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CHAIR'S COLUMN:

Wearing Purple

by Thomas J. Snyder

On Oct. 20, 2010, youth across the country were encouraged to wear the color purple to call attention to the deaths of six youths who committed suicide after they were bullied or harassed because they were gay or were thought to be gay.[1]

Gay, lesbian and bisexual youth are four times as likely to attempt suicide as straight, young people, according to a spokeswoman for the Trevor Project, a national organization focused on suicide prevention for lesbian, gay, bisexual and transgender (LGBT) youth.[2] Although these statistics are alarming, the very real life stories behind these statistics are gut wrenching. The suicide of Tyler Clementi, a Rutgers freshman, who committed suicide by jumping off the George Washington Bridge days after his sexual encounter was broadcast over the Internet without his knowledge, is an example of such a tragic story.

The statement released on behalf of Tyler Clementi's family after his death speaks volumes: "The family is heartbroken beyond words."[3]

The political and public policy implication of equal treatment toward the gay and lesbian citizens of New Jersey is articulated by the New Jersey Supreme Court in *Lewis v. Harris*:[4]

> Times and attitudes have changed, and there has been a developing understanding that discrimination against gays and lesbians is no longer acceptable in this State, as is evidenced by various laws and judicial decisions prohibiting differential treatment based on sexual orientation.[5]
>
> Over the last three decades, through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation.[6]
>
> New Jersey's Legislature has been at the forefront of combating sexual orientation discrimination and advancing equality of treatment toward gays and lesbians.[7]
>
> Gays and lesbians work in every profession, business, and trade. They are educators, architects, police officers, fire officials, doctors, lawyers, electricians, and construction workers. They serve on township boards, in civic organizations, and in church groups that minister to the needy. They are mothers and fathers. They are our neighbors, our coworkers, and our friends.[8]

In February 2007, New Jersey enacted the Civil Union Act[9] in an effort to fulfill the constitutional requirement articulated in *Lewis v. Harris*; specifically, creation of a parallel statutory structure providing same-sex couples all the rights, benefits and responsibilities of civil marriage.[10]

In January 2010, the New Jersey Senate voted against Senate Bill 1967, the Freedom of Religion and Equality in Civil Marriage Act. In so doing, the Senate denied New Jersey gay and lesbian couples the right to civil marriage.

The United States Supreme Court in *Brown v. Board of Education of Topeka, et al.*,[11] rejected the principle of the "separate but equal" doctrine articulated in *Plessy v. Ferguson*. [12] The Supreme Court in *Brown*, addressing the implications of segregation in education condemned state sanctioned segregation. "Segregation with the sanction of law, therefore has a tendency to [retard]"…"and to deprive"….[13]

Although the analysis applicable to *Brown* related to segregation in the classroom, its rationale is sound. State-sanctioned segregation deprives and demoralizes.

Chief Justice Deborah Poritz, in her concurring and dissenting opinion in *Lewis v. Harris*, provided poignant commentary on this point:

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EDITOR-IN-CHIEF'S COLUMN

Should the Decision to Have Children Require a Presumption of Residential Proximity?

by Charles F. Vuotto Jr.

Parents relinquish many rights upon the birth of a child in order to protect that child's best interests. Isn't it fundamental that among these rights relinquished as a consequence of parenthood is the right to relocate freely? Put differently, to the extent necessary to facilitate the best interests of the child, should not the autonomy relinquished by parents upon the birth of a child include restrictions upon relocation, except in limited circumstances?

When parents decide to have a child, there is no doubt a presumption that those parents should act in the best interests of their child. As detailed below, the evidence is clear that those best interests include, in most cases, both parents remaining in close geographical proximity to each other—whether married or divorced. As such, it is argued herein that there should be a legal presumption that parents relinquish their autonomy to relocate upon the birth of a child to the extent necessary to facilitate the best interests of the child except in extraordinary circumstances or where failure to move would cause harm to the child.

This column proposes that the paradigm must shift away from the ever-increasing ease with which a custodial parent is permitted to move with the child or children away from the other parent. If this is accepted, the standards and factors of our existing legal matrix on removal must change.

THE BASIC LAW OF *BAURES*

In 2001, the Supreme Court of New Jersey decided the seminal case governing the law of removal, *Baures v. Lewis*,[1] which has since served as the legal archetype for removal litigation in New Jersey.

As established in *Baures,* any parent who seeks removal of a child outside of the state of New Jersey over the objection of the other parent must first demonstrate a *prima facie* case for removal before the court may further consider the removal application. Initially, the moving party has the burden "to produce evidence to establish *prima facie* that there is a good faith reason for the move, and that the move will not be inimical to the child's interests."[2] Like any *prima facie* demonstration, the moving party must provide facts that, "if unrebutted, would sustain a judgment in the proponent's favor."[3]

The *prima facie* demonstration by the custodial parent "is not a particularly onerous one."[4] The Supreme Court explained:

> [the initial burden] will be met for example, by a custodial parent who shows that he is seeking to move closer to a large extended family that can help him raise his child; that the child will have educational, health, and leisure opportunities at least equal to that which is available here, and that he has thought out a visitation schedule that will allow the child to maintain his or her relationship with the noncustodial parent.[5]

Hence, in most cases, the custodial parent will be able to make a *prima facie* showing in favor of removal. Thereafter, the non-custodial parent must move forward with evidence demonstrating that the removal is "either not in good faith or inimical to the child's interest."[6]However, the ultimate burden to demonstrate good faith and that the move will not be inimical to the child remains at all times on the custodial parent. As stressed in the final paragraph of the *Baures* opinion:

> in a removal case, the burden is on the custodial parent, who seeks to relocate, to prove two things: a good faith motive and that the move will not be inimical to the interests of the child.[7]

Accordingly, in order to warrant removal, "the trial court will have to be satisfied by a preponderance of credible evidence that [the custodial parent] has provided a good faith reason to move and that [the child] will not suffer therefrom."[8] As detailed below, the Court's decision to invoke a less onerous demonstra-

tion that the move will not be inimical to the child's best interests, as opposed to a more stringent demonstration that the move will be in the child's best interests, reflects a clear presumption in favor of a custodial parent's right to relocate. Therefore, it is clear that the Supreme Court has placed the far greater burden on the parent seeking to oppose the move.

A PRESUMPTION IS BORN

Although several portions of *Baures* may be subject to interpretation, the easing of the burden on the custodial parent, and the resulting presumption in favor of a custodial parent's decision to remove a child, is not.

As detailed above, in order to be successful on a removal application, the custodial parent must demonstrate through a preponderance of the evidence that "(1) there is a good faith reason for the move and (2) that the move will not be inimical to the child's interests."[9] Many practitioners have mistakenly interpreted the second prong as requiring a 'best interests' demonstration, meaning that the custodial parent must demonstrate that the proposed move is in the child's best interests. This is incorrect. All the custodial parent must show is that the move is not inimical to the child's interests, not in the child's best interests. Is this purely semantics? This author thinks not.

Is a demonstration that a proposed move is not inimical to the child's interests synonymous with a demonstration that the move will be in the child's best interests? If there is a difference, is it not *de minimus*? The answer to both questions is "No." There is a marked difference between the two standards. A demonstration that the move will not be inimical to the child's interest requires only a showing that the child will 'suffer' as a result of the move.[10] In other words, harm must be shown if the move is to occur. A demonstration that the move will be in the child's best interest requires not only a demonstration that the child will not suffer from the move, but goes one substantial step further by requiring a demonstration that the move will actually benefit the child. In other words, a best interests standard would require a demonstration that the child's well-being will be better served in the foreign state than in New Jersey.

Why did the Supreme Court adopt the far less onerous standard of not inimical to the child's interest rather than the relied upon best interests standard? Here is where the presumption in favor of the custodial parent's right to remove a child comes into play.

Although asserting that the two-prong demonstration is not based on a presumption in favor of the custodial parent, the law speaks for itself as it does not require a demonstration that the move would be in the child's best interests and it further "recognize[s] the identity of the interests of the custodial parent and the child, and, as a result, accords particular respect to the custodial parent's right to seek happiness and fulfillment [through removal of a child outside of the state]."[11] Relying on the prior Supreme Court removal cases of *Cooper*[12] and *Holder,*[13] the law of *Baures* "accord[s] special respect to the liberty interests of the custodial parent to seek happiness and fulfillment because that parent's happiness and fulfillment enure to the child's benefit in the new family unit."[14]

Quoting from *Cooper,* the *Baures* Court emphasized:

> The realities of the situation after divorce compel the realization that the child's quality of life and style of life are provided by the custodial parent. That the interests of the child are closely interwoven with those of the custodial parent is consistent with psychological studies of children of divorced or separated parents.[15]

Further supporting the presumption in favor of the custodial parent's right to removal of a child, *Baures* offers the proposition that "social science research has uniformly confirmed the principal that, in general, what is good for the custodial parent is good for the child."[16] Stated succinctly, *Baures* directs that there is a presumption that if the custodial parent will benefit from the move, the child in the custodial parent's care will likewise benefit. Thus, there is an inherent presumption in favor of the custodial parent's right to move, ultimately reflected in the less onerous demonstration that the move will not be inimical to the child as opposed to a demonstration that the move is in the child's best interests.

ON WHAT IS THE PRESUMPTION PREMISED?

We must examine the competing premises. *Baures* is based on the premise that what's good for the custodial parent is good for the child. The proposal submitted by the author is that moving children a long distance from one parent is not in their best interest.

In support of easing the burden on a custodial parent seeking removal of a child outside of the state, *Baures* relied heavily on 'social science.' As referenced above, the *Baures* decision focuses on the assertion "that social science research has uniformly confirmed the principal that, in general, what is good for the custodial parent is good for the child."[17] Is this accurate? This author suggests not.

Baures relied on the social science research conducted by Judith S. Wallerstein and Tony J. Tanke,[18] as well as Marsha Kline, *et al.*, to support a determination that a child's well-being is directly related to the well-being of the custodial parent. However, *Baures* neglected to stress those social studies that have criticized these studies. For example, in 2000, Richard Warshak, a clinical and research psychologist, vehemently criticized the Wallerstein study for being based on only 10 limited and skewed references,

including one written solely by Wallerstein and five others co-authored by Wallerstein.[19] Warshak also argued that Wallerstein's study ignored "the broad consenses of professional opinion, based on a large body of evidence."[20] Warshak concluded that "a comprehensive and critical reading of over 75 studies in the social science literature, including Wallerstein's earlier reports, generally supports a policy of encouraging both parents to remain in close proximity to the children."[21]

While admittedly conducted after *Baures,* an empirical study by Sanford L. Braver, Ira M. Ellman, and William V. Farbricius has emerged that demonstrates the detrimental impact of relocation on children.[22] The Braver study involved 602 college students whose parents were divorced. These students were asked questions regarding the relocation status of their parents subsequent to the divorce. A series of criterion variables were measured, including, but not limited to, emotional health, hostility, physical health, perceived parental caring, parental conflict, emotional adjustment, general satisfaction with life, distress from the divorce, feelings of emotional parental support, perception of the relationship between parents, parental contributions to college, and general well being.[23]

Based on their studies, Braver, Ellman, and Fabricius, emphasized the following:

> Putting the point in legal terminology, the burden of persuasion in relocation disputes, on the question of whether the move is in the child's best interests, should probably lie with the custodial parent who seeks to relocate rather than with the objecting parent.…Ultimately, however, our data cannot establish with certainty that moves cause substantial harm. They do allow us to say, however, that there is no empirical basis by which to justify a legal presumption that a move by a custodial parent to a destination she plausibly believes will improve her life will necessarily confer benefits on the children she takes with her.[24]

Thus, the Braver study believes the *Baures* assertion that social science research has uniformly confirmed the principal that, in general, what is good for the custodial parent is good for the child."[25] Indeed, the Braver study criticized *Baures* reliance on the Wallerstein study, stressing that the Wallerstein study over-generalized prior studies in order to support its conclusions and further misrepresented the facts by failing to recognize findings that contradicted the studies' conclusion.

Declaring itself "the first direct evidence on relocation" the Braver study propounds:

> Unfortunately, in a recent review of the social science literature undertaken for the legal community (Gindes, 1998), not a single empirical study could be found containing direct data on the effects of parental moves on the well-being of children of divorce. In its absence, courts appear to have relied instead on quite indirect-and quite controversial-social science evidence about the potential effects of relocation on children. Even more troubling, this controversial evidence appears to have played an important role in generating the recent shift in legal doctrine away from restrictions on moves by custodial parents.[26]

The Braver study further adopts Warshak's criticisms of the Wallerstein study, noting:

> Clearly, courts ought to have better data than was available to the *Burgess* and *Baures* tribunals on the question of the impact of parental moves on children and divorce. We present new data that are far more direct than any previously in literature.[27]

The Wallerstein study continues to be criticized. For example, Robert Pasahow, a clinical and consulting psychologist, has asserted that "Warshak rightfully argued that Wallerstein took a skewed interpretation of a study on post-divorced fathers and their children."[28] Pasahow further opined that Wallerstein's "research minimized the importance of the father to a post-divorce removal because the study was started in the 1970's when fathers saw little of their children following divorce."[29] Comparing the Wallerstein and Braver studies, Pasahow concluded: "Braver, *et. al.* provided the first empirically based study examining the effects of post-divorce parental relocation on children's psychological functioning. This is in contrast to how Wallerstein presented her opinion about children's reaction to divorce and then generalized to make predictions about the effects of relocation. Wallerstein never provided quantitative data."[30]

More recent research literature supports the Braver study, and provides further confirmation of the "strong effects on child outcomes due to residential mobility following divorce."[31] After a thorough examination of research literature on the issue of removal, William G. Austin, Ph.D., a clinical and forensic psychologist, concluded that the "research literature appears to establish relocation as a general risk process for children of divorce and provides a base rate level of harm due to relocation that can be found in the effect sizes in the survey studies."[32]

The social science embodied in the Wallerstein study so heavily relied upon by *Baures* is now eroded.[33] In its place, there is general recognition of the impact of removal on a child that belies the very premise upon which *Baures* was decided: What is good for the custodial parent is not automatically good for the child when it comes to removal.

It is, however, acknowledged that there are experts in the field who believe there is limited scientific data to draw any conclusions with regard to the impact of

removal on children in the individual case. Some believe that both streams of research (*i.e.*, 1) what is good for the custodial parent is good for the child (Wallerstein study), or 2) relocation confers disadvantages (Braver)) will ultimately fail to be applicable to the individual case, largely because both streams do not capture adequately the full range of variables that may mediate the relationship between relocation and child status over time. Therefore, these experts believe that to impose either theoretical stance as scientifically credible in the individual case may lead to less well informed or poorer decisions. Needless to say, this author does not agree with this line of thought.

There is no question, however, that science should not be given undue weight one way or the other. The point is *not to over-emphasize* the scientific basis on which the law is founded because those studies, even if they are reliable and valid, may not be generally applied to individual cases. The science should serve as a template—a starting point for thinking about a case—but not as the over-arching controlling factor. Individual cases should be examined against the template, and if they do not conform, then the science should not over-ride common sense or reasoned single case arguments. The science can produce light, but does not necessarily illuminate the path. It is quite possible that the 'science' has caused the skewed result in *Bauers*.

CONCLUSION

Is there precedent for a presumption that parents relinquish their autonomy to relocate upon the birth of a child? Yes, to the extent that there are states that implement a presumption against removal by requiring the custodial parent to demonstrate that the move will be in the best interests of the child, including Pennsylvania, Montana, Alabama, Nebraska, Louisiana, and Illinois.

As the line between custodial and non-custodial parents becomes more and more blurred due to increased parenting time awards, as the scientific research and literature indicate that the premise upon which *Baures* was decided is flawed, and as evidence continues to reflect the negative impact of removal upon children, the law must be corrected in order to protect the interests of both the child and the non-custodial parent in removal litigation.

Why shouldn't there be a presumption against removal based on the premise that, upon the birth of a child, a parent automatically relinquishes his or her right to relocate to the extent necessary to facilitate the best interests of the child? The standard to be applied in order to overcome such a presumption against removal is left for another day. Should the standard be a demonstration that harm to the child will occur if the proposed removal is not permitted? Should it be a less stringent demonstration that the proposed removal will substantially benefit the child?

This author proposes, subject to discussion and debate, that there should be a presumption against removal (which may even be extended to long moves within a state) except upon a showing of extraordinary circumstances or of harm to the child if the move were not to occur. While the standard for overcoming the presumption against removal remains open to debate, the need to reexamine the issue is clear. ■

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2. *Baures,* 167 N.J. at 118.
3. *Id.* at 118.
4. *Id.* at 118.
5. *Id.* at 118.
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7. *Id.* at 122 (emphasis added).
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11. *Id.* at 97.
12. *Cooper v. Cooper,* 99 N.J. 42 (1984).
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14. *Baures,* 167 N.J. at 115.
15. *Id.* at 106 (*quoting Cooper,* 99 N.J. at 53-54).
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18. Judith S. Wallerstein & Tony J. Tanke, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 *Fam. L.Q.* 305 (1996).
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25. *Baures,* 167 N.J. at 107.
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28. Robert Parashow, A Critical Analysis of gthe First Empirical Research Study on Child Relocation, *Journal of the American Academy of Matrimonial Lawyers*, Vol. 19 (2005).
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31. William G. Austin, Relocation, Research, and Forensic Evaluation, Part 1: Effects of Residential Mobility on Children of Divorce, Family Court Review, Vo. 46., No. 1 (January 2008); *see also* Joan B. Kelly, *Family Process,* 2006, 46, pp.35-52 ("Relocation may be problematic regardless of whether mothers with children move, or fathers move away from their children; college students whose parents moved after a divorce reported a less favorable view of parents as role models and sources of emotional support, and more internal turmoil and distress, compared with students whose parents did not move after divorce (Braver *et al*., 2003)"); J.B. Rohrbaugh, 2008, *A Comprehensive Guide to Child Custody Evaluations: Mental Health and Legal Perspectives*, New York, Springer ("When college students from divorced families are compared on move-away status as children, they have the same overall level of adjustment but the move-aways have more emotional distress about the divorce, lower physical health, and less rapport with both parents. The drop in parental rapport is due to a loss of rapport with the non-custodial father, because 82% of the moves separated the children from their fathers (Braver, Ellman & Fabricius, 2003)").
32. Austin, *Relocation, Research, and Forensic Evaluation, Part 1: Effects of Residential Mobility on Children of Divorce,* pg. 146.
33. Not only has the social science relied upon by *Baures* been eroded, but some of the case law relied upon by *Baures* in support of an easing of the burden on the custodial parent has been overruled. In support of its decision to ease the burden on a custodial parent seeking to relocate, *Baures* cites to several states who eased the burden on custodial parent's burden in removal case, including Colorado. Interestingly, in 2005, four years after the *Baures* decision, the Colorado legislature amended statutory law to eliminate any presumption in favor of the custodial parent and instead implemented a best interest analysis wherein both parents shared the burden. *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).

Chair's Column

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> Human beings use labels to describe and sort their perceptions of the world. The particular labels often chosen in American culture can carry social and moral consequences while burying the choices and responsibility for those consequences.
>
> Language and labels play a special role in the perpetuation of the prejudice about differences.[14]

The New Jersey Supreme Court in *Lewis v. Harris*, was optimistic that, "[t]he great engine for social change," through the democratic process, would better serve the citizens of the state of New Jersey in determining whether to afford same-sex couples with equal rights.[15]

The rejection of Senate Bill 1967 and the wearing of the color purple this past Oct. 20, 2010, suggests that, "the great engine" needs a little push. ■

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9. N.J.S.A. 37:1-30 *et seq*.
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15. *Id* at. 462.

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Avoiding Deposition Pitfalls

by Jonathan W. Wolfe and Michael A. Mosberg

Lawyers love to tell war stories (or watch videos online) about depositions going wrong. This article addresses *why* depositions go wrong, which more often than not is the result of practitioners neglecting (or forgetting) some of the basic fundamentals for effectively preparing, taking and defending depositions.

THE FAILURE TO PROPERLY CONSIDER WHETHER TO TAKE THE DEPOSITION

Perhaps the single biggest contributor to a deposition going wrong is the failure to adequately consider whether to take the deposition in the first.[1]

Whether you are a practitioner who frequently takes or defends depositions or one who is only occasionally in that position, there is a natural tendency to be drawn into the conflict and to proceed with a deposition without asking yourself fundamental questions, the answers to which will quickly reveal whether you should go forward or not. These questions include:

- What is the purpose of this deposition?
- Why do I want to take it?
- What do I hope to accomplish?
- What are my objectives?

If you do not have good answers to those questions, you should not proceed with the deposition.

If your purpose in conducting the deposition is to 'beat' the witness, you should think about how you may be helping the other side. While the deposition may have some *in terrorem* value, you are coaching the deponent to be a better trial witness. This same witness who you embarrassed during the deposition, because of his or her lack of knowledge or lack of preparation, will most certainly be better prepared when you meet him or her again at trial. Is it really your objective to create a more formidable witness for trial?

TIMING OF THE DEPOSITION

Not enough time is devoted to the strategic timing of the deposition. There is a tendency to serve a deposition notice as a knee jerk reaction. To do so, without fully considering the ramifications of that decision, may lead to various unintended consequences that adversely impact your case. While many attorneys seek to resist having their client deposed first, there can be some potential benefits to starting first with your client:

- By allowing your client to be deposed first, you get the chance to see your opponent's hand before showing yours.
- You want the other side to 'discover' what a bad case they have or what a good case you have. If you have a solid case and a capable client, you may want to allow the deposition of your client to proceed first.
- You simply do not have enough information to take a thorough or meaningful deposition.

While there are often some benefits in taking the first deposition, you must analyze the risk/reward ratio. Do the advantages of probing your opponent first outweigh such advantages as learning the opponent's theory of the case before you must formulate your theory? In litigation, as in chess, the early moves are the most critical.

UNDERUTILIZATION OF DISCOVERY DEVICES

The failure to properly consider the strategic timing of the deposition goes hand in hand with the underutilization of other discovery devices. It has been the authors' experience that practitioners do not fully and effectively utilize *tailored* discovery demands,[2] interrogatories,[3] third-party subpoenas,[4] and demands for admission.[5] Each of these devices allows the practitioner to clear away the underbrush in advance of the deposition, as well as tie up loose ends after the deposition concludes.

These devices are to be used not in isolation, but rather in tandem with the deposition itself. Interrogatories, for example, are not only helpful in getting some preliminary answers to questions to aid in the preparation for a deposition, but also to close loopholes after the deposition has concluded.

Simply employing these devices is not enough. If you are going to use a discovery device, you must use it properly. First, the discovery device must be tailored to its objective. If you are going to serve a blunderbuss demand you will surely get one in response. If you serve a tailored demand (with follow up demands as necessary), it diminishes the likelihood you will get an overly broad retaliatory demand (and if you do, it becomes much easier to demonstrate the reasonableness of your demand when moving to compel and for a protective order). Moreover, by serving properly tailored demands you are far more likely to obtain the actual information you really need for your client's case.

Second, you must be prepared to follow through if you do not get

compliance.[6] If you are serving discovery demands just to serve them, do not bother. You must be resolute in the need for the information that you are seeking and the steps you are willing to take to obtain that information.

UNDERESTIMATING THE IMPORTANCE OF EXPERT HELP

Practitioners often overlook the use of experts and underestimate the impact (positive and negative) they can have on litigation.

Use of Experts for Deposition Preparation

It is critical for the practitioner to understand that experts are not just for trial testimony, but rather can serve as an invaluable tool during the discovery process as an educator. Employing an appropriate expert in preparing for your depositions (both defending and taking) can make the difference between bolstering and weakening your case. Also, keep in mind that while you may be compelled to disclose the identity of your non-testifying experts, additional discovery from non-testifying experts is largely protected by the Court Rules.[7]

Your Client's "Experts"

Be wary of your client's 'experts' or 'professional advisors' (*e.g.,* the business accountant, the house or family counsel). While this person may be great in the boardroom, he or she may not have experience with the case at hand, or experience with testifying in court.

CRAMMED/LIMITED PREPARATION

That the practitioner must be prepared is stating the obvious. However, on too many occasions the author's have heard lawyers explain: "I can spend a half day on the financial statement alone," or if defending, "all I have to do is stay awake." This type of approach does a disservice to both the practitioner and the case. The old adage that "failure to plan is planning to fail" comes to mind.

There are three fundamental components to deposition preparation: 1) starting your preparation the day you meet your client; 2) developing your theme; and 3) talking to your client.

Preparation Starts the Day You Meet Your Client

The first meeting with your client is the best time to assess both demeanor and credibility. At later meetings, his or her recollection is likely to be selective and or embellished. What you see is what you get. Is your client too tan? Wearing too much jewelry? Dressed inappropriately? Now is the time to begin rehabilitating those aspects of your client that warrant rehabilitation. If the client is long winded in your office, he or she will be long winded at a deposition and trial, absent proper preparation. If the client comes into your office dressed unsuitably, that is how he or she will show up to the deposition and trial.

Litigation is about white hats and black hats—the white hat signifying the 'good guy' and the black hat signifying the 'bad guy.' It is the practitioner's job to ensure the client understands how crucial it is for him or her to be viewed by the court as the party wearing the white hat.

Developing Your Theme

Nothing is more important to your case than your theme. Your theme is what the case is all about. It is the framework within which you make strategic decisions about the manner in which the case should proceed, the positions you take and how you prepare your client for deposition and trial. The theme of the case should be simple. It should be the sound bite that captures what your case is all about.

Depositions serve as the testing grounds for your themes. It is there that you will learn what works and what does not work. Most importantly, before trial you and your client and your experts should be on the same page, and each should able to finish this line: "The theme of this case is ___"

Talking to Your Client

Lack of client communication is a problem that too often permeates representation. As the lawyer, you are responsible for striking the balance in communication with both the micromanaging client and the disassociated client, because that communication is critical to the success of the representation.

Preparing Your Client for Deposition

Remember former President Bill Clinton's grand jury testimony?

Question: If Monica Lewinsky says that while you were in the Oval Office you touched her breasts would she be lying?

Answer: That is not my recollection. My recollection is that I did not have sexual relations with Ms. Lewinsky.[8]

The lesson here is: Do not assume because your client was a board leader, a debate champ, a lecturer, a public speaker or even the president of the United States, that he or she will be a good witness.

Start your client's deposition preparation early and bring familiarity to the unfamiliar. In addition to reviewing and practicing with your client the proper way to respond to deposition questions, your client needs to understand his or her limited role in the deposition, remembering that the testimony can only be used *against him or her* at trial. Your client must further be taught to use and find comfort and guidance from the theme of the case. The more in command your client is of the theme or themes of the case, the more prepared he or she will be for the deposition, regardless of the ultimate questions posed.

CONDUCTING THE DEPOSITION—THE X FACTORS

With respect to conducting the deposition, various other factors may contribute to a deposition going awry.

First and foremost, should your client attend? If your client can be controlled, the answer is yes. If you have a client who is going to

interrupt you or interrupt the orderly flow of the deposition, leave him or her home.

Next, plan your conduct. A deposition is not a social gathering. It is imperative that you set the tone from the outset. There should be no preamble or instructions. There should be no exchange of pleasantries with the deponent. You are not the deponent's friend. Your job is get at the truth, period.

Just as it is important to set the right tone, it is critical that you have the appropriate demeanor. You have to moderate your emotion and modulate your voice to maintain your own effectiveness and credibility as the interrogator. This way, when you get angry at the witness the witness assumes he or she is doing something wrong (as opposed to always being angry, in which case the anger loses its impact).

Find out what the witness was shown and told in preparation for the deposition. You never know what you may discover. You may learn that a third person wholly unrelated to the litigation was present, in which case privilege may have been waived.

Write down tricky or technical questions. This is not to suggest that you should be writing out a Q and A. An outline of the areas of inquiry is the best manner in which to proceed. However, if there are specific questions that need to be asked, or technical questions that you want to make sure are set out in the record correctly, write them out to avoid error.

Listening is critical. Do not sit there taking notes and writing down the answers. Look at and engage the witness. Make sure the witness answers the questions about his or her opinions, as they may lead to the discovery of admissible evidence. You may not be able to get the answers in at trial, but they may lead to other evidence. So ask questions such as: How do you know that? Why do you think that happened? And what did X tell you?

Ask why if it is important. (Of course you will almost never ask it at trial.) Why? At trial, you do not want to suddenly learn something negative about your case; during a deposition, you do. That way, you can prepare for it. It is best to get everything out on the table. But whatever happens, do not act surprised when you hear bad news. ("Of course we knew that you had a photograph of our client raiding the safe.")

Be cognizant of the transcript as a record. If the transcript is used at trial, remember that you only have frozen words. To make a good record, you must squeeze all life out of the dialogue; the words must be coherent standing alone. You should also keep in mind the limited rights your adversary has to object during your testimony,[9] and quickly put an end to improper speaking objections.

Establish what the witness does not know. Remember, non-responsive answers may be the best answers you get. "I don't know" or "I don't remember" may be music to your ears. Lock the witness into his or her testimony and move on! Do not belabor the point and give the witness the opportunity to figure out he or she should have the knowledge he or she claims not to have and fix the testimony.

Finally, leave something in your briefcase. Do not try your case at the deposition. The purpose of a deposition is to get information, not give it. So if you use the information in your briefcase, it should be used sparingly, if at all. Just because you can impeach a witness at a deposition with something you know or have does not mean you should. Save some valuable evidence for trial. ■

ENDNOTES

1. *See* R. 5:5-1 (discovery in civil family actions); 4:14-1 (rules for party and non-party depositions); R. 4:14-9 (authorizing videotaped depositions).
2. R. 4:18-1.
3. R. 4:17.
4. R. 1:9-2.
5. R. 4:22-1.
6. *See* R. 4:23-1 (motion for order compelling discovery); R. 4:23-5 (application for sanctions for failure to make discovery R. 4:17, R. 4:18-1 and R. 4:19).
7. *See* R. 4:10-2(d)(3) (prohibiting discovery except upon a showing of "exceptional circumstances.").
8. Grand Jury Testimony of William Jefferson Clinton, Aug. 17, 1998. (www.npr.org/news/national/clintontape/index.html).
9. *See* R. 4:14-3.

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Defining Savings in an Alimony Award

by John P. Paone Jr.

The *Webster's Dictionary* defines savings as the excess of income over consumption expenditures. Under New Jersey law, however, savings for alimony purposes is a carefully defined term of art having little relationship to the layman's definition of the word. Savings is a component of an alimony award to enable a payee "to protect…against the day when alimony payments may cease because of [the payor spouse's] death or change of circumstances."[1]

Contrary to the position of some commentators, there is no legal authority for defining savings as a vehicle to distribute the payor spouse's post-judgment stream of income developed during the marriage. Nor does the case law provide any authority for granting a savings component to enable the dependent spouse to grow his or her estate post-divorce in the same fashion that the parties had accumulated assets during the marriage. Instead, the court has linked the legal definition of savings with satisfying two distinct goals: 1) to ensure the payee's alimony against the eventuality of the payor's death; and 2) to ensure against the possibility that alimony could be modified due to a change of circumstances.

Property settlement agreements and final judgments commonly make provisions to protect the payee's alimony upon the death of the payor spouse. In most cases the eventuality of death is addressed not by adding a savings component to an alimony award, but through the maintenance of life insurance or other security device.[2] When sufficient life insurance or similar provisions are in place to protect the dependent spouse against the death of the payor, there is no need to add a savings component to an alimony award to address the concerns of death.

Protecting against a possible change in circumstance that may never occur is far more problematic. Indeed, if an alimony award is increased by a savings component for this purpose, the dependent spouse could receive an unintended windfall if the alimony award is never reduced or terminated due to changed circumstances.[3] On the other hand, as recognized by one court "an award of permanent alimony is not the equivalent of a guarantee of support for the remainder of (the dependent spouse's) life, at the exact amount originally ordered by the Court."[4] The task then is to provide for a savings component in an amount to ensure against that potential rainy day that is reasonable under the circumstances.[5] In fixing the appropriate savings component, courts must be mindful that "alimony is neither a punishment for the payor nor a reward for the payee. Nor should it be a windfall for any party."[6]

Recently, some have argued in favor of a more liberal definition of savings. These commentators claim that under the current law the dependent spouse is punished for being frugal during the marriage (*i.e.*, if the dependent spouse spent more—alimony would have been higher). They further argue that equity demands that these spouses receive an alimony award that includes a savings component that exceeds the requirements necessitated by concerns of death and change of circumstances.

In addition to lacking legal authority, these arguments also fail from a standpoint of equity and fairness. The argument that frugal parties are punished fundamentally ignores the fact that the manner in which the parties elected to live during the marriage is a joint decision. If the parties did not spend every penny they earned, this is the martial lifestyle, as this is how the parties "actually lived."[7] It would certainly be an abrogation of the marital contract for the court to impose a greater lifestyle after the divorce than the one the parties agreed to create for themselves during the marriage.

Furthermore, there is no authority to reward the frugality of the parties during the marriage by including a savings component in an alimony award for the dependent spouse not otherwise justified by concerns of death or changed circumstances. Rather, frugality during the marriage is rewarded in the equitable distribution phase of the case. Frugal parties share in the fruits of their prudent spending habits by dividing a larger marital estate.[8]

In essence, those seeking to define savings beyond satisfying the concerns of death and change of circumstances are arguing that a dependent spouse is entitled to the future income stream of their spouse to the extent that income stream was established during coverture. This proposition is clearly contrary to our law. As stated by Justice Worrall W. Mountain, "a person's earning capacity, even where its development has been aided and enhanced by the other spouse…

should not be recognized as a separate, particular item of property within the meaning of N.J.S.A. 2A:34-23."[9]

A savings component that is unrelated to the legitimate concerns of death and change of circumstances is a transfer of that earning capacity tantamount to that which the Supreme Court rejected in *Stern*. Put simply, the dependent spouse *is* entitled to the lifestyle established during the marriage; the dependent spouse *is not* entitled to have his or her post-divorce estate grow due to the efforts of the payor spouse after the marriage, unless necessary to secure against the eventuality of death or change of circumstances. It is worth recalling that compared with alimony, equitable distribution is a relatively new development in the law to ensure that the marital estate is fairly divided. However, even when equitable distribution did not exist, alimony was never intended as a vehicle to enable dependent spouses to add to their estate post-divorce.

Those arguing that it is not fair to allow the payor spouse to leave the marriage with most of the disposable income (*i.e.*, income after satisfying all reasonable needs of the payor and the dependent spouse and taxes) are ignoring that "marriage is shared enterprise, a joint undertaking…akin to a partnership."[10] It is long settled that the marital partnership ends with the filing of a complaint for divorce.[11] Increasing an alimony award through a savings component based on nothing more than the payor's ability to pay it is not congruent with the termination of the martial partnership.

Those arguing on the grounds of fairness also fail to address how it is fair to effectively divide the payor spouse's disposable income and then leave the payor spouse to seek alternative means to replace the contributions of the payee spouse. For example, while it may be difficult to quantify, one can easily envision the payor spouse having to hire a personal assistant, a domestic, an escort service, a gardener, a cook, and other professionals to replace the efforts of the dependent spouse after the marital partnership ends. Using a savings component to craft an alimony award that effectively divides the payor spouse's disposable income, gives no regard to the costs to be incurred by the payor spouse to replace those services previously provided by the dependent spouse.

Those who suggest that to define savings we should be guided by how the parties actually saved during the marriage are attempting to change the focus of alimony from looking at what was spent to define lifestyle to looking at what was earned to define lifestyle.[12] In the end, if the budget includes what was spent and what was not spent, then we are effectively looking solely at income alone to define the martial lifestyle. This flawed analysis inevitably leads down the path of using alimony to equalize the income of the parties, which is contrary to the law.[13] It also makes a mockery of having to complete a budget in the first place, as the court could merely look at disposable income and ignore expenses completely in fashioning an alimony award.[14] This interpretation would render meaningless years of case law that placed emphasis on defining precisely the martial lifestyle.[15] Those commentators that confuse income with expenses overlook that income does not define lifestyle. Income defines the ability to pay for the lifestyle created during the marriage.[16] Marital lifestyle may be in excess or below the parties' income and ability to pay, depending upon how they actually lived.[17]

Perhaps part of the confusion regarding savings may stem from the fact that the law requires practitioners to analyze this expense differently than the other line items in the case information statement.[18] For example, shelter, transportation, food, clothing, vacations, and related expenses require examination of the parties' expenses for these items during the marriage.[19] Regarding these line items, the past practices of the parties provide guidance regarding fixing a proper alimony award. However, there is no authority for defining savings by examining how or what the parties actually saved during the marriage. Indeed, such an approach blurs the distinction between 'savings' as a term of art having a specific definition with 'disposable income.' Rather, in defining savings the focus is properly placed on what is needed going forward to protect against the concerns of death or change of circumstances. After those concerns of death and change of circumstances are satisfied, there is no legal authority for distributing the payor spouse's disposable income in the alimony calculus under the guise of savings. ■

ENDNOTES

1. *Davis v. Davis*, 184 N.J. Super. 430, 437 (App. Div. 1982), *quoting Khalaf v. Khalaf*, 58 N.J. 63, 70 (1971). The author observes that in the overwhelming majority of cases savings is not considered. Where the disposable income of the parties is insufficient for parties now living separate and apart to meet the marital lifestyle, savings plays little if any role in the alimony determination. The issue of savings becomes important and must be addressed in those cases where excess income exists after all needs of the parties have been satisfied.
2. *Jacobitti v. Jacobitti*, 135 N.J. 571 (1994).
3. While the case law addresses savings as a vehicle to protect the dependent spouse against bad times—the case law is silent as to how the payor spouse is to be protected against those same bad times (other than through a reduction of the alimony obligation

under *Lepis v. Lepis*, 83 N.J. 139 (1980)).

4. *Lefkon v. Lefkon*, WL 3663714 (App. Div. 2006).
5. This task would require an article in itself, and will not be explored here. However, the author does recall some enterprising company several years ago offering 'alimony insurance.' This would indicate that some mathematical calculation can be fashioned for creating a savings component to insure against the possibility that an alimony award may be reduced or terminated due to change of circumstances.
6. *Aronson v. Aronson*, 245 N.J. Super. 354, 364 (App. Div. 1991).
7. *See Hughes v. Hughes,* 311 N.J. Super. 15, 34 (App. Div. 1998).
8. The Legislature has made clear that there is an interrelationship between alimony and equitable distribution. *See* N.J.S.A. 2A: 34-23b(10). This leads to the argument that it is unfair to include a savings component in an alimony award when the marital estate is being shared on a 50/50 basis.
9. *Stern v. Stern*, 66 N.J. 340, 345 (1975).
10. *Rothman v. Rothman*, 65 N.J. 219, 229 (1974).
11. *Painter v. Painter*, 65 N.J. 196, 218 (1974).
12. This logic would lead to a perverse result if applied in the not uncommon case where the parties accumulated no savings and indeed lived on debt. In other words, if the parties had "negative savings" this would result in reducing the lifestyle from that actually enjoyed. Fortunately, our courts have not adopted this faulty approach. *See Hughes v. Hughes*, 311 N.J. Super. 15 (App. Div. 1998).
13. *Weaver v. Weaver,* 2005 WL 1562798.
14. A determination of alimony in this fashion makes us a *de facto* alimony guidelines state. Alimony guidelines rely almost exclusively on disposable income to determine alimony. Unlike Pennsylvania and other states, New Jersey has not adopted alimony guidelines.
15. *Crews v. Crews*, 164 N.J. 11 (2000).
16. *Hughes v. Hughes*, 311 N.J. Super. 15, 35 (App. Div. 1998).
17. *Id.* at 34.
18. A line item for savings did not appear in the preliminary disclosure statement (PDS), which was incorporated in the Pashman report on June 10, 1981. *See Skoloff, New Jersey Family Law Practice*, Vol. V, Historical Documents, C:54-63 (12th Ed. 2006). The PDS was the predecessor to today's case information statement (CIS). In 1987, the CIS was modified to include the line item "savings/investment" with no further definition of this expense. *See Family Division Practice Committee Report*, 120 *N.J.L.J.* 127 (July 16, 1987). Interestingly, the current CIS has no line item for pension or 401(k) contributions.
19. *Crews v. Crews*, 164 N.J. 11 (2000).
20. The author also acknowledges that in those cases where marital fault of the type defined in *Mani* has negatively affected the economic *status quo* of the parties, a savings component can be included in an alimony award to recoup the plundered marital estate. *See Mani v. Mani,* 183 N.J. 70, 90 (2005).

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Special Treatment

When Divorce Involves a Special Needs Child

by Beth C. Manes

Before you can properly serve your clients with special needs children, you must first identify them. Many matrimonial attorneys ask the typical questions during initial consultation, seeking only basic information such as the number of children and their ages, but never probing further. It is, however, critical to delve deeper.

Asking if any of the children are disabled is an excellent start, but sometimes disabilities have not yet been identified or labeled. It is, therefore, important to ask detailed follow-up questions in an effort to tease out any potential disability issues. For example, you, as the attorney, should ask questions about the children's medical history and academic performance. Ask if there have been any behavioral issues. Ask how the children manage socially.

If your client gives you any indication that the child may be evidencing behavioral, educational or other developmental issues, you should counsel him or her to have the child evaluated. It is certainly preferable to identify a child's special needs prior to final judgment and to have child support, alimony, custody and visitation established accordingly, rather than being forced to address the issues post-judgment.

If your client tells you that his or her child has special needs, inquire what those needs are and how they affect the daily life of the child, as well as your client. Some pertinent questions to ask are: What is your child's diagnosis? When and by whom was that diagnosis made? How was the diagnosis made (*i.e.*, what testing methods were used)? What is the prognosis: Can the child be cured? Can the child be treated? Is the condition fatal?

Armed with this information, you can begin documenting the file so you can best represent your client. The first list you create should contain the names of all of the treating physicians and therapists. Have your client sign a HIPAA (Health Insurance Portability and Accountability Act) release for each of them so you can request necessary information and freely communicate with the treating professionals. Once you learn the child's diagnosis, you should also consider conducting some research on your own to educate yourself beyond what you have learned from your client. The more you know about the child's disability, the better prepared you will be to engage in critical discussions with doctors, therapists and school personnel.

Next, you should ascertain what, if any, medications the child is prescribed. You should create a chart for the medications, including the prescribing physician, the names and dosages of the medications, and any notes about the medications. The notes should include the purpose for which the medication is prescribed, the length of time the child has been taking the medication and whether there is an anticipated cessation of the medication. If it is anticipated that the child will cease taking the medication at some point, you should determine when and whether it will be replaced by another medication. You should also note whether the medication produces any side effects and, if so, how those effects are managed. In addition, you should document whether each medication is brand-name or generic. If it is a brand-name drug, find out why. For example, some doctors believe there is a higher efficacy rate among brand-name drugs. If this is the case, obtain documentation to support that assertion. You should also note the expectations for future medications and prescriptions if this information is available to you. Finally, next to each medication, you should identify the cost, both out-of-pocket and covered by insurance.

It is also essential that you document the therapies the child is receiving, including physical, occupational, behavioral and speech. Who recommended these therapies? Who is providing them? How frequently does the child receive therapy? When did the child begin therapy and how long is it anticipated the therapy will continue? Where does the child receive therapy—at home, school or elsewhere?

You should also obtain releases from your client for each of the child's therapists so that you can receive documentation of the goals of these therapies, the progress that has been made and the plan for the future. Again, you should note the cost of the therapy, both out-of-pocket and the amount, if any, covered by insurance.

In addition to documenting the child's medications and therapies, you should elicit information with respect to any equipment, medical devices or mobility aids the child uses. You should ascertain when the item was first obtained as well as its useful life, and then determine when, and if, the insurance company will

pay for a replacement. For example, a child may outgrow a wheelchair before the insurance company is willing to pay for a new one. Speak with the doctor or therapist and obtain a report on the progress the child has made with these devices and the expectations for the future. As with the medications and therapies, you should maintain a record of your client's out-of-pocket expenses as well as the costs that have been covered by insurance.

In representing a parent of a special needs child, you must also be apprised of the child's academic situation. Does the child have an individualized education plan (IEP), which is a specialized instruction plan, or a 504 reasonable accommodations plan? Is the child being tutored? If so, who is performing the tutoring and how frequently is the child tutored? Does your client anticipate tutoring will continue into the future? If tutoring is expected to continue, you should document its necessity through a progress report from the tutor and ascertain how the tutor is going to be paid. If there is a child study team in place, you should learn the name of the members, when the team last met and their topics of discussion. Again, be sure to have the appropriate releases signed by your client so you can obtain copies of the child's school records and the IEP or 504.

A final area of inquiry is whether the child is presently receiving any public services or benefits, and whether any future services are anticipated. You should also determine whether the child receives any means-tested benefits, such as SSI or Medicaid, or whether it is anticipated that the child will qualify for and receive such benefits in the future? Finally, you should confirm with your client that the child is registered with the Division of Developmental Disabilities.

SYNTHESIZING THE INFORMATION INTO A USEFUL DOCUMENT

After you have completed your fact-finding mission, the 'special needs' you have evaluated should include medical, therapeutic, equipment, medication, education, professional assistance and social. At this point, you have already identified the child's specific needs and assessed how those needs are presently being satisfied. The next consideration involves attempting to project those needs into the future to ensure they continue to be fulfilled as the child grows and develops.

A life care plan is an excellent place to start. Many social service agencies, as well as privately practicing nurses, social workers and therapists, work with families to provide a life care plan for a person with a disability. The life care planner will work in collaboration with the child's medical professionals and various therapists to document how the child's disabilities impact his or her daily life at home, at school and in the world, and to forecast what the family might expect in the future. Among other things, the life care plan will address the child's medical needs, education needs, therapeutic needs (*i.e.*, physical, occupational, speech), necessary aids (*i.e.*, hearing aids, mobility aids) and necessary modifications to the home to accommodate the child. The life care plan will help assess how the child's needs might change and identify programs for which he or she might be eligible.

In short, you are seeking information to help answer the $64,000 question: Will the child ever be emancipated? The life care plan should be revisited and updated frequently as the child matures and his or her needs and abilities change.

Knowing what a child's future needs might be and knowing what they will cost are two different issues. Unfortunately, the cost of certain therapies or other accommodations often makes the payer of child support question the effectiveness of the therapy. This fact makes it imperative that your experts carefully document the progress the child has made to date. It is also a further reason why a life care plan is so critical, since you will be obtaining a third party's expert opinion regarding how the child's special needs should be met in the future.

You must ask your client whether a life care plan has been prepared for his or her child and, if so, when it was last updated. A copy of the most recent plan should be kept in your file. If the most current life care plan is more than a year old, it would be wise to have an updated plan prepared.

Ideally, you should have the life care plan reviewed by a financial planner well versed in planning for special needs. In fact, some financial planning firms are equipped to project, based upon the child's anticipated needs, the future cost of caring for a special needs child. This is a critical component in helping your client plan for the future and will also serve as a useful tool for you as the attorney negotiating the divorce.

HOW THIS INFORMATION WILL IMPACT DIVORCE NEGOTIATIONS

Some of the information you have collected and evaluated will greatly impact child support, alimony, custody and visitation discussions. Before negotiations can begin, it is imperative that you discuss with your client the issue of day-to-day care for the child. For example, has one parent been the primary caretaker for the special needs child. If so, what does that mean? Does the child require around-the-clock care? Who else, if anyone, has provided this care? If it has been a hybrid parent/caregiver schedule, how much time has the parent been devoting to the special needs of the child? Will the parent continue to be able to care for the child, or does the life care plan indicate that professional caregivers will be exclusively required in the future?

The results of these inquiries will help answer another monetary question: Will the caregiver parent be able to return to the workforce and, if so, when and to what extent? Quite possibly, the cost of child care will exceed the salary the caregiver parent may be able to earn. Additionally, if one parent is to continue to be the primary caregiver for the

child, some respite for that parent must be factored in to fortify the parent to continue caring for the special needs child.

Next, you should inquire about the necessary household accommodations. Does the child need assistance with mobility? Has the house been renovated to facilitate the child's mobility? If the home has been modified to accommodate the child's needs, this will have implications on whether to sell the marital home and who will reside in the home after the divorce. The household accommodations will also affect the parameters of parenting time for the non-custodial parent. While the non-custodial parent may, for example, seek parenting time on alternate weekends and Wednesday nights, such a schedule might not be realistic if his or her home is not physically accessible to the child.

You will also need to counsel your client with respect to decision-making regarding the child's needs. For example, have both parents shared the responsibility of day-to-day decision making? What about medical decisions?

You should identify those issues on which the parents agree and disagree. Have the parents agreed on types of therapies to be used to treat their child? In terms of education, do they both agree that the public schools can adequately meet the child's needs, or does one parent endorse private school? If disagreements exist, you should inquire as to whether both parents have been present at consults with doctors and therapists as well as at school and child study team meetings.

In addition, it is imperative that you discuss with your client the potential need for decision-making authority after the child reaches the age of 18. If the child will not be emancipated, or might only be partially emancipated, someone will have to petition for guardianship, or limited guardianship, of the child. Depending on the age of the child and the relationship of the parties, you may elect to simply discuss the issue with your client but not raise it in settlement negotiations. If the child is already a teenager, however, it would be best to resolve the issue as early as possible to avoid post-judgment litigation.

The parties should decide who will be the child's guardian, or if there will be co-guardians, as well as who will initiate and pay for the guardianship application. If the child is old enough, the parties should also decide whether a full guardianship or limited guardianship is appropriate. For example, perhaps the child is able to make medical decisions, but not financial ones. The life care plan should provide necessary guidance on this issue. The guardianship action can be commenced prior to the child's 18th birthday so that a guardian is in place as soon as the child reaches the age of majority.

In terms of expenses, the costs associated with a guardianship proceeding include the parties' attorney(s), the attorney appointed by the court to represent the alleged incapacitated person and any fees charged by the doctors to prepare the two reports required to be filed with a guardianship complaint. Ideally, an agreement should be reached in advance, because it will streamline the process and avoid the displeasure felt by surrogate's court judges forced to litigate custody battles in their courtrooms.

Without question, a child's special needs will also affect the calculation and duration of child support. For example, a special needs child may never be emancipated. Therefore, child support may continue for the duration of the child's life. Additionally, it may be necessary to deviate from the child support guidelines to account for the child's unique needs.[1] A child's special needs will also have an impact on the amount of life insurance necessary to secure child support. You should not underestimate the importance of securing life insurance coverage sufficient to provide for the child's needs for the rest of his or her life.

Additionally, the life insurance coverage should account not only for the potential loss of child support paid by one parent, but also for the loss of care provided by the non-payer parent. For example, if one parent is providing 24-hour care for a special needs child, that care will be expensive to replace.

When discussing with your client the issue of child support, you must be mindful of the fact that child support, if appropriate past age 18, may be detrimental to a special needs child's qualification for public benefits if handled improperly. For example, child support payments will reduce SSI benefits dollar for dollar, which may, in turn, eliminate the child's Medicaid eligibility. Since many insurance companies will not allow a parent to carry a child on his or her insurance policy past the age of majority, despite the child's special needs, it is imperative to keep the child qualified for Medicaid.

The Social Security Administration's Program Operations Manual System (POMS), which is designed to provide guidance to administration officials, is also instructive to attorneys representing a parent of a special needs child. According to the POMS, after a child reaches age 18, child support payments made on behalf of the child are treated as unearned income to that child.[2] This mandate applies to arrears as well. If child support is received in the form of food or shelter, however, only two-thirds of that amount is considered in-kind support and maintenance (ISM) and will factor into the calculation.[3] If the non-custodial parent pays for goods and services for the child, such as child care, tuition, phone, cable or Internet service, these payments will not be considered income to the unemancipated adult child.

Although much of the planning for a special needs child often focuses on qualifying the child for benefits and ensuring that he or she remains qualified for those benefits, you must still be mindful of their impact on the calculation of child support. If a child is already receiving Supplemental Security Income (SSI) benefits, such payments will not reduce the child support obligation because those benefits are means-tested.[4] In contrast, Social

Security Disability (SSD), which is paid as a substitute for earned income, can be considered income when calculating child support.[5] The courts used the child support guidelines worksheets to support their findings, the distinction being that SSI is means-tested and SSD is not.[6]

The parties can protect their child's eligibility for means-tested public benefits through the use of a special needs trust. A special needs trust, also called a supplemental needs trust, is a vehicle used to ensure that funds are available for a person with special needs without disqualifying him or her from public benefits programs. Federal law protects children with disabilities from disqualification from SSI and Medicaid when assets are held in special needs trusts.[7]

Two types of special needs trusts are available: self-settled special needs trusts, which are created with the assets of the disabled person, and third-party special needs trusts, which are formed with the assets of a third party.

If the transfer of child support to a special needs trust is irrevocable, the payments will not be considered income to the child. If the parties intend to create a special needs trust and have child support payments directed into the trust after the child turns 18, it would be prudent to have the court order such an arrangement. Since the parties cannot modify the court order, court-ordered payment of child support to a special needs trust would likely be deemed irrevocable.

Although no case law specifically addresses the protection of child support by directing payment into a special needs trust, the Appellate Division has held that alimony was not income to a supported spouse when it was paid directly to a special needs trust pursuant to a family part order.[8]

If a special needs trust is created to receive child support, such a trust would be considered a self-settled special needs trust, since it will be funded with the child's own money. This trust will have to contain a pay-back provision, ensuring that if any funds remain in the trust at the end of the child's life, Medicaid will be reimbursed prior to any distribution to contingent beneficiaries.

If your client is securing child support with a life insurance policy, this policy can be paid into a third-party special needs trust, which would not contain a pay-back provision. This third-party special needs trust can also be the receptacle for funds from a 401(k) or 403(b) plan.

Regardless of whether a self-settled or third-party special needs trust is warranted, the trust document can be created mutually, with both parties deciding who the trustees will be. If they cannot agree on one trustee, then perhaps they will each choose one trustee. Those individuals will work together as co-trustees, ensuring that both 'sides' are represented.

If no family members are willing or available to serve as trustees, and the parties wish to hire their financial planner, you should counsel your client to be wary. Many financial planning firms will not serve as trustee, and those that are willing to do so are often ill-prepared to handle the intricacies of a special needs trust.

You might advise your client to consider a nonprofit agency such as Planned Lifetime Assistance Network of New Jersey (PLAN/NJ). PLAN/NJ exists to answer the question: Who will care for my loved one when I am gone? It is an excellent resource for families who do not have someone to whom they can turn. PLAN/NJ can serve as trustee, representative payee and even guardian for a disabled adult child. PLAN/NJ also has a pooled trust, which is a type of special needs trust that allows an individual to have his or her own account within a larger trust. This option provides a greater investment opportunity to someone with a smaller trust *corpus*.

FINAL CONSIDERATIONS

The issues surrounding the present and future care and support of a special needs child can complicate even the simplest of divorce negotiations. As the attorney for a parent of a special needs child, you must educate yourself in all aspects of the child's needs, from diagnosis to formulating a plan for fulfilling the child's anticipated future needs. If you invest the time in documenting the child's relevant past and present, you will be better equipped to ensure that the child has adequate and appropriate provisions for his or her unique needs going forward. Although divorce clients retain attorneys to represent them in dividing their assets and obligations, you may certainly counsel them that, in preparing for the future of their special needs child, a unified plan and mutuality of objectives are both necessary and appropriate. ■

ENDNOTES

1. Rule 5:6A.App. IX-A, ¶21(i) titled Other Factors that May Require an Adjustment to a Guidelines-Based Award.
2. POMS SI 00830.420 C1.
3. POMS SI00830.420 B2.
4. *Gifford v. Benjamin*, 383 N.J. Super. 516 (App. Div. 2006).
5. *Herd v. Herd*, 307 N.J. Super. 501 (App. Div. 1998).
6. *See,* Rule 5:6A, App. IX-A, ¶ 10(a) (Adjustments to the Support Obligation—Government Benefits Paid to or for Children); *Id.* App. IX-B Sole-Parenting Worksheet Line Instructions (Line 12—Deducting Government Benefits Paid to or for the Child), and Shared Parenting Worksheet Line Instructions (Line 11—Deducting Government Benefits Paid to or for the Child).
7. 42 U.S.C. §1382(b)(e)(5) and 42 U.S.C. §1396 (p)(d)(4).
8. *J.P. v. DMAHS*, 392 N.J. Super. 295 (App. Div. 2007).

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What Can We Know About "Known or Virtually Certain" Changes in a Chapter 13 Debtor's Financial Circumstances

by Ronald G. Lieberman and Paul Pflumm

How many family law practitioners ask potential clients if they, or another involved party, filed for bankruptcy in the last five to seven years? When an obligor files for bankruptcy, is it your initial inclination when you represent the dependent spouse or obligee to put the file aside until there is some resolution of the bankruptcy action?

We may now wish to be more vigilant and proactive when there are Chapter 13 filings because of the recent United States Supreme Court decision on June 7, 2010, in *Lanning v. Hamilton,*[1] holding that in Chapter 13 bankruptcies a court can calculate a debtor's projected disposable income by considering changes in the debtor's income or expenses that are known or virtually certain at the time of the confirmation of the repayment plan.

Some generic background information on bankruptcy filings under Bankruptcy Codes Chapter 7[2] and Chapter 13,[3] the main forms of bankruptcy filings by individuals, is necessary. A Chapter 7 bankruptcy is commonly called a straight bankruptcy, because it will generally eliminate most debt, except for support obligations and student loans, for example. Assets are liquidated to pay debts, and in return the debtor receives a clean slate from creditors. A Chapter 13 bankruptcy is commonly referred to as reorganization, because it involves a debtor who has regular, stable income, and thus will be restructuring the debt with lower payments made to the creditors for three to five years.

Chapter 13 involves a debtor[4] entering into a three-year to five-year payment plan, committing all of his or her disposable income to creditors. Chapter 13 is generally invoked under one of three circumstances. First, the most common use of Chapter 13 is to stop foreclosure and cure mortgage defaults. Second, it is the alternative for debtors who have assets they do not want sold in a Chapter 7 liquidation. If a debtor's income is sufficient, he or she will be permitted to pay at least the value of the assets into a Chapter 13 plan. Third, higher income debtors, who might be deemed to be abusing the Chapter 7 process, can use Chapter 13 to discharge their debts.

2005 CHANGES IN BANKRUPTCY LAW

In 2005, Congress passed a major revision of bankruptcy law called the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). BAPCPA was expressly intended to cause debtors to file Chapter 13 bankruptcy petitions as opposed to filing petitions under Chapter 7. The main method of doing so is the "means test."[5]

The means test creates a presumption of abuse for Chapter 7 debtors who are determined to have the ability to repay a portion of their debts.[6] The means test also determines payments for some higher income debtors filing under Chapter 13.

THE MEANS TEST

The means test is a two-step analysis. The first step is to determine whether the debtor's income is above or below the state median income. If a debtor's income is above the median income in his or her state, then Internal Revenue Service (IRS) standards are applied to determine the amount of debt the debtor can pay.[7]

Before applying the means test, a debtor must first compute his or her income. Current monthly income, for purposes of the means test, is defined as the average of the debtor's income from all sources in the six-month time period preceding the bankruptcy filing.[8] In practice, this definition can multiply the effects of one positive month of income, or, conversely, the effects of a decrease in income or even unemployment. When a debtor's income is changing, debtor's counsel and the client must determine whether waiting to file would be advantageous.

The current monthly income of the debtor is then multiplied by 12 and compared to the state median income. A debtor whose income is below median income will use a pre-BAPCPA analysis to calculate their Chapter 13 plan payments.[9]

A debtor whose income is above-median income will proceed onward to complete the balance of the means test. This continued process under the means test takes the debtor's previously calculated current monthly income, and deducts IRS standards for living expenses,[10] expenses for administration of the plan,[11] and average monthly payments on secured debt,[12] among other things. If the remaining income of a debtor, multiplied by 60, is sufficient to pay a statutorily determined amount of unsecured debts, then the debtor must file a Chapter 13 with a three- to five-year repayment plan. The remaining income of the debtor, after expenses, is the amount of monies dedicated by the debtor to the repayment plan under the mechanical approach. A debtor is also permitted to deduct payments for priority debts, which include alimony and child support.[13]

LANNING V. HAMILTON

Lanning arose from what was believed to be one of the multitudes of drafting mistakes in BAPCPA.[14] The Bankruptcy Code requires all of a debtor's "projected disposable income" to be paid into the Chapter 13 plan[15] "Projected disposable income" is not a defined phrase, although disposable income is defined,[16] and BAPCPA incorporated the means test.[17] Many courts interpreted the BAPCPA's new definition of disposable income to mean *projected* disposable income by way of what is known as "the mechanical test."[18] Considering that one of the goals of BAPCPA was to remove discretion from the judiciary regarding the amount of debt a debtor is to repay to creditors, this definition was widely believed to be the congressional intent.[19]

The Supreme Court in *Lanning* adopted the "forward looking" approach, allowing the courts to vary the results produced by the means test in "unusual cases."[20] *Lanning* also directed the courts to start with the mechanical definition of disposable income, but permitted them to "go further and take into account other known or virtually certain information about the debtor's future income or expenses."[21]

This definition of "current monthly income" was the cause of the problem in *Lanning*, because the debtor in that case received a one-time lump sum payment from a former employer that was not expected to reoccur.[22] The Supreme Court also discussed the ability of a debtor to delay filing to account for changes in income.[23]

Curiously, several of the cases cited by the Supreme Court in examining future changes in a debtor's income discussed whether a source of income received by a debtor was actually disposable income, as opposed to reviewing what constituted projected changes in a debtor's economic situation. *In re Heath* held that under Ninth Circuit case law, the existence of a future tax refund was too uncertain to be considered disposable income.[24] Similarly, *In re Richardson*[25] held that life insurance proceeds were not property of the estate and need not be turned over to the Chapter 13 trustee. More directly on point was *In re James*,[26] where the court suggested a repayment plan that included an increase in the debtor's payments to creditors as the circumstances involving the debtor's business improved over time.

INTERPLAY WITH FAMILY LAW

The Supreme Court decision in *Lanning* raises issues regarding what disclosures by a debtor, as revealed to a bankruptcy court in a Chapter 13 filing, support a family court's determination that certain financial circumstances were "known or virtually certain."

In order to seek a downward modification of a support obligation, a movant must establish a permanent diminution in his or her income.[27] The *Lanning* decision provides little guidance for judges and practitioners in bankruptcy law or family law regarding the meaning of "known or virtually certain information." But, the Court referred approvingly to pre-BAPCPA case law requiring "clearly foreseen" changes.[28] Practitioners almost certainly will notice that the *Lanning* Court looked to pre-BAPCPA practice that is still in use for lower-income debtors who pass the means test. This is usually a holistic process, which can incorporate annual raises, upcoming bonuses, and improved business conditions for self-employed individuals.

Because *Lanning* did not provide guidance regarding the meaning of "known or virtually certain information" about a debtor's future income or expenses, the question becomes just what will constitute such information. Are the significant changes in the debtor's financial circumstances that are known or virtually certain during the bankruptcy action the legal equivalent a permanent change in circumstances warranting a downward modification of alimony or child support? An attorney representing a Chapter 13 debtor in a family law action may wish to consider making that type of legal and/or factual argument. This would assume, however, that the debtor/obligor will be relying upon the same facts in the family part as were set forth and accepted by a bankruptcy court.

There is some precedent that may reveal an answer.

In a case all-too familiar to family law practitioners, *In re Gianakas,*[29] the Third Circuit Court of Appeals went about interpreting the meaning of a debtor's obligation despite the language of the parties in their divorce settlement agreement. In that case, the Third Circuit actually mentioned that a judge should review "the parties' financial circumstances at the time of the settlement."[30] Some exam-

ples included whether one spouse had custody of the children at the time of settlement and whether a party was unemployed or employed "in a less remunerative position than the other spouse...."[31] Those factors cited by the court in *Gianakas* included some of the factors specified by the New Jersey Supreme Court in *Lepis* as constituting changed circumstances.[32] Thus, there may be some overlap or interrelation between "known or virtually certain information" and "changed circumstances."

When an obligor files for bankruptcy, is it fair to ask for receipt of that party's tax returns to monitor his or her income situation and then to explore any potential changes in his or her income? That is permissible in a limited situation under *Walles v. Walles,*[33] and may be important in deciding whether a debtor who filed a Chapter 13 plan has experienced significant changes in his or her financial circumstances since that filing. This is an argument to be made by a family law practitioner, because the Bankruptcy Code includes a provision for modification of a repayment plan at any time after confirmation of it.[34] The modified repayment plan must meet the same standards for confirmation as any other repayment plan. Thus, a debtor who experiences a loss of a source of income, loss of employment, or reduction in business income, to name a few examples, can potentially reduce his or her payments to creditors, if the debtor is believed to have suffered changes in his or her circumstances.[35]

What happens if a debtor/obligor who filed under Chapter 13 thereafter files an application in the family part to reduce his or her alimony and/or child support based upon substantial changes in his or her economic circumstances? Is that obligor collaterally estopped from asserting in the family part significant changes in his or her financial circumstances if in the bankruptcy proceeding he or she failed to assert the existence of significant changes in his or her financial circumstances that were known or virtually certain? What if the debtor did assert them and a bankruptcy court rejected their existence?

That argument would appear to have merit because collateral estoppel requires: 1) that the issue to be precluded in the current matter be identical to the issue in a prior proceeding; 2) that the issue was actually litigated in that prior proceeding; 3) that there was a final judgment on the merits by a judge in the prior proceeding; 4) that a court's determination of that issue was essential to the prior judgment; and 5) the debtor will obviously be the same party in both the bankruptcy proceeding and in the family part action.[36] It would appear that collateral estoppel should apply to bar the obligor from raising such a claim in this situation in the family part because collateral estoppel applies to discharge proceedings in a bankruptcy court.[37]

An attorney representing the dependent spouse or obligee will obviously want to know what facts and information the Chapter 13 debtor presented to the bankruptcy court. But in order to avoid the allegation of unauthorized discovery in post-judgment motions[38] a practitioner representing the dependent spouse or obligee in a post-judgment matter who seeks to learn what proof and information was set forth by the debtor in the bankruptcy proceeding regarding the known or virtually certain changes in the debtor's financial circumstances should specifically request that type of discovery from the motion judge.

A creditor can also take advantage of the discovery provisions of the Bankruptcy Code and seek for the debtor to sit for an examination (*i.e.*, deposition) and to compel the debtor to produce documents.[39] Under local bankruptcy rules, a creditor does not need the permission of the bankruptcy judge to conduct such discovery.[40] An attorney may also wish to discuss the matter with the Chapter 13 trustee to reveal facts and information.

CONCLUSION

A Chapter 13 debtor who asserts "known or virtually certain information" in the bankruptcy proceeding regarding his or her future income or expenses can potentially provide a family law practitioner with a proverbial treasure chest of information. An attorney who either represents a Chapter 13 debtor or represents the dependent spouse/obligee should monitor the filing and the information supplied during it. ■

ENDNOTES

1. Slip No. 08-998; _____ U.S. _____ (2010).
2. 11 U.S.C. § 701 *et seq.*
3. 11 U.S.C. § 1301 *et seq.*
4. This article uses the singular form, even though clients are often a couple filing jointly.
5. 11 U.S.C. § 707(b)(2).
6. Prior to 2005, dismissal of a Chapter 7 case for abuse required a showing of "substantial abuse," and ability to repay was only one of the factors to be considered. *cf. In re Farrell*, 150 B.R. 116 (Bankr. D.N.J. 1992).
7. 11 U.S.C. § 707.
8. 11 U.S.C. § 101(10A).
9. 11 U.S.C. §§ 707(b), 1325(b).
10. 11 U.S.C. § 707(b)(2)(A)(ii)(I).
11. 11 U.S.C. § 707(b)(2)(A)(ii)(III).
12. 11 U.S.C. § 707(b)(2)(A)(iii).
13. 11 U.S.C. § 707(b)(2)(A)(iv).
14. *cf. In re Reyes*, 361 B.R. 276, 279 (Bankr. S.D. Fla. 2007)("the experts who drafted BAPCPA are entitled to a failing grade in Legislative Drafting 101").
15. 11 U.S.C. § 1325(b)(1).
16. 11 U.S.C. § 1325(2).
17. 11 U.S.C. § 1325(3).
18. *In re Kagenveama*, 541 F.3d 868, 875 (9th Cir. 2008); *In re Austin*, 372 B.R. 668, 679 (Bankr. D. Vt. 2007); *In re Tranmer*, 355 B.R. 234, 242 (Bankr. D. Mont. 2006); *In re Kolb*, 366 B.R. 802, 817-18 (Bankr.

S.D.Ohio 2007); *In re Hanks*, 362 B.R. 494, 498 (Bankr. D. Utah 2007); *In re Bardo*, 379 B.R. 524, 528 (Bankr. M.D. Pa. 2007).
19. *cf. Kagenveama*, 541 F.3d at 875.
20. Slip Op. at 12.
21. Slip Op. at 11-12.
22. Slip Op. at 4.
23. Slip Op. at 15-16.
24. 182 B.R. 557, 561 (B.A.P., 9th Cir. Ariz. 1995).
25. 283 B.R. 783 (Bankr. D. Kan. 2002).
26. 260 B.R. 498, 515-16 (Bankr. D. Idaho 2001).
27. *Lepis v. Lepis*, 83 N.J. 139, 149-151, 157 (1980); *Martindell v. Martindell*, 21 N.J. 341, 353 (1956); *Bonanno v. Bonanno*, 4 N.J. 268, 274 (1950); *Larbig v. Larbig*, 384 N.J. Super. 1, 22-23 (App. Div. 2006).
28. Slip. Op. at 8-9.
29. 917 F. 2d 759 (3d Cir. 1990).
30. 917 F. 2d at 763.
31. *Ibid*.
32. *Lepis*, 83 N.J. at 151.
33. 295 N.J. Super. 498 (App. Div. 1996).
34. 11 U.S.C. § 1329.
35. 11 U.S.C. § 1329.
36. *In re Estate of Dawson*, 136 N.J. 1, 20-21 (1994); *Hernandez v. Region Nine Housing Corp.*, 146 N.J. 645, 659-660 (1996); *Konieczny v. Micciche*, 305 N.J. Super. 374, 384-385 (App. Div. 1997).
37. *Grogan v. Garner*, 498 U.S. 279, 284-285 (1991); *In re Docteroff*, 133 F. 3d 210, 214 (3d Cir. 1997).
38. *See Welch v. Welch*, 401 N.J. Super. 438, 444 (Ch. Div. 2008) (holding that "[p]ost-judgment matrimonial matters continue to have little to no discovery absent a court order").
39. Fed. R. Bank. P. 2004.
40. D.N.J. LBR 2004-1(b).

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