litigants through their divorce process.

I am sure all of you can recount those unfortunate circumstances where you have found yourself in a situation where civility is all but lost. We must remember that we are required to conduct ourselves at all times in the dignified manner in which we hope to be treated ourselves.

No one can doubt that we are among the hardest working of our profession—every day helping someone through one of the most difficult and challenging times in their lives. This naturally breeds added stresses and pressures. Despite these stresses, we must all continue to endeavor to balance the challenges of our noble profession.

A few years ago, one of the former chairs of the Family Law Section, Lizanne Ceconi, wrote a column addressing these same issues. In her column she recalled vividly an example of the loss of this civility. In her column "Best Practices—Worst Behavior," circulated in October 2007, she recounts one of the worst cases of civility in the practice of law she encountered.[1]

In pertinent part, she recounted what she describes as her "particularly painful" civility story:

"In the fall of 2004, I was diagnosed with breast cancer. After surgery, it was decided that I should begin chemotherapy, with the first treatment to begin two days later. Chemotherapy was to begin on a Friday, and I was scheduled to appear for a post-judgment early settlement panel the following Tuesday. Despite the initial consent of my adversary, the court denied the adjournment request, advising my office late that Friday afternoon while I was at the doctor's office. The following Monday, another letter was written to the court expressly stating my diagnosis, surgery and treatment. Since the first judge had left for vacation another judge reviewed the letter and demanded that my partner appear in court the following morning with the client. My partner had never met the client, nor been involved in the case. The next morning, the judge on the record wanted to know why I should not be sanctioned for my failure to submit an early settlement panel statement. Imagine the litigant's horror to witness such insensitivity in a forum where one expects justice to be dispensed. When the case did not settle, the judge informed my partner that if I was not prepared to try the matter by Jan., I would have to find someone else to do it. How does one explain to a client that moving cases is more important than having one's health and/or personal choice of counsel?"

"When this particular instance was brought to the attention of a former Supreme Court justice, the response was that this story was simply "anecdotal." To me, it is and was personal. If I thought it was simply aberrational, I probably would have coped better with the insensitivity of the response. While it certainly was egregious, there are, unfortunately, many other similar

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stories that are circulating in courthouses throughout the state. This behavior is more than anecdotal—it is becoming commonplace. I have heard far too many tales about denials of adjournment requests for funerals, family illnesses, vacations, children's birthday parties and other events that are part of our lives."

It is now four years later; and it does not appear that Lizanne's story is anecdotal. I am certain all of us have our own war stories about how we have been treated in a manner inconsistent with the Rules of Professional Conduct, and what we believe should be civility in the practice of law. We must always be mindful that RPC 3.2 requires that "a lawyer...shall treat with courtesy and consideration all persons involved in the legal process."[2]

The question is: What can we do about it now? How can we restore some degree of civility to our litigation practices?[3]

As Lizanne suggested four years ago, we must set realistic discovery deadlines and provide the true time parameters necessary for each particular case.[4] These dates should not be modified by the court simply because of best practices. Moreover, there needs to be a better way to implement and assure access to the court when issues arise—such as discovery—without the need for motion practice. This would help to advance cases and make problem solving happen sooner rather than later.

In addition, when parties agree to an alternative to litigation, their requests and time frame for alternative dispute resolution should be honored. Certainly, not every case needs the same time frame to meet a global settlement on all issues.

Most importantly, it is absolutely essential that there is a continuing open dialogue between matrimonial attorneys to better understand issues as they arise in our practice, as well as engaging in early problem solving. As Lizanne did during her year as chair, I and the other Family Law Section Executive Committee officers hosted meet and greets to speak personally with attorneys about what is happening in the various counties around the state. It is extremely important that there continue to be an open line of communication to effectuate necessary changes to assure civility and courtesy to the practice of family law.

I invite all of you to please contact me or any other of the section officers regarding any issues or concerns as they arise, so we may all work together to make sure our practice, where we help litigants through the most stressful and needy times in their lives, is the best it can possibly be.

I am looking forward to hearing from all of you. ■

ENDNOTES

1. *See New Jersey Family Lawyer* (October 2007) Chair's Column, Best Practices—Worst Behavior by Lizanne Ceconi.
2. Rules of Professional Conduct 3.2.
3. *See New Jersey Family Lawyer* (October 2007) Chair Column, Best Practices—Worst Behavior by Lizanne Ceconi.
4. *See New Jersey Family Lawyer* (October 2007) Chair Column, Best Practices—Worst Behavior by Lizanne Ceconi.

EDITOR-IN-CHIEF'S COLUMN

Emancipation and Full-Time College Status

by Charles F. Vuotto Jr.

The interplay of "emancipation" and "college" were recently explored in the unpublished Appellate Division case of *Alexander v. Alexander.*[1] The case raises an interesting question: How do we define full-time college enrollment to stave off a determination of emancipation?

Emancipation is "the conclusion of the fundamental dependent relationship between parent and child[.]"[2] "[E]mancipation is reached 'when the fundamental dependent relationship between parent and child is concluded, the parent relinquishes the right to custody and is relieved of the burden of support, and the child is no longer entitled to support.'"[3] "[T]he essential inquiry is whether the child has moved 'beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status of his or her own.'"[4] This determination involves a critical evaluation of the prevailing circumstances, including the child's needs, interests, and independent resources; the family's reasonable expectations; and the parties' financial ability.[5] But doesn't this eloquent reasoning, which appears in most cases concerning emancipation, beg the question: Is the standard for emancipation objective or subjective in nature?

As the Supreme Court has confirmed, "[a]lthough there is no fixed age when emancipation occurs, N.J.S.A. 9:17B-3 provides that when a person reaches eighteen years of age, he or she shall be deemed to be an adult."[6] Thus, proof of majority satisfies a noncustodial parent's *prima facie* showing, shifting the burden to rebut the statutory presumption of emancipation to the custodial parent.[7] To prevail on a request for dependent support, the custodial parent must prove, for example, that the child remains a full-time student.[8]

The *Alexander* appellate court further explained that:

> "One of the fundamental concepts in American society is that parents are expected to support their children until they are emancipated, regardless of whether the children live with one, both, or neither parent." *Burns v. Edwards*, 367 N.J. Super. 29, 39 (App. Div. 2004)....The obligation to provide child support "is engrained into our common law, statutory, and rule-based jurisprudence." [*Id.*] at 39. [*Colca v. Anson*, 413 N.J. Super. 405, 414 (App. Div. 2010) (internal citations omitted).][9]

A well-established instance defeating a request for emancipation and requiring continued support occurs when a child is enrolled in a full-time educational program.[10]

The first question is: What constitutes full-time college enrollment? While parties often include language in their matrimonial settlement agreements addressing what constitutes full-time college enrollment in connection with emancipation, how does the court determine it when the parties' agreement is silent on this issue?

The standard definition would appear to be 12 credits. This is supported by the following quote from the *Alexander* case, as well as various universities throughout New Jersey:[11]

> Plaintiff argues his son had not achieved full-time student status until the fall 2009 semester. While we agree that during the prior four semesters, the child had not completed *at least 12 credit hours,* he did complete two summer classes in 2009, achieving 25 credit hours in the 2008–2009 academic year. This was followed by the fulfillment of 15 credit hours in the fall 2009 semester and 13 in the spring 2010 semester.[12] (Emphasis added)
>
> Proof of full-time student status requires registration for a full-time class load coupled with efforts designed to satisfy the degree or certification requirements of the educational institution. Implicit in this standard is that a child must act in good faith: the student must attend class and comply with other course requirements in an effort to satisfactorily pass. *See Filippone*, *supra*, 304 N.J. Super. at 311-12 (holding a child pursuing post-secondary education may no longer be dependent when the "child [is] unable to perform adequately in his academic program").[13]

However, the court cautions that: "Our determination must not

be misconstrued as a pronouncement that college students must pass every class taken. On the contrary, each student experiences his or her own unique adjustment to post-secondary schooling, which must always be considered in any review of the totality of the circumstances."

In rejecting the plaintiff's argument that the child had not accomplished the requirements of a full-time student, the trial judge examined the totality of the circumstances presented.[14] Specifically, the judge identified the child's slow start during the 2007-2008 academic year, resulting in part-time student status based on the completion of courses. However, for the 2008–2009 and 2009–2010 academic years, the parties' son passed courses garnering 25 and 28 credit hours respectively. The court concluded sufficient facts unmistakably revealed the child presented a "commitment to and aptitude…for the requested education[,]"[15] making emancipation improper.[16] Therefore, while it seems that a full-time student is generally defined by the enrollment in 12 credit hours per semester, there is no bright-line rule for the actual determination of emancipation.

Emancipation is a fact-sensitive issue, and each case must be examined independently and not in a cookie-cutter fashion.[17] However, one can draw a guiding principle from this unpublished decision when it comes to the issue of emancipation and college attendance: The parties, counsel and the court must consider whether the child presents "a commitment to and aptitude for" the requested education from the totality of the circumstances. As such, a mere assessment of credit hours earned in any one semester is not the sole factor.[18]

These concepts assume a free flow of information concerning the child's college status. In 2009, the United States Department of Education adopted new regulations for the implementation of the Family Educational Rights and Privacy Act (FERPA) restrictions.[19] To the benefit of *Newburgh* litigants, educational institutions may disclose information without a student's consent "to parents of a dependent student as defined in section 152 of the Internal Revenue Code of 1954."[20] For institutions within the reach of a subpoena power (or in cases where the parties have sufficient resources to conduct discovery outside of New Jersey), the school can make the same disclosures "to comply with a judicial order or lawfully issued subpoena."[21]

In the recent trial court decision of *Van Brunt v. Van Brunt*,[22] the court held that as a condition of continued child support, a requirement of proof of college attendance, grades, etc. does not violate an unemancipated child's right to privacy under FERPA. Both the child and the custodial parent each have a responsibility and obligation to make certain that the noncustodial parent is provided with ongoing proof of the student's college enrollment, course credits and grades.[23] "If the [custodial parent] has no control [over the child] and cannot obtain simple verifying information from [them] regarding collegiate attendance and performance, then clearly [the child] is outside the scope of [the custodial parent's] control and influence."[24]

In sum, it seems that interplay between emancipation and attendance at college, is, as many other things in the practice of matrimonial law, fact-sensitive, and subject to judicial discretion. Therefore, although it is essential to fully consider these issues when drafting provisions regarding emancipation incident to marital settlement agreements, family law attorneys must also be mindful that listing one or a limited number of bright-line criteria as emancipating events may not be sufficient to fully and accurately determine whether a child should be viewed as moving beyond the parental sphere. ■

ENDNOTES

1. *Alexander v. Alexander*, 2011 N.J. Super. Unpub. LEXIS 1562.
2. *Dolce v. Dolce*, 383 N.J. Super. 11, 17 (App. Div. 2006).
3. *Filippone v. Lee*, 304 N.J. Super. 301, 308 (App. Div. 1997); *See also L.D. v. K.D.*, 315 N.J. Super. 71, 75 (Ch. Div. 1998).
4. *Id.* (*quoting Bishop v. Bishop*, 287 N.J. Super. 593, 598 (Ch. Div. 1995)).
5. *Newburgh v. Arrigo*, 88 N.J. 529, 545 (1982).
6. *Gac v. Gac*, 186 N.J. 535, 542 (2006).
7. *See Filippone*, *supra*, 304 N.J. Super. at 308 (stating the statutory presumption is rebuttable).
8. *Limpert v. Limpert*, 119 N.J. Super. 438, 442-43 (App. Div. 1972).
9. *Alexander, supra,* at 8.
10. *See Gac*, *supra*, 186 N.J. at 542 ("The Legislature and our courts have long recognized a child's need for higher education and that this need is a proper consideration in determining a parent's child support obligation."); *Patetta v. Patetta*, 358 N.J. Super. 90, 94 (App. Div. 2003) (stating "while parents are not generally required to support a child over eighteen, his or her enrollment in a *full-time* educational program has been held to require continued support").
11. The following are examples of New Jersey colleges that define full-time enrollment as 12 or more credits per semester: Fairleigh Dickinson University, Kean University, New Jersey Institute of Technology, Monmouth University, Montclair State University, Ramapo College of New Jersey, Richard Stockton College of New Jersey, Rider University, Rowan University, Rutgers, the State University of New Jersey, Seton Hall University, The College of New Jersey and William Paterson University.
12. *Alexander, supra,* at 8.

13. *Id.*
14. *See Tremarki v. Pearce*, 2011 N.J. Super. Unpub. LEXIS 1116 holding that "enrollment is not the equivalent of actually attending college on a full-time basis; nor does attending college as a full-time student necessarily mean successful completion of at least twelve semester hours each semester. The fact-sensitive nature of the inquiry requires more than a finding that a student is enrolled in college. Here, plaintiff presented the transcript of the child that demonstrated full-time attendance through the fall of 2009. Withdrawing from one course in the 2009 fall semester and completing only one course during the spring 2010 semester is not dispositive of whether the child ceased being a full-time student."
15. *Newburgh*, *supra*, 88 N.J. at 545.
16. *Filippone*, *supra*, 304 N.J. Super. at 311-12. *See also, Keno v. Pilgrim*, 2006 N.J. Super. Unpub. LEXIS 1451 holding that the court cannot utilize a solitary criterion when determining whether a child has moved beyond the parental sphere (failing to maintain a B average in college courses) noting that early struggles at school do not take a child outside of the parental sphere and make him or her independent. On the contrary, when the child struggles in college he or she may need and rely on his or her parents even more than during times of success.
17. *Filippone*, *supra*, 304 N.J. Super. at 308.
18. *See Zingone v. Zingone*, 2009 N.J. Super. Unpub. LEXIS 1619 (denying the defendant's request for emancipation finding that although the noncustodial parent "may not be pleased with his son's scholastic performance, it is clear that the [child] has applied much greater effort in the past three semesters than he did when initially started college" maintaining a solid C average and is 'diligently pursuing' his education in accordance with the terms of the parties PSA).
19. The Family Educational Rights and Privacy Act is a federal law, which provides students (18 years of age or older) who are enrolled in any post-secondary educational institution, the right of privacy regarding grades, enrollment and billing information. Educational institutions are not permitted to release said information to a parent unless the student has given permission to do so.
20. 34 C.F.R. §99.31(a)(8).
21. 34 C.F.R. §99.31(a)(9). The court will also accept unofficial transcripts as evidence of college enrollment. The appellate court in *Alexander* rejected the husband's argument that the trial court erred by relying on the unofficial transcript, claiming it to be hearsay and lacking trustworthiness and reliability. Relying upon the business records exception to the hearsay rule, the court found that the trial court's reliance upon the document was not an abuse of discretion. *Alexander, supra,* at 10 *citing* N.J.R.E. 803(c)(6).
22. 419 N.J. Super. 327 (Ch. Div. 2010).
23. *Id.* at 334.
24. *Id.*

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OP ED

The Trials and Tribulations of Essex County

by Cary B. Cheifetz

If you are fortunate to live in Essex County, but unfortunate enough to have unsettled divorce issues, it appears that you will be waiting a long time before the family part resolves your case. In a vicinage slated for 44 judges, there are currently 11 judicial vacancies—yes 25 percent of the bench is vacant—with no prospect of them being filled in the near future. As a result, the assignment judge has issued a directive, presumably with notice to the Administrative Office of the Courts, that contested matrimonial trials in Essex County shall be suspended until further notice. In addition, this directive applies to complex civil cases, such as product liability cases. It does not (yet) apply to criminal trials, domestic violence hearings or cases involving parental rights or juvenile matters. Curiously, personal injury trials, which account for 80 percent of the civil court trials, small claims and landlord/tenant proceedings, are not affected, and for the moment are being allowed to continue.

While the politics surrounding the issue of judicial appointments may be a complex mixture of dynamics between the Senate and the Governor's Office, the victims are clearly the public at large, and more particularly the families who reside in Essex County. In a state where the divorce rate hovers at approximately 50 percent, families in New Jersey are entitled to have their divorce issues resolved within a reasonable time. Mental health professionals time after time are in unanimous agreement that unresolved and pending divorce litigation hurts the children and their parents.

Although nearly 99 percent of all matrimonial cases settle, leaving approximately only one percent of cases to be resolved by a trial, the reality is that the suspension of trials affects 100 percent of the matrimonial court docket, not just the one percent of cases that are actually tried. The reason for this is that compromises that produce settlements do not often occur without the court establishing a credible trial date; it is a 'real' trial date that provides true incentive for case resolution.

There are many causes for this phenomenon: In some cases, one of the parties does not want a divorce and will not focus on resolution until the end of the case. In other cases, a party may wish to continue receiving *pendente lite* support that is maintaining an artificially excessive *status quo,* which will terminate upon a judgment of divorce, or the other party unrealistically wishes to pay inadequate support that will change once the proofs are before the court at trial.

The motivations that stand in the way of settlement are numerous, but the fixing of a credible trial date is an equalizer that causes the parties and their lawyers to pause and attempt a pre-trial resolution before incurring the costs of the trial and its final preparation. The fixing of a trial date lets the parties know that the court will resolve their issues if they are not able to self-settle their case, and is a significant reason why so many cases scheduled for trial wind up settled before the first witness is ever called. Thus, where a court cannot provide a trial date that is credible, the result affects the ability to resolve many cases that would otherwise be resolved in the ordinary course.

With the exception of jury duty, many individuals have no contact with the judicial system, other than when going through the divorce process. In many cases, then, their view of judges, lawyers and the quality of justice in New Jersey are indelibly proscribed by their experience as a divorce litigant. Paraphrasing the finding from the last Divorce Reform Commission, the most common criticism voiced by the general public was that divorces in New Jersey took too long and cost too much. The *ad hoc* cessation of divorce trials in Essex County negates all prior efforts to remediate this negative viewpoint, and will ultimately cause another generation of litigants to lose faith in the judicial branch.

An unexpected consequence of the cessation of matrimonial trials is that some litigants, in effect those litigants who are economically advantaged, will elect to proceed to resolve their disputes by arbitration, and assume the economic costs of private justice. In an urban county such as Essex, there is some bittersweet irony that a two-tier jus-

*See **Essex County** on page 143*

Baby Steps

Developments in New Jersey's Law Regarding Artificial Insemination and Surrogacy

by Jennifer Lazor

The tortured progression of the *Baby M* case through our court system, now over two decades ago, presents a stark contrast to the way surrogacy arrangements are viewed today, at least in some regards. The angst of the Stern-Whitehead saga is palpable, even to a current day reader at each phase. First, there was Judge Harvey Sorkow's considered trial court decision, which upheld the surrogacy contract and terminated the parental rights of the surrogate, Mary Beth Whitehead, to Melissa, formerly *Baby M*.[1] Then upon direct certification to the state Supreme Court, then Chief Justice Robert Wilentz unflinchingly invalidated the surrogacy agreement; characterized the payment to Mary Beth Whitehead to act as surrogate as "illegal, perhaps criminal, and potentially degrading to women;" and ultimately reinstated the biological mother's parental rights.[2] Finally, post-judgment, Judge Birger M. Sween offered his elegantly economical decision establishing Mary Beth Whitehead's parenting time schedule with Melissa and denying the maternal grandparents rights to visitation.[3]

Virtually each line in this triumvirate of cases is leaden with the weight of decision, advocacy and toil, both emotional and financial.

Today there are lighter images of a modern family forged by bonds other than purely biological ones. There is Sarah Jessica Parker, synonymous with all things chic and enviable, smiling from a recent *Vogue* cover and extolling the joys of motherhood, both to her biological child and her twin daughters born of a surrogate. A recent noted *New York Times Magazine* article offers an extremely compelling account about how one married couple, after failing to conceive by infertility treatments and unable to adopt, finally found a modern-day version of their family through use of a gestational carrier and egg donor.[4] Although the story is by no definition romanticized, it nonetheless ends happier, if not quite happily, ever after. Then there are the many movie versions of sperm donation ranging from the comedic to the dramatic. They underscore that such births, if not yet commonplace, are at least a sufficiently known commodity to bank on at the box office.

However, changing perceptions and social norms do not always beget changes in the law. New Jersey's law regarding artificial insemination, surrogates and gestational carriers exemplifies that premise.

This article will provide an overview of New Jersey's foundational law on these issues and analyze some recent decisions in what will certainly be, if not an evolving area, a continued area of note in family law. Whether one is more comfortable with the term 'carrier' or 'mother,' it is indisputable that many of the same factors that drove the *Baby M* decisions are now perhaps even more relevant today. Accordingly, as practitioners we likely can expect to encounter related issues with growing frequency.

ARTIFICIAL INSEMINATION AND THE NEW JERSEY PARENTAGE ACT

There are three areas of alternative reproduction that are addressed in our law: artificial insemination, surrogacy and gestational carriers.

Artificial insemination is the process whereby semen is introduced into a woman's reproductive organs without sexual contact.[5] N.J.S.A. 9:17-44, which became effective May 21, 1983, addresses artificial insemination within the legislative framework that forms the New Jersey Parentage Act.[6] The statute only addresses the artificial insemination of a married woman with semen donated by an individual other than her husband, and performed under the supervision of a licensed physician. In such inseminations, the written consent of the husband must be obtained. Therefore, entirely unaddressed by this statute is the artificial insemination of unmarried women occurring outside the supervision of a licensed physician. As addressed below, such a factual scenario presented itself as an issue of first impression in a decision rendered in March 2011. Also unaddressed are married women who may wish to be inseminated absent the written consent of their husbands.

While many New Jersey statutes and Court Rules have been updated with language including same-sex couples in a civil union or domestic partnership, N.J.S.A. 9:17-44 has not been updated. Therefore, women party to a domestic partnership or civil union are unaddressed by this statute.

In artificial inseminations falling within the ambit of N.J.S.A. 9:17-44, the husband "is treated in law as if he were the natural father of a child thereby conceived." Wives in surrogacy and gestational carrier scenarios, where the husband's sperm was used to fertilize the egg, are not treated the same way. In other words, there is no "presumptive maternity" parallel to presumptive paternity, a situation addressed in pending legislation and the 2011 Appellate Division case, *In re Parentage of a Child by T.J.S. and A.L.S.*, both discussed below. Generally, wives in a scenario where a husband's sperm is used to fertilize either the surrogate's ovum or the ovum carried by a gestational carrier, would need to adopt the resulting child to be considered a parent of that child. This adoption would occur only after the parental rights of the surrogate or carrier have been terminated.

N.J.S.A. 9:17-44 further provides that "[u]nless the donor of semen and the woman have entered into a written contract to the contrary" the donor is "treated in law as if he were not the father...and shall have no rights or duties stemming from the conception of a child." Again, this applies where the semen is provided to a licensed physician for use in the insemination.

FUNDAMENTALS OF LAW ADDRESSING SURROGATES

There are two types of surrogate relationships. In the 'traditional' sense, surrogacy involves the fertilization of the surrogate's own egg by way of artificial insemination. Accordingly, the surrogate bears a biological relationship to the child. The other type of surrogacy is gestational. There, a fertilized ovum is implanted into a carrier. The ovum is not that of the carrier' so the carrier has no biological relationship to the child. Gestational carriers, therefore, are actually a subset of surrogates.[7]

The general intent of surrogacy agreements is that the surrogate or carrier enters into a written contract with the couple wishing to have a child. In the wake of *Baby M*, if the birth occurs in New Jersey, the surrogate or carrier is paid only the out-of-pocket costs associated with the pregnancy and legal costs. Once the child is born, the surrogate or carrier agrees to terminate her parental rights to the child, and the couple raises the child as their own with the non-biological parent adopting the child. That is the intent. Here is the problem: New Jersey invalidates such contracts not only where there is compensation to the carrier for the act of surrogacy, but also where the automatic termination of parental rights is required by the surrogate/carrier. Therefore, if the surrogate or carrier changes her mind and decides to keep the child, the courts must become involved to determine the best interests of the child.

This, of course, is a thumbnail sketch of what unfolded in *Baby M*. Elizabeth Stern, then an approximately 39-year-old pediatrician, and her husband, William Stern, then an approximate 35-year-old with a Ph.D. in biochemistry, wanted to have a child. Ms. Stern[8] suffered from multiple sclerosis and feared that having a child would accelerate her symptoms. They enlisted a surrogate through an agency. Twenty-nine-year-old Mary Beth Whitehead was the surrogate. Ms. Whitehead did not complete high school, was married at 16 and had two children from that marriage. Ms. Whitehead wanted to help the Sterns have a child, and felt that she would benefit financially from the arrangement. The Whiteheads were experiencing financial pressures that included default on both mortgages on their home and periods on public assistance.[9]

Unrepresented by counsel, Ms. Whitehead entered into a written surrogacy agreement where she was paid $10,000 to bring the baby to term and to surrender her rights thereafter. The child was born—Sara to the Whiteheads—Melissa to the Sterns—Baby M to those who followed the courtroom drama that ensued when Ms. Whitehead decided that she wanted the baby. The litigation began with an *ex parte* application filed in Bergen County by the Sterns on May 5, 1986, and labored through the courts until April 6, 1988.[10]

Weighing principles of equity, contract law and assessing the best interests of the child, in a nearly 100-page opinion, Judge Sorkow upheld the surrogacy contract. Among the relief granted was the termination of Ms. Whitehead's parental rights and the amendment of Baby M's birth certificate to identify her as Melissa Stern. Mr. Stern was awarded full custody of Melissa. Ms. Stern adopted Melissa the day of the trial court decision. However, the issue was far from resolved.[11]

New Jersey's high court next weighed in with an entirely different view, which remains our law regarding surrogates to date. In a layered analysis, New Jersey's Supreme Court invalided the agreement, generally stated, for three main reasons. First, extrapolating from statutory prohibitions against rendering payments above basic medical and legal costs in adoptions, the Court found that the $10,000 compensation paid to Mary Beth Whitehead to act as surrogate was criminal. Next, looking at the termination of parental rights in the context of agency and private placement adoptions, the Court determined that the *Baby M* surrogacy agreement improperly contracted for the automatic termination of Ms. Whitehead's parental rights. Finally, the Court found that the surrogacy agreement violated New Jersey's strong public policy in favor of the child having access to both biological parents. The Court then undertook constitutional, termination and best interests analyses, and concluded that Mr. Stern would have custody subject to the parenting time of Ms. Whitehead.[12]

The adoption by Ms. Stern was invalidated, as was the trial court's decision to terminate Ms. Whitehead's parental rights. Ms. Stern, whose desire to have a child despite her medical issues in part drove the

hiring of the surrogate, technically became Melissa's stepparent. In other words, in the event that she and Mr. Stern divorced, presumably her rights to Melissa would have been no greater than any other stepparent seeking visitation.[13]

WHY STATISTICS SUGGEST THAT ALTERNATIVE MEANS OF REPRODUCTION MAY CONTINUE TO COME BEFORE OUR COURTS

Although social mores may vary about the appropriateness of alternative methods of reproduction, there is empirical evidence that there is a growing reliance on such methods. One study cites to 260 surrogate births in the United States in 2006 compared to an estimated 1,000 in 2009.[14] Some sources even opine that level of growth is conservative because it does not include all clinics, private surrogacy agreements made outside of an agency/clinic, or couples who do not provide their own egg, such as with gay male couples.[15] These numbers, both quantified and unquantified, suggest that our courts will continue to confront these issues in years to come, perhaps with increased frequency.

Many of the relevant growth factors were presciently identified by Judge Sorkow in his trial level decision in *Baby M*. As Judge Sorkow wrote in 1987:

> [a]n estimated 10% to 15% of all married couples are involuntarily childless. This calculation represents a three-fold increase in childless married couples over the last 20 years. It is estimated that between five-hundred thousand and one million married women are unable to have a child related to them genetically or gestationally without some kind of assisted fertilization or uterine implant.[16]

Based on 2002 statistics from the Center for Disease Control, 7.3 million married women between the ages 15 and 44 have impaired fecundity. Those same statistics calculate that 2.1 million married women between the ages 15 and 44 are infertile.[17] Perhaps even more telling than these statistics and those cited by Judge Sorkow are the categories of people they exclude. Consider married women over the age of 44 trying to conceive. Then add to that contingent unmarried women and men, including those in same-sex couples, who look to alternative means of reproduction as their only option for creating a family structure of their own. It begins to seem as though there is virtually an unquantifiable pool of potential candidates for alternative methods of reproduction.

Other factors contribute to a reliance on surrogacy/gestational carriers. Growing complications in adoption result in fewer children available for adoption both domestically and abroad. On a very basic level, the availability of contraception also has contributed to the reduction in adoptable children. A growing tendency to marry later in life can mean that family planning goals are delayed commensurately at the expense of fertility. These postponements also contribute to classifying many couples as less favorable candidates for a child in the adoption arena due to age. The expense and uncertain results of infertility treatments also explain why people turn to surrogacy arrangements.[18]

LEGISLATION ANYONE?

At the outset of his decision in *Baby M*, Chief Justice Wilentz made clear the following:

> We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a "surrogate" mother, provided that she is not subject to a binding agreement to surrender her child. Moreover, our holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts. Under current law, however, the surrogacy agreement before us is illegal and invalid.[19]

Over 20 years later, our law remains the same. There is proposed legislation in circulation. Specifically, New Jersey Senate bill 2892, introduced on May 19, 2011, proposes amendments to the Parentage Act that would include couples in civil unions and domestic partnerships. It further anticipates egg donation in addition to semen donation and allows both "parents" of the resulting child (*i.e.*, members of the couple as opposed to the donor) to have rights to the child regardless of genetic connection. This proposed legislation comes in response to *In re Parentage of a Child by T.J.S. and A.L.S.*, discussed below.

RECENT CASES

Given the unremarkable progression of alternative reproduction issues through the Legislature, perhaps the better gauge of things to come is our courts. Recent decisions offer some insight. In April 2000, *A.H.W. v. G.H.B.*[20] presented an issue of first impression for the family court. A husband's sperm fertilized the ovum of his wife, which was then implanted into the uterus of the wife's sister, who was to carry the child to term. The sister was not financially compensated for her role as carrier. All were parties to a gestational carrier agreement. The married couple moved for a pre-birth order directing the delivering physician to list the couple as the legal parents on the child's birth certificate. The gestational carrier/sister did not oppose the request. Considering the existing statutes on birth records, including N.J.S.A. 26:8-28(a) and 26:8-30, the court denied the application. The court found that:

> [a] court order for the pre-birth termination of the pregnant defendant's parental rights is the equivalent of making her subject to a binding agreement to surrender the child and is contrary to New Jersey statutes and *Baby M*. Therefore, the gestational mother may surrender the child seventy-two hours after giving birth, which is forty-eight hours before the birth certificate must be prepared. If [the sister/carrier]

> does choose to surrender the infant, and she certifies that she wishes to surrender all rights, then the original birth certificate will list the two biological parents....If [the sister/carrier] changes her mind [about giving up the baby] once the baby is born, she will have a chance to litigate for parental rights to the child.[21]

Anticipating future contests of this sort, the court made clear that it was not the court's present role to determine "what parental rights, if any, the gestational mother may have," even though she technically has no genetic tie to the child.[22] Resolution of that issue would abide approximately nine years and the court's decision in *A.G.R v. D.R.H.*[23]

In *A.G.R.*, a gay male couple was legally married in California and had a civil union in New Jersey, where they resided at the time of this action. One of the partners (S.H.) donated the sperm used to fertilize an egg of an unknown woman. The sister of the other partner (D.R.H.) agreed to act as gestational carrier, ultimately of twin girls. The parties all entered a gestational carrier agreement.

The twins were born in 2006. Through their birth and the ensuing litigation, the sister/carrier lived in New Jersey and spent significant time with the children. The sister/carrier ultimately challenged the agreement and sought rights to the children. Her brother and his partner, the children's biological father, moved for summary judgment against the sister/carrier based mainly on the fact that she had no genetic tie to the twins. The court denied summary judgment. Basically finding the lack of a genetic tie to be an ancillary detail, the court applied the Supreme Court's decision in *Baby M* to the matter. The adoption by the brother was invalidated, as was the gestational carrier agreement. The 'parental rights' of the sister/carrier were preserved, and the donor-partner was held to be the biological father.

In an opinion decided Dec. 13, 2011, the trial court ultimately awarded sole legal custody and primary residential custody to biological father S.H., over the sister/carrier, who did retain visitation rights to the twins.[24] In interesting part, the court reached this conclusion by determining that the children had "special needs" but not due to medical or educational considerations. Rather, the court determined that the twins had special needs because they: were born of surrogacy, subjected to a custody dispute, are biracial, and have a biological father who is involved in a homosexual relationship. A weighing of these factors and others led the trial court to determine that the children were better off in the care of S.H.[25]

The year 2011 brought two additional decisions. First there was the Appellate Division case *In re Parentage of a Child by T.J.S. and A.L.S.*, where the issue presented was:

> whether the New Jersey Parentage Act (Parentage Act), N.J.S.A. 9:17-38 to -59, recognizes an infertile wife as the legal mother of her husband's biological child, born to a gestational carrier, and, if not, whether the statutory omission violates equal protection by treating women differently than similarly-situated infertile men, whose paternity is presumed when their wives give birth during the marriage.[26]

The Appellate Division found that there was no violation of equal protection, and that the Parentage Act does not presume maternity; thus, adoption is required. The facts were analogous to those of *A.H.W.*, except that the trial court permitted the wife a pre-birth order to be listed as the mother on the birth certificate as long as the gestational carrier surrendered her rights within the 72-hour period contemplated by N.J.S.A. 9:3-41(e). The order was challenged by the state registrar.

In upholding its decision, the Appellate Division found:

> the Legislature, in recognizing genetic link, birth and adoption as acceptable means of establishing parenthood, has not preferred one spouse over the other because of gender. And where both spouses are infertile, the law treats them identically by requiring adoption as the singular means of attaining parenthood. Where, however, one of the spouses is infertile, an equal protection claim has not been articulated because their respective situations are not identical and are not parallel and the Legislature is entitled to take these situational differences into account in defining additional means of parenthood.[27]

The Legislature may well further clarify this issue for us with proposed bill 2892, addressed above. The case was also granted certification to the state Supreme Court.

Perhaps the most novel fact pattern is presented by *E.E. v. O.M.G.R.*[28] The plaintiff, an unmarried woman, self-administered a donation of sperm secured from a friend, the defendant. The parties entered into an agreement, wherein the defendant surrendered rights to the child and had no financial obligation to the child. No father was listed on the birth certificate. After the birth of the child, the parties set forth their existing contract into a consent order and submitted it to the court for filing. The court engaged in a detailed analysis that basically led to the conclusion that the consent order was not legal. However, pragmatism seems to have borne out. The court conducted a hearing, with the defendant appearing by telephone but not testifying. The court did not terminate the defendant's parental rights, but awarded sole custody to the plaintiff with no parenting time granted to (or requested by) the defendant. Also, seemingly sidestepping the holding that a parent cannot waive a child's right to support,[29] the court noted:

> [t]he court believes this order is currently in the best interest of [the child] because plaintiff has testified to her ability to provide for the child both financially and emotionally, and the

> defendant has expressed, through consent order, his desire not to have any relationship with the child.[30]

In this matter, the court invalidated the parties' agreement but implemented its intentions nonetheless.

This particular decision perhaps serves as an appropriate endpoint for this analysis. It aptly illustrates the part maverick, part serpentine, yet viscerally correct, decision-making that courts will need until a body of law develops. ■

ENDNOTES

1. *In re Baby M*, 217 N.J. Super. 313, 408 (Ch. Div. 1987). Subsequent to this decision, Ms. Whitehead divorced and remarried, changing her surname in the process. *In re Baby M*, 109 N.J. 396, 412 n.1 (1988). For consistency in this article, she is referred to using the surname Whitehead.
2. *In re Baby M*, 109 N.J. at 411, 468-9.
3. *In re Baby M*, 225 N.J. Super. 267 (Ch. Div. 1988).
4. Melanie Theinstrom, Meet the Twiblings, *N.Y. Times Magazine*, Dec. 29, 2010, at www.nytimes.com/2011/01/02/magazine/02babymaking.
5. *In re Parentage of a Child by T.J.S and A.L.S.*, 419 N.J. Super. 46, 51 n.1 (App. Div.); *certif. granted*, 207 N.J. 228 (2011).
6. N.J.S.A. 9:17-38 *et seq*.
7. *Id*.
8. As both Sterns are doctors, they are differentiated by "Ms." and "Mr." for this article.
9. *In re Baby M*, 217 N.J. Super. at 335-40, 342-44.
10. *Id*. at 344-5, 326.
11. *Id*. at 408-410.
12. *In re Baby M*, 109 N.J. at 408-9.
13. *Id*. Notably, Melissa Stern was interviewed in March 2007. In that article it was suggested by some sources that Melissa Stern at age 18 initiated proceedings allowing for Elizabeth Stern to be her legally adopted mother. Jennifer Weiss, Now it's Melissa's Time, *New Jersey Monthly Magazine* (March 2007).
14. Lorraine Ali and Raina Kelly, The Curious Lives of Surrogates, *Newsweek,* Vol. 151, Issue 14, April 7, 2008, at 44-51.
15. *Id*.
16. *In re Baby M*., 217 N.J. Super. at 331 (*citing* National Center for Health Statistics, Vital and Health Statistics (December 1982) § 23 #11 at 13-16, 32).
17. www.cdc.gov/nchs/fastats/fertile.htm.
18. *In re Baby M*, 217 N.J. Super. at 331-2.
19. *In re Baby M*, 109 N.J. at 411.
20. *A.H.W. v. G.H.B.*, 339 N.J. Super. 495 (Ch. Div. 2000).
21. *Id*. at 505.
22. *Id*.
23. *A.G.R. v. D.R.H.*, 2009 N.J. Super. Unpub. Lexis 3250 (Nov. 30, 2009).
24. *A.G.R. V. D.R.H.*, No. FD-09-001838-07 (Ch. Div. filed Dec. 13, 2011)
25. *Id*.
26. *In re Parentage of a Child by T.J.S. and A.L.S.*, 419 N.J. Super. 46.
27. *Id*. at 66-7.
28. *E.E. v. O.M.G.R.*, 420 N.J. Super. 283 (Ch. Div. 2011).
29. *See Martinetti v. Hickman*, 261 N.J. Super. 508, 512 (App. Div. 1993); *Pascale v. Pascale*, 140 N.J. 583, 591 (1995).
30. *E.E.*, 420 N.J. Super. at 293.

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Essex County

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tice system could develop by the withholding of resources that are the right of every citizen.

The conflict in filling the vacancies must be resolved. The county and state bar associations must take swift action to have their voices heard, and be involved in the process. To this end, the New Jersey State Bar Association recently adopted a resolution, and the president of the Essex County Bar Association has written to the governor's counsel and the county's legislators. But the author believes more must be done. We are now given fair warning that if the matrimonial trial list of the busiest county of the state can be shut down, it can happen in any other county in the state. In fact, one might conclude that this is already the case, as there is a significant backlog in other counties as well. As leaders of our profession, and as the voice of our clients, we must vigilantly look for a solution, and we can never let this happen again.

Our elected officials should take a page out of our matrimonial practice playbook and immediately go to a mediator for the sole purpose of resolving their impasse. But until then, matrimonial trials need to be restored to the calendar. Judicial resources of an entire practice area should not be denied to the citizens of one county. The ability to obtain justice should not be determined by the vagaries of the county where a party happens to reside. If retired judges need to be recalled, or current judges shifted from one division to another or from one county to another, so be it. The public needs to know that action is being taken by the judicial branch while the executive and legislative branches fail to fulfill their responsibility to appoint and confirm judicial vacancies. The case law teaches us that spouses are entitled to live at comparable standards of living after a divorce. Equally compelling is the need for the quality of justice to be comparable from county to county, without regard to politics. ■

A Trend Toward the Removal of Presumptions In Relocation Cases

by Arlene F. Albino and Amanda L. Mulvaney

Relocation has been the subject of much debate and controversy among legal scholars, commentators, mental health professionals, and social scientists over the past decade. A review of state relocation laws indicates that there are four distinct positions that our states have taken regarding which party should bear the burden of proof in relocation hearings and whether there should be a presumption for or against relocation.

1. Burden of Proof on Relocating Parent: The plurality of states place the burden of proof on the relocating parent, and most of these states also have either specifically stated that there is a presumption against relocation or have at least implied such a presumption.[1]

2. Burden of Proof on Non-Relocating Parent: There are 14 states that place the burden of proof on the non-relocating parent, and have either an actual or implied presumption in favor of relocation.[2]

3. Shifting Burden: The third group consists of six states, which employ a shifting burden where the relocating parent must first establish certain factors such as the good faith, reasonableness, and/or legitimacy of the relocation, and then the burden shifts to the non-relocating parent to establish relocation should not be granted.[3]

4. Progressive Approach: The last group of six states[4] has taken a more progressive approach to relocation cases. These states have adopted the position that there should be no presumption for or against relocation, both parties should share the burden of proof and the court should conduct a best interest analysis along with all other relevant factors in determining whether to allow a proposed relocation.[5]

> Relocation cases...present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interest of the custodial parent who wishes to move away are pitted against those of a non-custodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, *the court must weigh the paramount interest of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents.* (emphasis added)[6]

THE PROGRESSIVE APPROACH

Colorado has the most comprehensive legislation, requiring the court to consider 20 factors, including the 11 best interests factors used in Colorado's custody cases and nine additional factors specifically tailored to relocation hearings. Georgia and Maryland also use the best interest analysis in addition to a list of other enumerated factors related to relocation. The remaining three states (Kansas, New Mexico and Rhode Island) utilize a best interest analysis along with any other relevant factors, but do not provide an enumerated list.

These 'progressive approach' states have recognized the need to find a non-prejudicial way to balance the competing interests of each parent's constitutional right to travel and control of the child, as well as the child's best interests. While the best interests of the child are always of primary importance in making a relocation determination, they do not automatically overcome the constitutional interests of the parents, which must be weighed against each other in the best-interests analysis. Making this weighted analysis is quite complicated, and this progressive approach group of states proposes that the most effective way of protecting *all* of these competing interests is by having each parent share equally in the burden of demonstrating how the child's best interests will be affected by a proposed relocation. By equalizing the parties' positions, it is believed that the courts will have an easier time weighing the facts of each case and making a determination than under the other three approaches.

THE AAML MODEL RELOCATION ACT

The AAML (American Academy of Matrimonial Lawyers) created a committee called the Special Concerns of Children Committee (SCC Committee), in 1991, which endeavored to create a model act for relocation purposes.[7] The goal of the committee was to develop a model statute that "would help states arrive at increased rationality and consistency with difficult relocation decisions."[8] In conducting a poll of AAML members, it became apparent that although there seemed to be a general consensus among the AAML membership that there should be some restrictions placed on relocation (94 percent), such as a requirement that the relocating parent provide notice (100

percent), on many crucial issues, such as presumptions and who should bear the burden of proof, the responses were much more diverse.[9]

Accordingly, the AAML Model Relocation Act set forth the procedures and mechanisms for a full evidentiary relocation hearing, but it does not to weigh in on whether there should be a presumption for or against relocation, and which party should bear the burden of proof. Instead, the AAML Model Relocation Act sets forth three alternatives from which each state could choose. The first alternative provides that the relocating parent has the burden of proof that the relocation is in good faith and the best interests of the child. The second alternative provides that the non-relocating parent has the burden of proof that the objection is made in good faith and the relocation is not in the best interests of the child. The third alternative provides a shifting burden, whereby the relocating parent first must show the relocation is in good faith and once met, the burden shifts to the other non-relocating parent to prove the relocation is not in the best interests of the child.[10]

What the AAML Model Relocation Act does not address, however, is a fourth option available to states where presumptions are eliminated and both parties equally share the burden in a best interest analysis. This omission is likely due to the fact that the AAML Model Relocation Act was published in 1998, before a more progressive approach started gaining acceptance.

BAURES

New Jersey is one of 13 states that have not enacted legislation regulating relocation. The seminal case in New Jersey is *Baures v. Lewis,*[11] which provides a shifting burden analysis. First the relocating parent must establish by a preponderance of the evidence that there is a good faith reason for the move, and the move will not be inimical to the child's interests.[12] The relocating parent must also include a visitation proposal.[13] The *Baures* Court specifically notes that the relocating party's burden is "not particularly onerous" and can be satisfied by showing the party seeks to move closer to an extended family, the child will have increased educational or other opportunities, and that the party has contemplated a visitation schedule that will allow the non-relocating parent to maintain his or her relationship with the child.[14] Once this initial burden is met, the burden then shifts to the non-relocating parent to establish that the move is either not in good faith or it is inimical to the child's interest.[15]

Thus, applying the *Baures* paradigm results in a presumption in favor of the relocating parent. The *Baures* Court adopted the view that what is good for the custodial parent is good for the child largely based upon a study by Judith S. Wallerstein and Tony J. Tanke.[16] That study relied upon Wallerstein's own research, and has been largely discredited.[17] Nevertheless, the *Baures* standard remains the law governing removal cases in New Jersey, and the recent Supreme Court case of *Morgan v. Morgan*[18] reaffirmed the *Baures* paradigm.

PRESUMPTIONS SHOULD BE ABOLISHED

It is the authors' opinion that it is time for the Legislature to formulate and enact a removal statute that makes no presumption in favor of or against removal, but yields to the best interests of the child. The statute should incorporate factors drawn from the best available social science research and literature to adopt a child-oriented analysis, rather than a parent-oriented analysis.

> …it serves neither the interests of the children nor the ends of justice to view relocation cases through prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another… courts should be free to consider and give appropriate weight to all the factors that may be relevant to the determination.[19]

Presumptions in favor of either parent are controversial, problematic, and serve no valid purpose in removal litigation. Parties are forced to exaggerate their own roles in their child's life; magnify every defect (real or imagined) in the other parent; discount the role the other parent plays in the child's life; and marginalize the other parent's participation in the child's life.

Presumptions impact the outcome without adequately considering the child's best interests and unduly restrain the court's ability to weigh and compare all the relevant facts and information. Their only real value is "…to simplify what are necessarily extremely complicated inquiries."[20] Parenthetically, there is no controlled study demonstrating that presumptions are effective in reducing the amount of child custody litigation.[21]

Even though the New Jersey Supreme Court in *Morgan* criticized the use of the best interest standard, observing that such a standard would "…always, or nearly always, break in favor of keeping the child in proximity to fit parents, thus chaining the custodial parent, who bears the laboring oar in child-drearing, to New Jersey, while permitting the non-custodial parent free movement,"[22] the author disagrees. If the proper factors are considered and weighed, then the use of a best interest standard will not act as a presumption in favor of the non-moving parent.

Linda D. Elrod is the Richard S. Righter Distinguished Professor of Law at Washburn University School of Law, director of the Children and Family Law Center, and the editor of the *Family Law Quarterly*. Professor Elrod has written several articles on relocation. In her most recent article, she reviewed the changing view toward relocation

matters, which is away from a parent-centered focus toward a child-centered focus.[23] She acknowledges that the "best interests" standard can be vague and easily influenced by the judge's own values, yet it is "flexible and adaptable" to each child's particular circumstance. If children are truly the focus of the relocation analysis, the key then is to provide judges with weighted, prioritized, child-focused factors.[24] She concludes "…[t]he clear trend in the United States seems to be to abandon presumptions and to adopt a 'best interests of the child' test that requires both parents to prove that their position is in the child's best interests."[25]

Although relocation is associated with increased potential of harm to children, it should not be interpreted as a bias against relocation.[26] Courts throughout the country recognize that any relocation will likely produce some degree of harm. The inquiry is, therefore, how much anticipated harm will be enough to deny relocation.

Relocation, like divorce, involves transition in many aspects of a child's life, and appears to be a general risk factor for children. The current *Baures* analysis does not adequately address those aspects of a child's life that are impacted by relocation. It is the authors' view that the Legislature should take up the issue of relocation and adopt a child-centered paradigm that rejects presumptions in favor of either parent, and focuses instead on all of the factors that bear upon a particular child's best interests. ■

ENDNOTES

1. Alabama, Arizona, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, Minnesota, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, and Virginia.
2. Arkansas, California, Mississippi, Montana, North Carolina, Oklahoma, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.
3. Alaska, Florida, Indiana, Massachusetts, New Hampshire, and New Jersey.
4. Colorado, Georgia, Kansas, Maryland, New Mexico and Rhode Island.
5. Colo. Rev. Stat. Ann. §14-10-129; Ga. Code Ann. §19-9-1; Kan. Stat. Ann. §60-1610(a)(3)(c); Md. Code Ann. Fam. Law §9-106; N.M. Stat. Ann. §40-4-9; *In re Ciesluk*, 113 P.3d 135 (Colo. 2005); *Dupre v. Dupre*, 857 A.2d 242 (R.I. 2004); *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991); *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003); *In re Marriage of Bradley*, 899 P.2d 471 (Kan. 1995).
6. *Tropea v. Tropea*, 66 N.E. 2d 145, 148 (N.Y. 1996).
7. Barbara Ellen Handschu, The Making of a Model Relocation Act: A Committee Member's Perspective, 15 *J.Am.Acad.Mat. Laws*. 25(1998).
8. *Id.* at 28.
9. *Id.* at 27.
10. AAML Proposed Model Relocation Act, 15 *J. Am. Acad. Mat. Laws*. § 407 at 20-22 (1998).
11. 167 N.J. 91 (2001).
12. *Id.* at 118.
13. *Id.*
14. *Id.*
15. *Id.* at 119.
16. Judith S. Wallerstein & Tony J. Tanke, To Move or Not to Move:Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 *Fam. L.Q.* 305 (Summer 1996) with Richard A. Warshak, Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited, 34 *Fam. L.Q.* 83 (Spring 2000) and Sanford L. Braver, Ira M. Ellman & William V. Fabricius, Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations, 17 *J. of Fam. Psych*. 206(2003)(suggesting harm to children from move of either parent, but criticized for both methodology and conclusions).
17. Charles F. Vuotto Jr., Editor-in-Chief's Column, Should the Decision to Have Children Require a Presumption of Residential Proximity? 31 *NJFL* 63 (2010).
18. *Morgan v. Morgan,* 205 N.J. 50 (2011).
19. *Tropea, supra,* 66 N. E. 2d at 151.
20. *Id.*
21. Lyn R. Greenberg, Dianna J. Gould-Saltman, Hon. Robert Schnider, The Problem with Presumptions – A Review and Commentary, 3 *J. Child Custody* 139, 146 (2006).
22. *Morgan, supra*, 205 N.J. at 65.
23. Linda D. Elrod, National and International Momentum Builds for More Child Focus in Relocation Disputes, 44 *Fam. L.Q.* 341(Fall 2010).
24. *Id.*
25. *Id.* at 356.
26. William G. Austin, *The Child and Family Investigator's Evaluation For the Relocation Case*, R.M. Smith (Ed.), *The Role of the Child and Family Investigator and the Child's Legal Representative in Colorado* (pp. C9-1- C9-28) (2005).

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The Psychology of Settlement

by Christopher R. Musulin

As matrimonial attorneys we are educated and trained to address legal issues such as custody, child support, alimony and equitable distribution; yet divorce is both a legal and a psychological process. Often the emotional and psychological issues, rather than the inherent merits or legal complexities of a particular client's situation, present the most significant obstacle to a negotiated settlement of a divorce matter. It is our obligation as divorce lawyers and legal professionals to both educate ourselves and to follow established norms of professional conduct that consider and respect the psychodynamics and all of the inherent hardships accompanying a family going through the process of divorce.

THE PSYCHODYNAMICS OF DIVORCE

Divorce necessitates a complete set of psychological adjustments for the litigants involved. The adjustments can be intensely personal, even primitive, involving behavioral regression, or more pragmatic, such as acclimating to new parenting plans, housing, or reduced socio–economic status.

PERSONAL ADJUSTMENTS

The process of personal adjustments can be the most challenging aspect of the divorce process. According to Professor Marc Ackerman, one of America's leading forensic psychologists whose book, *Psychological Experts in Divorce Actions*, is now in its fifth edition:

> At the time of divorce, there is often a massive ego regression on the part of parents. People who had previously behaved reasonably well will behave poorly at this time. A spilling of aggressive and sexual impulses, in addition to intense depression, can occur. Most of this is based on the fact that most divorces are unilateral decisions. This results in a "narcissistic injury" of being rejected. Because a shared identity exists during the marriage, anxiety rises based upon the question, "Who am I without the marriage?" This is similar to the experience an adolescent goes through. Intense loneliness and diminished capacity can also occur in conjunction with ego regression.[1]

All attorneys have encountered clients immersed in different stages of often complex ego regression. Interacting with a person in this condition is extremely challenging. A prospective client may seem distant, almost intellectually impaired and often extremely upset, bordering on volatility. A matrimonial attorney's calm logic, rational explanations and socially appropriate interaction do not fit their emotional station. One's failure to regress to their level of behavior can upset and even offend them. Why isn't this attorney equally outraged? This attorney is not empathetic with my situation! I am not connecting with him! He won't fight for me! I'll go somewhere else and find an attorney who *will* fight for me!

Bonding with a client on an emotional level at a regressed state is a fatal mistake. It distracts the client from the business at hand and creates unrealistic expectation with regard to the use of the divorce process (using litigation to exact emotional retribution), making settlement of a divorce completely impossible.

According to many legal and psychological authorities, the process of bonding with a client in a regressed psychological state is similar to a phenomenon known as "client think," a version of "group think" identified by author Irving Janus.[2] Professional objectivity and the pursuit of traditional litigation goals are supplanted by pursuit of a client's emotional agenda and unrealistic goals, which then become the mantra of the attorney/client duo. The attorney assumes a position in the litigation based upon 'client think' and, in effect, becomes the client. When immersed in client think, subconscious cognitive barriers arise that directly impact an attorney's judgment and otherwise compromise the fiduciary duty.

PRAGMATIC ADJUSTMENT

As to the more pragmatic adjustments related to the divorce process, both parents and children must deal with the concerns of moving to a new neighborhood, going to a new school or job, getting used to new relationships and single parenthood, and becoming familiar with visitation schedules. It may be necessary for a parent who had not previously worked outside the home to do so after the divorce. Litigants and the children are often required to survive on a strict budget. Many experience the loss of previous social groups and extended family, and are forced to make any number of other adjustments.

MUTUALITY IN THE DECISION TO DIVORCE

According to Sam Margulies, Ph.D., Esquire, a nationally recognized expert on the psychology of

divorce, the participants in the divorce process, litigants and attorneys alike, must recognize and identify the psychological position of the parties at the commencement of the divorce process if they have a genuine desire to problem-solve the marital estate and achieve a settlement.

As stated by Margulies:

> The most important psychodynamic of the divorce is the issue of mutuality and how it develops. In very few divorces do the two partners mutually decide on a divorce at the same time. Invariably, after some long period of reflection and consideration, one of the partners will decide that she can't take the discomfort of the marriage anymore and is determined to end the marriage. Such decisions are not made lightly or impulsively. I have found that it is not unusual that the "initiator" has been ruminating about divorce for years. He or she has had an opportunity to mourn the loss of the dream associated with the marriage, has had time to think through what an alternative life would be like and has begun to prepare emotionally and in other ways for the end of the marriage. She may have made new friends who are not linked to her mate, may have started to achieve new credentials to be able to better earn money and in general started to live a new life.
>
> The other partner, who we call the "non-initiator," may be anywhere on a continuum from resigned acceptance to utter shock and surprise. To the extent that the two partners are nearly equal the divorce can begin more easily. He announces he wants a divorce, citing many years of unresolved unhappiness and numerous unsuccessful attempts at counseling. And although she might have been inclined to try a little longer, she agrees that he is probably right and that they ought to get divorced. In this situation, the decision is nearly mutual and both are almost ready to begin negotiating the divorce. Contrast this situation with one in which he makes the same announcement but she reacts with surprise and terror. She is committed to the covenant they made in their wedding vows and believes that marriage is forever no matter what. She is aghast at the damage a divorce would do to the children and she is filled with fear for her loss of place in the community and the changes that would be necessary. She is outraged that he could even consider divorce and declares her complete opposition. This couple is in trouble.[3]

The failure to fully recognize, acknowledge and temper the psychological position of the litigants is destructive to a settlement. A party responding to a divorce, the so-called non-initiator, needs time to adjust, mourn, and envision a new existence as a single person with all of the anxieties and adaptations accompanying such a position. Until the period of psychological adjustment is sufficiently complete to permit rational discussion concerning the marital estate, no settlement will occur.

THE TIMING OF PSYCHOLOGICAL ADJUSTMENT

Unfortunately, the process of psychological adjustment related to divorce can take anywhere from six months to a year, or even longer. In fact, according to psychologist and researcher Judith Wallerstein, a well-known clinical and forensic psychologist who has conducted a study of the impact of divorce on families over a period of 25 years, 10 years after the divorce 40 percent of women and 80 percent of men are just as angry as they were at the time of the initial divorce application.[4]

According to research results conducted by psychologist Judy Corcoran and Julie Ross, authors of *Joint Custody With A Jerk*, "There's still anger, jealousy…these feelings are reignited with every disagreement."[5] Court proceedings, letters, phone calls or other matters related to the divorce also have the potential of reigniting regressive behavior.

Traditional divorce practice is simply not compatible with the timing of psychological adjustment in most divorce cases. The process of litigation is replete with opportunities to reignite ego regression; for example, a divorce complaint utilizing extreme cruelty as a basis to dissolve the marriage; a *pendente lite* motion detailing alcohol or drug use or poor parental decisions relating to children; or the filing of a domestic violence complaint detailing physically abusive behaviors or otherwise recounting horrible interactions between a husband and wife.

Just when the smoke clears and the property settlement agreement is drafted, the smallest or most inconsequential thing—a word, a gesture, an email or the discovery of a paramour—may upset the fragile psychological dynamic of settlement. It has nothing to do with the merits; rather, it is simple emotion. Additionally, the best practice protocols requiring a rapid disposition of divorce cases in 12 months or less are unrealistic in light of the psychological timetable in most divorce matters. In fact, the pressure of complying with best practices can make the situation even worse.

PROFESSIONAL STANDARDS ADDRESSING THE PSYCHOLOGY OF DIVORCE

Various standards of professional conduct from the state of New Jersey, the American Bar Association and the American Academy of Matrimonial Lawyers address the psychology of divorce, either directly or indirectly, in relation to the conduct of counsel and the parties. Most of these relate to expediting litigation, assuming reasonable positions, and striving to limit the emotionalization of the divorce process.

Pursuant to the Bounds of Advocacy of the American Academy of Matrimonial Lawyers:

> 7.1 An attorney should strive to lower the emotional level of marital disputes by treating counsel and the parties with respect.
>
> Comment: Some clients expect and want the matrimonial lawyer to reflect

the highly emotional, vengeful relationship between the spouses. The attorney should explain to the client that discourteous or uncivil conduct is inappropriate and counterproductive, that measures of respect are consistent with competent and ethical representation of the client, and that it is unprofessional for the attorney to act otherwise.

Ideally, the relationship between counsel is that of colleagues using constructive problem-solving techniques to settle their respective clients' disputes consistent with the realistic objectives of each client. Examples of appropriate measures of respect include: cooperating with voluntary or court-mandated mediation; meeting with opposing counsel to reduce issues and facilitate settlement; promptly answering phone calls and correspondence; advising opposing counsel at the earliest possible time of any perceived conflict of interest; and refraining from attacking, demeaning or disparaging other counsel, the Court or other parties.

The attorney should make sure that no long-standing adversarial relationship with or a personal feeling toward another attorney interferes with negotiations, the level of professionalism maintained, or effective representation of the client. Although it may be difficult to be courteous and cooperative when opposed by an overzealous lawyer, an attorney should not react in kind to unprofessional conduct. Pointing out the unprofessional conduct and requesting that it cease is appropriate.[6]

This canon recognizes that the psychology of divorce is not limited to the parties. Rather, the attorneys can also engage in ego regression based upon a prior history of difficulty with a particular adversary, being overly aggressive or just being a bad attorney. Another phenomenon analogous to client think, referred to as 'attorney think,' may occur, wherein an otherwise reasonable client may become immersed in the ego regression or general bad behavior of their attorney, and thereafter assume unreasonable positions. As a result, settlement negotiations are, once again, adversely affected.

The American Bar Association (ABA) has published standards for civility in family law practice. These standards impose obligations upon a family law attorney to be civil toward clients, opposing counsel, and the court as core obligations of the fiduciary duty. Among the civility standards published by the ABA, the following are directly related to the psychodynamics of divorce:

I. To Client

- Try to keep the client on an even emotional keel and avoid characterizing the actions of the other party, opposing lawyers, and judicial officials in emotional terms.
- Be aware of counseling resources and be prepared to refer the client to counseling where appropriate.
- Where a client has an exaggerated or unrealistic view of his or her options in any given situation, explain matters as carefully as possible in order to assist the client to realistically assess the situation.
- Where a client wishes to pursue a claim or motion for purely hostile or vindictive purposes, explain to the client the reasons why the client should not do so.

II. To Opposing Counsel

- Be respectful and courteous in all oral and written communications with the opposing side.
- Do not engage in conduct, oral or written, that promotes animosity and rancor between the parties or their counsel.
- Use a demeanor and conduct during the deposition or other out-of-court meeting that would be no less appropriate than it would be in the courtroom.
- Do not engage in harassing or obstructive behavior.

III. To the Court

- Act with complete honesty; show respect to the Court by proper demeanor, and act and speak civilly to the judge, court staff and adversaries.
- Explore settlement possibilities at the earliest reasonable date, and seek agreement on procedural and discovery matters.

New Jersey Rule of Professional Conduct 3.2 provides that "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process."

All of these standards both implicitly and explicitly acknowledge the presence of emotions in family law proceedings and empower judges, attorneys and litigants to separate the psychological dynamic from the legal issues at hand, always with an eye toward resolution, compromise and settlement, virtues consistent with the discharge of our fiduciary duties.

CONCLUSION

Of the 30,484 new FM filings in the 22 New Jersey counties between July 1, 2009, and June 30, 2010, only 226 cases were tried to conclusion, less than one percent of all divorces filed in the state of New Jersey.[7]

It is, therefore, not a question of whether a case will settle, but when. Of course, there may be a need for significant discovery, reasonable debate over legal issues, domestic violence, the institutional realities of judicial backlog or other circumstances delaying resolution, but clearly the emotional station of the litigants is equally significant and often dispositive.

As matrimonial attorneys, we can no longer be oblivious to the psychology of divorce. Law schools, continuing legal education programs, and members of the bench and bar must make better efforts to enlighten all participants on the obvious psychody-

*See **Settlement** on page 155*

Support After Death

In New Jersey Three Things are Certain: Taxes, Death, and an Obligation to Pay Support After Death

by Vincent D. Segal

The law of this state was that after death a person obligated to pay alimony or child support was relieved of that obligation.[1] In *Modell*, the Appellate Division struck down a provision of the trial court that obligated the husband to maintain life insurance for the benefit of the wife in a separate maintenance action. In recent years, this concept has been eroded, and now the law is that a payor/estate most likely has an obligation to pay or secure payment of alimony or child support after death. The ultimate determination depends upon the circumstances of a particular case. What follows is an analysis of the critical case law that has evolved over the last half century.

EARLY RULES

In 1959, the Appellate Division decided *Flicker v. Chenitz*.[2] The parties in *Flicker* were divorced in 1947, and under the terms of the property settlement agreement the husband agreed to pay $140 per week in satisfaction of all support, alimony, and maintenance for the lifetime of the wife. The agreement was dated Dec. 30, 1946. At the time of the divorce there were two unempancipated children.

On March 29, 1958, the husband died. Under the existing law at that time, his support obligation was terminated. The wife sued on the basis that the agreement provided her support for her lifetime. The trial court dismissed the wife's complaint to enforce the agreement, noting that the essence of the agreement was to discharge a marital obligation, and there was no intention to the contrary observed by the court. The Appellate Division reversed, and granted judgment to the wife on the basis of the language of the property settlement agreement, which in the opinion of the appellate court *did not conflict with existing public policy*.

Twelve years later, the Supreme Court decided *Grotsky v. Grotsky*.[3] The trial court directed the husband to maintain life insurance on his life, naming his children as irrevocable beneficiaries until their majority. The children at the time of the trial were ages 16, 15, and six. The Supreme Court noted that the statute, then in effect, did not deal in explicit terms with the power to provide for continued support of children after death. Apparently, no court had yet held such an obligation existed. In enforcing the order of the trial court, the state Supreme Court noted:

> For present purposes it is sufficient to hold, as we now do, that the comprehensive terms of N.J.S.A. 2A:34-23 are not to be narrowed but to be applied liberally to the end that, where the circumstances equitably call for such actions, the court may enter a support order for minor children to survive their father's death and may direct the father to maintain his insurance naming the minor children as beneficiaries, for the purpose of securing due fulfillment of the support order during their minority.[4]

Meerwarth v. Meerwarth[5] followed *Grotsky*. In *Meerwarth*, the trial court denied the wife's post-judgment request that the husband undergo a physical to obtain life insurance to provide her protection for the $25,000-a-year alimony award previously ordered. The state Supreme Court reviewed and affirmed, noting that the wife not only was awarded alimony but also one-third of the defendant husband's total estate, some $200,000. In *dicta*, the Court endorsed the theory of life insurance to protect alimony relying upon the broad language of N.J.S.A. 2A:34-23. The Court then went on to note:

> However, each case must stand on its own facts and deference must be given to the trial court's ability to weigh the equities and take appropriate action.[6]

Since the wife's needs were not compelling under the facts presented, the determination of the trial court denying the obligation of the husband to take a physical, thus denying death event security, was sustained.

RULE 1 AND RULE 2

In *Davis v. Davis,*[7] the result was the opposite from *Meerwarth*. After a 14-and-a-half-year marriage the parties divorced in Sept. 1956. The wife was awarded $50 per week in alimony. Post-judgment applications in 1961, 1963, and 1973 raised the alimony award each time to $75, $80, and $135 per week, respectively. Note that by 1973, 17 years had passed since the divorce. In 1979, 23

years after the divorce, the wife asked for another increase in alimony, and asked for $140,000 in life insurance protection. Discovery was permitted, and the wife renewed her application in 1980. In 1981, she was awarded $230 per week alimony, and the issue of life insurance was again raised by the wife. The trial court, 25 years after the divorce, directed the husband to provide $100,000 in life insurance coverage or, in the alternative, establish a $100,000 trust for the protection of the wife's support award.

In affirming this determination, the Appellate Division found that while *Modell* was not overruled, its holding has been undercut substantially by later decisions of the Supreme Court.

> We are satisfied that in the particular circumstances of this case the rule discussed in *Modell* should not be applied…Defendant…has substantial assets and income and can easily provide the measure of security necessary to assure payment of the court-ordered alimony in the event that he predeceases plaintiff. In these circumstances, equity cries out for some relief.[8]

With this decision, the Appellate Division established two rules: Rule 1 relief for the needy payee will be granted when the well-to-do payor can afford it; and Rule 2 no relief is afforded the comfortable payee spouse irrespective of the ability of the payor to afford it.

THE ETERNAL OBLIGATION

In *Koidl v. Schreiber,*[9] the court significantly extended the obligation to pay support beyond death. Here, the defendant, Mr. Schreiber, fathered two children with the plaintiff, Ms. Koidl, without benefit of marriage. Paternity was established on Oct. 17, 1977, and a $40 per week support order for the two children followed. The order was eventually raised to $50 per week in Jan. 1978. On July 13, 1984, Mr. Schreiber died. The court insightfully observed in its opinion that "[p]resumably, the payments stopped."[10] On Nov. 30, 1984, an *ex parte* order was entered, terminating the support obligation and closing the probation department account because of the death of the obligor.

An unopposed appeal followed, and the Appellate Division quoted from *Grotsky*:

> Where the circumstances equitably call for such action, the court may enter a support order for minor children to survive their father's death…[11]

The rest of the quotation pertaining to the maintenance of life insurance coverage for this purpose is missing from the Appellate Division's opinion.

In total, the obligor had $30,000 in life insurance coverage for the benefit of the children. His will made no provisions for the children. Each child also started to receive $255 per month from Social Security as a result of the death of their father. These factors, the court said, should be reviewed when the matter was remanded to the trial court to determine what obligation, if any, the estate had for the continued support of the children.

The Appellate Division did not base its entire opinion strictly upon the language in *Grotsky*. It also looked at the broad purpose of N.J.S.A. 9:17-53, which is that provision of the Uniform Parentage Act adopted by New Jersey that authorizes a court to establish support. It read N.J.S.A. 9:17-53 in the context of N.J.S.A. 9:17-45, which is that provision of the statute discussing appropriate parties, the statute of limitations, and the death of the alleged father in the event paternity is sought to be established. By connecting N.J.S.A. 9:17-53 to N.J.S.A. 9:17-45, and by taking only a partial quote from *Grotsky*, the Appellate Division in *Koidl* reached the determination that the death of the obligor does not, in and of itself, terminate his or his estate's obligation to pay child support.

A FURTHER TWIST

Five years after *Koidl*, the Supreme Court decided *Vasconi v. Guardian Life Ins. Co.*[12] The parties in the matter finalized a property settlement agreement on May 5, 1985, and were divorced the same day. Under the terms of the agreement, there was a "mutual waiver of alimony and a mutual waiver of all claims or obligations either may have had to the other rising out of the marital relationship."[13] Both parties also relinquished any claims they may have had in the other's estate.

The parties had married on Sept. 9, 1982, and in Aug. 1984 the husband designated the wife as beneficiary under his life insurance policy through his employment. Apparently no consideration was given to this life insurance policy by either party at the time the marriage dissolved. The husband died on Dec. 28, 1986. He was only 33 years old.

The trial court, on application of the former wife, granted summary judgment to her since she was named beneficiary under the insurance policy. The Appellate Division stayed that order, but after a hearing on the merits, affirmed the trial court. The Supreme Court reversed, making an analogy to the New Jersey law of wills. The Court concluded that:

> [a] beneficiary designation must yield to the provisions of a separation agreement expressing an intent contrary to the policy provision.[14]

Justice Daniel O'Hern, writing for the majority, added:

> [i]n the procedural posture of this case we must assume that it would be unfair and unjust for the former wife to retain this property. The only question is whether the law is powerless to remedy the injustice. We hold that the law is fully capable of effectuating marital distributions 'derived from

> notions of fairness, common decency, and good faith."[15]

Justice Stuart Pollock, dissenting, observed:

> Until today an insured could change the beneficiary on an insurance policy only by notifying the insurer in accordance with the policy or by substantially complying with policy provisions. The majority rejects that rule. It holds that after the death of a divorced insured, the named beneficiary, his former wife, may be deprived of the insurance proceeds because her lawyer did not specifically protect her in their property settlement agreement. I would leave so drastic a change to the Legislature. The rule accomplishes little except to engender uncertainty and spawn litigation. Consequently, I dissent.[16]

TO THE REAR MARCH

On the heels of *Vasconi*, there follows *DeCeglia v. Estate of Colletti*.[17] Mr. Colletti was insured under two policies, a $25,000 group term policy in which he had designated his mother as beneficiary, and a $50,000 group term policy in which he had designated his mother and sister as beneficiaries. He was a single man.

He began a relationship with the plaintiff, Ms. DeCeglia, and they commenced living together in May 1990. She became pregnant and they planned to marry Dec. 13, 1990. Unfortunately, Mr. Colletti died unexpectedly.

Apparently, just before his death one of his good friends was killed in a hunting accident and, as a result, the decedent made some preliminary inquiries about changing his life insurance and changing his will. He took no steps beyond these preliminary inquires before he died.

With nothing more than what has been indicated, the plaintiff filed suit seeking the benefit of the life insurance policies for the child that Mr. Colletti fathered. The trial court granted judgment to the plaintiff, finding that Mr. Colletti intended to change his insurance beneficiaries notwithstanding the fact that he took no significant steps in this direction. The estate appealed, and the Appellate Division reversed regarding the trial court's reasoning, but not regarding the result.

> We conclude that decedent's verbal expressions of intent to change the beneficiary designations under his life insurance policies did not change those designations. However, we also conclude that decedent's obligation to support his child is enforceable against his estate and that the proceeds of his insurance policies are available to satisfy this obligation. Therefore, we reverse the part of the judgment which awards the proceeds of the insurance policies to plaintiff, but remand to the trial court to allow plaintiff to pursue claims for child support from the proceeds of the policies.[18]

To reach its conclusion, the Appellate Division returned to *Koidl* and *Grotsky* and N.J.S.A. 9:17-45, noting that *Koidl* imposed a child support obligation that may continue after death, and that *Grotsky* proposed such an obligation in the first instance. The Appellate Division also construed N.J.S.A. 9:17-45(c):

> The death of the alleged father shall not cause abatement of any action to establish paternity, and an action to determine the existence or nonexistence of the parent and child relationship may be instituted or continued against the estate or the legal representative of the alleged father.[19]

to mean that not only the establishment of paternity but a support action against the estate was permissible under the language of the statute. At this point, the Appellate Division had only gone as far as *Koidl*. It was faced with an additional problem, however. Insurance proceeds are not part of a decedent's estate. Such an impediment did not deter the Appellate Division. It concluded that:

> …our courts have held that the basic purpose of statutory provisions which exempt the proceeds of insurance policies and related benefits from the claims of creditors is to protect beneficiaries from commercial creditors. Consequently, such provisions do not necessarily foreclose the claims of those to whom the insured or other claimant owes a duty of support.[20]

This general provision was supported by the opinions of *Fischer v. Fischer,*[21] *Stellar v. Stellar,*[22] and *Hirko v. Hirko.*[23] Not one of these opinions deals with life insurance proceeds.

Fischer permitted the invasion of a Police and Firemen's Pension Fund to satisfy an alimony award. *Stellar* permitted the invasion of worker compensation proceeds to satisfy court-ordered support for a wife and children. *Hirko* permitted a levy on the cash surrender value of a life insurance policy for the payment of alimony. In an effort to provide for the infant child, the Appellate Division created a new rule of law, not withstanding the old maxim that "equity can only follow the law."

RULE 1 REVISITED

Jacobitti v. Jacobitti[24] deals with an alimony trust in lieu of life insurance. Here, the plaintiff husband was 85 years old, and the defendant wife was 66 years old. The trial court directed that the plaintiff establish an alimony trust, since he was not capable of obtaining life insurance at a reasonable cost, and since he had more than substantial funds to establish the trust. Relying upon the recently enacted N.J.S.A. 2A:34-23, which provides for reasonable security for support orders, including, but not limited to, the creation of trusts or other security devices, the court found the trust vehicle appropriate. The court recognized Rule 1 from *Davis*, relief for the needy when the well-to-do payor can afford it.

Notwithstanding the foregoing, the Appellate Division was rather

conservative when ruling *In the Matter of the Declaration of Death of Dominick Santos, Jr.*[25] In *Santos*, the trial court refused to expand *Vasconi* to find that a property settlement agreement "creates a rebuttable presumption that a deceased divorced spouse intended to revoke the former spouse's beneficiary interest in his or her life insurance policy."[26] The Appellate Division affirmed. Here, the divorce decree was silent regarding life insurance. The decedent did not change his policy after the divorce, notwithstanding his apparent authority to do so. The court ultimately ruled for the former spouse, and not the estate, and the life insurance proceeds were paid to her.

CHILD 1 VS. CHILD 2

Under still another fact pattern, the state's Appellate Division decided *Della Terza v. Estate of Della Terza*.[27] In this instance, the parties were divorced on Aug. 23, 1983. The husband was obligated to maintain the child of the marriage as a beneficiary under his life insurance policy until she became emancipated. He was employed by the Belleville Board of Education, and insured under a group term life insurance policy that increased in increments consistent with his pay raises.

After the divorce, the husband married and designated his new wife as the primary beneficiary under his life insurance policy. His daughter from his first marriage, as well as his son from his second marriage, were designated contingent beneficiaries. Despite an order from the court in a post-judgment proceeding directing the husband to provide proof that his daughter of the first marriage was primary beneficiary under his life insurance policy, that proof was never provided.

The husband died on July 16, 1989. The insurance proceeds totaled $80,337.88. The proceeds were paid to his widow as the primary beneficiary. Suit was filed on behalf of the unemancipated child of the first marriage, and the trial court granted summary judgment in her favor, turning all the policy proceeds over to the unemancipated daughter of the first marriage. The Appellate Division agreed with the reasoning of the trial court but added,

> [n]evertheless…we are loathe to reach a result which, through automatic operation, would confer the intended benefit on the child of the first marriage to the total exclusion of the child of the second marriage, whether directly or through the parental interests and responsibilities of the second spouse…This case is one factually of first impression in New Jersey in that regard, therefore; and there lurks within this cryptic record a possibility that may provide a basis for reaching an appropriate result in respect of this decedent's obligations to the children of both of his marriages. We hold, therefore, that notwithstanding the correctness of its decision on the substantive issue presented, the trial court's ruling on plaintiff's motion should have been seen, at most, as a grant of partial summary judgment.[28]

The Appellate Division then remanded the matter back to the trial court to determine the entitlement of the child of the first marriage. Was it:

1) the face amount of the life insurance coverage at the time of the divorce settlement;
2) the face amount of the life insurance coverage at the time of the divorce settlement plus the incremental increases that came along with annual pay raises;
3) the face amount of the life insurance coverage at the time of the divorce settlement plus the incremental increases that came along with annual raises plus any increase in the policy that might be attributable to a new position obtained by decedent after his divorce but prior to his death?

Faced with the dilemma of a child from a first relationship versus a child from the second relationship, the appellate court was not enthusiastic to follow the precedents of *Koidl* and *DeCeglia,* both of which permitted post-death child support claims against insurance proceeds, *DeCeglia* going as far as to permit claims to be made against insurance payable to the decedent's mother and sister.

SEPARATE PROPERTY IF THIRD PARTY

In *Raynor v. Raynor*,[29] the Appellate Division opined that "the guiding principle is the best interest of the children and the fulfillment of the intent contained in the final judgment that decedent provide the children with support in the event of his untimely death."[30] The dispute was between the former wife on behalf of her children and the widow of Wayne Douglas Raynor, who died Dec. 5, 1995.

When Mr. Raynor died, he was obligated, pursuant to a property settlement agreement, to provide the proceeds of his work-related life insurance to his children for their continued support. At the time of his death, he was a federal employee with Federal Employees Group Life Insurance (FEGLI). Knowing he was near death, he designated his wife as 76 percent beneficiary and his children as 24 percent beneficiaries of the $215,700 insurance. He also had in place a privately paid policy of insurance for his wife, amounting to $130,000.

The former wife challenged in both the U.S. District Court regarding the FEGLI and in state court seeking funds for her children's support and schooling. The property settlement agreement was silent regarding college costs. The trial court found the private insurance proceeds to be part of the decedent's estate relying on *DeCeglia*. It also found the estate to be responsible for 50 percent of the college costs.

The Appellate Division affirmed in part relying upon N.J.S.A. 2A:34-

23(a)(5) ("Need and capacity of the child for education, including higher education"). It found further that after the trial court considers the extent of the benefits conveyed to the children under the decedent's group life insurance, if additional funds are necessary to meet the decedent's share of the college costs, the court may look to the proceeds from the private insurance. In this instance, the designated beneficiary of the insurance proceeds may find that the decedent's designation of beneficiary is subject to change the same as in *DeCeglia*.

RULE 2 REVISITED

In an unreported opinion of the Appellate Division, *Mezey v. Porter,*[31] one issue on appeal was:

> Did the judge abuse his discretion by requiring the defendant's alimony payments be secured by a life insurance policy or trust while also ordering that such payment terminate upon the death of either party?

In determining that, in fact, the trial court had abused its discretion, the Appellate Division found that the record did not support the conclusion of the trial court, particularly the conclusion that there was a certain dependency in this case on the part of the defendant for the receipt of alimony from the plaintiff. Contrasting the facts in this instance with those in *Jacobitti*, the Appellate Division determined that since the defendant-wife had no physical ailment to impair her ability to work, since she was not penniless and, in fact, had several hundred thousand dollars in equitable distribution apart from exempt assets, the requirement to maintain life insurance to preserve the alimony award was not substantiated. The case in the opinion of the appellate court was more akin to *Meerwarth* than to *Davis* or *Jacobitti*. Here, *Davis* Rule 2 applied: no relief for the comfortable irrespective of the ability of the payor to afford it.

Konczyk v. Konczyk[32] raised still another issue: How much, if anything, may the plaintiff receive from a life insurance policy on the life of her former husband? The property settlement agreement required Mr. Konczyk to pay alimony of $200 per month for five years, and then $100 per month until Ms. Konczyk reached age 65. The mandatory life insurance coverage reduced from $20,000 during the first five years, to $15,000. For the remainder of the term, no other incremental reductions were specified. After Ms. Konczyk reached age 65, the alimony and the life insurance obligation ceased.

When Mr. Konczyk died, it was learned, contrary to the property settlement agreement, that he had designated his adult daughters as beneficiaries. As Ms. Konczyk was only 20 months from her 65th birthday, the trial court awarded her $2,000, with the balance of the policy to be paid to the daughters. The appellate court affirmed.

In satisfying the term alimony obligation, the court followed neither *Davis* and *Jacobitti* nor *Meerwarth*, although a reading of the facts seems to imply that Ms. Konczyk was not a needy person. Query: If this contest had been between the former spouse and a second spouse, and not the children of the marriage, would the result have been the same?

CONCLUSION

What is clear is that no single rule of law now controls the support obligation of a decedent. The case outcomes vary depending upon whether or not the:

1) obligation is alimony (not certain) or child support (certain),
2) obligor is wealthy or poor, and/or
3) obligee is needy or comfortable.

What appears not to matter is the source of the funds. Life insurance proceeds, retirement funds, and third-party assets are treated without distinction, notwithstanding any legal difference. As a result, predictability regarding the outcome in any single case is unlikely.[33] In alimony cases, the facts and surrounding circumstances of each party and each party's financial well being is likely determinative. In child support, the issue is against what will the child support be enforced: The estate of the obligor, insurance proceeds regardless of to whom payable and whether the lump sum payment of insurance or other payments would satisfy the estate's obligation.

This uncertainty and lack of predictability increases significantly the litigation that clogs our courts. Without clear and distinguishable guidelines, attorneys will continually make applications on behalf of parties hoping beyond hope that an appellate tribunal will find a way to 'correct' a 'wrong' where no one has gone before.

Note: Under the United States Supreme Court's decision in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan, et al*,[34] for the Employment Retirement Income Security Act (ERISA)[35] -qualified retirement plans, the beneficiary designation on file with the plan representative is determinative. Although, in a footnote the Supreme Court indicated that it was not determining whether the estate could bring a state court action once the proceeds were in the hands of the ex-wife for distribution to the beneficiaries of the estate.

Counsel should keep in mind the adage that counsel's failure to plan does not create an emergency for the court. *Prudential Insurance Company of America v. Prashker,*[36] is another example of the failure to follow-up to be sure that promises with respect to insurance policies are maintained under judgments. In a suit over a policy, the Appellate Division stated:

> Certainly, situations such as that in

this case can largely be avoided if the judgment of divorce requires that the person with an obligation to designate or maintain a beneficiary produce appropriate proof of compliance and if the person entitled to the proof insists on it being supplied. The assistance would be particularly important in a case in which the obligation under the judgment carry insurance is not directed to a specific policy. In that event, a court might distinguish this case and provide that the designation by the insured of the beneficiary takes precedence over a general direction and the judgment of divorce to carry insurance in favor of a particular person. We, of course, do not decide that case.

Plan accordingly. ■

ENDNOTES

1. *Modell v. Modell*, 23 N.J. Super. 60 (App. Div. 1952).
2. 55 N.J. Super. 273 (App. Div. 1959).
3. 58 N.J. 354 (1971).
4. *Id.* at 361.
5. 71 N.J. 541 (1976).
6. *Id.* at 544.
7. 184 N.J. Super. 430 (App. Div. 1982).
8. *Id.* at 439.
9. 214 N.J. Super. 513 (App. Div. 1986).
10. *Id.* at 514.
11. *Id.* at 515.
12. 124 N.J. 338 (1991).
13. *Id.* at 341.
14. *Id.* at 347.
15. *Id.* at 347-48 (*citing Carr v. Carr*, 120 N.J. 336, 349 (1990)).
16. *Id.* at 350.
17. 265 N.J. Super. 128 (App. Div. 1993).
18. *Id.* at 133.
19. N.J.S.A. 9:17-45(c).
20. 265 N.J. Super. at 138.
21. 13 N.J. 162 (1953).
22. 97 N.J. Super. 493 (App. Div. 1967).
23. 166 N.J. Super. 111 (Ch. Div. 1979).
24. 263 N.J. Super. 609 (App. Div. 1992), *aff'd* 135 N.J. 571 (1994).
25. 283 N.J. Super. 26 (Ch. Div. 1994), *aff'd* 282 N.J. Super. 509 (App. Div. 1995).
26. *Id.* at 27.
27. 276 N.J. Super. 46 (App. Div. 1994).
28. *Id.* at 49-50.
29. 319 N.J. Super. 591 (App. Div. 1999).
30. *Id.* at 614.
31. Decided May 18, 1995.
32. 367 N.J. Super. 551 (Ch. Div. 2003), *aff'd* 367 N.J. Super. 512 (App. Div. 2004).
33. *See* Justice Pollock's dissent in *Vasconi*, 124 N.J. at 350.
34. 129 S. Ct. 865 (Jan. 26, 2009).
35. 29 U.S.C.A. 1001 – 1461.
36. 201 N.J. Super. 553, 557 (App. Div. 1985).

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namics of matrimonial practice. With every decision we make, whether it is choosing a cause of action, drafting a letter, or assuming a position on a particular issue, we must act with a sensitivity to and awareness of the emotionalization of the process. ■

ENDNOTES

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3. Sam Marguilies, Divorce for Grownups, *Psychology Today* (May 28, 1988).
4. Ackerman *et al.* at 248-9.
5. Judy A. Corcoran and Julie Ross, *Joint Custody with a Jerk: Raising a Child with an Uncooperative Ex.,* New York: St. Martin's, 1996.
6. *Bounds of Advocacy – Goals for Family Lawyers*, Chicago: American Academy of Matrimonial Lawyers, 2000.
7. Statistics maintained by the New Jersey Administrative Office of the Courts, Dissolution (FM) MSF, MFT.

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