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Chair's Column

A Recap of the 2015 Family Law Symposium

by Jeralyn Lawrence

This year, our annual Family Law Symposium proved to be a great success! Several hundred of our colleagues gathered in New Brunswick. We spent the bulk of our weekend nourishing our spirits with friendship and collegiality, and our brains with a discussion of a multitude of contemporary and cutting-edge family law topics.

It was truly an honor to coordinate and moderate this year's symposium, as it allowed me the privilege of advancing the platform I set my heart and sights on in satisfying my role as chair of the Family Law Section during this term. In my first column this year as chair, I itemized some of the substantive areas of our profession that I intended to challenge our section to brainstorm about and ultimately change. Not only was the symposium a great opportunity to advance these goals in an engaging and collaborative way, but the brilliance of the speakers was something very special to witness.

As part of my first column, I advocated that our section become a strong legislative force and remain active in the legislative process, so that we have a presence in ensuring good laws are passed and bad laws are thwarted. I had proposed that the laws governing relocation, college contribution and parenting time schedules for infants be further explored by the respective subcommittees of the Family Law Executive Committee to determine their validity and application. It was truly a privilege to address these topics at the symposium to encourage the input of our colleagues to help facilitate the change envisioned.

On Friday, Jan. 23, the symposium dealt with the issue of retirement, especially in light of the new provisions set forth in the alimony statute that was passed on Sept. 10, 2014. John F. DeBartolo led the discussion and moderated a stimulating panel on this interesting area of the law. Christopher R. Musulin's presentation and materials concerning the social sciences surrounding retirement were informative, fascinating and not to be missed. Judge Angela

White Dalton, J.S.C., Judge Kimarie Rahill, J.S.C., Evelyn Padin and Kimber L. Gallo each spoke on issues relevant to our practice, were terrific, and brought much value and insight to the program.

On Saturday, Jan. 24, while we prayed the snow would show us a modicum of mercy for the morning, John J. Paone Jr. began the day's discussions with "The 10 Most Important Family Law Cases Reported in 2014," which was undeniably a crowd pleaser. Frank A. Louis walked us through "10 Arguments Lawyers Fail to Make," and reminded us to be fair and creative in our advocacy. As the day progressed, Frank gave a passionate presentation on what he believes should be the correct standard by which to value a professional practice in New Jersey.

We spent the rest of the day broaching topics consistent with the overall objective of facilitating change in certain areas of law. It was exciting to see my vision coming full circle with the remarkable presentations by the panelists.

It is hard to believe that it is in a child's best interests to be relocated away from an active and involved parent. At the suggestion of Justice Virginia Long, who had recommended that the section review the social sciences underpinning the *Baures v. Lewis* case at one of the recent bench bar conferences, Sheryl J. Seiden and Ronald G. Lieberman put their expertise to the test by delving into the background on relocation, exploring new ways to approach relocation cases, discussing the individual relocation statutes that govern specific states in our country, and addressing the factors that are implicated in *Baures*. Sheryl and Ron spoke on their ground-breaking articles that offered insight on the social sciences and current law surrounding relocation, and uniformly suggested that New Jersey law was due for a change on the issue. Judge Lisa F. Chrystal, J.S.C., offered her guidance and expertise on relocation as well.

The Relocation Subcommittee of the Family Law Executive Committee was given the task of drafting a proposed statute based on the findings in Ron's and Sheryl's articles. The Family Law Executive Committee is actively discussing and debating the proposed statute. In the near future, we expect to have a draft finalized and submitted to the NJSBA Board of Trustees for further review and approval.

My thanks go to Sheryl and Ron for their articles, and for taking the time to speak on this very important issue at the symposium. I also thank the members of the Executive Committee Relocation Subcommittee, namely Sandy Durst, Christine C. Fitzgerald, Derek M. Freed, Karin Duchin Haber, Dina M. Mikulka, Jennifer Weisberg Millner and Charles F. Vuotto Jr., for their continuing hard work and efforts on reviewing, and hopefully changing, this area of law, and for their contributions to the proposed statute.

The focus of the symposium then turned to another panel, "Parenting Time Schedules and Overnights with Infants." Having been divorced when my daughter was eight weeks old, I was alarmed by the inconsistency in the literature that exists on parenting time schedules and the allocation of overnights in New Jersey. As any concerned parent would, I had many sleepless nights not knowing which study a court would rely upon should my daughter's biological father seek overnights. Years later, I had an FD case in which the judge summarily gave 50-50 parenting time to parents who could not seem to agree on what day of the week it was, let alone effectively make joint decisions on behalf of a 10-month-old infant. Based on both personal and professional experience, it has always been a priority in my work to review the laws governing parenting time schedules and overnights delegated to single parents trying to successfully co-parent a child. It was my hope that I could help prevent other single parents from facing fears of how the court will rule on parenting time, and the sleepless nights they might endure while a young child is not in their care.

We learned that there are two schools of thought on this issue, and while neither may be the victory we are seeking, it remains paramount that we, as attorneys, focus on the specific facts of each case and, more importantly, the *children's* best interests rather than the *parents'* best interests. Certainly, children benefit from the presence of two active parents who can communicate efficiently and effectively in order to co-parent. Therefore, we need to do our very best to ensure that these young children, whose lives we are impacting, have their best interests served.

I extend my thanks to Debra S. Weisberg, William J. Rudnik, and Judge Margaret Goodzeit, J.S.C., for weighing in on this issue with passion and enthusiasm. They each presented wonderfully and shared materials that I wholeheartedly believe are worth reading before your next custody case. I also am very grateful to the members of the Children's Rights Subcommittee, namely Amy Wechsler, William J. Rudnik, Arlene F. Albino, Cynthia Ann Brassington, Linda A. Mainenti-Walsh, Marla Marinucci, Amy L. Miller, Lisa R. Moore, Francesca S. Blanco

and Dina M. Mikulka. The subcommittee's vast research and work on this issue was also relied upon in Debra and William's article, and I thank them for their contribution, which was paramount in addressing this evolving topic.

Next, a panel discussion on "Income, Restricted Stock Units, Options and When Income Averaging is Appropriate" was presented by Amy Z. Shimalla, Charles F. Vuotto Jr., and the Honorable Thomas J. Walsh, J.S.C. The panelists helped us understand various forms of income and how to differentiate income from an asset. Although many of us might have feared a lecture on math analyses we have not touched since high school, Amy, Chuck, and Judge Walsh rejuvenated this topic into a fast-paced and interesting discussion that undoubtedly benefitted all attendees. I, like many of you, have had cases where my colleagues have taken the position that stock options or restricted stock units were not income, but only assets, and advocates can waste valuable time butting heads on this issue. The articles and presentation prepared by the panelists effectively clarified any gray in this area. I thank Amy, Chuck, and Judge Walsh for working collectively on an issue that is often underestimated and misunderstood, and providing us with valuable information to use in our practice.

Trudging forward, so to speak, on that snowy, cold day, we addressed the new alimony statute, beginning with the new verbiage we all must familiarize ourselves with when considering alimony in our matrimonial matters. We also discussed the nuances of the statute, and how its implications will translate into our everyday practice. I thank Megan S. Murray, Frank J. LaRocca, and Kathryn M. Laughlin for their time and efforts in presenting the new alimony law clearly and concisely, and for the informative materials they provided.

We concluded the symposium on the topic of college contribution, which was a significant issue in my platform as chair. I had expressed concern about the current cost of college, and the requirements New Jersey places on divorced parents funding the education of their children. Derek M. Freed and Robin C. Bogan authored and discussed fantastic articles outlining these complex issues, and the Hon. Colleen M. Flynn, J.S.C., contributed valuable input and a spirited presentation on the topic. The College Contribution Subcommittee of the Family Law Executive Committee, chaired by Derek and Robin, and including Catherine Ansello, Michele E. D'Onofrio, Beatrice E. Kandell, Donna Legband, William J. Rudnik, Jeanette Russell, and Joseph Russell, has drafted a statute based on Robin's and Derek's articles. I thank the subcommittee for their input, which has been incredible. The subcommittee's involvement in this issue has been instrumental in facilitating a change. The proposed statute has been presented to the Family Law Executive Committee. We are actively debating the draft, and hope to have a statute approved and ready in the near future for further review and approval by the NJSBA Board of Trustees.

A heartfelt thank you must be given to Judge Marie E. Lihotz, J.A.D., for her invaluable commentary throughout the entire day. The section is fortunate and extremely privileged to have had her contribute to the symposium. Her thoughts, suggestions and recommendations alone were worth the price of admission. We thank her for her continued commitment to the section.

Coordinating and moderating the symposium was exciting for me. It was not only a pleasure to participate in the process, but a revelatory and meaningful experience to be able to breathe life into the visions I have had as chair and open them for discussion among an audience that inspires me in this profession. I am so proud of our section for the way we tackle these difficult issues. I am inspired by the passion, commitment, interest and enthusiasm of all of you, especially those who made presentations on these challenging issues at the symposium.

I would also like to thank my fellow officers, Amanda Trigg, Timothy F. McGoughran, Stephanie Hagan, Michael Weinberg, and Brian Schwartz, for all of their contributions to the success of this program, their tireless support of me, and their efforts to ensure these significant issues were addressed at this year's Family Law Symposium. I look forward to the future chairs using the symposium to further their goals and platforms. I would also like to thank Amy Z. Shimalla for her immense help planning the symposium with me. A special thanks also to Paris P. Eliades for his help ensuring the symposium's success.

For our section to be proactively discussing these sensitive issues and having input on drafting legislation that has the capacity to help our profession and our clients is simply tremendous. It really is just awesome! We must remain relevant in the halls of the State House to ensure good laws are enacted and bad laws are thwarted. Just as our efforts created a successful symposium, I know the combined efforts by the valued members of our profession will ensure the success of our section, and the change in our practice we wish to achieve. ■

Inside this issue

Religious Exemptions from School Immunization Requirements in New Jersey: Best Interests of the Child Versus Religious Liberty

by Ronald G. Lieberman

All states in the United States currently require documentation that school-age children have been vaccinated before enrollment in school, unless otherwise provided by law.[1]

The United States has by far the safest and most effective vaccine supply in its history.[2] Nonetheless, many parents object to 'government fiat' overruling their objections by subjecting their children to immunizations.[3] All states offer a medical exemption where the vaccine would have adverse consequences to the child's life or health.[4] In addition, every state but Mississippi and West Virginia offers an exemption for sincere religious beliefs opposing vaccination.[5]

This article is not intended to address the issue of whether any particular religion should or does create a basis for an exemption from vaccinations. Instead, this article is designed to explore the issue of religious exemption from school immunization requirements when the custodial parent seeks to assert that religious exemption on behalf of his or her child, and the other parent believes vaccination to be in the child's best interest.

Balancing Religious Freedom with Parental Autonomy

The primacy of the familial unit is a bedrock principle of law.[6] Courts have routinely recognized that the essential element of preserving the integrity of the family is maintaining the autonomy of the parent-child relationship.[7] However, parental autonomy over a child is not an absolute right. As this author examines *infra*, the state can intervene in the parent/child relationship where the health and safety of the child and the public at large are in jeopardy. As stated by the Supreme Court of the United States, the *parens patriae* doctrine overrules a parent's religious freedom:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[8]

An examination of the interplay between parental autonomy and the safety of a child in the context of compulsory immunization follows.

Mandatory Immunization Case Law: An Overview

In 1905, the United States Supreme Court issued its precedent-setting decision, *Jacobson v. Massachusetts*, which upheld the right of states to pass mandatory immunization laws.[9] In 1922, the United States Supreme Court again addressed the issue of compulsory vaccination in the case of *Zucht v. King*, by solidifying the right of states to pass laws that require vaccinations of children as a prerequisite to their entry in the public school system.[10] Since 1922, the Court has affirmed *Jacobson* and *Zucht* on multiple occasions.[11]

In New Jersey, it is a proper exercise of the state's police power to require vaccinations. In the 1948 case of *Sadlock v. Board of Education*, the New Jersey Supreme Court held that "[s]o-called constitutional liberties are not absolute, but are relative only. They must be considered in the light of the general public welfare. To hold otherwise would be to place the individual above the law."[12] Further, "the constitutional guaranty of religious freedom was not intended to prohibit legislation with respect to the general public welfare."[13]

Indeed, the ability of public schools to require vaccination before a child can be enrolled in school was upheld in New Jersey in 1959, in *Board of Education of Mountain Lakes v. Maas*.[14] In *Maas*, the defendant claimed that mandatory vaccination contravenes the child's religious freedom guaranteed under the First and 14th amendments to the United States Constitution, and

under Article I, Paragraphs 3 and 5 of the New Jersey Constitution of 1947.[15] In denying the defendant's claim, the Appellate Division cited to *Jacobson* and *Zucht* for the proposition that compulsory vaccination is an appropriate exercise of police power by the state to protect public health.[16] The Appellate Division also recognized that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[17]

The Appellate Division also cited the United States Supreme Court decision of *Prince v. Commonwealth of Massachusetts* for the proposition that the state may curtail the free exercise of religion when such a restriction is reasonably necessary to protect societal interests.[18] As the U.S. Supreme Court held in *Prince*:

> To make accommodation between these freedoms [free exercise of religion] and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end…[19]

Following *Maas*, in 1964, a New Jersey trial court was presented with the question of whether a person could claim a religious exemption from medical tests required to enroll in college, even when the individual was not a member of any recognized religion.[20] In upholding the right of the individual to object, and thus requiring Rutgers University to enroll the individual without such tests, the *Kolbeck v. Cramer* court cited to the Supreme Court decision of *Cantwell v. Connecticut*, which held that no state has a right to determine that a cause is not a religious one.[21] The *Kolbeck* court also cited to the United States Supreme Court decision of *Everson v. Board of Education*, which found that no person can be punished for entertaining or professing religious beliefs.[22]

Seven years later, in 1971, the New Jersey Supreme Court recognized, in *J.F.K. Memorial Hospital v. Heston,* that religious beliefs were absolute, but religious practices could be regulated.[23] In that case, the Court addressed the issue of whether a hospital and its staff could compel a blood transfusion when the transfusion was against the religious beliefs of the patient.[24] The Supreme Court held that if a death would follow unless a transfusion or lifesaving measure occurred, then the medical procedure could take place.[25] That ruling was overruled on other grounds 14 years later.[26]

Outside the immunization context, the United States Supreme Court has repeatedly held that a party may enjoy an absolute right to religious freedom, but not to religious practices; and that society cannot allow a person to adhere to his or her own private standards of conduct on matters in which society has important interests.[27]

So, how does the aforementioned law apply to a situation where the custodial parent refuses to vaccinate a child before enrolling that child in school based on a religious exemption, when the non-custodial parent does not agree to this approach? Is the custodial parent's refusal to vaccinate the child, even if based upon a sincerely held religious belief, a basis to modify a custody arrangement? This situation creates a troubling entanglement of church and state.

Current New Jersey Law Regarding Immunization of a Child

Specific vaccinations are required before a child may enroll in school. These requirements are set forth in the New Jersey Administrative Code.[28] A child's immunization records confirming that he or she has received the appropriate vaccinations must be presented on the first day of school or at the time of registration for school, and updates to the immunization records must be provided to the school as the child receives subsequent immunizations.[29]

New Jersey has a religious exemption policy for immunizations,[30] providing an exemption for pupils for mandatory immunization "[i]f the parent or guardian of the pupil objects thereto in a written statement signed by the parent or guardian upon the ground that the proposed immunization interferes with the free exercise of the pupil's religious rights."[31] This exemption extends to private, parochial, and public institutions.[32]

For the school year 2013-2014 (the last year during which records were compiled from the New Jersey Department of Health), almost 9,000 out of approximate-

ly 535,000 students in pre-kindergarten through sixth grade claimed religious exemptions from vaccinations.[33] As one might expect, the number of New Jersey children in private school claiming religious exemptions is greater than the number of children in public school claiming religious exemptions. For the school year 2013-2014, 2.8 percent of the overall student body in private school claimed a religious exemption from vaccinations.[34] In contrast, only 1.1 percent of the overall student body in public school claimed a religious exemption from vaccinations.[35] Interestingly, over the last 10 years the number of children claiming religious exemptions from vaccinations has increased over 500 percent. For the school year 2005-2006, 1,641 students claimed a religious exemption; 10 years later, for the school year 2013-2014, the number of students claiming religious exemptions grew to 8,977.[36]

Pending Legislation to Modify Religious Exemptions

In response to the increasing number of students claiming exemptions from immunizations, there are two pending bills in the New Jersey Legislature, S-1147 and A-1931, both of which amend the requirements to be able to claim an exemption from mandatory immunizations. Both bills would compel a student's parent or guardian to provide a written statement that is notarized and signed, indicating the religious exemption is part of the parent's or guardian's religious tenet or practice and that a vaccination would violate the religious tenet or practice; that the religious tenet or practice was consistently held by the person; that the religious tenet or practice is not solely an expression of the person's views related to the safety of vaccination; and that the person understands the risks and benefits of the vaccination to the child. S-1147 was reported out of the Senate Health, Human Services and Senior Citizens Committee on March 9 by a vote of 5-2. A-1931 was voted out of the Assembly Health and Senior Services Committee on March 16 by a vote of 9-1-2.

It is against this backdrop of federal and state case law, administrative code, and social trends that this author examines the impact of a custodial parent's refusal to vaccinate a child when the non-custodial parent objects.

The Impact of Religious Exemptions on Custodial Arrangements

Practitioners know that joint legal custody means equal rights and responsibilities for the care, nurture, education, and welfare of the child.[37] The parent of primary residence has the autonomy to control the day-to-day arrangements of the child.[38] A change in circumstances is the prerequisite to a modification of the custodial arrangements of the child.[39] After a showing of changed circumstances has been made, the court must address the best interests of the child.[40]So, after a showing of changed circumstances has been made, the practitioner seeking to utilize a lack of immunization as the basis for a modification of custody must establish that vaccination is in the child's best interests, even in the face of a religious exemption asserted by the custodial parent. Another complication is presented: Would the non-custodial parent actually have to wait for harm to the child as a result of non-vaccination to occur before seeking a modification in custody? Certainly, actual harm to the child would constitute a violation of a child's best interests, warranting an application by the non-custodial parent for the modification of custody. However, does the mere possibility (or increased likelihood) of harm to a child, without the harm having actually occurred, implicate the child's best interests?[41]

The custodial parent could claim he or she has a fundamental right to make choices regarding the child's upbringing without governmental interference.[42] A state needs a more compelling reason to interfere with parental autonomy than the fact that it could have possibly made a 'better' decision for the child than the parent.[43] In contrast, the non-custodial parent may assert that the best interests of the child does not sanction the custodial parent placing the child at risk and hoping for the best thereafter. The non-custodial parent may argue that he or she need not wait for actual physical harm to the child to manifest before a modification is permitted.

An analogous situation exists in the case of a parent smoking in front of a child, thus exposing the child to the risk of cancer and other ills, though these illnesses may not manifest themselves for decades, if at all. At least one New Jersey decision has established that "environmental tobacco smoke" is a factor the court may consider when determining a child's best interests, as it relates to the child's health and safety.[44]

Indeed, two of the custody factors found in N.J.S.A. 9:2-4(c) include "the safety of the child" and "the fitness of the parents." So, if exposing a child to second-hand smoke is a factor in custody, and is a health and safety factor, then does it logically flow that failing to vaccinate a child may also be a health and safety factor? A practitio-

ner may wish to draw the parallel between the situation of a parent smoking in the presence of a child—where harm to the child does not immediately manifest—and the failure of the parent to immunize a child—where harm to the child may or may not manifest.

The author could find no decisions in New Jersey where custody was modified due to the failure of the custodial parent to vaccinate the child. This issue would be fertile grounds for litigation.

Though the outcome of such litigation remains unknown, when the religious beliefs of one parent conflict with the other parent's desire for the child to be immunized practitioners should heed the Supreme Court's warning in *Prince, supra*:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[45]

Endnotes

1. Centers for Disease Control and Prevention, Recommended Immunization Schedules for Persons Aged 0 Through 18 Years, United States, 2015, http://www.cdc.gov/vaccines/schedules/downloads/child/0-18yrs-child-combined-schedule.pdf.
2. Centers for Disease Control and Prevention, Vaccine Safety, http://www.cdc.gov/vaccinesafety/index.html.
3. Lawrence O. Gostin, *Public Health Law: Power, Duty, and Restraint* 1983 (2000).
4. Centers for Disease Control and Prevention, Vaccines and Immunizations: State Vaccination Requirements, http://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html.
5. *Id*.
6. *See, e.g. Stanley v. Illinois*, 405 U. S. 645, 651 (1972).
7. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents...").
8. *Prince*, *supra* note 7, at 170.
9. 197 U.S. 11, 37-38 (1905).
10. 260 U.S. 174, 177 (1922).
11. *Emp't Div., Dept. of Human Res. v. Smith*, 485 U.S. 660, 670 n.13 (1988) (*citing Jacobson*, *supra* note 9, in support of the principle that government can regulate overt acts prompted by religious beliefs); *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (*citing Jacobson*, *supra* note 9, in support of the premise that, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").
12. 137 N.J.L. 85, 91 (1948).
13. *Id*.
14. 56 N.J. Super. 245 (App. Div. 1959).
15. *Id*. at 255.
16. *Id*. at 264-66.
17. *Id*. at 269 (*citing People v. Pierson*, 176 N.Y. 201 (1903)).
18. *Id*. at 268-69.
19. 321 U.S. 158, 165 (1944).
20. *Kolbeck v. Kramer*, 84 N.J. Super. 569 (L. Div. 1964), *modified*, 46 N.J. 46 (1965).
21. *Id*. at 574 (*citing Cantwell v. Connecticut*, 310 U.S. 296 (1940)).
22. *Id*. at 576 (*citing Everson v. Bd. of Ed.*, 330 U.S. 1 (1947)).
23. 58 N.J. 576, 580 (1971).

24. *Id*.
25. *Id.* at 583.
26. *Matter of Conroy*, 98 N.J. 321 (1985).
27. *See, e.g. United States v. Ballard*, 322 U.S. 78 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
28. N.J. Admin. Code §§8:57-4.1-8:57-4.24 (2013).
29. N.J. Admin. Code §8:57-4.2 (2013).
30. N.J.S.A. 26:1A-9.1; N.J. Admin. Code §8:57-4.4 (2013).
31. N.J.S.A. 26:1A-9.1.
32. State of New Jersey, Department of Health and Senior Services, N.J.A.C. 8:57-4.3 and 4.4 Immunization of Pupils in Schools Rule, Religious and Medical Exemption, Dec. 1, 2008, http://www.nj.gov/health/cd/documents/religious_exemption.pdf.
33. New Jersey Annual Immunization Status Reports, 2013-2014, http://www.state.nj.us/health/cd/documents/status_report/2014/all_schools_rel14.pdf.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Beck v. Beck*, 86 N.J. 480, 485 (1981).
38. *Pascale v. Pascale*, 140 N.J. 583, 599-600 (1995).
39. *R.K. v. F.K.*, 437 N.J. Super. 58 (App. Div. 2014).
40. *Hand v. Hand*, 391 N.J. Super. 102, 105 (App. Div. 2007).
41. For an interesting potential parallel, *see Sacharow v. Sacharow*, 177 N.J. 62, 79-80 (2003).
42. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2007).
43. *Id*. at 72-73.
44. *Unger v. Unger*, 274 N.J. Super. 532, 538 (Ch. Div. 1994).
45. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944).

NJFL Legislative Corner

An Interview with Assemblyman Troy Singleton

by Jeralyn Lawrence

New Jersey Assemblyman Troy Singleton played an instrumental role as the voice for the reformers of alimony laws governing our state, and worked cooperatively with the Family Law Section to ensure that any modification to the recently enacted alimony statute would result in a fair and balanced consideration for both sides of alimony reform. Enlisted by the reformers to exact change in the law, Assemblyman Singleton was a tenacious and fierce advocate for their cause, quickly advancing to become the key player in the divide between the Family Law Section, its supporters, and the reformers. Assemblyman Singleton committed to sitting down and negotiating the terms of what would become the newly enacted alimony statute, working hard to find common ground and areas of compromise during our negotiations. Ultimately, through hours of tireless work and relentless efforts to build a consensus with the Family Law Section and its 160,000 coalition members, and the reformers, the new alimony statute was created and enacted on Sept. 10, 2014.

It was my pleasure and privilege to work directly with Assemblyman Singleton to bring change to our alimony statute in a collaborative fashion. We developed a respectful and cordial working relationship, and a friendship that I greatly value. I know I have learned a lot from him throughout this process, and the section is grateful for his guidance, integrity and passion, and we certainly look forward to working with him again in the future. With his leadership and credibility, we hope we have the good fortune of having Assemblyman Singleton seek to advocate change on the section's behalf in the future.

I had the opportunity to sit down with Assemblyman Singleton to discuss his view on the recent change to alimony in New Jersey, as well as other bills he would like to move in Trenton.

Q: Assemblyman Singleton, what district do you represent?

A: I represent the Seventh Legislative District, which is 17 towns in Burlington County.

Q: How did you get involved in politics?

A: Public service has been a lifelong goal. It is something that I have had a deep passion for since I was young and engaged in government. So, when the opportunity came for me to be able to run for election in 2011, I leapt at that opportunity and fortunately for me I have been successful in getting re-elected by my neighbors in Burlington County.

Q: You were instrumental in the new alimony statute. Why were you so passionate about alimony reform?

A: Well, I think the idea behind the whole alimony reform effort was to try and strike a balance in this sort of archaic system, so to speak. Looking at it, as we are moving forward, I wanted to be in a position to make sure that we were being fair to payers of alimony as well as those who receive it, while also looking at the divorce process as a whole, and maybe modernizing our statutory law to really look at how divorce is adjudicated currently in our country. I think we did a good job of it. Obviously, some would argue that there is more work to be done. But, we would like to see where the law matures at this point so we can determine if, in fact, we need to keep moving the ball forward.

Q: Are there any other areas of family law that you are passionate about?

A: Domestic violence is a huge issue for me. That is something that I am very passionate about. Ultimately, I would like to eradicate its very existence and continue the work that we have done in the Legislature, whether it is to try and promote GPS monitoring for domestic violence offenders, or making sure that guns are nowhere to be found with relation to domestic violence perpetrators, which is work that I care deeply about. We are going to continue to look at this issue as broadly as we can, as well as education not only for men and women, but also our next generation of children so that they are not caught in the cycle of violence. I do not want the children seeing it happen, over and over again. So, the prevention of domestic violence, on all aspects, is something I am very passionate about.

Q: You introduced legislation with regard to Lisa's Law. Can you tell us a little about that?

A: Sure. Lisa's Law is named after Letizia Zindel out of Ocean County, a social worker, a woman who did all the right things when she was trying to obtain a domestic violence restraining order. Unfortunately, her fiancé, or soon-to-be-ex-fiancé, had adopted the mindset of "if I can't have her, no one can," and because of that mentality he ultimately strangled and killed Lisa and then killed himself. What Lisa's Law is all about is allowing there to be the option of GPS monitoring on individuals who have been found to be in violation of a domestic violence restraining order. This would be at the discretion of a judge after a hearing, where the judge would then determine whether or not GPS monitoring is suitable for that case, and if so, then the offender would be fitted with a monitoring device akin to an ankle bracelet, and a domestic violence survivor would have a handheld device similar to a phone so that he or she would know the proximity of their attacker, and that individual is aware of what boundaries or lines he or she is not supposed to cross. In addition, the courts will be monitoring that information and if there was an instance where an individual does go into a restricted area, police are notified. That individual is given an opportunity to leave the restricted area, but to keep order the police are notified and able to go en route to make sure the situation is harmless, and that there is not an incident of violence that could be or is being perpetrated. So, I believe Lisa's Law provides folks with an opportunity for safety and knowledge and gives them some sense of peace of mind.

Q: Was there a study by the attorney general on this?

A: Yes. The Attorney General's Office was able to conduct a study that looked at whether or not the technology is feasible with respect to Lisa's Law. Come to find out, as many of us knew before the study, the technology is feasible and actually used in other jurisdictions. In fact, it is used, in part, here in the state of New Jersey for those who have been convicted of sexual violence. Many of our Megan's Law violators are subject to 24/7 monitoring, so we are confident that if we can get this bill to the governor's desk, that we have met all the stated challenges that were previously put before us. It is our hope that it will get there, the governor will sign it, and we could start turning more victims into survivors.

Q: Do you have any future plans that you can talk about?

A: No. I am exceedingly happy in the job that I have as a state assemblyman and was often taught that if you do your job well, opportunity will make itself available, so I will just continue to do my job as best I can and we will see what the future holds.

Q: You know the Family Law Section is always here to help you if you want to draft any legislation, right?

A: Yes of course. I always look forward to working with you.

The Need for Cultural Competency in Custody Decisions

by Nina Kaweblum, Robyn Koslowitz and Abigale Stolfe

Your client asks to speak with you—urgently. Urgent is a word with different meanings for you and your client. He tells you, angrily, that his hopefully soon-to-be-ex-wife is allowing their daughters to wear pants in public and he insists on an order to show cause to stop her.

How would you react? What level of priority would you assign to this, compared to all the other files weighing down your desk?

This scenario was given to a parenting coordinator as an example of an unreasonable, controlling, old-fashion, rigid father who needs to be educated and brought into this century. Do you agree?

First you must ask yourself: Is this behavior, this attitude, the norm in the parent's culture? Is this behavior, this attitude, the norm in the child's culture, and how will it affect the child? In this situation, wearing pants breaks the family's cultural norm. In this family's culture, a girl wearing pants will be socially ostracized from play dates to potential marriage partners, and perhaps expelled from school. We, the divorce professionals, from our cultural perspective, may or may not agree with the values and mores of the father's and child's culture. However, by not understanding that culture, or by imposing different cultural standards on the family, we unwittingly allow, and perhaps even enable, serious negative consequences to the children we are charged to protect. At its core, parenting is an exercise in acculturation. Parents are attempting to raise children to be successful actors in their culture. Without viewing parenting practices through the lens of culture, we cannot assess whether the parent's actions and attitudes are in the child's best interest.

Why Cultural Competency is Essential to Determining Custody Decisions

The goal of making 'best interest' custody decisions is to provide an arrangement that allows the child to be raised in a way that optimizes his or her present and future emotional health and ability to succeed in the tasks of adulthood.[1] Cultural competency is important in this decision because "parents socialize for instrumental competence within their cultural niche. Child rearing goals differ radically cross-culturally because parents emphasize those goals that will lead to instrumental competence within their culture when children mature."[2] In other words, even if a parent fits the evaluator's ideal of an 'ideal parent,' this assessment becomes questionable if it harms the child's present or future standing within his or her cultural group.

In order to develop a custody plan based on instrumental competence within the child's cultural group, the professionals involved in custody decisions need to assess the deep-structure of core cultural values and beliefs (*i.e.*, the role of the family, gender norms, relational orientation, time orientation, and constructions of human nature).[3] The Core Cultural Assumptions Method (C-CAM) posits that all cultures can be assessed according to deep-structure categories.[4] Although specific values and beliefs may differ between cultures, these categories remain relevant when assessing and comparing cultures.[5]

In this article, the authors demonstrate the benefit of having a standardized method of assessing and understanding a client so that no matter how unfamiliar the client's culture, the divorce professionals have a reliable, empirically based tool to gather the information necessary to determine which custody plan is in the best interest of the child. This approach would also enable professionals to be aware of their own core-cultural values, how they match with and differ from those of the family they represent, and how those similarities and differences influence the professional's understanding and assessment of the family.

In keeping with this goal, Part I of this article identifies various issues that need to be considered in making culturally competent custody evaluations and determining which custody plan best facilitates the child's developing instrumental competence congruent with his or

her cultural identity and place. Part II outlines a template to construct a family's cultural profile organized into the deep-structure core cultural beliefs and describes its application to specific cases.

Part I: Cultural Competency and its Application to Custody Determinations

Kate Funder, a principal researcher at the Australian Institute for Family Studies, writes that, "Respect for diverse cultural beliefs and practices and the administration of just and equal treatment before the law is nowhere more challenging than in the sensitive realm of family law."[6] Unsure of how to navigate this challenge, professionals involved in custody disputes may believe the safest route is to stick with what they know and work from this perspective. Unfortunately, for the children and families affected, this approach is likely to result in situations where children's needs have not been met or even addressed; incorrect readings and assumptions have led to decisions that lock children into situations that in reality are not in accord with their best interests.

The Full Court of the Family Court of Australia explains the need for cultural competence in their "custody [decision] of an aboriginal child, 'Equal justice cannot be seen as being the same as identical treatment where it may result in disparate impact on particular individuals.... The treatment of individuals in a manner which recognizes and responds to their relevant difference is just, and to ignore those differences accords them less respectful treatment than is given to others in the community.'"[7]

Developing Cultural Competency

In order to develop cultural competency, one must first value it. Allan Barsky, JD, MSW, PhD, certified family mediator, professor of social work, and ethicist, identifies five "[c]ore [d]imensions of [c]ultural [c]ompetence in [m]ediation" that focus on the attitudes and beliefs essential to cultural competence: 1) "to value diversity[, 2) to] respect the inherent dignity of all cultural groups[,]" 3) to "believe that heterogeneity within cultures is as important as diversity between cultures[,]" 4) to "view and respect clients as unique individuals within their respective cultural group[,]" and 5) to believe "that there are always different ways of viewing and interpreting phenomena."[8] Once valued, cultural competence needs to be operationalized in practical terms so it can be implemented. Cultural competence requires the development of "specific standards, policies, practices, and attitudes… as well as the adaptation of services to meet culturally and linguistically unique needs."[9]

Application of Cultural Competency to Custody Decisions

An example of the impact culture may have on custody evaluation and decisions can be seen when applying the first factor of N.J.S.A. 9:2-4(c), which permits the court to consider "the parents' ability to agree, communicate and cooperate in matters relating to the child[.]"[10]

Although accepted in mainstream American culture and embraced by the legal system, co-parenting is a concept alien to and even incompatible with the cultural beliefs of certain customs.[11] In Japanese law, custody is granted only to one parent, with the cultural expectation that this person usually will be the mother.[12] This law understandably causes a mindset of animosity between parents.[13]

Additionally, divorce in certain cultures engenders high conflict between parents, which cripples their ability to agree, communicate and cooperate.[14] In collectivist cultures such as Buddhist, Catholic, Indian, Moslem and Orthodox Judaism, where "there is a lot of pressure to remain in the marriage, the guilt, shame, [hurt and resentment] that [either or] both spouses feel may be translated into hatred toward the other spouse."[15] There is bound to be considerable hurt, anger, and perhaps even hatred when a couple, whose community is focused on intact nuclear families, is still willing to obtain a divorce, despite its negative consequences.

In contrast to the value placed on co-parenting by the statute and in practice, the meaning and consequences of divorce in certain cultures intrinsically engenders a situation antithetical to co-parenting. Couples from mainstream American culture do not face the same pressure to remain in the marriage, and as such presumably have a lower likelihood of having such strong negative feelings toward the other, and will have fewer obstacles in co-parenting. Parents who, because of their culture, have difficulty meeting the first factor to be considered in N.J.S.A 9:2-4(c) will understandably feel compelled to present themselves as fitting into this 'norm' so as not to lose time with their children.[16] Post-divorce, however, difficulties will arise as the result of the fact that one or both parties are unwilling to co-parent. If, however, this phenomenon was acknowledged by the professionals involved and discussed openly and non-judgmentally with the parents, each parent's ability and willingness to overcome or to plan ways of

managing this cultural phenomenon could be more accurately assessed. This more accurate assessment could then lead to a more appropriate custody determination, and the possibility of implementing more effective interventions to enable better co-parenting would exist.

Part II: Specific Applications and Proposals for the Future: The Core Cultural Assessment Model Organizing the Template for a Bi-dimensional Cultural Profile of the Family

An effective cultural profile of the family does not just occur spontaneously or naturally. It needs to be planned, and to include cultural factors. "In order to intervene with a particular cultural group, the interventionist must first understand the ways in which that culture constructs the 'self that is being parented."[17] Kenneth A. Resnicow, PhD, a leading expert in conceptualizing and designing culturally sensitive community-based interventions for health promotion, suggests starting all intervention planning with an examination of what he terms "deep-structure core cultural values"—the role of the family, gender norms, relational orientation, time orientation, and constructions of human nature.[18]

Building on Resnicow's formulation of the fundamental elements of culture, the authors have developed a template as a tool for professionals to understand and assess families from any unfamiliar culture.[19] This template is research-based and derived from studies of the connection between cultural competency and custody decisions.[20]In keeping with Penny P. Anderson and Emily Schrag Fenichel, a licensed social worker and the editor of the scholarly press at the Zero to Three National Center for Infants, Toddlers and Families, professionals need to appreciate both the differences and similarities of the mainstream culture along these deep-structure core cultural values.[21] The information gleaned from this template can be used both to understand the family and to assist in developing an ideal custodial arrangement.

Refer to Figure 1 on page 19

In the second dimension of evaluation, the information gleaned from the cultural profile template is then evaluated on three axes: 1) "Deviance from mainstream cultural values," 2) "Degree of acculturation of the family unit" as a whole and of individual members, 3) "Cultural views on problem-solving strategies of the family unit" (for example, going to a priest, shaman or counselor during a period of stress).[22] This bi-dimensional evaluation enables custody professionals to develop a custody plan the family can maintain.

Even if parents agree to an arrangement, a custody decision that fails to identify deep-structure core cultural factors and their similarity and difference to mainstream American culture may become unsustainable post-judgment, and may have unforeseen consequences that are not in the child's best interest. For example, Pratibha Reebye, infant psychiatrist and clinical professor, reports a case with a family of Chinese origin that illustrates how a dichotomy between the family's conceptions of the role of family, gender norms and relational orientation, and the cultural assumptions behind their custody plan led to the collapse of the plan post-divorce.[23] In this case, both parents were from China and "spent a fortune in legal fees" to develop a joint custody plan "with the[ir] co-operation and input."[24] Despite their involvement and financial expenditure, neither parent exercised their parenting time, and the son ended up completely separated from his mother and raised by his father's mother (the child's grandmother), whose cultural beliefs led her to reject the America idea of a child's being co-parented by his own mother.[25]

Reebye gives what she terms the following "cultural analysis":

> The loneliness and unfamiliarity with lone parenting took its toll on both parents [and they reverted to the more familiar attitudes towards child rearing from their original Chinese culture]. The mother reverted to her parental style, which resembled mostly the native culture in which she was raised (Hong Kong/Chinese influence). The mother gave way to her ex-husband's plans for raising their son, although she could have enforced the co-parenting plan sanctioned through the legal process. The father still struggled with the idea of remaining the breadwinner rather than the

> nurturing parent, and soon left the parenting part to his mother (the child's grandmother), who refused to understand democratic, liberal co-parenting plans.[26]

Had the parents' underlying comfort with the cultural value of the father's having the right to unilaterally take sole custody of their child versus the American value of the child's having a relationship with both parents been discussed openly and/or with a culturally appropriate facilitator, the parents could have considered their options and chosen one that best fit their child's needs and their ability to provide for it. Furthermore, an understanding of the parents' approach to communication, problem solving and conflict resolution might have spared the family from squandering money and time on an unsustainable custody decision. Additionally, an understanding of the family's values about the role of family, gender norms and relational orientation might have opened up a more productive discussion to make a mindful decision whether it was in the child's best interest to be raised by his grandmother, who opposed the child's mother's involvement in his upbringing.

Custody decisions must also take into account the extent to which the children and parents share culture, and whether each parent takes proper action to promote the child's instrumental competence in the culture in which he or she is being raised. Take, for example, a case where the father adheres to traditional, religious practice while the mother has changed to mainstream American culture. In such a case, the more secular mother might bring up the father's throwing out a Barbie doll she bought for their sons and daughters in her attempt to portray the religious father as restrictive and controlling. Reminiscing on his or her positive childhood memories of Barbie, the divorce professional might wonder with some annoyance: What could be more innocuous than a Barbie doll? This reaction would have missed the point. Rather, the point is that the mother's attempt to vilify the other parent and the divorce professional's possible agreement may ignore the child's cultural identity, shifting the focus away from what is best for the child. In mainstream American culture, parents allow their children to visit friends who own Barbies, even if the parent disapproves of the doll. However, in some cultures having a Barbie doll violates the cultural values of the community and will lead to the child's being socially isolated, since other families will not allow their children to play in a house where there is a Barbie doll.

It is up to the evaluator to determine whether the child would benefit from a bicultural upbringing with its concomitant consequences, or whether the child's best interests are served by choosing a culture. The evaluator must also assess whether the mother is using her presumption of the evaluator's own cultural viewpoint as a tool to alienate the children from their culture, friends, family, and father—and why. The template for constructing a cultural profile assessed on its three axes gathers the information necessary to make this culturally competent evaluation and plan. Without the information and understanding gleaned from the use of this template, the divorce professional may remain unaware of important dynamics and needs of the child in this family.

Another case study of parents from different cultures and economic strata highlights the importance of considering all cultural factors in order to determine a custody arrangement that is not only sustainable but ensures the child's physical and emotional safety:

> When interviewed in the judge's chamber, two teenaged siblings from a bi-racial marriage declared that they did not want to live with their wealthy, alcoholic and physically abusive Caucasian father. Custody was awarded to their mother who was of visible ethnic minority. Prior to separation, the children were enrolled in a grammar school that was located in an affluent area of the town. After the first semester, the son adamantly returned to his father's custody. His decision was prompted by ridicule from his peers for living in a poorer, ethnic section of the town (where his mother had relocated, as her family of origin still resided in that section of the city). The adolescent son could not adjust to the social demoting that occurred following the divorce of his parents.[27]

In this case, remaining in the same culture as his peers was more important to the son than his attachment to his mother, a need that conflicted with his mother's desire to be close to her family. In this case, the issue of culture resulted in the son having two poor options: live with an alcoholic, abusive father or face ridicule for living in a neighborhood culturally different from his peers. While it is not clear whether these cultural factors had been determined and weighed before the custody deci-

sion in this case, the painful quandary certainly demonstrates the essential need to include an assessment of deep-structure core cultural values and to apply the three axes to this assessment in order to anticipate a child's reaction to each possible custody plan, to choose the plan most in accord with his or her identity and needs.

The Need for Cultural Competency of Evaluators in Core Cultural Values

Courts, lawyers and mediators usually rely heavily on the custody evaluation in arriving at a custody decision or agreement.[28] Custody evaluators have a professional responsibility to include cultural factors in their evaluation, and to incorporate this information into their analysis and recommendations. Indeed, the American Psychological Association (APA) and the Academy of Child and Adolescent Psychiatry both include, in their guidelines for custody evaluators, the recommendation that cultural issues be noted in custody evaluations.[29] The APA guidelines warn, "Biases and an attendant lack of culturally competent insight are likely to interfere with data collection and interpretation and thus with the development of valid opinions and recommendations."[30] Eleanor W. Lynch, PhD, one of the national collaborators on the Culturally and Linguistically Appropriate Services Early Childhood Research Institute, and Marci J. Hanson, professor of early childhood special education at San Francisco State University, write that assessment needs to include the notion of cultural diversity "whenever there is the probability that, in interaction with a particular child or family, the assessor might attribute different meaning or values to behaviors or events than would the family or someone from that family's environment."[31]

One way an evaluator might misinterpret the impact of a child's or family's attitude or behavior is when the attitude or behavior conforms with the evaluator's, thus giving it credibility and normality that it actually may not have in the culture of the child. Indeed, the attitude or behavior may be considered deviant in the child's culture, and cause the child to be seen as someone to avoid. Robyn Koslowitz, PhD, explains that, "Parents structure their parenting, implicitly and explicitly, to promote instrumental competence within their culture."[32] Additionally, "[c]ulture is both descriptive and prescriptive, explicating the way things are and the way things should be….In any given culture, there are both unwritten and codified rules that reflect an underlying shared understanding of the world." [33]

If, then, a parent deviates from the cultural norm of the child, the child will not only lack this instrumental competence within his or her own culture, but the parenting practices that the non-conforming parent engages may cause the child to be excluded by peers. For example, although the dominant culture of America is to allow children to use the Internet both at home and in school, some cultures are different. In these cultures, admission to school is contingent on the family's committing in writing to prevent the child's access to the Internet. A child who is allowed to use the Internet may be expelled from school; other parents—even extended family members—may not allow their child to visit their house, nor allow their children to visit theirs. An evaluator for this family needs to educate him or herself to the cultural norms and make an assessment, not according to his or her opinion about the cultural norm, but on whether the child identifies with the culture and whether each parent's attitude or behavior enables the child to succeed in the culture, or will cause him or her to be excluded.

The Core Cultural Assumptions Method and the bi-level cultural profile template provide essential tools for the divorce professional to use in clarifying his or her own and his or her clients' core cultural values.[34] Only then can appropriate, sustainable parenting decisions be determined.

Conclusion

Culture is akin to looking through a one-way mirror; everything seen is from one's own perspective. It is only by joining those on the other side of the mirror that it is possible to see oneself and others clearly; however, getting to the other side of the glass presents many challenges. Achieving cross-cultural competence requires lowering ones' defenses, taking risks, and practicing behaviors that may feel unfamiliar and uncomfortable. It requires a flexible mind, an open heart, and a willingness to accept alternative perspectives. It may mean setting aside some beliefs that are cherished to make room for others whose value is unknown; it may mean changing thoughts and behaviors. But there are rewards, such as assisting families who need someone to help them bridge two disparate cultures, as well as becoming more effective interpersonally.[35]

Custody plans should enable children to develop instrumental competence within their culture when they mature. To enable professionals to make an assessment that supports this development and is sustainable post-

divorce, the authors' template can be used to construct a bi-dimensional cultural profile based on deep-structure core cultural values. By then analyzing how each parent's values match or differ from the children's culture, it is possible to understand whether the parent's behaviors and attitudes benefit the children's ability to succeed and integrate into the children's cultural niche, and how these behaviors and attitudes influence each parent's ability to assume a parenting role. This cultural analysis then forms the basis of a culturally consistent parenting plan that both provides for the children's best interests and remains sustainable post divorce.

The authors hope this article begins a conversation of how divorce professionals can best help children whose lives are influenced by the custody decisions made on their behalf. Further study can examine specifics such as when parents are from different cultures or each is from multicultural backgrounds. Other questions to be investigated arise from the issue of acculturation. What happens when parents differ either completely or along only one deep-structure cultural value? What if, for example, along the time dimension, the mother becomes more future-oriented and has new aspirations for her children's education while the father remains more present-oriented and focuses on play? What if the parents split along two deep-structure cultural values, for example both time and gender, with the mother becoming future-oriented for both sons and daughters while the father remains present-oriented only for his daughters? What will be the implications for custody? Additionally, how does a cultural understanding influence the application of the factors used to determine custody?

From evaluation to testimony in litigation or arbitration, to mediation or collaborative decisions, to judicial decisions, to parent coordination, divorce professionals have the responsibility and the privilege to help children on their path of instrumental competence in their personal cultural niche. By developing ways of better understanding families through their relationship to culture, practitioners acquire the ability to do so successfully. ■

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Fig. 1: The Core-Cultural Assessment Method and Bi-Dimensional Cultural Profile Template

DEEP-STRUCTURE CORE CULTURAL VALUE	SPECIFIC INDICES	SOME EXAMPLES OF QUESTIONS TO ASK
Role of Family	• Role of father, mother, child vis-à-vis each other • Immediate vs. extended family • Authority • Parenting and discipline	• Authoritarian parenting, authoritative parenting vs. permissive or *laissez faire* parenting?
Gender Norms	• Each spouse's responsibilities • Each parent's responsibilities • Education and professional ambitions • Equality vs. superiority	• Who addresses the daily needs and decisions for the children? • Who provides financial support? • Are daughters and sons given the same education? • Are people equal and independent or integrate parts of hierarchal • Are men and women considered equals? Interdependent social relationships?
Relational Orientation	• Individual vs. collective • Attachment during infancy and childhood • Family hierarchy • Respect, status, power • Conflict resolution and problem solving • Cultural tightness • Rules of decorum • Religion • Assimilationist vs. contra-assimilationist	• What is the nature of relationships? • What is emphasized in the culture: rights of the individual or of the group? • What if someone does not fit in? • What role does religion play in everyday life?
Time Orientation	• Past – history, custom • Present – play, enjoyment, relational factors • Future – accomplishments (such as professional)	• Is the focus on the child's future or the needs of here and now? • Can the culture focus on more than one time orientation?
Construction of Human Nature	• Relationship to parenting • Individuality vs. conformity • Agentic vs. familialistic • Work ethic	• Does parent need to help child individuate or to become part of larger community? • Are people essentially good, bad or neutral?

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Defined Benefit Pensions: The Evolution of Advocacy Concerning What is Often the Most Valuable Marital Asset

by Dina M. Mikulka and Peter Laemers

This article attempts to address the problems that arise in the distribution of future payable defined benefit pensions and how the approach to these assets has evolved over time. The issues reviewed below are not exhaustive. The authors believe court review will inevitably provide attorneys with additional guidance when addressing equitable distribution of these valuable assets, which are frequently given insufficient thought and attention when drafting marital settlement agreements.

In order to understand the division of retirement assets, it is essential to review the *Kikkert* decision.[1] The *Kikkert* decision involved equitable distribution of a vested private pension. The Appellate Division was "called upon to decide whether a 'vested' pension plan which will provide future monetary benefits to plaintiff husband is equitably distributable."[2] The court decided a pension is an asset acquired during the marriage, and is subject to equitable distribution. The measure of distribution of a defined benefit retirement plan is the coverture portion, which is the portion acquired during the marriage (the date of marriage through the date of complaint) versus the total years in service.[3]

Prior to *Kikkert*, there were conflicting decisions regarding the appropriateness of distributing a future benefit that may or may not be realized.[4] It became clear that the efforts of both spouses during a marriage contributed toward the acquisition of a deferred benefit, thus "both justifiably expect to share the future enjoyment of the pension benefits…"[5]

Courts are charged with effectuating an "equitable distribution of property, both real and personal which was legally and beneficially acquired" during the marriage.[6] The definition of assets acquired during a marriage is "comprehensive."[7]

The "vested" status of the asset was not dispositive:

> (T)he concept of vesting should probably find no significant place in the developing law of equitable distribution…These now customary usages of the concept of vesting are in no way relevant to the question of effecting an equitable distribution.[8]

The fair analysis was not whether the asset vested during the marriage, but whether it was acquired by either party during the marriage.[9]

From a reading of *Kikkert*, it is clear the "right to receive monies in the future is unquestionably...an economic resource subject to equitable distribution based upon proper computation of its present dollar value."[10] Future payable benefits earned during coverture "constitute distributable assets to the extent to which the anticipated benefits will have been generated by the mutual effort of the parties."[11] As far as a defined benefit pension: "Each spouse had the same expectation of future enjoyment with the knowledge that the pensioner need only survive to receive it."[12]

However, the *Kikkert* court also opined regarding the preferred method of distributing a future pension interest:

> Long-term and deferred sharing of financial interests are obviously too susceptible to continued strife and hostility, circumstances which our courts traditionally strive to avoid to the greatest extent possible.[13]

In other words, in situations where other assets were available for distribution, offsetting the known present value of a deferred distribution asset was preferable, provided the present value of the asset was ascertainable with the acknowledgment that "all appropriate consid-

erations, including the length of time the pensioner must survive to enjoy its benefits, to be satisfied out of other assets, leaving all pension benefits to the employee himself."[14]

Equitable distribution of a future payable pension can occur by any of the following methods: "(1) a present-value offset distribution; (2) a deferred-distribution; and (3) a partial deferred-distribution."[15] The present value of the pension is determined by valuing it at the assumed date of retirement and then establishing a discount to determine present value.[16] The most common reason for this approach occurs when, for example, the non-member spouse retains other property, such as a marital home, an IRA or any other asset of value in exchange for a waiver of the deferred distribution of a pension. If the offset method is used, serious thought must be given to tax consequences, such as tax-free equity in a home, when compared to assets held in a simple IRA, for example. Attorneys contemplating present-value offsets need to be mindful of the tax consequences of the assets used in the offset in order to adequately protect their client's interests.

However, when there are insufficient assets to allow for the offset of the present value of the deferred distribution asset, or "where no present value can be established and the parties are unable to reach agreement, resort must be had to a form of deferred distribution based upon fixed percentages."[17]

The Participant's Disability Challenges the *Kikkert* Concepts

The concepts set forth in *Kikkert* become even more complicated in situations where a plan participant has vested in a deferred distribution/defined benefit retirement plan, such as a state pension plan, but becomes eligible for disability benefits. It is notable that the published cases addressing distribution of defined benefit disability pensions involve the Police and Fire Retirement System (PFRS), which generally permits the collection of the retirement benefit at the conclusion of a certain number of years in service, irrespective of age.[18] Unlike PFRS, the Public Employee Retirement System (PERS) provides for collection of regular benefits upon meeting both years of service and age requirements. A member of the PFRS pension (depending on his or her start date in the plan) is "eligible for 'special' retirement on the first of the month following the establishment of 25 years of creditable service, regardless of the member's age."[19] Whereas, a member of the PERS pension could achieve 25 years of service but not be eligible to collect benefits until age 60 or older, depending on the year the employment commenced.[20]

Thus, for a member of PERS who has 25 years of service at age 44 but cannot collect the benefit until age 60 or later, the disability component of the pension is significantly different than a PFRS member who becomes disabled after 24 years of service and does not have an age requirement for collection. The Appellate Division has addressed the division of the PFRS disability pension, but a comparable analysis regarding a PERS disability pension has never been undertaken in a published or unpublished opinion that the authors were able to locate.

Generally, a disability retirement allowance:

> has two components—one that represents a retirement allowance and is subject to equitable distribution to the extent attributable to marital efforts and another that represents compensation for disability and belongs to the disabled spouse alone.[21]

There is no set formula for determining the marital versus non-marital/disability component of a disability defined benefit pension:

> [T]he statute governing the pension plan does not set forth a procedure for determining what portion of a pensioner's benefit is intended to compensate exclusively for his disability. This omission, however, cannot result in unjustly and improperly subjecting the full amount of a disability pension to equitable distribution upon divorce. Confronted with this situation, a trial court should explore, with the assistance of expert analysis, other options, including limiting the amount subject to equitable distribution to defendant's contributions to his pension, which is what he would have received had he left the police department at the time.[22]

Limiting distribution to the disabled participant's actual contributions may result in an insignificant amount of equitable distribution compared to the total monthly disbursement. Limiting disbursement to the actual contributions of the parties is a seldom-made argument by attorneys representing the participant

disabled spouse despite the clear acknowledgment by the Appellate Division that such an approach was potentially reasonable.

The *Sternesky* court noted that even though the Appellate Division "encouraged the Board of Trustees of PFRS to provide information that would permit courts to identify the components of a disability pension…The board has not done so."[23] Because of the board's failure to act, the parties to such matters need "to present evidence that permits segregation of the component of a disability pension that is a retirement asset and part of the marital estate from the component that is designed to compensate the disabled spouse and is part of his or her individual property."[24]

To fill the void left by the state, the appellate court created a formula for when the plan participant is not yet ready for ordinary retirement:

> [T]he ordinary retirement allowance should be calculated at fifty percent of the member's final salary. Fifty percent of final salary is the amount of an ordinary retirement at the earliest date. N.J.S.A. 43:16A-5. Final salary is also the figure used to calculate the accidental disability benefit. Use of that percentage and salary, absent evidence or guidance suggesting otherwise, will recognize that reasonable expectation that the non-pensioner spouse has in sharing in a retirement benefit based on efforts during the marriage. The injury to the disabled spouse should neither enhance nor diminish the value of the investment interest anticipated on the basis of efforts during the marriage.[25]

Once the amount of the ordinary retirement allowance is identified, the next part of the analysis is preserving the excess allowance beyond what would be allocated to ordinary retirement as the disability component, which would not otherwise be subject to equitable distribution.

The *Sternesky* court was specifically addressing a PFRS matter where the plan participant could have elected retirement at 25 years of service, regardless of age. This approach does not necessarily work in the case of a PERS system employee who may have 25 years of service, but is not eligible to retire because he or she has not reached the required age. Implementation of the concepts established in *Kikkert* and expanded by *Sternesky* may very well result in an inequitable outcome in certain circumstances. If a participant spouse is eligible to collect a PERS disability pension 20 years before the standard retirement age, that individual is receiving a full 20 years of payment solely due to disability. It seems perfectly reasonable and appropriate for the non-participant spouse to commence receiving his or her equitable share of the pension at the pensioner's regular age for retirement eligibility. Conversely, there would likely be no disability component for a PFRS disability pension if the member spouse was disabled in the 25th year of service, even though he or she planned on working an additional 10 years to maintain their lifestyle or to support young children.

The solutions offered by the appellate court were intended to address fact-specific scenarios that required immediate resolution. The court's call for other branches of state government to create an equitable formula has fallen on deaf ears, potentially to the detriment of litigants on both sides of the issue, especially those addressing how to divide a PERS disability pension.

Insurance for Benefits, Pre-retirement Death Benefits and Survivor Benefits as Security

Another common dilemma is securing pension benefits for a non-participant former spouse when there is no right to survivor benefits. The concept of pre-retirement death benefits is often confused with survivor benefits, even though they are vastly different. With many defined benefit government pensions, if the participant passes away before the pension is in pay status there is no survivor benefit provided to the non-participant former spouse. However, pre-retirement death benefits can be designated as security for such a situation. Securing the future pension payment with pre-retirement death benefits is often overlooked when marital settlement agreements are drafted.

Another dilemma is how to secure the pension benefit for the non-participant former spouse once the pension is in pay status. In some plans, like the New Jersey State Police (NJSP) pension or the PFRS pension, the non-participant former spouse is not eligible to receive benefits beyond the death of the participant. If there was no possibility the benefits would continue past the death of the participant spouse, there is no equitable distribution to insure. The non-participant former spouse's interest is a deferred distribution and

> amounts to a contingency distribution dependent upon the survival of the pensioner

> spouse. Accordingly, if the pension does not provide survivor benefits to an ex-spouse, then her benefits cease when defendant dies…when he gets, she gets; when he dies, so does her benefit.[26]

Where the plan does not provide for survivor benefits to a spouse or former spouse, there is no legal support for the trial court's order for the participant spouse to maintain life insurance to secure the pension benefit for the non-participant spouse.[27]

This begs the question of whether a non-participant spouse who is divorced from the participant spouse after decades of marriage has any right to expect security for his or her interest in the pension. Each pension has different rules regarding survivor benefits. For example, the NJSP pension affords a 50 percent survivor benefit to the participant's surviving spouse, but not to a divorced spouse. If the plan administrator does not permit survivor benefits for a divorced spouse, logically there is nothing to secure.

However, it seems this approach may be too simplistic in long-term marriages. Defined benefit pension plans, especially for long-term government employees, in addition to Social Security benefits, are often the primary source of income for a couple upon retirement. Decades earlier, couples may consciously have decided one spouse would accept a job with lower pay but 'good benefits,' while the other spouse's contribution was limited to employment that offered no benefits but otherwise enhanced the marital enterprise. If a couple is married for a long duration and the non-member spouse depended on receiving the pension benefits and expected to receive a 50 percent survivor benefit as a married surviving spouse, it seems harsh and inequitable to not only take away the survivor benefit upon divorce but also the valuable healthcare insurance attached to the member spouse's retirement package. The *Larrison* precedent may be too harsh in certain factual circumstances.

Although the statute does not specifically provide that there should be security for equitable distribution, including a pension, "[t]he need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse…or children" is a factor the authors believe the courts must consider.[28] It seems equitable in some situations to extend this concept to ex-spouses who depend not only on the pension benefits, but on continued healthcare insurance coverage at no or minimal cost for the remainder of one's life. As a counterbalance, however, it should be noted the lack of survivor benefits afforded to a non-member former spouse increases the total monthly benefits paid out, since survivor benefits come at a cost.

Circumstances Where the Coverture Fraction is Inequitable

An example of when it is inequitable to apply the coverture fraction to a defined benefit pension would be when the marital portion consists of a short number of years early in a member spouse's career. By way of example, if a participant in the PFRS plan married during her third year of service and remained married for four years from the date of marriage through the date of complaint, roughly 16 percent of the pension is marital if the member worked for 25 years. This factual scenario renders the non-participant spouse's coverture interest as eight percent. If the member was a patrol officer when the parties married and earned $45,000 per year at the time of separation, but by her 25th year of service was retiring as the police chief with an annual salary of $125,000, it seems unfair and inequitable to calculate the marital coverture fraction based on the ending police chief's salary, since the non-member former spouse contributed relatively little to the enhancement of the member spouse's income.

In *Barr v. Barr*, the Appellate Division looked to the specific language of the marital settlement agreement for direction.[29] The parties in *Barr* were married in 1968 and divorced in 1987.[30] The parties entered into a settlement agreement that provided:

> The Wife will receive 50% of Husband's pension benefits attributable to his 11 years in the military service only. Such benefits are to be distributed when Husband commences receiving same.[31]

In *Barr*, the husband joined the Air Force Reserves after the divorce and achieved the rank of major upon retirement, resulting in a significant increase in the value of his retirement benefits.[32] At the time of the parties' separation, the husband had reached the rank of captain.[33]

The ex-wife in *Barr* claimed she was entitled to 42 percent of the member spouse's benefits. The ex-husband argued the ex-wife's "interest must be calculated without consideration of the increased benefit directly attributable to his post-dissolution promotion."[34]

While there are certainly some unique features to military pensions, including the fact that there are no member contributions whatsoever, the language of the party's agreement was critical to the analysis:

> We first review the PSA to discern whether its terms unambiguously resolve this dispute. As noted, the terse provisions of the parties' agreement afforded plaintiff a fifty-percent interest in defendant's pension benefits "attributable to his 11 years in the military service only."[35]

The language of the *Barr* settlement agreement was ambiguous and was subject to "two reasonable alternative interpretations."[36] The Appellate Division focused on the "modifier 'only,'" which arguably could "mean only that portion of the asset defined by the time of the marriage," which could have been interpreted as years or active duty, excluding the time in the reserves and the later promotion from captain to major.[37] The Appellate Division reversed the trial court's application of a simple coverture fraction approach and remanded the matter for "a plenary hearing as necessary, to discern the intent of the parties when drafting the PSA provision distributing defendant's military pension."[38]

The holding in *Barr* was not an aberration. Post-divorce efforts, to the extent they can be quantified, may not be subject to equitable distribution:

> Thus far, we have considered the "coverture fraction" as sufficient to carve out the marital value of the asset and have not required that the value of the benefits as of the date of retirement be analyzed to determine, and subtract out, any enhancement due to post-divorce work effort. We do not foreclose that possibility in the event, on remand, the parties choose to pursue that issue and establish an appropriate record.[39]

In *Menake*, the determination of post-divorce efforts included the ability to mathematically quantify those efforts.[40] While it may be difficult to reconcile this notion with *Reinbold v. Reinbold*,[41] there are

> some extraordinary post-judgment pension increases that may be proven to be attributable to post-dissolution efforts of the employee-spouse, and not dependent on the prior joint efforts of the parties during the marriage. In such instances, these sums must be excluded from equitable distribution and the application of the coverture fraction may be insufficient to accomplish this purpose.[42]

The burden is on the employee-spouse seeking exclusion "proving with calculable precision what portion of the increase in the pensions value is immune from equitable distribution."[43] In order to prevail, the employee-spouse in *Barr* was required to make a "showing that the promotion was awarded solely through his post-judgment work efforts, rather than related to past efforts."[44]

The key to properly analyzing intent of the parties' years post-judgment lies in providing detailed factual background in the settlement agreement itself. Such detail must exceed mere rank and title. It must include specific identification of the retirement plan and the way benefits are calculated, whether or not overtime is a basis, and whether there is a possibility of a return to an already vested pension.

The conflicts in the above cases arose because of ambiguous provisions in marital settlement agreements, which are subject to different interpretations. In order to better protect clients and effectuate the intent of the parties, careful drafting of pension provisions is critical.

When addressing future payable defined benefit retirement plans in marital settlement agreements it is critical to carefully draft the intent of the parties and contemplate future scenarios. It is not offensive or contrary to existing precedent to set forth clear limits for a member early in his or her career, or to ask for concessions for a non-member spouse after many years of marriage. The simple coverture fraction and concepts established in *Kikkert* have evolved into a more fluid scheme that requires skilled advocacy in the proper circumstances. ■

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Endnotes

1. *Kikkert v. Kikkert*, 177 N.J. Super. 471 (App. Div. 1981).
2. *Id.* at 473.
3. *Marx v. Marx*, 265 N.J. Super. 418 (Ch. Div. 1993).
4. *See Mueller v. Mueller*, 166 N.J. Super. 557 (Ch. Div. 1979); *Weir v. Weir*, 173 N.J. Super. 130 (Ch. Div. 1980).
5. *Sternesky v. Salcie-Sternesky*, 396 N.J. Super. 290, 298, (App. Div. 2007), *citing Whitfield v. Whitfield*, 222 N.J. Super. 36, 46 (App Div. 1987).
6. N.J.S.A. 2A:34-23.
7. *Kikkert*, *supra*, 177 N.J. Super. at 474, *citing Painter v. Painter*, 65 N.J. 196, 215 (1974).
8. *Id.* at 474-475, *citing Stern v. Stern*, 66 N.J. 340, 348 (1975).
9. *Id.* at 475, *citing Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 515-516 (App. Div. 1975) (citations omitted).
10. *Id.* at 475, *citing Kruger v. Kruger*, 73 N.J. 464, 468 (1977).
11. *Id.* at 475, *citing McGrew v. McGrew*, 151 N.J. Super. 515, 518 (App. Div. 1977).
12. *Id.* at 476-477.
13. *Id.* at 479.
14. *Id.* at 478.
15. *Claffey v. Claffey*, 360 N.J. Super. 240, 255 (App. Div. 2003) (citation omitted).
16. *Id.* at 255-256, *citing Menake v. Menake*, 348 N.J. Super. 442, 448 (App. Div. 2002).
17. *Kikkert*, *supra*, 177 N.J. Super. at 478.
18. N.J.S.A. 43:16A-6.
19. N.J.A.C. 17:4-6.11, *see also* N.J.A.C. 17:9-6.9(a)(1)(iii).
20. N.J.A.C. 17:1-17.8.
21. *Sternesky*, *supra*, 396 N.J. Super. at 295 *citing Larrison v. Larrison*, 392 N.J. Super. 1, 17 (App. Div. 2007).
22. *Larrison*, *supra*, 392 N.J. Super. at 18.
23. *Sternesky*, *supra*, 396 N.J. Super. at 296.
24. *Id.* at 296, *citing Larrison*, *supra*, 392 N.J. Super. at 16-18; *Avallone v. Avallone*, 275 N.J. Super. 575, 584 (App. Div. 1994).
25. *Sternesky*, *supra*, 396 N.J. Super. at 302.
26. *Larrison*, *supra*, 392 N.J. Super. at 18, *citing Claffey v. Claffey*, 360 N.J. Super. 240, 261 (App. Div. 2003) (citation omitted) (internal quotation marks omitted).
27. *Larrison*, *supra*, 392 N.J. Super. at 19.
28. N.J.S.A. 2A:34-23.1(n).
29. *Barr v. Barr*, 418 N.J. Super. 18 (App. Div. 2011).
30. *Barr*, *supra*, 418 N.J. Super. at 29.
31. *Id.*
32. *Id.* at 37.
33. *Id.*
34. Id. at 30.
35. *Id.* at 36-37.
36. *Barr*, *supra*, at 37, *citing Chubb Custom Ins. Co. v. Prudential Ins. Co. of America*, 195 N.J. Super. 231, 238 (2008).
37. *Id.*
38. *Id.* at 38.
39. *Barr*, *supra*, 418 N.J. Super. at 40, *quoting Menake v. Menake*, 348 N.J. Super. 442, 454 (App. Div. 2002).
40. *Menake*, *supra*, 348 N.J. Super. at 454.
41. *Reinbold v. Reinbold*, 311 N.J. Super. 460 (App. Div. 1998).
42. *Barr*, *supra*, 418 N.J. Super. at 41.
43. *Id.*
44. *Id.*

Children Testifying in Domestic Violence Trials

by Richard Sevrin

Should children be testifying as witnesses in domestic violence proceedings? Attorneys are well aware of the fact that there are usually no witnesses to acts of domestic violence other than the parties. In too many cases, however, children are witnesses to acts of domestic violence that ultimately are brought to court on the filing of a complaint under the Prevention of Domestic Violence Act.[1]

Proceeding on a trial of an act of domestic violence that occurred in the presence of children creates a very difficult position for the parties, counsel, and the children who have to testify. In many cases, attorneys have complained that they are reluctant to call children as witnesses in domestic violence proceedings because it infects the family and places the children in a position of testifying for one parent against the other. In addition, even if an attorney believes it is essential to his or her client's case to call a child witness, judges are reluctant to allow counsel to call child witnesses because of what is believed to be the emotional strain and anguish to the children and infection of the family relationship. It appears a discussion is necessary regarding whether or not to call the child/witness to the stand.

The Act

Justice Marie L. Garibaldi, in *Cesare,*[2] best described the societal problem caused by domestic abuse:

> Domestic violence is a serious problem in our society. Described as a "pattern of abusive and controlling behavior injurious to its victims," *Peranio v. Peranio*, 280 NJ *supra.* 47, 52, (App. Div. 1995); accord *Corrente v. Corrente*, 281 NJ *supra.* 243, 246, 657 82d 440 (App. Div. 1995), domestic violence "persists as a grave threat to the family, particularly to women and children." *State v. Chenique-Puey*, 145 NJ 334, 340, (1996). Studies show that between three and four million women each year, from all socioeconomic classes, races and religions, are battered by husbands, partners, and boyfriends. *Brennen v. Orban, Jr.*, 145 NJ 282. 299, (1996) (citations omitted); see also *William G. Bassler*, the Federalization of domestic violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources? 48 Rutgers L. Rev. 1139, 1140 (1996) "No class, religion or race is immune").

In *Cesare,* Justice Garibaldi described that until recently the law did not take seriously the plight of abused and battered women. It was noted that courts generally treated domestic violence significantly different than similar crimes that occur outside of the domestic context. The Legislature enacted the Prevention of Domestic Violence Act in response to that situation. The act was intended to ensure that domestic violence victims receive the maximum protection from abuse the law can provide. This statute requires immediate response when an offense is suspected. It mandates training for judges as well as law enforcement personnel, and demands uniformity in prosecution and adjudication of claims.[3]

Procedurally, as Justice Garibaldi noted, the act provides both emergency and long-term civil and criminal remedies and sanctions. An abuser may be subject to arrest upon probable cause and, depending on the factual circumstances, the seizure of weapons the abuser possesses and the revocation of any licenses or permits for use, possession and ownership of weapons. In the civil context, the act permits victims to file a complaint alleging the commission of an act of domestic violence and to seek emergency *ex parte* relief. At the hearing held within 10 days of the filing of complaint, the court may grant any relief necessary to prevent further abuse. Among the remedies provided are: the exclusion of the defendant from the marital premises; parenting time or suspension of parenting time; monetary compensation for losses suffered payable by the defendant; mandatory counseling for the defendant; a grant of temporary custody; an order restraining the defendant from making contact with the plaintiff; and the prohibition of the defendant from possessing any firearms or certain other weapons.[4]

Because of the serious consequences to both the victim and accused, it is at those hearings that the issue of which witnesses may or will be called to testify arises. That issue leads to a discussion of what is in the best interest of the parties and the child in determining how to proceed.

Burden and Nature of Proof

A judge at the first instance must determine whether the plaintiff has proven by a preponderance of the evidence that one or more of the indicated predicate acts set forth in the statute has occurred. In assessing whether or not the act rises to the level of domestic violence, the court must evaluate the past history between the parties.

> When determining whether a restraining order should be issued based upon an act of assault or for that matter any of the predicate acts, the court must consider the evidence in light of whether there is a previous history of domestic violence and whether there exist immediate danger to person or property.[5]

The second inquiry upon a finding of the commission of a predicate act of domestic violence is whether the court should enter a restraining order that provides protection to the victim.

> It is not automatic that the commission of one of the enumerated predicate acts results in the issuance of a domestic violence restraining order.[6]

Hence, the importance of witness testimony to prove or disprove the predicate act and to provide evidence of the couple's background is critical. Ethical implications abound. A lawyer's duty of zealous representation must be weighed against his or her duty to advise his or her client of all ramifications of a course of action.

Calling a Child as a Witness

When a trial regarding an act of domestic violence occurs, counsel is required to produce all witnesses he or she can in favor of the respective client, even a child of one or both parties. Children can be called as witnesses in various domestic violence cases when they witness an alleged crime committed by an intimate partner against a parent (most often the mother), such as assault, threats, harassment and other acts. They testify as witnesses when they are involved in a court proceeding as victims or when they were, in fact, present and witnesses to acts of domestic violence between their parent(s) or significant others.

An article entitled "Children and Teenagers Testifying in Domestic Violence Cases," by Allison Cunningham and Pamela Hurley, describes a study of children testifying in domestic violence proceedings in 2007 for the Children and Families Justice System in Canada.[7] The article describes the impact on children and family dynamics. Children can feel divided loyalties, guilt and pressure not to testify. Children experience ongoing trauma, reactions traceable to multiple incidents of violence or to witnessing a sudden act where they feared for their own life or the life of a parent. Children can experience a range of complicated feelings about themselves, their parents and their family. These include worry, fear, guilt, relief, sadness, anger, helplessness, powerlessness, blame, shame, embarrassment, anxiety and stigmatization.

The study indicated children may feel they are "in the middle" of parental conflict. Children can face loyalty conflicts. They believe they have to take sides. Different children in the same family may have different opinions and experiences. Some children feel safe knowing an abusive parent is out of the home; others yearn for the return of that parent. Children have a range of issues that may come into their minds. One sibling will remain silent about family secrets or may be angry at another who called 911 or gave a statement to the police. A child who wants the accused parent to return home can feel alone with those feelings if other family members are glad the parent is gone. A child who is afraid of the accused parent can be isolated with those feelings if other family members want the parent to return. A child who called the police may blame him or herself for financial struggles the family experiences due to the absence of the breadwinner. A child may doubt his or her mother's ability to keep the family safe. A charge being filed against a parent may have been an unwanted outcome for the children, even if they called the police to have the immediate threat of violence stopped. Children may feel pressured by one or both parents not to talk about family matters, which may leave them fearful of testifying. Children can bounce between feelings of intense hatred for the accused and being panicked for the accused's wellbeing. Children will reflect on the happy times as well as the incidents of domestic violence. This creates much conflict in a child's mind. A child may worry about experiencing the

accused parent's anger or rejection. A child may miss the daily contact and support of the accused parent, or worry that the accused parent may be suffering in a prison or lonely without the family. The opposite is that a child may double check locks in case the accused parent tries to break in, and lay awake at night worrying about the possibility of the accused parent returning to the home.

One obvious conclusion of the article is that children rarely wish to testify. The study reported that a child witness in domestic violence cases fears the accused will lie and be believed, or that the accused will be found not guilty, or that the accused will hurt the child or come after the child after court. Children worry they will get sick or feel sick in the witness box. Children worry the accused will hurt the family as a result of their testimony.

There are various psychological dynamics to the children that were revealed by the study. The dynamics include distorted thoughts and feelings common to witnesses in domestic violence cases: For example, the child feels something he or she did prompted the violence, and that he or she should have been better behaved. The child may believe the parents would not fight so much if he or she were better behaved. If the child called the police, or was involved in the call to the police, he or she may fear that what is happening to the accused is his or her fault. Alternatively, if a parent is injured the child may feel he or she should have stepped in and protected the injured parent.

The study by Cunningham and Hurley found that children who testify in domestic violence cases blame themselves or blame their victimized parents for the incident. They may excuse the accused's violent actions by adopting rationalizations, such as the accused warned the spouse about spending too much money or the spouse never stops complaining and knows the accused is under a lot of stress at work. Distorted feelings come out in children scheduled to testify as witnesses in domestic violence cases. Children have been known to say: "It was my fault he got mad and hit my mom." "I should have been better behaved that day." "My parents wouldn't fight so much if I were a better kid or if they loved me more." Children blame themselves for the incident. They are concerned they are choosing one parent over the other. Children fear they are breaking up the household or the abuser will return to the house. They fear being taken away.

Charles Katz, a well-known Red Bank clinical and forensic psychologist, points to several issues involved in calling a child as a witness in a domestic violence proceeding between parents:

> It is a given that episodes of domestic violence, particularly when these episodes are recurrent in a family, represent the breakdown of the family system and the loss of self-regulation abilities on the part of the abuser. Domestic violence is physically and psychologically traumatic for the victim, and it exposes children living in that family to vicarious traumatization even if they have not been directly abused themselves. Simply living in a family in which domestic violence occurs contributes to children experiencing toxic stress, which is linked to a variety of adverse physical health outcomes. This is in addition to the psychological damage children suffer from their exposure to domestic violence. Children typically feel helpless as they witness violence directed against one of their parents by the other. They may also feel anger toward the offending parent, and the desire to protect the target parent. Yet the range of effective responses available to children observers is quite limited. Typically, even if they attempt to intervene—to protect the injured parent or to stop the offending parent—they are helpless nevertheless. Therefore, exposure to domestic violence skews the relationship that a child has with both parents. This, in addition to the vicarious traumatization of witnessing the violence, further changes the family dynamics in a dysfunctional direction.
>
> That one parent may use violence against the other is itself an indication of psychopathology in the offending parent. Drug and/or alcohol use/abuse often contributes to the parent's loss of inhibitory control. Anxiety, depression, and Post Traumatic Stress Disorder are possible clinical problems that may afflict the victim. Children in the family are thus additionally affected by their parents' psychological disorders, which further diminish the quality of parenting that the child(ren) receive. In all, a pattern of progressive dysfunction is set in motion, the culmination of which may be long-lasting psychological problems for the children

as they grow into adulthood and try to establish positive relationships in their own lives.

As far as the question of children testifying as witnesses in domestic violence cases: first, we should set aside considerations about factors that might compromise the validity of what the child might say. Let us assume that no efforts have been made by one parent to influence or coach what the child might say. Let us further assume that we have ruled out problems related to the accuracy of what the testimony might be; these are concerns about the malleability and suggestibility of the child's memory; let us assume that the child is capable of remembering accurately and of providing accurate testimony, and that there have been no leading questions or interviewer bias that might distort what the child has to say. Let us also assume that the context of the child's testimony is such that the child will be interviewed in a manner that is appropriate to the child's level of development, and that the interrogation will not be intimidating to the child.

If the above can be controlled for, and the child (of whatever age) can be considered a reliable and credible witness, then consideration must be given to what the consequences of testifying might be for the child.

For some children, testifying might be an empowering experience that provides an opportunity to counter the helplessness of their vicarious traumatization and their helplessness to assist/protect their abused parent.

For other children, testifying might have the opposite effect and might contribute to increasing their sense of vulnerability. To testify means to take the side of one parent and confront the other parent. This can be frightening for a child, particularly in view of the fear they may already experience in relation to the abusive parent. A child who testifies against a parent is putting a lot at risk: defending/helping one parent means doing something that could have significant punitive consequences for the abusive parent. Therefore, helping one parent, for a child, risks harming the other parent. Children love both parents, even when one of those parents is abusive to the other. In fact, the abusive parent may have been indulgent and solicitous toward the child, thus adding to a child's ambivalence about testifying (or the parent may have been controlling and domineering toward that child, adding to a child's sense of intimidation).

If a child testifies, he/she risks bringing on a significant, long-lasting change in his/her relationship with the offending parent. The parent will not thank the child for telling the truth and doing the right thing. The child who testifies risks alienating the parent testified against. Consider the potential consequences to the child: loss of contact with the abusive parent, loss of love, loss of approval, loss of economic support, and perhaps negative reactions from other siblings, as well. Those siblings, too, potentially have a lot to lose from the outcome of the case. For the child who testifies, a lot is being put on the line. This is the case whether the accused abuser is found guilty, or is acquitted.

In dealing with children who testify in domestic violence cases, the legal process should be sensitive to these psychological factors, and should take steps to support the child, siblings, and the abused parent in thinking through these potential inadvertent, adverse consequences. To the greatest extent possible, children who testify should be psychologically supported before and after their testimony. The child's and family's psychological functioning in the time following the testimony will require ongoing attention.

Notwithstanding all of this, an attorney representing a client has the obligation to do what is necessary to protect the client's best interests. This may be couched in the terms of a serious discussion concerning calling a child witness to the stand. A client must be advised about the necessity of calling anyone who has knowledge of the facts, especially a child who may be a witness to the predicate act committed or acts that had been committed in the past. The client also must be advised of whether or not the child can testify that acts did not occur as described by the other parent or party, and that the testimony of the child is relevant to the issues of the case. It is obvious the attorney's duty lies within the obligation to represent a client with diligence and in accordance with a standard of care attorneys would have in the same or similar circumstances.

Ethical Considerations

The Rules of Professional Conduct, specifically RPC 1.1 (Competence), provides: A lawyer shall not:

> (a) handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
>
> (b) exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

This obviously makes it clear that an attorney's ethical responsibility under the Rules of Professional Conduct require he or she represent the client competently and use reasonable care in the handling of the matter. Advice regarding whether to call a child witness, as described above, falls in the area of competence/avoidance of a claim of negligent handling of a matter (*i.e.*, malpractice).

RPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer) provides that:

> (a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to Paragraphs c and d and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as impliedly authorized to carry out the representation …

RPC 1.4 (b) provides that a lawyer shall keep a client reasonably informed about the status of a matter, and promptly comply with reasonable requests for information. Based upon the necessity to inform a client of the status of the matter, it is required to notify the client of the aspects of calling or not calling witnesses to the stand, especially the child in a domestic violence case.

Obviously the lawyer has an obligation to notify a client of the necessary decisions to be made regarding the representation of the client in a domestic violence proceeding. When an attorney is faced with the knowledge that a child witness has material facts regarding incidents that have been observed by the child, which will provide the client with support for his or her position, there is no doubt the attorney representing the client in any proceeding, including a domestic violence proceeding, must give the client full knowledge of the options to call or not call the witness to the stand. This is especially true in light of the fact of the enormity of the consequences and the requirement that the attorney ethically do all that is necessary to represent a client. There is no doubt that at times difficult decisions have to be made with reference to whether or not to call witnesses to the stand. This is an obvious difficulty with reference to calling a child witness in a domestic violence case to testify for or against a parent or significant other.

Presuming a plaintiff or defendant desires that a witness be called even though it is a child, the attorney must, based upon the requirements of the Rules of Professional Conduct, call the witness and do that which is necessary to advocate and advance the position of the client. Obviously there are clients who may decide not to call the child to the stand for the reasons set forth in this article. This decision, however, must be made by the parent/client in the case, as opposed to the attorney.

Competence to Testify

Once the client has been advised of the options regarding the child's testimony, and has reached a decision that the child should testify, it must be determined whether or not the child is competent to testify.

Whether a child is competent to testify may be gleaned from the Rules of Evidence and the cases on the issue. Notably, usually when young children have testified in court the cases relate to criminal charges for child sexual abuse. The inquiry on competency requires a review of New Jersey Rule of Evidence 601, which provides:

> General Rule of Competency: Every person is competent to be a witness unless (a) the Judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) except as otherwise provided by these rules or by law.

The rule regarding whether a child of a young age may testify was reviewed by the Supreme Court in *State v. G.C.*[8] The settled law is that determining competence to testify resides in the sound discretion of the trial court. The Supreme Court held that there was no abuse of discretion in the trial court's determination that the child

witness was competent. The Court reaffirmed the provisions of the Rules of Evidence that presume every person is competent to testify unless, among other things, "the proposed witness is incapable of understanding the duty to tell the truth."[9]

In *State v. G.C.*, the Court held that the five-year-old witness was capable of testifying even though she did not take a formal oath required pursuant to statute. In *voir diring* the witness in this case, the judge was capable of determining that the child knew the difference between telling the truth and lying, and did not require the child to swear on a Bible or formally take an affirmation or oath.

The Court held:

> In that context, the clearly preferred procedure would have entailed the use of an oath or oath substitute that acknowledged both the obligation to testify truthfully and that the failure to do so could result in adverse consequences. However, taken as a whole, the inquiry conducted by the trial court of a five year old concerning the events that transpired a year and a half earlier were sufficient to support the trial court's exercise of discretion in determining Doris' competence. The trial court tailored Doris' competence voir dire to focus on whether Doris understood her duty to tell the truth. That duty necessarily implicates the consequences arising as a result of a failure to comply with the duty. Ultimately, the trial court determined that she did understand that duty. Again, the determination of whether a person is competent to be a witness lies within the sound discretion of the trial judge. (Citations Omitted)[10]

Manner of Testimony

It is clear there are issues with reference to calling children to the stand in domestic violence cases. There are issues related to psychological trauma and damage to the child. The manner in which a child may be testifying for one parent and against the other may have far-reaching effects. The psychological stress and trauma must be acknowledged if and when a child is called.

Certainly, the case law indicates that a child of four or five years of age can be called as a witness, and testimony may be taken. The obligation of counsel, however, is to ensure the requirements of representation to the client's best interest is satisfied.

To advance the litigation in the best interest of the parties and a child witness, the judge can manage the case and exercise options to ensure due process to both parties, and reasonable protection of the child's emotional and psychological wellbeing. There is no reason why, where a young child is required to testify in a domestic violence matter involving his or her parents or a parent or significant other, the testimony cannot be taken in chambers with a court reporter or stenographer in the presence of counsel. This certainly would alleviate some of the trauma of a child being placed in a courtroom with a parent or significant other and strangers in the gallery who would witness the child testifying, adding to the child's stress.

If technology permits, the child could testify in another room and be remotely examined by the attorneys. Under these circumstances, the examination and cross-examination of a child can take place without the child facing either parent. This would alleviate the pressure and hopefully some of the emotional stress and anguish placed on a child during testimony in a domestic violence proceeding.

It is not unreasonable to assume that counsel for the parties and the judge can agree to take the testimony of a young child away from the open courtroom and still provide constitutional protections to both parties in a separate location under video or television with a recording of the proceeding for appellate purposes. In addition, the respective parties would be hard-pressed to argue that in-chambers testimony being taken in the presence of counsel, and the opportunity to cross-examine the child in a less stressful setting, would be inappropriate.

Conclusion

Calling the child witness to the stand in a domestic violence proceeding weighs heavily on attorneys, the parties, and the court. The parties are entitled to their day in court. The plaintiff is entitled to have the opportunity to testify and call witnesses to obtain the relief desired. A defendant is entitled to call witnesses on his or her behalf in order to defend against the allegations of domestic violence. The court, in its discretion, has the ability to frame the trial and the proceedings in a manner that will best serve the due process requirements and, at the same time, protect the emotional and psychological

wellbeing of the child who is called as a witness. Presuming the child's testimony passes the tests of competence and the child is able to tell the truth, there is no reason to believe a protective measure for the child testifying in a domestic violence case cannot be accomplished.

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The author wishes to thank Charles Katz, Ph.D, of Red Bank, for his contribution to this article.

Endnotes

1. N.J.S.A. 2C:25-17, *et. seq.*
2. *Casare v. Casare*, 154 N.J. 394, 397 (1998).
3. *Id.* at 399.
4. N.J.S.A. 2C:25-29, *Id.*
5. *Silver v. Silver*, 387 N.J. Super. 112, 125 (App. Div. 2006), N.J.S.A. 2C:25-29 (a) (1) and (2).
6. *Id.* at 125.
7. Alison Cunningham and Pamela Hurley, (2007). Children and Teenagers Testifying in Domestic Violence Cases. London ON: Centre for Children and Families in the Justice System pamphlet at http://www.lfcc.on.ca/7_DomesticViolenceCases.pdf.
8. 188 N.J. 118 (2006).
9. *Id.* at 120, N.J.R.E. 601(b).
10. *Id.* at 132-133.

The Ethical Labyrinth Facing the Matrimonial Attorney in the Collection of Fees

by Michael A. Weinberg and Marla Marinucci

The collection of fees by matrimonial attorneys in the state of New Jersey is among the more challenging areas of matrimonial ethics. The failure of an attorney to strictly adhere to the precise procedural requirements with regard to collection of fees can result in disciplinary action.

New Jersey Court Rule 5:3-5(b), entitled "Limitation of Retainer Agreements," provides in part:

> During the period of the representation, an attorney shall not take or hold a security interest, mortgage, or other lien on the client's property interests to assure payment of the fee. This Rule shall not, however, prohibit an attorney from taking a security interest in the property of a former client after the conclusion of the matter for which the attorney was retained, provided the requirements of RPC 1.8(a) shall have been satisfied. Nor shall the retainer agreement include a provision for a non-refundable retainer….

Similarly, RPC 1.8(a) specifically disallows an attorney from entering into a business transaction with a client or knowingly acquiring "an ownership, possessory, security or other pecuniary interest adverse to a client." While there is an exception to RPC 1.8(a), it is not relevant for purposes of this article.

RPC 1.8(i) further provides that an attorney "shall not acquire a proprietary interest in the cause of action nor subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case."

The interplay of Rule 5:3-5(b) and RPC 1.8 was addressed in *Van Horn v. Van Horn*.[1] In *Van Horn,* the appellate court was called upon to decide, among other things, whether an attorney who still actively represented his client was permitted to obtain a mortgage on the client's property as security for fees owed to the attorney.[2] In *Van Horn*, the parties' marriage was dissolved in a dual final judgment of divorce dated June 30, 2005.[3] An amended judgment of divorce resolving the parties' claims to alimony, child support, equitable distribution and other issues was entered by the court on Dec. 9, 2005.[4] Thereafter, on Dec. 27, 2005, plaintiff's counsel filed a notice of motion in aid of litigant's rights and for reconsideration of a portion of the amended judgment of divorce that denied the plaintiff's application for counsel fees, and sought other relief.[5] While this motion was pending, the plaintiff executed a mortgage against his home in favor of his attorney on Feb. 13, 2006.[6] In the mortgage document, the plaintiff stated: "In return for legal fees that I owe, I promise to pay Two Hundred Fifty Thousand and 00/100 Dollars ($250,000.00)…in accordance with the terms of a Mortgage Note dated February 13, 2006."[7]

Following the entry of the trial court's four post-judgment orders on March 10, 2006, the defendant filed a notice of appeal on March 30, 2006.[8] The plaintiff, through his counsel, who now held a security interest in the plaintiff's home, filed a cross-appeal on April 24, 2006.[9] While the appeals were pending, plaintiff's counsel filed another motion with the trial court in aid of litigant's rights on behalf of the plaintiff on Feb. 7, 2007, seeking various forms of relief, including counsel fees.[10] The defendant filed a cross motion requesting a stay of the plaintiff's motion pending the outcome of the appeals, and further sought an order disqualifying plaintiff's counsel from further representing the plaintiff in the case.[11] The plaintiff opposed the cross motion and certified that he wished to have his attorney continue to represent him.[12]

On June 29, 2007, the trial court entered an order: 1) disqualifying the plaintiff's attorney from continuing to represent him, finding that the attorney had violated Rule 5:3-5(b) by taking a security interest in the client's property before conclusion of the matter; 2) enforcing the

amended judgment of divorce and ordered the defendant to pay $17,140 in counsel fees previously awarded to the plaintiff; and 3) denying all other relief.[13]

On review, the Appellate Division noted the comments to Rule 5:3-5(b) make clear that "not only must the representation have first terminated but also that the matter for which the attorney was retained must also have been concluded."[14] The Appellate Division further noted that Rule 5:3-5(b) "has no enforcement mechanisms specified nor does it address standing to enforce the rule."[15]

In finding that a violation of Rule 5:3-5(b) had occurred, the Appellate Division explained that "a violation of the rule occurs if an attorney takes a security interest, mortgage or other lien on a client's property to assure payment of a fee *during the period of representation*."[16] The court further cited Rule 1:11-3, which provides that an attorney's representation of a client terminates upon the expiration of the time for appeal from the final judgment or order entered therein. Specifically, the court determined that after the amended judgment of divorce was entered on Dec. 9, 2005, plaintiff's counsel was required to represent the plaintiff for at least another 45 days.[17] On Dec. 27, 2005, when the plaintiff, through his counsel, moved to enforce his rights under the judgment and for reconsideration, the time for appeal was tolled.[18] It was during the time these motions were pending that plaintiff's counsel secured the note and mortgage from the plaintiff.[19]

Based upon the foregoing, the Appellate Division in *Van Horn* concluded that a clear violation of Rule 5:3-5(b) occurred when the plaintiff's attorney took a note and mortgage on the plaintiff's home during the course of the representation, noting that the attorney represented the plaintiff until April 6, 2006, at which point the time to appeal had expired and the matter for which the attorney was retained concluded.[20] However, after noting that neither Rule 5:3-5(b) nor RPC 1.8(a) require disqualification of an attorney where a violation occurs, the Appellate Division held:

> This leaves only the question of what remedy should there be for a violation of Rule 5:3-5(b) where the attorney took a security interest in the client's property while the action was still pending and the client was represented by the attorney. We have found no case considering the issue. However, it seems to us that the prohibition in Rule 5:3-5(b) should not trigger a more severe sanction that that afforded by RPC 1.8. As a result, we are thoroughly satisfied that disqualification [of plaintiff's attorney] was unjustified. At most, the Family Part judge should have required the discharge of the mortgage, which she could have ordered even over the objection of plaintiff in order to enforce the rule…[21]

A far more problematic issue facing the matrimonial attorney involves the procedure for attempting to collect fees given the interplay between Rule 5:3-5(b) and Rule 1:20A-6, which prohibits an attorney from filing an action to recover a fee until after giving the client notice of the right to have a fee dispute submitted to the Fee Committee for adjudication. Rule 1:20A-6 provides:

> No lawsuit to recover a fee may be filed until the expiration of the 30 day period herein giving Pre-Action Notice to a client; however, this shall not prevent a lawyer from instituting any ancillary legal action. Pre-Action Notice shall be given in writing, which shall be sent by certified mail and regular mail to the last known address of the client, or, alternatively, hand delivered to the client, and which shall contain the name, address and telephone number of the current secretary of the Fee Committee in a district where the lawyer maintains an office. If unknown, the appropriate Fee Committee secretary listed in the most current New Jersey Lawyers Diary and Manual shall be sufficient. The notice shall specifically advise the client of the right to request fee arbitration and that the client should immediately call the secretary to request appropriate forms; the notice shall also state that if the client does not promptly communicate with the Fee Committee secretary and file the approved form of request for fee arbitration within 30 days after receiving pre-action notice by the lawyer, the client shall lose the right to initiate fee arbitration. The attorney's complaint shall allege the giving of the notice required by this rule or it shall be dismissed.

In *Mateo v. Mateo*,[22] a civil action, plaintiff's attorney did not file a complaint demanding payment of an attorney's fee.[23] Instead, the attorney moved in the underlying

action for an attorney's lien pursuant to N.J.S.A. 2A:13-5,[24] which provides:

> After the filing of a complaint or third-party complaint or the service of a pleading containing a counterclaim or cross-claim, the attorney or counsellor at law, who shall appear in the cause for the party instituting the action or maintaining the third-party claim or counterclaim or cross-claim, shall have a lien for compensation, upon his client's action, cause of action, claim or counterclaim or cross-claim, which shall contain and attach to a verdict, report, decision, award, judgment or final order in his client's favor, and the proceeds thereof in whosesoever hands they may come. The lien shall not be affected by any settlement between the parties before or after judgment or final order, nor by the entry of satisfaction or cancellation of a judgment on the record. The court in which the action or other proceeding is pending, upon the petition of the attorney or counsellor at law, may determine and enforce the lien.

The court found that this procedure "was not the proper way to establish the attorney's lien."[25] In citing *Rosenfeld v. Rosenfeld*[26] with approval, the court then held that "the Pre-Action Notice requirement applies to a petition to establish an attorney's lien as well as to a complaint for attorney's fees. In the absence of compliance with the *Rule*, such a petition must be dismissed."[27]

Thus, based upon the court's holding in *Mateo*[28] and its reliance upon *Rosenfeld*,[29] it would appear that even if an attorney is entitled to file a *lis pendens* against marital property to enforce a charging lien against the client in an equitable distribution action, the *lis pendens* stands on no different footing than the charging lien, and hence the pre-action notice required by RPC 1:20A-6 would be a prerequisite to the validity of the charging lien.

Typically, the charging lien arises when a discharged attorney seeks the imposition of the lien for compensation against the former client. However, at issue in *In re Simon*[30] was whether, after being denied on his motion to be relieved, the attorney violated RPC 1.7(a)(2) when he filed suit to recover fees against the client, thereby knowingly creating an irreconcilable conflict of interest resulting in the court having no recourse but to relieve him as the client's counsel due to the obvious conflict.[31]

In *Simon*, the attorney's client faced murder charges.[32] A significant pre-trial fee, plus expenses, had been incurred, with only a portion having been paid by the client's relatives who, along with the client, had signed Simon's retainer agreement.[33] With his fees still outstanding, and prior to the scheduling of the trial, Simon sent his client and his client's family four letters over the course of four months seeking payment.[34] Each letter contained a warning that if payment arrangements were not made, Simon would seek to be relieved as counsel.[35] In other correspondence to the family, Simon indicated he intended to file suit if payment was not forthcoming.[36] Receiving no further payments, Simon filed a motion to be relieved as counsel, which was denied, and a trial date was scheduled for four months later.[37] Simon appealed the trial court's decision.[38]

Shortly after his motion to be relieved was denied, on Aug. 29, 2008, Simon filed suit against his client and the client's family to recover fees in the approximate amount of $75,000.[39] On Sept. 23, 2008, after learning his client's family had transferred their home to another family member for nominal consideration, Simon filed an amended complaint alleging fraudulent transfer of the home, the proceeds of which were supposed to be used to pay Simon's fees based upon an earlier verbal representation made by the client's brother to Simon.[40] When the client learned of the lawsuit, he wrote the judge and requested another attorney. The court granted the application and entered an amended order relieving Simon as counsel, finding that in light of the lawsuit filed by Simon against his client, "any further representation of the defendant by [respondent] is impossible."[41]

Simon was subsequently awarded $55,000 against the client's family members at fee arbitration.[42] In its subsequent review of the matter, the court found a conflict of interest existed, as RPC 1.7(a) specifically prohibits an attorney from suing a present or existing client during active representation or seeking any remedy against the client.[43] The court thus determined that "by filing suit against his client for unpaid fees while defending that client against murder charges, respondent violated RPC 1.7(a)(2) by placing himself in an adversarial relationship vis-à-vis his client and thus 'jeopardize[ing] his duty to represent [his client] with the utmost zeal.'"[44] Additionally, the court found that Simon's action in filing suit against his client after his motion to be relieved was denied, amounted to "self help" in order to force his own withdrawal from the matter.[45] Specifically in that

regard, the court stated, "By filing suit, respondent knowingly created an irreconcilable conflict of interest for that purpose, and that conduct cannot be tolerated."[46]

Most recently, in the matter of *In re Lord,*[47] at issue, among other things, was whether the plaintiff attorney's service of the pre-action notice to her clients while still representing them created a conflict of interest in violation of RPC 1.7(a)(2).

On March 29, 2012, while in court, the parties to the lawsuit executed a marked-up stipulation of settlement, with a final version to be circulated and executed at a later time. The stipulation of settlement required installment payments by the plaintiffs to the defendant/counterclaimant to be made over the course of 12 months, with the first installment payment being due on or before April 25, 2012.[48]

Thereafter, on April 16, 2012, plaintiff's attorney sent her clients the pre-action notice required by Rule 1:20A-6, informing the plaintiffs of their right to fee arbitration.[49] Nine days later, on April 25, 2012, plaintiff's attorney sent her clients correspondence reminding them that the first installment payment was due that day, and advising them that opposing counsel had advised the payment had not been received.[50]

The Disciplinary Review Board (DRB) rejected the argument of plaintiff's counsel that the representation was not "active," given that only "ministerial" items remained to be done at the time the April 16, 2012, pre-action letter was sent to the plaintiffs, and concluded that a violation of RPC 1.7(a)(2) had occurred.

RPC 1.7(a)(2) provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> …
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.[51]

In finding that a violation of RPC 1.7(a)(2) had occurred, the DRB explained the plaintiffs were still "current" clients at the time the pre-action letter was sent and that plaintiff's counsel "still had legal tasks to perform for her clients, including the preparation and distribution of the final draft of the stipulation of settlement and the monitoring of the installment payments for the year to follow."[52]

RPC 1.7(a)(2) prohibits representation of a client if the representation involves a "concurrent conflict of interest." The DRB, in *In re Lord,* found the collection of legal fees is a "personal interest of the lawyer."[53] In assessing what actions by the attorney constitute "collection" for purposes of RPC 1.7(a)(2), the DRB cited *Simon v. Simon* with approval, and posed the issue as "whether *Simon* applies to a case in which the attorney has only launched the first salvo—the required pre-action letter—in collecting a fee, but has not yet sued the client."[54] In finding that the rationale in *Simon* supports the proposition that a pre-action letter to a current client creates a conflict of interest under RPC 1.7(a)(2), the DRB noted:

> Under R. 1:20A-6, an attorney may not sue the client for fees, without first sending a pre-action letter affording the client an opportunity to resolve the dispute through the fee arbitration process. That required letter is no less an indicator that the attorney is pursuing the collection of the fee than is an actual suit. In *Simon*, the parties were well past the fee arbitration stage. Therefore, the Court did not have to visit this question. Having said that, nothing in the Court's opinion suggests that sending a pre-action letter is any less litigious an act or that it would not signal the beginning of an adversarial relationship between the attorney and the client….[55]

Based upon the foregoing, the DRB concluded that sending the pre-action letter to a current client creates a conflict of interest proscribed by RPC 1.7(a)(2).[56]

Conclusion

An attorney's failure to abide by the applicable Rules of Court and Rules of Professional Conduct in the collection of fees can result in detrimental consequences. The court opinions discussed above—*Van Horn*, *Simon*, *Mateo*, and *Rosenfeld*—examine the appropriate and inappropriate process for collection of attorney's fees, from the pre-action notice requirement as well as the interplay between the requisite Rules of Court and Rules of Professional Conduct. However, with regard to the *In re Lord* opinion, what impact there be on situations matrimonial

lawyers encounter on a regular basis? For example, in a situation in which an attorney is finalizing a qualified domestic relations order (QDRO) after the time frame for representation has expired and unforeseen problems arise that prolong the process, is it now a violation of RPC 1.7(a)(2), which could result in disciplinary action, to send a pre-action letter to a client who owes a practitioner fees before the QDRO is finalized? As the saying goes, "Look before you leap." ■

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Endnotes

1. *Van Horn v. Van Horn,* 415 N.J. Super. 398 (App. Div. 2010).
2. *Van Horn, supra,* at 403.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 403-404.
8. *Id.* at 404.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 405.
14. *Id.* at 411.
15. *Id.*
16. *Id.* at 413.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 413-414.
21. *Id.* at 416.
22. 281 N.J. Super. 73 (App. Div. 1995).
23. *Mateo,* 281 N.J. Super. at 79.
24. *Id.*
25. *Id.*
26. 239 N.J. Super. 77 (Ch. Div. 1989).
27. *Mateo,* 281 N.J. Super. at 79-80, *citing Rosenfeld v. Rosenfeld,* 239 N.J. Super. 77 (Ch. Div. 1989).
28. *Mateo, supra.*
29. *Rosenfeld, supra.*
30. 206 N.J. 306 (2011).
31. *Simon,* 306 N.J. at 317.
32. *Simon,* 306 N.J. at 308.
33. *Id.*
34. *Id.* at 309.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 310.
40. *Id.*
41. *Id.* at 309-310.
42. *Id.* at 310.
43. *Id.* at 319.
44. *Id.* at 318.
45. *Id.* at 320-321.
46. *Id.* at 321.
47. *In the Matter of Estelle Flynn Lord, An Attorney at Law,* Supreme Court of New Jersey, Disciplinary Review Board, Docket No. DRB 14-105.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*