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CHAIR'S COLUMN

Moving in the Right Direction

by Thomas Snyder

In May 2010, New Jersey State Bar Association President Richard H. Steen pledged his commitment to fostering diversity within the association's leadership. This commitment was ratified through the state bar board of trustees' unanimous adoption of a diversity statement that provides:

> The NJSBA strives to promote and foster an all inclusive and diverse Bar Association. The Association includes within the broad concept of the diversity, race, ethnicity, gender, religion, age, disability, sexual orientation and gender identity and other under-represented groups such as government lawyers and in-house counsel. We are committed to insuring that all of our members are given the opportunity to fully participate in leadership positions and all programs and services offered by this Bar Association and in all aspects of the legal profession.

President Steen's pledge, and the policy articulated by our state bar's trustees were, unfortunately, needed.

During the 10-year period of 1999–2009, there have been only minor increases in the number of trustees in any of the groups the association has designated as under-represented. But for at-large positions, these groups might continue to be under-represented. One need only consider the 100 years of bar association history to conclude that minority representation at officer levels has been sparse at best.

In October 2010, President Steen, along with his fellow officers and the state bar trustees, took the first steps in furtherance of the association's commitment to promoting diversity within the association's leadership. That action was through a proposed amendment to the association's bylaws. The amendment would expand the association's governing body and the Nominating Committee. As reported by *The Bar Report*:

> The proposals are about bolstering the State Bars core mission to promote the fair administration of justice and a commitment to inclusion. Rather than diminish any voices in the process, the changes seek to ensure that more voices and perspectives are involved in the decision-making process and the selection of future leaders…

The proposed amendments to the bylaws were thereafter adopted. As a result, the size of the state bar's Nominating Committee has increased from seven members to 15 members. The larger committee includes representatives from county state bar association sections, the Young Lawyers Division, and the general membership, as well under-represented segments of the NJSBAs membership.

It is commendable that President Steen, the officers of the state bar association and the state bar trustees have taken action on such an important issue. The adoption of the bylaw amendments by the bar association at large clearly signifies a ratification of President Steen's mission to promote and accomplish diversity in the association's leadership. It is now up to the newly formed Nominating Committee, as well as sections, to fulfill the mandate of inclusion and diversity among the bar's leadership. ■

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EDITOR-IN-CHIEF'S COLUMN

Has the Door Swung Too Far?

An Analysis of the Supreme Court's Decision in *Johnson*

by Charles F. Vuotto Jr.

Readers of this respected publication will note a number of columns written by this author espousing the benefits of arbitration.[1] There is no question that it is the policy of this state to permit matrimonial litigants the opportunity to arbitrate all family law issues. There is also no question that this is a sound policy. However, a question arises regarding the Supreme Court's recent decision in *Johnson*:[2] Have the procedures associated with arbitrating family law matters become too informal or too relaxed? It now appears that a mere custody evaluation can be elevated to the status of arbitration. A summary of *Johnson* is necessary to understand the potential problem.

The parties were married Oct. 26, 1994. Two children were born of the marriage, ages six and four at the time of the arbitration at issue. The parties' final judgment of divorce incorporated a matrimonial settlement agreement that provided joint legal custody, with Mr. Johnson as the residential parent. The parties agreed that Ms. Johnson would have the children from Tuesday evening until Wednesday evening, Thursday after school until Friday evening, and alternate weekends from Friday until Sunday evening.[3] Thereafter, the parties had problems with the parenting scheduled and sought arbitration. The parties executed an arbitration agreement wherein they agreed to arbitrate their custody dispute in accordance with the Alternative Procedure for Dispute Resolution Act (APDRA),[4] with Mark White, Ph.D., serving as the arbitrator.

Summarizing the essential aspects of the agreement:

- Dr. White would meet with both parties and counsel as many times as he deemed necessary.
- Each party was to submit a position statement for Dr. White's review.
- Dr. White would observe the parties' children in the presence of the parties.
- *Without the taking of formal testimony*, Dr. White would render a decision to resolve the parties' parenting and scheduling issues.
- No formal arbitration proceeding was anticipated, although Dr. White had the authority to require such formal proceedings at his discretion.
- A decision by Dr. White would be based on findings of relevant material facts and legal determinations, in accordance with the law of New Jersey.[5]
- Any appeal to the trial court was limited to whether Dr. White properly applied the law to the factual findings and issues presented for resolution.[6]
- There would be no transcript of the proceedings, as the findings of Dr. White would constitute the record, as supplemented by the written statements of the parties submitted prior to arbitration.
- Dr. White would create a scheduling calendar, with the intent to keep future parenting time disputes to a minimum.
- Testimony outside a party's or counsel's presence would not constitute grounds for reversing an award.
- Both parties waived their right to a trial on the merits and preserved the right to appeal in accordance with the APDRA.[7]

In accordance with the agreement, Dr. White conducted multiple interviews with Mr. Johnson, Ms. Johnson, Mr. Johnson's new wife, the parties' children, and a social worker who had previously counseled the parties. Dr. White also observed the children in both home settings and reviewed their school records.[8] The process occurred over several months, ending with Dr. White submitting an award wherein he reached the following determinations:

- Both parties were well-intentioned parents and the children were developing positively with both parents.
- Ms. Johnson needed to accept responsibility for leaving the marriage.
- Mr. Johnson needed to resolve his anger toward Ms. Johnson over the divorce.
- The children were too young for the current parenting time transitions given the tension between the parties.

- Ms. Johnson's parenting time would be expanded to include Sunday overnights, while her weekly visitation would be limited to overnights on Wednesday only. In order to compensate the loss of parenting time, Dr. White directed that Ms. Johnson have the majority of long weekends and additional parenting time during school vacations.
- Dr. White also referred Ms. Johnson to a neuropsychologist for an evaluation for attention deficit hyperactivity disorder, and also referred Mr. Johnson to counseling to deal with his emotions related to the divorce.
- After Ms. Johnson underwent her evaluation, her request to extend parenting time could be reconsidered.
- There could be future meetings between Dr. White and the parties to consider further modification.[9]

Ms. Johnson filed a motion for reconsideration with Dr. White. This was denied by Dr. White, who issued a decision reaffirming his prior conclusions. As part of his decision, Dr. White delayed implementation of the new parenting schedule due to his finding that a change in the schedule late in the school year was not in the children's best interest.[10]

Ms. Johnson filed an application with the trial court to remove Dr. White based on the appellate decision of *Fawzy*,[11] wherein the court prohibited arbitration of custody matters. Judge Robert A. Coogan confirmed the award after a hearing. Ms. Johnson appealed.

In the midst of the above, the Supreme Court issued its decision in *Fawzy* that permitted arbitration of custody matters.[12] Relying on the Supreme Court's decision, the appellate panel reversed Judge Coogan's decision that confirmed Dr. White's award, and remanded the matter for a plenary hearing because the procedural requirements dictated in *Fawzy* were not satisfied.[13] The appellate panel stressed that there was no verbatim record of the proceedings as required by *Fawzy,* and, as a result of the absence of such a record, it could not evaluate the threat of harm to the children nor confirm the award. The appellate panel refused to distinguish the case on grounds that the parties arbitrated pursuant to the APDRA, rather than the Arbitration Act[14] at issue in *Fawzy,* holding that the law of *Fawzy* applied with equal force to both acts.

Mr. Johnson filed a petition for certification, which was granted. The Court began its decision with a review of *Fawzy.*[15] Next, the Court turned to Mr. Johnson's argument that *Fawzy* was inapplicable to matters arbitrated pursuant to the APDRA. Disagreeing with Mr. Johnson, the Court determined that the law of *Fawzy* applied with equal force regardless of the statute employed by the parties.[16] This author views this conclusion as logical and sound.

Finding *Fawzy* applicable, the Court examined whether the parties' arbitration met the standards required by *Fawzy.* The Court noted that unlike the arbitration at issue in *Fawzy* where there was no record whatsoever, there was an adequate record of the arbitration at issue in the case at bar. Specifically, the Court determined that a verbatim record was not necessary, since Dr. White gave "a complete recitation of what the parties told him and what he heard and saw during his observations."[17] The Court further found that Dr. White's opinions "were painstakingly detailed."[18]

The Court stressed:

> In the final analysis, whether an arbitration is conducted under the Arbitration Act or APDRA is not the issue of consequence. What matters is the state of the record. Obviously, a verbatim transcript of a trial-type hearing will satisfy *Fawzy,* assuming the other requirements of that case are met. However, where, as here, the arbitrator creates a detailed record for review, the award can be confirmed without verbatim transcription. It goes without saying that it would behoove any arbitrator tasked with resolving a child custody or parenting-time issue to prepare a record, at least as detailed as the one we have approved today. Such preparation will avoid a judicial replay of the entire matter in the event of a substantial claim of harm.[19]

Lastly, the Court considered Mr. Johnson's argument that Ms. Johnson's claim of harm to the children was insufficient to warrant judicial review. Agreeing with Mr. Johnson, the Court determined that neither party had "raised any real claim of parental unfitness," and that the issue between the parties "was always parenting style, not capacity, and the arbitrator's commission was to create a schedule that would minimize conflicts and problems in the face of such different parenting styles."[20] Declaring the award to be nothing more than a "tweaking" of the parties' already existing parenting time schedule, the Court determined that the claim of harm did "not begin to approach a showing of harm sufficient to warrant judicial review beyond what is provided in the APDRA."[21]

Based on the foregoing, the Court reversed the judgment of the Appellate Division and reinstated the order of Judge Coogan confirming the award.

This author does not disagree with the Supreme Court's conclusion that the requirements of *Fawzy* apply with equal force to arbitrations conducted under either the Arbitration Act or the APDRA. This author is, however, weary of relaxing the requirement of a verbatim record and substituting, in its place, the arbitrator giving "a complete recitation of what the parties told him and what he heard and saw during his observations." That, however, is not the thrust of this column.

The possible problem is one not raised by either party in the case or

any court. The issue of some concern is that there was no arbitration. The *Fawzy* requirements are in the context of "arbitration," not a custody evaluation substituting for an arbitration hearing. Although Dr. White may have conducted a perfectly executed custody evaluation, which was compliant with all psychological or other applicable guidelines, he did not conduct an arbitration.

According to *Black's Law Dictionary*, "arbitration" is defined as follows:

> The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard.[22]

The definition of arbitration is also found in various reported decisions. For example, the Supreme Court case of *Levine v.* Wiss & Co.,[23] defines arbitration as "a quasi-judicial proceeding, with hearings, notice of hearings, oaths of arbitrators and oaths of witnesses," distinguishable from expert evaluations (appraisals in particular) wherein the expert "need hold no formal hearings so long as both sides are given an opportunity to state their positions."

The Appellate Division has also held that issues of custody and parenting time should not be deferred to third parties, such as parenting coordinators, since the threat of harm to the child in such disputes warrants full adjudication.[24] Isn't that exactly what the Johnsons did?

What happened in *Johnson*, this author contends, was not arbitration. This was simply an opinion by a forensic expert, which opinion was to be adopted as final. There was no testimony or presentation of evidence in the traditional sense, or any opportunity to cross-examine witnesses.

Although, unlike the Arbitration Act, the APDRA permits parties to waive the requirement of a hearing, presentation of evidence and cross-examination of witnesses,[25] such waivers should not be permitted in arbitration involving custody and time parenting. The Supreme Court in *Fawzy* established an extra layer of procedural safeguards necessary in order to balance the Court's *parens patraie* authority to protect children against a parent's autonomy to resolve disputes through arbitration. A strong argument can be made that allowing the procedural safeguards mandated by *Fawzy* to be waived by the parties would permit parents to circumvent the very procedural requirements determined by our Supreme Court to be indispensible when arbitrating custody and parenting time matters; a result clearly contrary to the express language of *Fawzy.*

Although this author is fully supportive of the utilization of arbitration to resolve all family law issues including custody and parenting time, such a position is premised upon the process occurring in the traditional structure of an arbitration hearing. There is little doubt that our Supreme Court had every good intention in rendering its decision in *Johnson* as it did when rendering its past decisions in *Faherty*[26] and *Fawzy*.[27] However, in its decision in *Johnson,* there is a distinct possibility that the process has been relaxed a bit too much. Such relaxation may create a slippery slope leading to further erosion, and possible eradication, of the procedural safeguards enacted by the arbitration statutes and expanded upon by the Supreme Court in *Faherty* and *Fawzy* to protect children involved in custody arbitration.

One such example is the recent case of *N.H. v. H.H.,*[28] wherein the parties, both represented by counsel, entered into a matrimonial settlement agreement that bound them to the ultimate recommendations of a pending custody and parenting time evaluation. On appeal, the court confirmed the parties' agreement as acceptable "arbitration" of custody matters pursuant to *Fawzy* and *Johnson,* despite the fact that the parties' agreement made no reference to arbitration.[29] Such disregard for the arbitration process and the procedural safeguards established by *Fawzy* is, perhaps, a relaxation of the process that threatens the very *parens patriae* obligations of the courts of this state. ■

ENDNOTES

1. *See* chair's column titled Family Law Arbitration Statute—Its Time Has Come, *New Jersey Family Lawyer*, Volume 30, #2 (November 2009); and editor-in-chief's column titled Equal Protection for Arbitration, *New Jersey Family Lawyer,* Volume 31, #2 (October 2010)
2. *Johnson v. Johnson* 2010 WL 5018581 (N.J.).
3. *Johnson,* 2010 WL at 1.
4. N.J.S.A. 2A:23A-1, *et. seq.*
5. Query: How does a mental health expert "apply the law?" Although not the focus of the within column, some of our colleagues have openly questioned whether an expert—mental health, financial or otherwise—is able to apply the law in rendering a decision.
6. *Ibid.*
7. *Johnson,* 2010 WL at 2-3.
8. *Id.* at 3.
9. *Id.* at 4-5.
10. *Id.* at 6.
11. *Fawzy v. Fawzy,* 400 N.J. Super. 567 (App. Div. 2008).
12. *Fawzy v. Fawzy,* 199 N.J. 456 (2009).
13. N.J.S.A. 2A:23B-1, *et seq.*
14. The *Johnson* Court summarized the required procedure of *Fawzy,* as follows:

> As a matter of practice, *Fawzy* plays out this way: When a child custody or parenting time arbitration award issues, one party will ordinarily move for confirmation. If there is no challenge, the award will be confirmed. If there is a challenge that does not implicate harm to the child, the

award is subject to review under the limited standards in the relevant arbitration statute or as agreed by the parties. If a party advances the claim that the arbitration award will harm the child, the trial judge must determine whether a *prima facie* case has been established. In other words, is there evidence which if not controverted, would prove harm? If that question is answered in the negative, for example, where a claim of harm is insubstantial or frivolous (*e.g.*, not enough summer vacation), the only review available will be that provided in the relevant arbitration act or as otherwise agreed. If, on the other hand, the claim is one that, if proved, would implicate harm to the child, the judge must determine if the arbitration record is an adequate basis for review. If it is, the judge will evaluate the harm claim and, if there is a finding of harm, the parents' choice of arbitration will be overcome and it will fall to the judge to decide what is in the children's best interests. If the arbitration record is insufficient, the judge will be required to conduct a plenary hearing. That is the backdrop for our inquiry.

Johnson, 2010 WL at 9.

15. *Johnson,* 2010 WL at 10.
16. *Id.* at 10.
17. *Id.* at 10.
18. *Id.* at 10.
19. *Id.* at 11.
20. *Id.* at 11.
21. *Black's Law Dictionary* 96 (5th ed. 1979).
22. *Levine v. Wiss & Co.,* 97 N.J. 242, 249 (1984) (quoting *Elberon Bathing Co., Inc. v. Ambassador Ins. Co., Inc.*, 71 N.J. 1, 19 (1978)).
23. *Parish v. Parish,* 412 N.J. Super. 39, 52 (App. Div. 2010).
24. N.J.S.A. 2A:23A-12(g)(2).
25. *Faherty v. Faherty,* 97 N.J. 99 (1984).
26. *Fawzy v. Fawzy,* 199 N.J. 456 (2009).
27. 2011 WL 341261 (N.J. Super. A.D.).
28. *Id.* at 33.

Recent Developments in Family Law

November 2009–November 2010

by E. David Millard, Thomas H. Dilts, William R. DeLorenzo, Michael A. Guadagno, Patricia B. Roe, Octavia Melendez, Patrick Judge Jr., and Gina G. Bellucci

(Editor's Note: The information reproduced here was provided to members of the judiciary at the judicial college in November of 2010. The analyses and comments are those of the authors, and not that of the judiciary.)

CHILDREN IN COURT

STATUTES

Educational Stability Law, (Section 19 of P.L. 1979, c. 207), N.J. Stat. § 18A:7B-12 (2010) provides for educational stability of children placed in resource family homes and that school district of residence for the child shall be present district of residence of parent or guardian. Signed into law on September 9, 2010.

COURT RULES

None

DIRECTIVES AND MEMORANDA

Directive #11-09
Family—Child Welfare Mediation Program Procedures Manual—Statewide Implementation

This directive mandates the statewide implementation of mediation in child welfare cases in the family part, as approved by the Judicial Council. The affected case types are child placement review (FC docket), abuse and neglect (FN docket), termination of parental rights (FG docket) and kinship legal guardianship (FL docket). Attached to Directive #11-09 are a procedures manual and forms.

Directive #4-10
Family—Better Protection for Children—Improved Oversight of Abused and Neglected Children in Foster Care

This directive (and related assignment judge memorandum) promulgates revised policies approved by the Supreme Court with respect to children in court cases. The basis of these policies is protection of the children. The Supreme Court has adopted a policy recommendation by the Conference of Family Presiding Judges that responsibility for monitoring abused and neglected children in foster care be assigned to superior court judges. This direct judicial oversight of abused or neglected children in foster care will necessitate some refocusing of the work performed by the Child Placement Review Boards.

Assignment Judge Memorandum
Family—Terminating Child Support When the Court Terminates Parental Rights dated February 24, 2010

When the court terminates parental rights (FG docket) in a children in court (CIC) matter, it also has the discretion to terminate any existing child support obligation (FD or FM docket). This memorandum sets forth procedures to be used when the court exercises that discretion. The procedures ensure that all necessary parties are advised of this action so that court records and child support enforcement records are updated and consistent. The procedures also ensure that the confidentiality of the CIC matter is protected.

Assignment Judge Memorandum
Family—Better Protection for Children—Improved Oversight of Abused and Neglected Children in Foster Care dated March 9, 2010

This memorandum (and related directive) promulgates revised policies approved by the Supreme Court with respect to children in court cases. The basis of these polices is protection of the children. The Supreme Court has adopted a policy recommendation by the Conference of Family Presiding Judges that responsibility for monitoring abused and neglected children in foster care be assigned to superior court judges. This direct judicial oversight of abused or neglected children in foster care will necessitate some refocusing of the work performed by the Child Placement Review Boards.

Assignment Judge Memorandum
Family—New and Revised Children in Court Orders and Forms dated May 25, 2010

The memorandum contains the following new children in court (CIC) orders:

- New order for the appointment of court-appointed special advocate (CN 10161).
- New order to show cause for investigation (CN 11079).
- New order to show cause for

care and supervision (CN 10160).
- New voluntary surrender of parental rights form (CN 10983).

The memorandum also contains a substantial number of revised CIC orders and forms.

Assignment Judge Memorandum
Family—New Children in Court Order—Post-Termination Permanency Order dated July 8, 2010

This memorandum distributes a new post-termination permanency order to implement Administrative Directive #04-10. Under the new children in court standard set forth in that directive, judges, not Child Placement Review Boards, will now oversee a child's foster care placement after parental rights have been terminated. Judges have exclusive oversight of these cases, known as post-term cases, until the child is adopted or obtains some other permanent living arrangement. An annual permanency hearing is required by federal law. The new post-termination permanency order shall be incorporated into the children in court manual.

CASE LAW

***In the Matter of D.C. and D.C.*, __N.J.__ (2010), 2010 N.J. Lexis 948 [Justice Long]**
Sibling Visits May Be Ordered Post Adoption

In a unanimous decision, the Supreme Court held that under the Child Placement Bill of Rights Act, N.J.S.A. 9:6B-1 to -6, visitation between siblings placed outside the home is presumed in the period between placement and adoption, and that the division has an independent obligation during that period to facilitate such visitation. After adoption, under the *parens patriae* exception, siblings can petition for visitation with their brothers and sisters who have been adopted by non relatives, in order to protect the child from harm.

Five-year-old twins and Hugo, their minor brother, were removed from their mother's custody by the N.J. Division of Youth & Family Services. The parental rights to the twins were terminated in December 2007. Hugo was placed with Nellie, his 24-year-old sister. The division discussed Hugo and Nellie having visitation with the twins, and the first visit was conducted in July of 2007. In August 2007, placement of the twins with Nellie was approved but it was recommended that the division arrange visitation to ease the transition. In late 2007, the recommendation to place the twins with Nellie was rescinded. Nellie was approved as kinship legal guardian of Hugo, but not for the twins in January 2008. The division informed her that her visitation with the twins would be terminated. In April of 2008, Nellie filed an action seeking placement of the twins in her care or, alternatively, reestablishment of visitation to assist in developing the sibling relationship and to facilitate reevaluation of her petition for custody. In June 2008, the trial court ruled that the twins should remain with the foster mother, who had then agreed to visitation. One month later, Nellie was informed by the division that the foster mother was no longer willing to allow visitation with the twins. In October 2008, the trial court concluded that Nellie could not re-litigate the division's plan for adoption, and that it could not order the foster mother to permit visitation. The Appellate Division affirmed.

Pursuant to the Child Placement Bill of Rights Act, N.J.S.A. 9:6B-4(f), from the time of placement and up until the adoption is finalized, "visitation between siblings placed outside the home is presumed…and the Division has an independent obligation during that period to facilitate such visitation." If the division opposes the sibling visitation, it then bears the burden of overcoming the presumption and proving that under the standards of the Child Placement Bill of Rights Act, such visitation is contrary to the best interest of the child. Particularly, the division is required to show that visitation would be inconsistent "with the health, safety, and physical and psychological welfare of the child" and inappropriate "to the individual circumstances of the child's physical or mental development." The division was under the erroneous impression that under the Child Placement Bill of Rights Act, when the biological mother's rights were terminated, its own obligations to facilitate sibling visitation with the twins and Hugo and Nellie had ceased.

The Supreme Court also held that once a child has been adopted, pursuant to the Visitation Statute, N.J.S.A. 9:2-7.1, the sibling seeking visitation has the burden of proving by a preponderance of the evidence that the child will be harmed if visitation does not occur. "The constitutional right to family integrity is not absolute" and "the state has an obligation, under the *parens patriae* doctrine, to intervene where it is necessary to prevent harm to a child." If the court determines that the sibling seeking visitation has demonstrated the necessary harm, the presumption in favor of parental decision making will be overcome. The judgment of the Appellate Division was reversed and the matter was remanded to determine whether the twins would be harmed by severance of visitation with Nellie and Hugo.

***N.J. Division of Youth & Family Services v. N.J and D.R.*, 412 N.J. Super. 357 (App. Div. 2010) [Judge Parrillo], *certification granted by, remanded by, Sub nomine at N.J. Div. of Youth & Family Services v. D.R.*, 2010 N.J. LEXIS 1076 (N.J. Oct. 5, 2010)**
Sibling Visit Decision Essentially Overruled By In the Matter of D.C. and D.C.

The trial court acted properly in denying the request by the law guardian to compel the adoptive parent of two children to continue

visitation with their sibling. Trial courts should not exercise *parens patriae* power to force sibling visitation post adoption in view of express legislative policy according to this appellate decision.

The law guardian sought to compel sibling visitation between the two children with their brother who was born with cerebral palsy and was at the Matheny Center, a long-term, specialized school and hospital. The evidence supported the bond between the children and the benefit to the children of sibling visits. Pending the adoption, the trial judge ordered that the sibling visits would continue. The trial judge determined, however, that he did not have the authority to order post-adoption sibling visitation, rejecting arguments by the law guardian that the court should do so pursuant to the court's *parens patriae* power and the children's constitutional right to associate with their sibling post adoption.

The Appellate Division affirmed the decision by the trial judge, relying in part upon the Supreme Court decision in *N.J. Division of Youth & Family Services v. S.S.,* 187 N.J. 556, [2005]. The Supreme Court recognized that social scientists and professionals believe "that the sibling's relationship can be 'longer lasting and more influential than any other, including those with parents, spouse or children.' And that when it is severed the fallout can last a life time." *Id*. at 561. The appellate court cited the invitation extended by the Supreme Court to the Legislature to consider the question of open adoption and sibling visitation after adoption. The Supreme Court said the "Legislature may wish to weigh the importance in maintaining sibling relationships in the post adoption context against the need to protect parental autonomy and the harmony of the new family unit, and insuring the success of our adoption system." *Id* at 564. Judge Parrillo took note of the fact that the Legislature has not responded to the court's invitation, and that both the Legislature and the Supreme Court recognize as paramount the rights of parental authority and autonomy. In *In the Matter of the Adoption of Child by WP and MP.*, 163 N.J. 158 [2000], the Court said:

> An adoptive family must be given the right to grow and develop as an autonomous family, and must not be tied to the very relationship that put the child in the position of being adopted. Any other ruling would relegate the adoptive parents to 'second-class status.' *Id.* at 175.

While recognizing the inherent right of a family judge, pursuant to *parens patriae* jurisdiction, to act consistent with the child's best interest, the court held that the power to act in the child's best interest "may not be exercised in contravention of expressed public policy embodied in constitutional enactments of the Legislature." 412 N.J. Super. 357, 367.

Comment: This decision must be read in the context of *In the Matter of D.C. and D.C.*, __N.J.__ (2010) [Justice Long] decided on September 29, 2010.

N.J. Division of Youth & Family Services v. I.S. and C.M., 202 N.J. 145 (2010) [Justice Rivera-Soto]

Parental Fitness, Not Period of Time Child is in Foster Care, is Determinative

Parental fitness, not the period of time a child has spent in foster care, is determinative of whether parental rights to that child should be terminated. The protection of parental rights continues when a child is placed in foster care and is the key to determining the best interests of the child.

C.M., a 56- year-old married man and father of four children, had a one night affair with a woman that resulted in the birth of a child on April 3, 2006. The mother had a long history of substance abuse, which resulted in the child's removal by the N.J. Division of Youth & Family Services. The mother initially identified the father of her other children as this child's father but he was excluded after a paternity test. In July 2006, the N.J. Division of Youth & Family Services placed the child in a foster home where he remained until the case was decided in June 2010. In late July 2006, the mother named C.M. as the father, but had only met him once and knew him only by his nickname. At a hearing in August 2006, the mother again identified C.M. as the father, but provided no additional information. In October 2006, the N.J. Division of Youth & Family Services informed the court that it had no information about C.M.'s whereabouts, but the mother countered that she had provided the N.J. Division of Youth & Family Services with his address and details about his employment, including his telephone number. The judge ordered the N.J. Division of Youth & Family Services to locate C.M. and required him to submit to a DNA test. C.M. maintained that he did not learn that he might be the child's father until December 2006. His paternity was confirmed on December 14, 2006, and he appeared in court on January 17, 2007, but stated that he could not take custody as he was married and his wife did not want the child. C.M. did not attend the next hearing, on March 14, 2007, when the N.J. Division of Youth & Family Services proposed the goal of termination of parental rights. Although C.M. had been visiting the child, he was still not offering himself or his wife as a placement.

The guardianship trial was held in October 2007. The division presented proof that the child was bonded to his foster parents and that severing the bond would cause permanent psychological harm to the child. C.M. testified through an interpreter that he was not approached concerning the child until December 2006, voluntarily submitted to the DNA test, and

appeared at the next hearing to express his desire to parent the child with the assistance of relatives. He stated also that after the N.J. Division of Youth & Family Services ruled out his sister based on her small apartment, his wife had thrown him out of the house and he decided he wanted to care for the child. He testified that he complied with the N.J. Division of Youth & Family Services' directions that he obtain an apartment with two bedrooms and arrange for someone to care for the child while he was at work, enlisting for that purpose a woman who had a license to care for children. C.M. also testified that he would allow his son's relationship with the foster parents to continue as a result of all they had done for him. The trial court found that the division had established the four prongs of the best interests test by clear and convincing evidence and terminated C.M.'s parental rights. The appellate court affirmed but the Supreme Court not only granted C.M.'s petition for certification, but took the unusual step of ordering the N.J. Division of Youth & Family Services to establish an accelerating visitation schedule for C.M. during the pendency of the appeal.

In a 4–3 decision, Justice Rivera-Soto, writing for the majority, vacated the judgment terminating parental rights and remanded to the trial court "for the immediate development and implementation of a reasonable, realistic and meaningful reunification plan." As to prong one, the Court was critical of the decision that C.M.'s failure to offer himself as the child's caregiver for a period of eight to nine months permits a finding that the child's safety, health or development has been or will continue to be endangered by the parental relationship, and that the finding of "harm" was unsustainable. As to the second prong, the Court reasoned that since the only "harm" was an eight-month delay, the proofs adduced by the N.J. Division of Youth & Family Services were "woefully insufficient" to prove the defendant was unable or unwilling to eliminate the harm to the child. In the analysis of the third prong the Court was critical of the services offered to C.M., calling parenting classes for a 56-year-old man who had already raised four children, "utterly irrelevant" and one-hour-per-week supervised visitation "paltry" and in violation of the N.J. Division of Youth & Family Services' own regulations as to the required frequency and time of visitation. Finally, as to the fourth prong, the Court recognized that the child was more bonded with his foster parents than with the defendant but blamed that on the N.J. Division of Youth & Family Services' failure to satisfy its statutory obligations in a meaningful manner and held that the N.J. Division of Youth & Family Services' inadequate visitation plans for the defendant, standing alone, should have caused the rejection of any application seeking the termination of the defendant's parental rights.

Comment: The Court reserved its strongest criticism for the services offered by the division, finding parenting classes "irrelevant" and visitation "woefully inadequate." The clear message to trial judges is that we are being urged to scrutinize the "laundry list" approach to services that the N.J. Division of Youth & Family Services often proposes and only order those services that will actually promote reunification. Additionally, we must renew efforts to force an often reluctant division to provide significant visitation.

N.J. Division of Youth & Family Services v. D.M., In the Matter of the Guardianship of S.M., 414 N.J. Super. 56 (App. Div. 2010) [Judge Gilroy]

That Child Will Suffer Serious Psychological Harm is Not Sufficient By Itself to Justify Termination

When the division has not proven all prongs of the best interests of the child standard by clear and convincing evidence, and the child may suffer serious psychological or emotional harm if removed from his foster parents, the severance of that bond cannot in itself serve as a legally sufficient basis for termination of parental rights.

Defendant D.M and F.M.'s parental rights were terminated as to their child S.M. on May 22, 2007. Both parents appealed. The appellate court reversed because the division had "failed to present clear and convincing evidence that S.M.'s safety, health, or development has or will continue to be endangered by the parental relationship," and concluded that "in the absence of such proof, termination of appellants' parental rights was improper." The court further determined that the division had failed to prove prongs two and four of the best interests of the child standard, noting specifically that:

> The record contains evidence of a strong loving bond between S.M. and her natural parents as well as evidence of the lack of such a bond with her foster parents. The court also noted the lack of any evidence of abuse, neglect, or endangerment of S.M. on the part of the defendants' conduct.

Accordingly, the appellate court remanded and ordered an evidentiary hearing to determine whether S.M. had bonded with her foster parents, and if so, to further determine if the breaking of that bond would cause serious psychological or emotional harm to the child.

In remand, the trial court concluded that S.M. would suffer serious psychological harm if the bond between her and her foster parents was broken, and that it would be in the best interests of the child to terminate parental rights. D.M. again appealed that decision. On appeal, the appellate court agreed with the trial court that S.M. would suffer psychological harm if separated from her foster parents, but disagreed with the trial court's conclu-

sion that this alone required termination of parental rights. Upon analysis of *In re Guardianship of J.C.,* 129 N.J. 1, 6 (1992), *In re Guardianship of K.L.F.,* 129 N.J. 32, 45 (1992) and *G.L.,* 191 N.J. 596, 608 (2007), the court further highlighted that "the N.J. Division of Youth & Family Services must still prove by clear and convincing evidence that the parent's actions or inactions substantially contributed to the forming of that bond, and that the harm caused to the child from severing that bond rests at the feet of the parent."

The court again stated that the record was devoid of evidence that D.M.'s actions or omissions substantially contributed to S.M.'s bonding with the foster parents as S.M. had maintained a long relationship with D.M., and that proof of a bond with her foster parents was "mixed" at best. The court looked to the recent decision in *C.M.* to support its conclusion that termination of parental rights cannot be justified by evidence that a child may suffer harm by being removed from his foster parents without evidence showing that the parent substantially caused that harm to the child. Accordingly, the court concluded that "…an analysis that focuses entirely on the child's bonding with his foster parents, without a concomitant finding of parental fault, cannot stand." Accordingly, the appellate court reversed the order terminating D.M.'s parental rights and remanded to formulate a plan for reunification.

***N.J. Division of Youth & Family Services v. K.A.*, 413 N.J. Super. 504 (App. Div. 2010) [Judge Fuentes]**

Corporal Punishment Not Excessive

A mother, who struck her eight-year-old daughter four or five times on the back of the shoulder with a closed fist, did not inflict "excessive corporal punishment." After a teacher's aide noticed bruising on the arm of a student, the eight-year-old child, A.A., explained that her mother hit her. The division was notified and a caseworker responded. A.A. was a high-functioning autistic child with pervasive development and attention deficit disorders. She was difficult to interview, as she would not sit still and would not answer most of the caseworker's questions. The caseworker described the child's bruises as "four quarter-sized bruises and one ½ dollar sized bruise on [A.A.'s] left shoulder blade." The mother, who was sobbing throughout the interview, told the caseworker that she hit her daughter four or five times with a closed fist because the child would not listen to her and refused to stay in her room for a time-out. She claimed to be "stressed out" because her husband worked long hours and did not help in caring for A.A. The mother agreed to participate in various recommended services and attended therapy, went to meditation and exercised in a gym. Her husband also changed his schedule so he was available to help more in caring for the child.

After a hearing on stipulated facts, an administrative law judge found that the mother had not used excessive corporal punishment when she struck A.A. The director rejected these findings and reaffirmed the substantiation of abuse.

The appellate panel reversed the director, noting that excessive corporal punishment is not defined in Title 9, and there are no reported decisions defining the term. The panel examined the administrative code, N.J.A.C. 10:129-2.2 and held that in evaluating a claim of abuse the court must look at "the harm suffered by the child, rather than the mental state of the accused abused." The panel noted that the force used by the mother "did not lacerate the child's skin and did not require any type of medical intervention. Bruises, although visible, never exposed A.A. to any further harm if left untreated." As a result, the inflicted injury did not constitute "*per se* excessive corporal punishment," and required an examination of the circumstances facing the mother to determine if her punishment was excessive. This evaluation included: 1) the reasons underlying the mother's actions; 2) the isolation of the incident; and 3) the trying circumstances which the mother was undergoing due to the child's psychological disorder. The panel noted that the child was psychologically disruptive; the mother had no support from her husband; she expressed remorse; and accepted services. They also found that the child's injuries "though undoubtedly painful, did not cause the child any permanent harm, did not require medical intervention and were not a part of a pattern of abuse."

***N.J. Division of Youth & Family Services v. C.H.*, 414 N.J. Super. 472 (App. Div.) (2010) [Judge Sapp-Peterson], adhered to, on reconsideration by *N.J. Division of Youth & Family Services v. C.H.*, 2010 N.J. Super. LEXIS 197 (App. Div. Oct. 5, 2010).**

Corporal Punishment Was Excessive

A mother committed an act of child abuse by inflicting excessive corporal punishment upon her five-year-old daughter by beating her with a paddle.

The division initially substantiated abuse but an administrative law judge (ALJ) found the evidence insufficient. The N.J. Division of Youth & Family Services director rejected the conclusion of the ALJ and found that the evidence was sufficient to sustain the division's allegation that the mother's conduct constituted child abuse. The appellate panel affirmed the director's decision.

The teacher of five-year-old T.H. noticed red marks and scratches on the child's face and elbow along with a green mark in the middle of her back. The child explained that her mother had beaten her with a paddle the night before for telling a neighbor that they were without

electricity in their home. The school nurse did not feel the child required medical attention but N.J. Division of Youth & Family Services was called. The caseworker interviewed the mother who explained that a storm had caused a one day power outage and the child had told a neighbor that they had no electricity. The mother admitted spanking the child on the buttocks but denied causing the facial marks.

Two weeks later, the child was examined by Dr. Vitale who was unable to confirm the injuries, as they had healed. In Dr. Vitale's report, which was admitted at the hearing without objection, she included discussions with the mother who admitted she spanked T.H. when "more significant discipline [was] required" and used discipline to keep T.H. from "end[ing] up on the streets or doing drugs[.]" T.H. told Dr. Vitale that her mother beat her with a paddle on her face, eyes and cheek. Dr. Vitale concluded that the discipline was excessive and was concerned that the mother felt that it was appropriate.

The appellate panel first noted that the agency's determination carried a "substantial burden of persuasion" and that the scope of their review was limited. The panel focused on the mother's reason for disciplining the child, finding that "there was absolutely nothing reasonable about inflicting harm, in the form of paddling, upon a five-year-old child because the child told a neighbor that their home was without electricity." The panel also noted that there was evidence that the mother had used corporal punishment regularly in the past, including pinching the child when she was three as a form of punishment, and that there had been an earlier N.J. Division of Youth & Family Services referral regarding the mother's manner of discipline. That evidence was relevant to likelihood that the mother would continue to expose the child to "unjustifiable discipline." Finally the panel was troubled by the mother's position that she felt the discipline was justified and that no one could tell her how to discipline her child.

While the panel did not attempt to distinguish or even cite *N.J. Division of Youth & Family Services v. K.A.*, 413 N.J. Super. 504, decided two months earlier by a different panel, which involved similar injuries and a different result, they did grant the defendant's motion for reconsideration on the ground *inter alia* that the court erred in not applying the standard established in *K.A.*

***N.J. Division of Youth & Family Services v. I.H.C., and D.C., In the Matter of A.C., J.C., and H.C.*, 415 N.J. Super. 551 (App. Div. 2010)**

Parents Past Conduct Can Be Admissible to Determine Risk of Harm

The appellate court held that a parent or guardian's past conduct can be relevant and admissible to determine risk of harm to the child. Furthermore, a pattern of parental conduct can place a child at risk of harm without proof of a particular episode of physical or similar domestic violence as defined in the Domestic Violence Act.

The defendants, father and mother, lived together with their three minor children. The father had fathered two other children from a previous marriage, with whom he had no contact. After N.J. Division of Youth & Family Services received a second referral alleging domestic violence and that the children were physically abused, the children were removed from the home and placed in emergency foster care. The father denied any domestic violence against his current family or ex-wife. During the fact-finding hearing, the trial court disregarded the ex-wife's testimony regarding domestic violence against her and the two children of that marriage because it was inadmissible pursuant to N.J.R.E. 404(b). During trial, a number of exhibits were admitted into evidence including reports of expert witnesses, which stated that domestic violence in the home and the untreated mental conditions of both parents presented a high risk of abuse and neglect of the children. However, the trial court concluded that even if it accepted that coercive control had been proven, "It does not lead to a finding of abuse and neglect in this particular case because of the lack of tie in to…any particular facts or conduct." The trial court concluded that the evidence did not prove that the children had been abused or neglected. The court then notified the parties that it intended to order the children returned to the parents within 60 days. The appellate court granted a stay of that order pending their decision on appeal.

The appellate court concluded that the trial court erred in precluding the testimony of the ex-wife regarding domestic violence, and hence, abuse or neglect of those children.

N.J.S.A. 9:6-8.46(a) states that "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of …the parent or guardian." "The statute makes no distinction between children in the current relationship and children of a previous relationship." The trial court also erred when it concluded that the experts' testimony of the risk that the defendant-father would again engage in domestic violence was essentially synonymous with evidence of his propensity or disposition to commit domestic violence and therefore prohibited by the language of N.J.R.E. 404(b) when based on prior crimes or bad acts. Pursuant to the language of N.J.S.A. 9:6-8.21c(4) and N.J.S.A. 9:6-8.31b, the Legislature had made risk of harm, not just past injury or acts, relevant in determining whether a child was an abused or neglected child. Thus, "the risk, or pre-disposition, that a defendant may harm the children is expressly admissible in an abuse or neglect case despite the general evi-

dentiary prohibition contained in N.J.R.E. 404(b)." *Id*. at 576.

Finally, the trial court erred in holding that N.J. Division of Youth & Family Services had not proved that the children had been abused or neglected since it failed to prove that the father had committed acts of domestic violence. Proof of domestic violence within the meaning of the Domestic Violence Act is not required. "In the context of abuse or neglect of children, a pattern of parental conduct can place the children at risk of harm as contemplated in N.J.S.A. 9:6-8.21c(4) without proving a particular episode or physical or similar domestic violence as defined in the Domestic Violence Act, N.J.S.A. 2C:25-19."

***N.J. Division of Youth & Family Services v. B.M. and T.B., In the Matter of Z.T.T.B.,* 413 N.J. Super 118 (App. Div. 2010) [Judge Skillman, P.J.A.D.]**

Due Process and Rules of Evidence in TPR Case

When N.J. Division of Youth & Family Services fails to establish all prerequisites of N.J.R.E. 803(c) (6) prior to the admission of a medical report containing a doctor's expert opinion, such a report is inadmissible hearsay. Furthermore, when N.J. Division of Youth & Family Services fails to provide or give notice of that report to appellants prior to trial, this constitutes a denial of due process, which requires reversal of a judgment terminating parental rights.

Z.B. is T.B.'s 10th child. B.M. fathered four other children by T.B., two of whom were born addicted to cocaine, and he was never a caretaker for them. None of T.B.'s other children are in her custody, and all have been raised by relatives. There has been substantial involvement with N.J. Division of Youth & Family Services for close to 20 years, during which time T.B. had a continuing cocaine addiction. The child, Z.B., tested positive for cocaine at birth but he did not exhibit any withdrawal symptoms. The division removed the child based on Z.B.'s positive drug test for the presence of cocaine, T.B.'s history of drug abuse, and her inability to care for her other children. On the first day of trial, N.J. Division of Youth & Family Services presented for the first time a medical report that concluded that Z.B. exhibited symptoms consistent with fetal alcohol spectrum disorder. This report was the only evidence presented at trial that the child had been suffering from fetal alcohol syndrome. The report was admitted into evidence at the close of the trial. Although the court recognized that the report had been produced for the first time at trial, it relied on that report in its decision and consequently terminated parental rights.

The appellate court examined whether the appellants' due process rights had been violated. The court highlighted that the division had never alleged in its complaint that T.B. had "endangered" Z.B.'s "safety, health or development" by consuming too much alcohol during her pregnancy. The division had also failed to provide appellants with notice that Z.B. was exhibiting symptoms of fetal alcohol syndrome prior to the first day of trial. The court concluded that this denial of notice constituted "a deprivation of due process," as appellants did not have the opportunity to call their own witnesses.

The appellate court further noted that "N.J. Division of Youth & Family Services failure to notify appellants before trial that it would be relying on a medical opinion... cannot be found to be harmless error." Although the trial court found that Z.B. had tested positive for drugs at birth, this court opined that this was not enough, finding that harm can only be found when "drug use results in the child being born addicted to drugs with the attendant suffering caused by such addiction." *K.H.O.* 161 N.J. 337, 349 (1999). As Z.B. was born with no symptoms of withdrawal, the initial positive drug test was insufficient in itself to constitute harm.

The appellate court concluded that the admission of the medical report resulted in a deprivation of due process and warranted a reversal of the judgment terminating parental rights. It added that even if the division had given sufficient notice, the report would still have been inadmissible, "unless appellants consented to its admission or N.J. Division of Youth & Family Services was able to establish the prerequisites for its admission as a business record under N.J.R.E. 803 (c) (6)," noting however that "an expert medical opinion contained in a report is generally inadmissible under this test because of the complexity of the analysis involved in arriving at the opinion and the consequent need for the other party to have an opportunity to cross examine the expert." *Id*. at 129.

***N.J. Division of Youth & Family Services v. M.C. III*, 201 N.J. 328 (2010) [Justice Wallace]**

Admissibility of N.J. Division of Youth & Family Services Records

The doctrine of "invited error" prohibits the defendant from contesting the admission of documents that were admitted at trial with his express consent according to this Supreme Court decision.

The trial court's finding of abuse and neglect was reversed by the appellate panel who found plain error in the trial court's extensive reliance upon N.J. Division of Youth & Family Services documents that contained inadmissible hearsay.

The father, who had custody of his son, 15, and daughter, 13, argued with both over Internet access. The children claimed the father hit them and called police twice. Police responded to each call but saw no injuries and left both times. The children went to their mother who took them the to hospital. The emergency room physician, Dr. Lewis, found the daughter had abrasions behind her ear and tenderness to her ribs, while the son had scratches on his neck,

abrasions and swelling over his ribs and soft tissue injury to his hand. Dr. Lewis called N.J. Division of Youth & Family Services. The caseworker responded and spoke with the children and Dr. Lewis. She later interviewed the father and included all of the statements in a "screening summary." The caseworker also asked Dr. Lewis to complete some "N.J. Division of Youth & Family Services generated forms."

At trial, neither Dr. Lewis nor the caseworker who completed the screening summary testified, yet the forms completed by Dr. Lewis and the screening summary were admitted without objection. The trial court relied heavily on Dr. Lewis' observations of injuries in rejecting the father's testimony and finding that he abused both children.

In reversing this finding, the appellate panel found that Dr. Lewis was not an "affiliated medical consultant," pursuant to Rule 5:12-4(d); thus, admission of her reports and the use of hearsay contained within them was plain error.

The Supreme Court reversed the panel's decision noting that defendant's trial counsel did not object to the documents and that "[t]he doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." The Court also rejected the panel's criticism of the sufficiency of the trial court's findings, noting that it could be inferred from those findings that the trial court credited the son's version over the father's as to how the injuries occurred.

The Court went on to provide "general guidance" on the admission of documentary evidence in abuse and neglect cases and criticized the panel's definition of a "consultant" under Rule 5:12-4(d) as "exceedingly narrow" and "untethered to the purpose of the Rule that recognizes the Division's need to secure the services of a range of professionals when investigating a claim of child abuse." *Id*. at 348.

Comment: The significance of this case is not in the holding but in the *dicta* and the rather harsh criticism of the panel for taking a "exceedingly narrow" view of the admissibility of N.J. Division of Youth & Family Services documents.

***N.J. Division of Youth & Family Services v. R.D., In the Matter of K.D. and Ry.D.,* 412 N.J. Super. 389 (App. Div. 2010) [Judge Newman]**

Collateral Estoppel May be Applied to Bar Relitigation of Abuse in TPR Case

When abuse and neglect has been proven by clear and convincing evidence in a Title 9 fact-finding hearing, the doctrine of collateral estoppel can be applied to bar relitigation of the issue of abuse under the best interests of the child standard in a subsequent Title 30 termination proceeding.

In an abuse and neglect proceeding under Title 9, the appellant, R.D., was found to have abused and neglected his five children by engaging in sexual relations with his oldest daughter, S.D. The trial court judge determined that the division had proven abuse and neglect by clear and convincing evidence and concluded that this finding would serve to satisfy the first prong of the termination of parental rights test under N.J.S.A. 30:4C-15(10(a). Subsequently, the division filed and was granted its motion seeking to apply collateral estoppel to prevent relitigation of the issues of abuse during the Title 30 guardianship trial. On appeal, R.D. asserts that the trial court erred in applying collateral estoppel to incorporate the findings from the fact finding hearing in the guardianship proceeding.

On appeal, the court first looked at the meaning of collateral estoppel, stating that it " bars a party from relitigating any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action, where the burden of proof is the same."

In re Caruzzo, 95 N.J. 557, 567, *et al*. The court further noted the requirements that must be satisfied before collateral estoppel is applicable, such as whether the issue to be precluded is identical to the one already decided, whether it was actually litigated in the prior proceeding, whether a final judgment was issued on the matter, whether its determination was essential to the prior judgment, and whether the party against whom it is being asserted was the same party as in the prior proceeding. (*See Olivieri v. Y.M.F. Carpet, Inc.*, 186 N.J. 511, 521 (2006) (*quoting In re Estate of Dawson*, 136 N.J. 1, 20-21 (1994)).

Taking into account the finality of such a determination and issues of fairness, the court opined that a determination of abuse and neglect does have ongoing consequences for a parent against whom such a decision has been made, and may be admissible in a Title 30 termination action. *A.P.,* 408 N.J. Super. at 262. The court went on to say that although the division need only prove abuse and neglect by a preponderance of the evidence in a fact-finding hearing, the burden of proof for a Title 30 termination action is clear and convincing evidence. The court further noted that when the underlying finding of abuse and neglect has already been proved by the higher standard of clear and convincing evidence, such as in this case, "it may support a termination of parental rights." *V.K.,* 236 N.J. Super. 243, 261 (App. Div. 1989).

The court determined that all prongs of collateral estoppel applied to this case and that the trial judge had sufficiently evaluated any exceptions and had ruled them out. Accordingly, the court determined that the trial judge had properly barred re-litigation of the findings made that the children

were abused and neglected, as they had been proven by clear and convincing evidence, thus satisfying the first prong of the termination of parental rights standard. The Appellate Division affirmed the order terminating R.D.'s parental rights to K.D. and Ry. D.

***N.J. Div. of Youth & Family Services v. N.S. & R. (In re K.A.N.),* 412 N.J. Super. 593 (App. Div. 2010) [Judge Lihotz], *cert. denied*, October 5, 2010**

KLG: Collateral Estoppel and Dual Representation

Even though parents do not expressly reserve their right to appeal a finding of abuse and neglect prior to consenting to a KLG disposition, they may challenge those findings on appeal. However, where the factual questions decided in a criminal case are identical to those determined in a Title 9 proceeding, the criminal convictions collaterally estop any asserted claims of innocence in abuse and neglect proceeding. Finally, where one attorney seeks to represent the same defendant in both a Title 9 action and criminal proceedings arising from the abuse or neglect of a child a specific procedure is now to be followed.

The defendants, a mother and her boyfriend, appealed a finding of abuse and neglect regarding the death of the mother's five-year-old child, K.S.N., while in their care. While the boyfriend, R.B., maintained that the child was injured when K.S.N.'s brother jumped on his stomach, the brother told a N.J. Division of Youth & Family Services caseworker and a detective that R.B. punched the child in the stomach. Before the child's death, N.J. Division of Youth & Family Services had been involved with the family for two years and had investigated referrals that were unfounded.

The day after K.S.N. died, N.J. Division of Youth & Family Services removed the mother's two other children and filed a Title 9 complaint alleging abuse and neglect against both defendants. The trial court found that the division proved by clear and convincing evidence that R.B. had inflicted the fatal blows to the child, and that he and the mother were responsible for K.S.N.'s death by failing to render timely and necessary medical treatment.

One year later, R.B. and the mother consented to KLG as to two of the children with their grandmother. The mother and R.B. filed appeals of the abuse and neglect findings on October 20 and October 31, 2006. Both defendants were charged criminally, and R.B. was convicted after trial for the second-degree offenses of reckless manslaughter, endangering the welfare of a child by causing physical injury, and endangerment for failure to seek timely medical care in the death of K.S.N. The mother pled guilty to third-degree child endangerment by failing to get K.S.N. timely medical treatment.

On appeal, the first issue was whether the defendants, who did not expressly reserve their right to appeal the abuse and neglect findings before agreeing to the KLG disposition, would be permitted to challenge those findings on appeal. The panel concluded that it is necessary to balance the rights of the parents while protecting the best interests of the children and concluded that, while defendants in these actions should reserve the right to challenge any interlocutory finding of abuse or neglect notwithstanding their agreement to an acceptable resolution of the litigation, in the event that they did not, they may challenge those findings on appeal.

The court found sufficient evidence to support the findings of abuse and neglect and noted that the criminal convictions of both defendants collaterally estop any asserted claims of innocence as the factual questions decided in the criminal case were identical to those determined in the Title 9 proceeding.

The panel also resolved a conflict between two reported chancery cases on the issue of whether a disqualifying conflict occurs when one attorney assumes the roles of counsel for the same defendant in both a Title 9 action and criminal proceedings arising from the abuse or neglect of a child. The panel held that the trial court, after balancing the competing concerns posed, may allow dual representation subject to a protective order, which preserves the confidentiality of the source prompting the division's protective services litigation.

Comment: This case and *N.J. Div. of Youth & Family Services v. R.D.,* 412 N.J. Super. 389 (February 9, 2010) are two cases where the doctrine of collateral estoppel has been applied Title 9 litigation in different contexts.

***N.J. Div. of Youth & Family Services v. L.L.,* 201 N.J. 210 (2010) [Justice Wallace]**

Standard to Vacate KLG

A parent who moves to vacate a kinship legal guardianship has the burden of proof to show by clear and convincing evidence that they have overcome the incapacity or inability to care for the child that led to the original removal, and that termination of kinship legal guardianship is in the best interest of the child.

L. L., the mother of four children, was arrested in September 2001 for hitting her 12-year-old daughter with a frying pan. N.J. Division of Youth & Family Services removed two of her children and initially placed them with L.L.'s mother then with her sister, Jane. N.J. Division of Youth & Family Services offered L.L. services but after reunification efforts were unsuccessful, they filed a petition for kinship legal guardianship. Following a hearing in May 2005, the trial court found by clear and convincing evidence that L.L. had unresolved drug and anger problems, and that her inability to perform parenting functions was unlikely to change in the foresee-

able future. The court concluded it was in the best interest of the child to award kinship legal guardianship to Jane.

Jane supported L.L.'s reunification and provided liberal visitation, even giving L.L. a key to her apartment. L.L. visited the child almost daily but continued to test positive for drugs over the next two years. In January 2007, L.L. moved to vacate the kinship legal guardianship. Shortly thereafter, Jane discontinued L.L.'s visitation and changed the locks to her apartment.

After a hearing, the trial court denied L.L.'s motion, finding that she had major unresolved anger issues; had recently been arrested for stabbing someone; and was in need of parenting skills. Also, Jane had obtained a domestic violence restraining order against L.L. The trial court concluded that the evidence was clear and convincing that it would not be in the child's best interest to be removed from Jane's home, where she was flourishing.

L.L. appealed and the Appellate Division affirmed, holding that the trial court properly placed the burden of proof on the parent seeking to terminate the kinship legal guardianship. The panel found sufficient credible evidence to support the trial court's finding that L.L. failed to prove by clear and convincing evidence that the circumstances leading to the original removal were adequately overcome, and that it was in the child's best interest to terminate the guardianship.

The Supreme Court affirmed, holding that pursuant to N.J.S.A. 3B:12A-6(f), before a KLG judgment could be vacated, the court must find that the parent has overcome the incapacity or inability to care for the child that led to the original removal, and that termination of kinship legal guardianship is in the best interest of the child. The Court additionally held that the party seeking to terminate the kinship legal guardianship has the burden to prove by clear and convincing evidence each of those two criteria. The first prong was satisfied as L.L. still had unresolved anger, violence and substance abuse issues.

As to the second prong, the Court cited the nine factors in N.J.A.C. 10:132A-3.6(a) that N.J. Division of Youth & Family Services considers when taking a position on a motion to vacate a kinship legal guardianship, including the child's age; the duration of the division's involvement with the child, prior to the granting of kinship legal guardianship; the total length of time the child was in out-of-home placement; the length of time the child has lived with the guardian, prior to and after the granting of kinship legal guardianship; when KLG was granted; the nature of the original harm or risk of harm to the child; the parent's present fitness to care for the child; any subsequent allegations of abuse or neglect received by the division and their findings; and what plan is proposed for the child if the guardianship is vacated. The Court cautioned that this list should aid the court, but was not exhaustive.

Comment: *L.L.* presents a very high bar to clear for a parent seeking to vacate a KLG. A parent may have resolved all of the problems that led to the initial removal but fail because reunification is not in the child's best interests. The longer the child is with the guardian the harder it will be to establish best interests. This is especially true in long-term cases like *L.L.*, where the child was with her aunt almost seven years before the mother moved for her return.

***N.J. Div. of Youth & Family Services v. P.W.R., and L.C. and C.R. Jr., In the Matter of A.R.,* 410 N.J. Super. 501 (App. Div. 2009) [Judge Fisher] *cert. granted by N.J. Div. of Youth & Family Services v. P.W.R.,* 2010 N.J. LEXIS 321 (2010)**

Entry of Default Not Favored

Unless warranted by a party's failure to comply with a prior order and given ample notice that a default could be potentially entered, a judge may not enter a default against a party who is not present in court during the trial but had appeared in court on all other occasions.

N.J. Division of Youth & Family Services commenced this Title 9 action alleging that A.R. had been abused or neglected in the home of the defendants, C.R., Jr., the child's father, and P.W.R., the child's stepmother. P.W.R. was not present during the fact-finding hearing, although she was represented by counsel. P.W.R. had notified the court that she could not attend due to medical issues, but had not submitted a doctor's note as requested by the court. The court entered a default against the defendant due to her absence. P.W.R. appealed. The appellate court found that the trial court's decision to enter a default had been erroneous.

The court highlighted that Rule 4:43-1 allows for a default to be entered "…if that party, against whom a judgment for affirmative relief is sought, has failed to plead or otherwise defend by these rules or court order," and stated that a party represented by counsel may defend at trial without actually being physically present. P.W.R. had proper representation at trial.

The court went on to state that "…there are various ways in which a party's failure to adequately fulfill conditions imposed by a court order in discovery or preparation at trial may ultimately permit the dismissal of a claim or the entry of default." The court determined that the record did not reveal that the defendant had failed to honor any order, nor had she been adequately notified that such a failure would lead to the entry of a default and distinguished this case from *In re Guardianship of N.J.,* 340 N.J. Super. 558, 560 (App. Div.), *certif. denied*, 170 N.J. 211 (2001), where the defendant had a lengthy history of failing to appear and to comply with orders.

The court added that a party

must be given proper notice that a default may follow a failure to comply. The court examined the prior order which stated:

The failure of the defendant(s) to comply with any provision of this order or the defendant's continuing failure to appear may result in default being entered by the court and may result in the commencement of a termination of parental rights proceeding. *Id*. at ___.

Upon analysis, the court deemed that the provision in the court order permitted default if the defendant had either: 1) failed to comply with any provision of the order, or 2) continuously failed to appear. As the prior order did not require the defendant to be present, the court concluded that her failure to appear at the hearing could not constitute a violation of that order, noting that the defendant had appeared in court on all prior occasions.

The court opined that a "…default should not be entered absent clear notice to defendant of the potential for such an outcome and absent a principled consideration of all the circumstances to which we have alluded." The court impressed that "proceeding in a party's absence is not the same as entering a default." Since in this case the defendant's attorney was allowed to cross examine, to give closing arguments, and did not move to vacate the default or provide any testimony, the error was of no consequence and the matter was affirmed.

***N.J. Div. of Youth & Family Services v. J.C., N.J. Div. of Youth & Family Services v. T.S.L., In the Matter of the Guardianship of J.D.L.C.,* 411 N.J. Super. 508 (App. Div. 2010) [Judge Fisher]**

Grant of Adoption Weighs Heavily Against Granting Untimely Appeal of TPR

An intervening judgment of adoption weighs heavily against granting an untimely filed appeal to a judgment of termination of parental rights.

Defendants J.C. and T.S.L.'s parental rights were terminated as to their child, J.D.L.C., on August 18, 2008. On July 17, 2009, the child was adopted. The adoption took place before the defendants filed their separate motions seeking leave to appeal. Due to the defendants' extraordinary delay in filing their motions, and the fact that child had already been adopted, the appellate court denied the motions.

Although the appellate court deemed that the defendants had timely notified the Office of Parental Representation (OPR) of their desire to appeal, OPR reported to the court that they had no record of ever receiving the necessary documents. However, evidence at trial revealed that, in fact, the defendants had followed OPR's procedures for pursuing their appeal. The court opined that although the defendants had placed their trust in OPR and could not be personally faulted for the untimely filing of their motions, their motions must be denied.

The court compared the case at hand with *N.J. Div. of Youth & Family Services v. R.G.*, 354 N.J. Super. 202 (App. Div. 2002), in which similar issues were raised and relief was granted. However, the court concluded that the present case was distinguishable from *R.G*. In that case, the time between the judgment and the filing of the defendant's motion had not exceeded a year, where in the present case, the delay was nearly 16 months. The other parent in *R.G.* had filed a timely appeal and this had helped prevent an adoption in that case. Most detrimental to the defendants' case is the fact that J.D.L.C. had been adopted prior to the filing of their motions.

Although the court acknowledged OPR's mistake, it put great weight on "…the overarching goal of permanency for children caught up in such litigation," and determined that "…it would simply be unconscionable for this court to permit an appeal at such a late date." The court further highlighted that:

> Entry of a judgment of adoption triggers the strong public policy of this State to 'promote the creation of a new family unit without fear of interference from the natural parents.' *In re Adoption of Child by W.P.*, 163 N.J. 158, 169(2000). The effect of adoption on the rights flowing from the child's former relationship with his or her natural parents is so extensive as to preclude the enforcement of indirect natural rights.

The court concluded that "…the policy that adoption creates a new family unit without fear of interference from the child's natural parents would be disserved if we were to permit the filing of defendants' nascent guardianship appeals at this late date."

Comment: The court did note that pursuant to *In Re Guardianship of J.N.H.,* it was not entirely clear whether an intervening judgment of adoption necessarily moots a guardianship appeal.

***N.J. Div. of Youth & Family Services v. R.M., In the Matter of I.L., C.L., and I.T.*, 411 N.J. Super. 467 (App. Div. 2010) [Judge Waugh]**

Successful Completion of Suspended Judgment Does Not Result in Expungement of Abuse Finding

A suspended judgment is not a disposition available where children have already been returned home. Successful completion of a suspended judgment does not result in the automatic expungement of the original abuse or neglect finding.

After a domestic dispute, the Raritan Township Police found that R.M., a child care worker and mother of four of the children, and the father of two of the children were highly intoxicated while the children were in their care. The children were placed with their grandparents on May 10, 2008. On May 19, 2008, N.J. Division of Youth &

Family Services filed an OTSC and obtained custody of all three children. Upon completing the necessary services, the children were returned home on August 21, 2008. On September 18, 2008, the parents waived their right to a fact-finding hearing and both stipulated that their drug and alcohol abuse had put their children at risk of harm. Based on their stipulation, the judge determined that the parents had "knowingly, willingly, and voluntarily" admitted to acts of child neglect. At the same hearing, the mother requested that the judge enter a "suspended judgment" in her case so that her name would be removed from the division's central registry due to the adverse effects it would have on her employment. The judge deferred consideration. On November 6, 2008, the judge granted the division's request to terminate litigation.

The appellate court detailed the two-step hearing process for adjudicating contested cases of abuse or neglect which commences with a fact-finding hearing, and, if abuse or neglect is established, proceeds to a dispositional hearing. At the conclusion of a dispositional hearing, the judge may order a suspended judgment. The court addressed the limitations set forth by N.J.S.A. 9:6-8.52, which states that the court shall define permissible terms and conditions of a suspended judgment, and sets the maximum duration to one year, except in exceptional circumstances. The court then examined the criteria for the application of the suspended judgment provision, noting that it was "intended primarily as a temporary alternative to the final return of the child to the parent… [and]…as an interim measure with the ultimate goal of maintaining the family unit."

The court noted that "…the statute is silent, however, as to what happens at the end of a successful period of a suspended judgment." The court also rejected the mother's argument, noting that "there is simply no language in N.J.S.A. 9:6-8.51(a)(1), or anywhere else in Title Nine, stating, or even suggesting, that successful completion of a period of suspended judgment leads to such expungement." The court further highlighted that "the statutory scheme contains no explicit provision for expunging findings of child abuse or neglect."

The court specifically overruled *N.J. Div. of Youth & Family Services v. C.R.,* 387 N.J. Super. 363 (Ch. Div. 2010), finding "no basis to conclude that the legislature intended the suspended judgment provision of N.J.S.A. 9:6-8.51(a)(1) to provide the equivalent of PTI in an abuse or neglect case."

***Matter of W.R. and L.R. for the Adoption of S.W.,* 412 N.J. Super. 275 (Ch. Div. 2009). [Judge Mendez]**

Adoption May be Granted Effective the Date of Filing

The adoption of a child may be granted *nunc pro tunc*, effective the date of the filing of the complaint for adoption, when the prospective adoptive father dies before the final hearing, according to this trial court decision.

S.W. came to live with the prospective adoptive parents when he was 10 years old as the result of a placement by N.J. Division of Youth & Family Services. The couple decided to adopt S.W. in April 2008, 16 months before the complaint for adoption was actually filed. The verified petition was filed on August 14, 2009. The final hearing was scheduled for September 18, 2009. The prospective adoptive father died on September 16, 2009.

Judge Mendez observed that "this case is not just about a potential financial benefit to the child, but more importantly, it is about this child belonging to his adoptive parents and legally becoming part of the adopted family." *Id.* at 281. Judge Mendez noted that the statute, N.J.S. 9:3-50(b), authorizes entry of the adoption effective the date of filing "for good cause shown." The holding of the court is that:

> Before granting an adoption *nunc pro tunc*, after the death of an adopted parent, sufficient evidence must be presented to support a finding that: (1) there is an agreement to adopt, (2) the nature of the relationship was that of a parent-child, (3) the intent of the deceased parent was to adopt, and (4) granting the adoption is in the best interests of the child. *Id.* at 283-284.

The court held that all four factors were met and the adoption was entered effective August 14, 2009, the date of filing.

***N.J. Div. of Youth & Family Services v. T.G.,* 414 N.J. Super. 423 (App. Div. 2010) [Judge Lihotz]:**

Standard for Vacating Voluntary Surrender of Parental Rights

The trial judge properly denied the defendant's request to set aside her surrender of parental rights, according to this appellate court decision.

After a full inquiry by the trial judge to ensure that the surrender was knowing and voluntary, the defendant mother asked for and received assurance that the proceedings were secret and that her child would never learn of her substance abuse relapse. Months later, with new counsel, the mother filed a motion to vacate the judgment of guardianship on the basis that N.J. Division of Youth & Family Services failed to comply with a "material condition" of the surrender agreement, namely that N.J. Division of Youth & Family Services told her drug treatment program and her probation officer that she had relapsed. As a result, she was charged with violating her probation. The trial judge denied the motion to vacate and the appellate court affirmed that denial.

The court applied the two-part standard adopted by the Supreme Court in *Guardianship of J.H.N.,* 172 N.J. 440, 474 (2002), which holds that when considering a motion to vacate a surrender of

parental right and to vacate the guardianship pursuant to Rule 4:50-1, the moving party's application must be supported by evidence of changed circumstances and that "the best interests of the child must be considered." In this case, the appellate court held that the mother failed to meet the first part of the test because she failed to establish that her desire for confidentiality extended beyond her child. Judge Lihotz wrote that "any contention that the Division accepted an unexpressed obligation to not disclose unfavorable information of her failed rehabilitation and continued substance abuse is wholly unsupported." *Id*. at 437.

The appellate court also considered the defendant mother's argument that the judge violated her Fifth Amendment right against "incrimination by engaging in a bullying and intimidating inquiry during the proceeding to consider her motion to vacate." During the colloquy, the defendant admitted she committed perjury at the initial surrender hearing. The appellate court held, relying upon *All Modes v. Hecksteden*, 389 N.J. Super. 462 (App. Div. 2006) and *Attor v. Attor*, 384 N.J. Super. 154 (App. Div. 2006):

> Moreover, a trial court does not have an obligation to warn a witness that his or her testimony may be self-incriminating, that obligation rests with the defendant's counsel. *Id.*

***N.J. Division of Youth & Family Services v. T.S. and K.G.*, (October 25, 2010) [Judge Lihotz]**

Post-Judgment Developments in TPR Case May Require Further Hearing

Where a trial court's decision to terminate a mother's parental rights would likely have withstood appellate review had no additional changes occurred, several post-trial developments sufficiently eroded the underpinning of the guardianship judgment so that it had to be vacated.

In December 2006, eight-year-old M.S. was removed from her mother's home by the N.J. Division of Youth & Family Services due to the mother's drug abuse. At the time of the removal, the father was incarcerated. M.S. was initially placed with her aunt, but was removed after a murder in the aunt's home and placed in a foster home where she remained for two years, until the foster parents requested her removal. After a year of being offered services, T.S. was still unwilling to address her drug addiction and was arrested on drug-related charges. Her visitation with M.S. was suspended in May 2008. After trial in April 2009, the court terminated the rights of both parents.

The appellate panel affirmed the termination of the rights of the father who remained incarcerated throughout most of the litigation. As to T.S., they found significant post-trial circumstances regarding the child's pre-adoptive placement and the mother's rehabilitation efforts that displayed her ability to resume parenting. At the time of trial, T.S. had obtained appropriate housing and found part-time employment. She had also successfully completed a drug rehabilitation program and had remained drug-free for several months. T.S. maintained contact with M.S. via cell phone and the Internet, and learned that the child may have experience a sexual assault when first placed into foster care. As the child had been replaced into the same foster home after her initial removal, the panel expressed concern as to whether these foster parents could provide a safe placement for the child. The panel found the desire expressed by the child, who was now almost a teenager, to see her mother was a significant consideration as was the lack of a bond with the foster parents due to their initial request for the child's removal. The child's recent re-placement with these foster parents created uncertainty and provided only the prospect of permanency.

The panel concluded that the mother's progress coupled with the delay of permanent placement undermined the proof and findings as to the second prong. In addition, they found that without an "unwavering foster commitment," the termination of T.S.'s parental rights did not afford the child an identifiable compensable benefit and resulted in a failure of proof as to the fourth prong.

Comment: The panel pointed out that they did not intend to suggest that all post-trial changes warrant a reexamination of the proofs at trial.

***In re Doe,* 416 N.J. Super. 233 (Ch. Div. 2010) [Judge Mendez]**

Safe Haven Infant Protection Act Case

A mother who gives birth in the maternity ward of a hospital may surrender her infant under the Safe Haven Infant Protection Act even though the act specifies a hospital emergency room.

After a mother gave birth in a hospital, she informed hospital authorities of her wish to surrender the infant under the Safe Haven Infant Protection Act, N.J.S.A. 30:4C-15.5 to 15.11. N.J. Division of Youth & Family Services was notified and the child was removed and placed in a division-approved resource home. Although the mother had initially provided her name and other identifying information, the hospital redacted all of her information from their records. The resource parents expressed a desire to adopt the child and the division filed a petition seeking to terminate the parental rights of the mother and father, who had not been identified by the mother.

The initial question was whether the infant, who had been born in the hospital's maternity ward, qualified as a Safe Haven baby as N.J.S.A. 30:4C-15.7(b) specifically designates a hospital emergency room for delivery of a Safe Haven baby. The court recognized that while the language of the statute is clear in designating a hospital emergency

room for delivery of a Safe Haven baby, the Legislature anticipated the need for a more expansive set of Safe Haven sites than hospital emergency rooms alone. While some other states who have passed Safe Haven laws have limited Safe Haven sites to hospitals alone, New Jersey chose to include in the definition of Safe Haven sites police stations as well as hospitals.

The court found that the legislative intent, in passing the act, was to provide safety, anonymity, and immunity from prosecution to a mother who delivered a baby in a hospital maternity ward, then clearly and unambiguously stated her desire to surrender that infant anonymously. As the mother was unwilling to identify the father of her child and the division did not know his identity, notice to him of the termination proceedings was not required.

JUVENILE

STATUTES

None

COURT RULES

None

DIRECTIVES AND MEMORANDA

Assignment Judge Memoranda

Family—Juvenile Delinquency and Domestic Violence Appeal Rights Forms and Colloquies (Corrections to Two Attachments) Dated October 13, 2009

Directive #01-09, dated April 13, 2009, promulgated appeal rights forms and colloquies for use in domestic violence contempt and juvenile delinquency dispositions. Through a production error, the juvenile delinquency appeal rights forms (both the English-language version and the Spanish-language version) appended to that directive were not the correct versions that the Supreme Court had approved. This supplement merely replaces the incorrect juvenile delinquency appeal rights form with the correct form.

Assignment Judge Memorandum

Family—New Brochure—"Juvenile Delinquency Proceedings and Your Child: A Guide for Parents and Guardians" Dated December 29, 2009

This memorandum distributes a new brochure, "Juvenile Delinquency Proceedings and Your Child: A Guide for Parents and Guardians," in an easy-to-read question and answer format, and contains a glossary and a list of contacts for each county.

Assignment Judge Memorandum

Family—Supplement to Directive #10-09 Amended Juvenile Complaint Form—Deletion of the Word "Oriental" from Listed Race Categories Dated July 21, 2010

This assignment judge memorandum supplements Directive #10-09, "Amended Juvenile Complaint Form–Addition of Degree of Offense," issued September 28, 2009. That directive promulgated an amended juvenile complaint form requiring that the degree of offense be indicated on the form. However, that form as promulgated by Directive #10-09 contained an error in that it failed to delete the obsolete term "Oriental" from the categories for race. The assignment judge memorandum contains a corrected juvenile complaint form that instead uses the term "Asian" and announces that the correct form shall start to be used immediately.

CASE LAW

***State v. Best*, 201 N.J. 100 (2010) [Justice Wallace]**

Reasonable Suspicion, Not Probable Cause, Needed to Search Student's Parked Vehicle on Campus

School officials need only satisfy the reasonable suspicion standard and need not have probable cause to search a student's vehicle parked on campus. The Supreme Court affirmed the appellate court (which affirmed the trial court decision) denying a motion to suppress involving a search of a student's vehicle without a search warrant or probable cause, on reasonable suspicion that contraband would be located therein.

School officials at the Egg Harbor Township High School received information from a student that the defendant had sold him suspected contraband earlier in the day. A search of the defendant's person and school locker produced no contraband, at which point the search was expanded to the defendant's vehicle, parked on campus pursuant to a school parking permit.

The Court concluded that the reasonableness standard and not the traditional warrant and probable cause requirements apply to a search by school authorities of a student's automobile on school property. The Court found no reason warranting a departure from the rationale of *State in Re T.LO.*, 94 N.J. 331 (1983), authorizing a search of the student and personal locker on the lesser reasonable suspicion standard, concluding the same standard would apply to a vehicle parked on school property. Underlying the Court's decision is the substantial interest in maintaining discipline and a drug-free environment for students.

> [T]he need for school officials to maintain safety, order and discipline is necessary whether school officials are addressing concerns inside the school building or outside on the school parking lot. 201 N.J. 100, 113 (2010)

In applying the *T.L.O.* standard to the actions of the school officials in conducting the search, the Court was satisfied that the conduct was appropriate as there was a reasonable suspicion that contraband would be found in the automobile.

***State of New Jersey in the Interest of T.M.*, 412 N.J. Super. 225 (App. Div. 2010) [Judge Ashrafi]**

Mandatory Waiver Standards

The mandatory waiver statute involving defendants 16 years of age or older, alleged to have committed chart 1 offenses, only requires that the state establish probable cause.

There is no obligation for the state to address or discredit any possible available defenses. The appellate court reversed the family part order denying waiver of jurisdiction and referral of the juvenile to the criminal part for prosecution.

Among other charges, the defendant was charged with possession of firearms while committing a narcotics distribution offense. In executing a search warrant, the authorities removed a safe from under the bed in T.M.'s bedroom, which contained 61 decks of heroin, cash, and two handguns loaded with hollow-point bullets. The family part judge found the evidence insufficient to establish probable cause, concluding that since there were other individuals that resided in the three-story house, some other person could have placed the safe under T.M.'s bed.

In reversing the trial court decision, the appellate court concluded that there was ample evidence to believe that TM was in possession of the safe and its contents. The possibility that someone else placed the safe under T.M.'s bed without his knowledge could ultimately provide reasonable doubt to the eventual fact finder. However, "guilt or innocence is not at issue in a waiver hearing." The trial court inappropriately interjected a defense, which could be asserted by the defendant, into the probable cause analysis. The undisputed evidence presented at the waiver hearing was sufficient to establish probable cause to conclude that the 17-year-old juvenile possessed firearms while in possession of heroin with intent to distribute.

Comment: Under Rule 5:22-2 and the waiver statute, N.J.S.A. 2A: 4A-26(e), there is no requirement that the state disprove any available defenses, or even that they establish a *prima facie* case. The court's function is limited to determining the existence of probable cause.

***State of New Jersey in the Interest of C.V.*, 201 N.J. 281 (2010) [Justice LaVecchia]**

Disposition Options for Violation of Probation

In imposing a disposition on a violation of probation, the court is not limited to the parameters of any original suspended sentence and may impose any disposition option that was originally available. Additionally, only time spent in a secure custodial treatment facility may be credited as time served against a subsequent term of detention imposed on a violation of probation. A unanimous Supreme Court upheld the appellate court's affirmance of the trial court determination that only time spent in a secure facility may be credited against a subsequently imposed term of detention.

After multiple violations of probation and the imposition of prior suspended dispositions on a fourth-degree weapons offense, the family part sentenced C.V. to a term of detention to the State Training School for Girls. While providing credit for prior periods of secure detention, the court denied the request that time spent at restrictive residential programs as a condition of probation, be credited against the term of detention. This appeal followed.

The Court found the decision in *State ex rel. S. T.*, 273 N.J Super. 436 (App. Div. 1994) controlling on the detention credit issue, concluding that the goals of the code would be subverted if the trial court was required to award credit for the time spent, unsuccessfully, in a rehabilitative placement. 201 N.J. 281, 294 (2010). The Court then addressed the scope of discretion reposed in family part judges when imposing disposition on a violation of probation. The Court made clear that the same principles apply in juvenile probationary cases as in the adult system.

> [O]n resentencing a juvenile on a suspended sentence, after probation has been violated or imperfectly performed, the court may impose any sentence that the court could have initially imposed. 201 N.J. 281, 298 (2010).

The trial court was not limited to re-imposing the original suspended sentence and was free to enter any appropriate term, within the statutory sentencing parameters, which the judge felt appropriate.

Comment: The family part retains significant flexibility in entering disposition on a violation of probation, allowing deviation either upward or downward from the terms of the original sentence, including an earlier suspended sentence.

***State of New Jersey in the Interest of T. S., a minor*, 413 N. J. Super. 540 (App. Div. 2010) [Judge Fuentes]**

Limits on Detention for Fourth-Degree Offenses

The Juvenile Justice Code does not authorize imposition of a period of detention as a condition of probation. The appellate court vacated a 10-day detention sentence imposed by the family court as a condition of probation.

The defendant was adjudicated delinquent for simple assault, a disorderly person's offense, arising out of a fist fight she initiated on school property.

The adult criminal system authorizes imposition of a 'split sentence', where a jail term not to exceed 364 days, may be imposed as a condition of probation, even where the presumption against incarceration has not been overcome. However the juvenile justice system does not authorize such split sentences as there is no equivalent of N.J.S.A. 2C: 43-2(b)(2) in the juvenile sentencing code.

N.J.S.A. 2A: 4A-44(b)(1) provides for a presumption of non-incarceration for any fourth-degree offense or lower. In order to impose any term of detention on these offenses (fourth-degree and disorderly person's offenses), the presumption against non-incarceration must be overcome.

Comment: No period of detention may be ordered on a juvenile case involving disorderly person's offenses or fourth-degree offenses, unless the family court finds that the presumption against non-incarceration has been overcome.

***Terrance Jamar Graham, Petitioner v. Florida*, 130 S. Ct. 2011 (2010) [Justice Kennedy]**
Cruel and Unusual Punishment

In a 6–3 decision, the U. S. Supreme Court determined that the Eighth Amendment of the U. S. Constitution prohibits the imposition of a life sentence without parole on a juvenile offender committing a non-homicide offense.

Comment: The case has little practical impact in New Jersey as this state's sentencing code does not provide for juvenile sentences subject to the prohibition.

***State of New Jersey in the Interest of J.S., N.J.*, 202 N.J. 465 (2010) [Justice LaVecchia]**
N.J. Div. of Youth & Family Services May Not Be Ordered to Provide Services for a 21-year-old

In a juvenile delinquency preceding the family part lacked authority to order N.J. Division of Youth & Family Services to provide services to the 21-year-old defendant, since no specific statutory authorization exists. The Supreme Court agreed with the trial court and appellate affirmance, placing the defendant on probation but reversed the condition that N.J. Division of Youth & Family Services be responsible to provide the court-ordered sex offender treatment.

The defendant, who was 21 at the time of the plea, pled guilty to digital penetration of his sister, less than 13 years of age, a first-degree aggravated sexual assault. The trial judge placed the defendant on probation and ordered that N.J. Division of Youth & Family Services provide and pay for sex offender treatment services for the defendant as a condition of probation. N.J. Division of Youth & Family Services objected both at the time of the plea and throughout the appeal process, that the court had no authority to order it to be responsible for providing such services, since the division had never previously provided services to J.S. and there was no specific statutory authorization for utilizing its limited resources on adults.

The Supreme Court acknowledged that the Juvenile Justice Code provides authority for the family part to adjudicate adults who committed offenses as minors. N.J.S.A. 2A:-4A-43(b) provides multiple sentencing options to family part judges as alternatives to incarceration. However, the only authority to compel N.J. Division of Youth & Family Services (a component of DCF) to provide services is found in subsection (b)(5). The majority of the sentencing options provide no specific directive regarding what governmental entity is responsible for paying for and proving the services, and N.J.S.A. 2A:4-41 provides that when no governmental entity is mandated to provide the services, then the county of the home residence of the juvenile shall bear the cost. In addition there are several limited circumstances where N.J. Division of Youth & Family Services is mandated to continue providing services to an individual, begun as a juvenile, through their 21st birthday.

There being no express statutory authorization for N.J. Division of Youth & Family Services to provide the specified treatment, and N.J. Division of Youth & Family Services not having had prior contacts with the defendant as a minor, the family part had no authority to order N.J. Division of Youth & Family Services to provide the services. The trial court is within its rights to order such services but should determine if J.S. has the resources to pay for the services, and if not, the expense would fall to the county.

Comment: N.J. Division of Youth & Family Services can only be ordered to provide services in a juvenile sentencing where specific statutory authority exists. The impact of the case may be to cause county government to shoulder more of the burden of juvenile sentencing options.

***State of New Jersey in the Interest of A.S. and N.J.* 203 N.J. 131 (2010) [Justice LaVecchia]**
Suppression of Juvenile Confession Required

Suppression of a confession as involuntary requires the prophylactic remedy of a new trial, where the confession was admitted in evidence at trial, despite the trial court's determination there was otherwise sufficient evidence for conviction. Also, *State v. Presha*, 163 N.J. 304 (2000), continues to be controlling precedent, requiring the presence of a parent or guardian to be present, if at all possible, during the interrogation of a juvenile.

A.S., a 14-year-old girl, was charged with one count of conduct that, if committed by an adult, would constitute first-degree aggravated sexual assault, commission of an act of sexual penetration on a victim who is less than 13 years of age. A.S. was accused of performing oral sex on the four-year-old victim, C.J. The trial court did not suppress the confession but was clearly concerned about its admissibility. In entering a judgment of conviction, the court specified that there was sufficient evidence for a conviction independent of the questioned confession. The appellate panel found admission of the confession to be error but determined there was no apparent remedy since the trial court had made factual and legal findings supporting the conviction, independent of the confession.

The circumstances surrounding A.S.'s statement to the police included a number of defects:

1) Her mother read the Miranda warning.
2) A.S.'s mother was also the grandmother of the victim, indicating possible conflicting allegiances.
3) The police officer assured A.S.

that she should tell the truth because "the truth is only going to help you...and the more truthful you are and the more complete you are, the better it looks for you."

4) A.S.'s mother dominated the interview, and A.S. expressed great reluctance in speaking.

The Supreme Court determined that the confession was involuntary under a totality of the circumstances test. In such conclusion the court did not reach the issue of conflict of interest, central to the appellate decision. The Supreme Court overruled the appellate court's remedy requiring an attorney be present any time a parent or guardian had a similar conflict of interest before a juvenile confession may be taken. Rather, the Court determined that *Presha* continues to provide the appropriate analysis but cautioned that when it is apparent to police that a parent has such a conflict, they should take steps to ensure the parent does not assume the role of interrogator and consider finding another adult to intercede.

Comment: The decision serves to underline the Court's concern that there be a remedial consequence as a result of an appellate determination that improper police conduct was utilized in obtaining a confession.

DISSOLUTION/NON-DISSOLUTION

STATUTES

None

COURT RULES

Appendix IX-H

Combined Tax Withholding Tables for Use with the Child Support Guidelines

Amended due to changes in federal income tax withholding rates.

Clarification of Rule 1:38

Family Part Records—(1) Non-Redaction of Confidential Personal Identifiers from Confidential Court Records; (2) Continued Confidentiality of Family CIS Appended to a Non-Confidential Document, Published: Nov-20-2009

This notice clarifies two aspects of Rule 1:38, "Public Access to Court Records and Administrative Records," as it relates to family part records.

(1) Non-Redaction of Confidential Personal Identifiers from Confidential Court Records

Rule 1:38-7 lists those confidential personal identifiers (Social Security number, driver's license number, vehicle plate number, insurance policy number, active financial account number, and active credit card number) that must be redacted from documents or pleadings submitted to the court. While such redaction is required to prevent disclosure of those personal identifiers in documents that are otherwise available to the public, it is not required with respect to confidential documents. One such confidential document is the family case information statement (CIS).

The revised CIS as promulgated by the August 14, 2009, notice to the bar contains the following additional certification: "I certify that, other than in this form and its attachments, confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b)."

Despite that clear language, some litigants nonetheless have erroneously redacted personal identifiers from the CIS. The personal identifiers included in the CIS and similar confidential documents are necessary for use by the court. Confidential personal identifiers, as defined in Rule 1:38-7, thus are not to be redacted from confidential records filed with the court, including the CIS.

(2) Continued Confidentiality of Family CIS Appended to a Non-Confidential Document

Rule 1:38-3(d)(1) provides that the CIS and any attachments thereto when filed with the court are excluded from public access and thus are confidential. Rule 1:38-3(a) provides that records enumerated in Rule 1:38-3 remain confidential even when attached to a non-confidential document. Therefore, a CIS and its attachments that have been filed with the court remain confidential even when appended to a document that might otherwise be non-confidential (*e.g.*, a motion).

DIRECTIVES AND MEMORANDA

Directive #01-10

Nicole's Law (N.J.S.A. 2C:14-12 and N.J.S.A. 2C:44-8)—Restraining Order and Notification Procedures Dated March 2, 2010

This directive promulgates a model restraining order and notification procedures to be used in situations involving Nicole's Law, N.J.S.A. 2C:14-12 and N.J.S.A. 2C:44-8. Nicole's Law permits the court to issue an order as a condition of bail or to continue a prior order or issue a new order upon conviction, prohibiting a defendant charged with or convicted of a sex offense from having any contact with a victim, including restraining the defendant from entering a victim's residence, place of employment, business or school and from harassing or stalking the victim or victim's relatives.

Assignment Judge Memorandum

Nicole's Law—Restraining Order and Notification Procedures Dated March 2, 2010

This assignment judge memorandum accompanies Directive #01-10 and promulgates a model restraining order and notification procedures to be used in situations involving Nicole's Law, N.J.S.A. 2C:14-12 and N.J.S.A. 2C:44-8. Nicole's Law permits the court to issue an order as a condition of bail or to continue a prior order or issue a new order upon conviction, prohibiting a defendant charged with or convicted of a sex offense from having any contact with a victim, including restraining the defendant from entering a victim's residence,

place of employment, business or school and from harassing or stalking the victim or victim's relatives.

CASE LAW

***Colca v. Anson*, 413 N.J. Super. 405 (App. Div. 2010) [Judge Lihotz]**

Child Support Orders, Including Emancipation, are Subject to Review and Modification Based Upon Changed Circumstances

The parties divorced in 1993. They had two children. Upon the oldest child's graduation from college, the parties entered into a consent order awarding residential custody to the plaintiff, terminating any child support obligation of the plaintiff. The defendant was then ordered to pay child support. The parties agreed to an allocation of college costs.

Thereafter, the second child moved to the defendant's residence. The defendant filed for child support, which the court denied. The order also provided for the plaintiff to pay 30 percent of college costs. The defendant filed a third motion in 2008, which sought enforcement of the November 2005 order with respect to the plaintiff's failure to pay her share of college costs for both children, and sought child support for the second child.

The trial court found no basis for the prior order denying the defendant's November 2005 application for child support and ordered the plaintiff to pay child support, pointing out that child support belongs to the child and the residential parent has the right to receive financial assistance from the other parent.

The trial court ordered the plaintiff to pay 35 percent of college costs for both children and child support for the second child. The plaintiff maintained that the defendant waived college costs for the first child because he waited two years after he incurred the costs and that the court could not revisit child support for the second child without a showing of a change of circumstances.

The appellate court set forth the following "essential principles":

- Parents are expected to support their children until they are emancipated.
- A parent has an obligation to contribute to the needs of their children consistent with their financial ability.
- Child support is for the benefit of children; as a result the right to receive child support belongs to the child.

The appellate court found that, first, until a child is emancipated the "... inherent equitable power of the family part allows the court to enter, revise or alter support orders from time to time as circumstances may require." Second, despite a delay in seeking payment of college costs for the first child the defendant remains entitled to receive reimbursement...which cannot be waived by a custodial parent." The court "...may not impute to a child the custodial parent's negligence, purposeful delay or obstinacy so as to vitiate the child's independent rights of support..." (*Gotlib v. Gotlib*, 399 N.J. Super. 295 (App. Div. 2008).

Comment: A court has the inherit power to amend a child support order; the custodial parents' failure to seek unreimbursed medical expenses or college costs contrary to the property settlement agreement's mechanism for making a claim cannot vitiate the supporting parents' obligation to the child.

***Gonzalez-Posse v. Ricciardulli*, 410 N.J. Super. 340 (App. Div. 2009), [Judge Parrillo]**

Limited Duration Alimony: Amount May Be Modified, Term May Not

The court may modify the amount of limited duration alimony (LDA) based upon changed circumstances but not the term except in unusual circumstances.

The parties, citizens of Argentina, were married in 1995. Three children were born of the marriage. The defendant was trained as an attorney in Argentina. Subsequently, he received a L.L.M. from N.Y.U. In August 1998, the family moved to New Jersey pursuant to an H-1B visa that permits a person in a specialty occupation to work in the United States for not more than seven years. The defendant worked as an attorney for a Wall Street law firm, and thereafter for two corporations.

The parties were divorced in 2006. A property settlement agreement (PSA) was executed, which provided for the defendant to pay LDA for five years and child support based on the defendant's income of $150,000 and the plaintiff's income of $21,000.

The defendant was required, under the terms of his visa, to return to Argentina. The defendant obtained employment in Argentina for $26,000, per year (U.S. dollars). The defendant moved to terminate alimony and to reduce child support based on his then current income.

The trial court found that the defendant's income was consistent with his earning capacity in Argentina and reduced his child support. The trial court did not terminate alimony but instead calculated that $88,615 remained to be paid over the life of the LDA award. The trial court modified the alimony award such that the full support would be paid, but over a longer 17-year term.

The appellate court found that the trial court properly determined that the defendant's income was consistent with his earning capacity in Argentina. *See Ibraham v. Agiz*, 402 N.J. Super. 205 (App. Div. 2008).

The appellate court found, however, that the trial court extended the term of the LDA beyond the "temporary arrangement originally fashioned by the parties...into one of more lasting duration" which contravened the purposes of LDA without "any articulated, sustainable reason, much less unusual circumstances."

N.J.S.A. 2A:34-23(c) provides in any case where permanent alimony is sought, the court must make specific findings as to why the permanent alimony is not appropriate and then consider LDA taking into account all factors. An award of LDA "...may be modified based either upon change of circumstances or the nonoccurrence of circumstances...The court may modify the amount of such award, but shall not modify the length of the term except in unusual circumstances."

Comment: Specific findings must be made as to the existence of unusual circumstances as set forth in *Gordon v. Rozenwald*, 380 N.J. Super. 55 (App. Div. 2005) in order to modify the LDA term.

***Tannen v. Tannen*, 2010 N.J. Super. Lexis 183 (App. Div. 2010) [Judge Messano]**

Discretionary Trust Income in Alimony Determination

A discretionary trust may not be considered as income to a party in determining an amount of alimony, nor may such a trust be ordered to make payments on account of a party in a matrimonial action. The appellate court reversed and remanded to the trial court just to re-compute alimony without considering income imputed from such a discretionary trust.

The parties were married 20 years at the time of the divorce. The wife was the beneficiary of a discretionary trust established by her parents. The trial court, in establishing permanent alimony, imputed $25,000 in income to her and then added $4,000/mo. imputed income from the trust. The trust was joined in the litigation by the court and ordered to continue to pay the real estate taxes on the former marital residence, and one-half of the cost for the housekeeper.

The appellate court determined that income emanating from the trust should be exempt, as "an asset is properly considered to be on the economic ledger sheet of one divorcing party if that party controls the asset." Since the trustees have full discretion as to the disbursement of income and principal the beneficiary has no control over the trust, and cannot compel the trustee to make any payments. The appellate court found the intent of the settlor in forming the trust was to provide support to the beneficiary/wife, in the discretion of the trustees, but not to relieve the husband of his financial obligations.

"Our courts have also repeatedly recognized the broad discretion accorded trustees of a discretionary trust, and thereby, implicitly the limits upon a beneficiary's ability to compel a specific exercise of the trustee's discretion."

While acknowledging that the *Restatement (Third) of Trusts* may be viewed as supporting the imputation of income to the beneficiary, the appellate court viewed the restatement to be a change in existing law and deferred the adoption of such change to the Supreme Court.

Comment: Despite finding that the trust disbursements may not be factored into the alimony equation, the appellate court directed that on remand, in determining lifestyle, the trial court must consider the historical record of payment made by the trust on the wife's behalf.

***Parish v. Parish*, 412 N.J. Super. 39 (App. Div. 2010) [Judge Lihotz]**

Trial Court May Not Restrict Filing of Motions Except in Extraordinary and Egregious Circumstances

Mandatory restrictions on the filing of motions in the absence of specific findings of the need to control frivolous litigation is improper according to this appellate decision.

The plaintiff filed a motion to enforce litigant's rights for issues pertaining to parenting time and communication between the parties only one month after entry of the parties' divorce. The plaintiff's pending domestic violence complaint was dismissed prior to the return date of his motion. Between the dismissal of the TRO and before the return date of the motion the parties met with a parenting time coordinator. The parenting time coordinator's recommendations were rejected by the defendant. The trial court determined any parenting time issues were moot due to the dismissal of the TRO. The parties were ordered to engage in a four-way conference with counsel prior to any future motions being filed. Failure would result in an automatic dismissal of the motion. The plaintiff appealed, citing violations of due process.

The appellate court determined the motion judge's restriction of access to the court was an abuse of discretion absent specific findings that past pleadings were frivolous or designed for an abusive purpose, new pleadings were repetitive and other sanctions had been utilized to prevent the abuse. The "mere danger" of possible frivolous litigation was not enough to warrant the restraints imposed. Courts should not impose barriers that postpone review of a claimed violation of its previously entered order. Such delays tend to exacerbate rather than mitigate family issues.

The business of the courts is to finalize disputes. Any discretionary exercise of the extreme remedy of enjoining or conditioning a litigant's ability to present his or her claim to the court must be used sparingly; it is not a remedy of first or even second resort. 412 N.J. Super. at 54.

Comment: Restraints on filing of motions should only be employed in the most egregious cases that demonstrate a long pattern of harassment or misuse of the judicial process as found in *Kozak v. Kozak*, 280 N.J. Super. 272, 274 (Ch. Div. 1994).

***Palombi v. Palombi*, 414 NJ Super. 274 (App. Div. 2010) [Judge Espinosa]**

Oral Argument on Motion May Be Denied

Whether a trial court has properly exercised its discretion as to

oral argument does not turn solely on the subject matter of the motion.

The parties, married in May 1997, were divorced in April 2007. The court found that while custody was not an issue since Carly was 18 years of age, she was not emancipated because she was still a high school student.

After the divorce, Carly resided with her father. Thereafter, while still in high school she moved into an apartment with her boyfriend, and subsequently to her mother's house. The mother filed a cross-motion for child support.The father filed a motion to reduce alimony based on a reduction of income, increased income for the mother and additional expenses due to his remarriage.

The father failed to comply with Rule 5:5-4(a) by not filing a current and prior CIS. The father's motion was denied because of his failure to comply with Rule 5:5-4(a), as the court had no basis to evaluate his claim of a change of circumstances. The father filed a motion for reconsideration pursuant to Rule 4:49-2 which the trial court denied based on his failure to identify an error by the court.

The appellate court found that while Rule 5:5-4 requires oral argument on substantive issues, the motion judge has the discretion to deny oral argument when there is "...no factual dispute between the parties or...where deficiencies in the motions rendered oral argument unnecessary and unproductive."

Since "...neither party presented an adequate factual basis for the court to assess essential facts necessary to a determination of the issues presented, oral argument was properly denied."

The appellate court also reviewed Rule 4:49-2 pointing out that there must be an error that is "a game-changer" to be an appropriate basis for reconsideration.

Comment: While a motion may raise substantive, as opposed to discovery or calendar issues, oral argument is not required if the movant fails to raise a genuine material factual dispute or the application is deficient rendering oral argument unnecessary or unproductive.

Johnson v. Johnson, 411 N.J. Super. 161 (App. Div. 2008) [Judge Miniman]

Arbitration of Custody Must Include an Adequate Record

Arbitration of custody and parenting time issues must include an adequate record for the court to evaluate any threat of harm to the child pursuant to *Fawzy v. Fawzy*, 199 N.J. 456 (2009) according to this appellate decision.

Parties agreed to binding arbitration to resolve parenting and scheduling differences, prior to the court's issuance of *Fawzy*, *supra.* The arbitration agreement was made pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-13, and provided for no transcript of the proceedings.Any appeals to the family part would be limited to a determination of whether the arbitrator failed to properly apply the applicable law to the factual finding and issues under the agreement. The trial court confirmed the award and the defendant appealed.

The appellate court concluded the arbitration proceedings did not meet the guidelines set forth in *Fawzy*, *supra.* When child custody and parenting time issues are subjected to arbitration, a record of all documentary evidence and testimony shall be kept with the arbitrator stating in writing their findings of fact and conclusions of law with a focus on the best interest standard. Without an adequate record the court was unable to evaluate the threat of harm to the child, custody and parenting time.

It is only upon such a record that an evaluation of the threat of harm can take place without an entirely new trial.(Citing to *Fawzy* at 480-81.) 411 N.J. Super. 173

Public policy dictates a more expansive review of custody and parenting issues than provided by N.J.S.A. § 2A:23A-13.

Comment: Pipeline retroactivity is appropriate when the arbitration proceedings fail to meet the guidelines for recording set forth in *Fawzy* to protect the best interests of the children.

Van Horn v. Van Horn, 415 N.J. Super. 398 (App. Div. 2010) [Judge Miniman]

Appropriate Remedy for Violation of Rules on Taking Mortgage by Attorney

Disqualification of counsel is not an available remedy for a violation of Rule 5:3-5(b) or R.P.C. 1.8. This appellate court determined invalidation of the note and mortgage taken by counsel during a period of representation is the most appropriate remedy.

While appeal of the JOD was still pending, the plaintiff filed a post-judgment motion for reconsideration. He executed a mortgage in favor of his attorney to secure her fees for the post-judgment litigation. The defendant made application to disqualify plaintiff's counsel for violating Rule 5:3-5(b) by taking a mortgage on her client's real estate during a period of representation. Rule 1:11-3. The plaintiff opposed the defendant's standing under Rule 5:3-5(b) asserting the rule aims to protect the client's interest and not the opposing party. The trial court granted the defendant's request for disqualification over the plaintiff's objection.

The appellate court affirmed the trial court's determination that the defendant had standing, reasoning the former spouse had a financial interest in the outcome of the litigation due to the pendency of the appeal that is ordinarily sufficient to confer standing.The disqualification of counsel was reversed by the appellate court, notwithstanding the clear violation of Rule 5:3-5(b). The court held neither Rule 5:3-5(b) nor R.P.C. 1.8(a) require disqualification of an attorney where a

violation occurs.

Regarding disqualification as a remedy, New Jersey courts have consistently held that disqualification is a harsh discretionary remedy that must be used sparingly. *Cavallaro v. Jamco Prop. Mgmt.*, 334 N.J. Super. 557, 572 (App. Div. 2000)…The Supreme Court has emphasized that "only in extraordinary cases should a client's right to counsel of his or her choice outweigh the need to maintain the highest standards of the profession." (*quoting Dewey* at 109 N.J. at 218).

Comment: Invalidation of the note and mortgage is the appropriate remedy for a violation of R.P.C. 1.8 and Rule 5:3-5(b).

***Segal v. Lynch*, 413 N.J. Super. 171 (App. Div. 2010) [Judge Fuentes]**

Intentional Infliction of Emotional Distress

A father's suit against a mother alleging intentional infliction of emotional distress should have been filed in the family part and is barred as inimical to the best interests of the children, according to this appellate decision.

The plaintiff filed a tort claim for intentional infliction of emotional distress in the Law Division for himself and on behalf of the children. He asserted the defendant had taken the children away by moving them, enrolling them in a school under her surname, and preventing him from seeing or communicating with them in any manner for a period of three months. The trial court dismissed the plaintiff's complaint, holding it was barred by the Heart Balm Act, Section 2A-23-1, it failed to state a claim as a matter of law and any claim should have been raised in the family part. The appellate court affirmed the dismissal on separate grounds, reasoning the plaintiff's claim was barred as not being in the best interests of the children.

The appellate panel concluded the Heart Balm Act did not bar the plaintiff's claim as the statute's prohibitions were only intended to apply to causes of action alleging alienation of affections arising out of the parties' relationship. The court noted any tort claim for intentional infliction of emotional distress as it pertains to the children would require extensive discovery and depositions of the children. This would result in children taking sides, as they would be the key witness against one parent.This directly contravenes the principles embodied in the best interests standard. Claims of alienation are uniquely suited to the expertise of the family court and must be brought as part of an action seeking custody or parenting time in the family part. *Tevis v. Tevis*, 79 N.J. 422 (1979).

The family judge is thus responsible for shielding the child from the animosity that each parent may have against the other and promoting a spirit of selflessness where the parent subordinates his or her own personal grievances to the best interests of the child. 413 N.J. Super. 190.

Comment: The family judge shall make the initial determination and evaluate the merits of the claim for intentional infliction of emotional distress to avoid entangling the children in the discovery process.

***Kay v. Kay*, 200 N.J. 551 (2010) [*Per Curiam*]**

The Estate of Deceased Spouse May Pursue Equitable Claims Regarding Alleged Diverted Marital Assets

The Supreme Court held an estate of a deceased spouse may not be deprived of an opportunity to pursue equitable claims given allegations the surviving spouse had diverted marital assets.

The defendant passed away during the parties' divorce litigation. His will included specific bequests to his children, with the remainder of the estate devised to his brother/executor.The plaintiff submitted a stipulation dismissing her divorce complaint unsigned by the defendant's attorney. She subsequently transferred the monies from their joint brokerage account into her sole name depriving the defendant's estate of sufficient funds to cover his burial expenses and attorney's fees. The defendant's executor sought a constructive trust to prevent the unjust enrichment which would allegedly occur if plaintiff retained all marital property. The trial court, relying on *Kruzdlo v. Kruzdlo*, 251 N.J. Super. 70 (Ch. Div. 1990), held the estate of a decedent spouse is not entitled to assert equitable claims against the marital estate.The appellate court reversed in *Kay v. Kay*, 405 N.J. Super. 278 (App. Div. 2009), concluding the trial court should have accepted the pleadings and decided the case on its merits.

The Supreme Court affirmed the appellate court for substantially the reasons expressed by Judge Grall, holding an estate must be given the opportunity to pursue its claim for equitable relief to promote equity and fair dealing between spouses. This ensures marital property belonging to a decedent will be retained by the estate to the benefit of the deceased spouse's rightful heirs, preventing the unjust enrichment of the surviving spouse.

The Court took note of the similarities of this claim to *Carr v. Carr*, 120 N.J. 336 (1990) where "marital assets had been wrongfully diverted by one spouse to the detriment of the other." *Id.* at 553. Here the estate merely sought to continue claims raised by the deceased spouse during the litigation. Equity demanded the innocent spouse have a forum for recovery.

Comment: The estate of a spouse can continue to assert the decedent spouse's equitable claims where decedent, prior to his death, argued his spouse had inappropriately diverted marital assets.

***Dalessio v. Gallagher*, 414 N.J. Super. 18 (App. Div. 2010) [Judge Skillman]**

Home State and the UCCJEA

When addressing initial jurisdiction under the under the Uniform

Child Custody Jurisdiction and Enforcement Act (UCCJEA), N.J.S.A. 2A:34-53 to 95, the determination of the child's "home state" is not limited to the time period of six consecutive months immediately before the commencement of a child custody proceeding but rather should be interpreted to be within six months before the commencement of the child custody proceeding. The appellate court affirmed the trial court determination, finding that exclusive jurisdiction was vested in the state of Washington.

The child was born in the state of Washington in June 2008. On May 17, 2009, the mother and child relocated to New Jersey without the father's consent. Within 30 days, each parent thereafter instituted proceedings in their respective states seeking temporary custody of the child. In addition, the child's maternal aunt and grandmother filed an ancillary New Jersey action against the child's mother and father seeking custody of the child, alleging the parents to be unfit. The New Jersey court, exercising emergency jurisdiction, entered an order granting temporary custody to the grandmother/aunt. After conducting a telephone conference with the Washington court, the New Jersey court determined the state of Washington had exclusive jurisdiction under the UCCJEA to determine custody of the child.

The issue on review pertained to that section of the UCCJEA addressing initial child custody jurisdiction which provides in relevant part:

> a. ...[A] court of this State has jurisdiction to make the initial child custody determination on if: (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;...
>
> Both New Jersey and the State of Washington define "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of child custody proceeding."

The appellate court determined that the state of Washington had exclusive jurisdiction to determine the custody dispute, adopted the reasoning in *Stephens v. Fourth Judicial District Court,* 128 P.3d 1026, 1028-29 (Mont. 2006), which held in part:

> As a result, we hold that "home state" for purposes of determining initial jurisdiction under [Montana's version of N.J.S.A. 2A:34-65(a)(1)] is not limited to the time period of "6 consecutive months immediately before the commencement of a child custody proceeding." The applicable time period to determine "home state" in such circumstances should be "within 6 months before the commencement of the [child custody] proceeding." This interpretation promotes the priority of home state jurisdiction that the drafters of the UCCJEA specifically intended. *Dalessio*, 414 N.J. Super. 18.

Comment: A parent's unauthorized removal of a child from a state that otherwise meets the home state six-month definition will not vitiate a finding of jurisdiction.

Faucett v. Vasquez, 411 N.J. Super. 108 (App. Div. 2009) [Judge Messano]

One-year Military Deployment is a Change of Circumstances Requiring Plenary Hearing

The father's one-year deployment was sufficient to establish a *prima facie* case of changed circumstances, thus entitling the mother to a plenary hearing on a motion to modify child custody.

The plaintiff father and defendant mother were married in 1997. One child was born to the parties in 1997. The parties divorced in 2001. A post-judgment application was heard and decided in 2002, which provided that joint legal custody would continue and that the plaintiff father would be the parent of primary residence. In 2009, the defendant mother sought, by the filing of an order to show cause, the immediate transfer of custody to her because of the plaintiff father's impending deployment as a reservist in the military. Initially, the deployment would be from New Jersey and, thereafter, overseas. The trial court denied the emergent application but left open the possibility of considering the application on motion. The defendant mother subsequently moved by motion to modify custody and parenting time. The defendant mother certified that the plaintiff father had recently informed her that he was about to be deployed to Iraq for one year, and that he expected his current wife to care for the child while he was deployed. The defendant mother claimed that the child should live with her in the absence of the plaintiff father. The trial court declined to change custody, noting that the child was not residing with "a distant family member or friend." *Faucett* at 117.

On appeal, the defendant mother argued that a parental presumption should apply in the case where a parent of primary residence is about to be deployed by the military.

The appellate court found that deployment by the parent of primary residence for one year or more establishes for the moving party a *prima facie* case for modification and an entitlement to a plenary hearing. The appellate court held that "...the parental presumption does not apply when one parent seeks modification of a previously-entered court order regarding custody solely because of the other parent's impending military deployment." *Faucett* at 134. The appellate court concluded that "...when the military deployment is likely to last a year or more and the application is contested, the parent seeking modification, having demonstrated

a *prima facie* case of changed circumstances that affect the child's welfare, is entitled to a plenary hearing if material facts remain disputed. Thereafter, the moving parent must demonstrate that temporary modification is in the child's best interests." *Faucett* at 134.

***Abbott v. Abbott*, 130 S. Ct. 1983, 176 L. Ed. 2d 789 (2010) [Justice Kennedy]**

Hague Convention

A party has standing to seek the return of a child under the Hague Convention based on limited *ne exeat* rights of visitation and inherent rights to oppose an out-of-country removal. The United States Supreme Court reversed the court of appeals for the Fifth Circuit, finding that these rights, though limited, constitute a "right of custody" under the convention.

The Abbotts, residents of Chile, had separated and Mrs. Abbott obtained an order for daily care and custody of their child. Mr. Abbott had visitation rights and the right under Chilean law to object to an out-of-country removal without a court order. Mrs. Abbott relocated with the child to Texas without consent or court authority. The father filed this application under the Hague Convention in federal court, seeking the return of the child illegally removed from Chile without court order.

Both the Federal District Court and the U. S. Court of Appeals held that the father's limited custody rights did not establish a custody interest entitling him to maintain the application for the child's return under the Hague Convention. The Supreme Court's determination resulted in a remand to the trial court to hold the hearing to determine whether the child should be returned to the jurisdiction of the Chilean court.

> Adopting the view that the convention provides a return remedy for violation of *ne exeat* rights accords with its objects and purposes. The convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. *Abbott*, at 808.

Comment: While the court's decision authorized the father's petition to be heard by the district court, an order for return of the child is not automatic. Return may be denied if the abducting parent can establish that there is a grave risk that his or her return would expose the child to physical or psychological harm, or otherwise create an intolerable situation.

DOMESTIC VIOLENCE

STATUTES

None

COURT RULES

None

DIRECTIVES AND MEMORANDA

Assignment Judge Memorandum
Family—Juvenile Delinquency and Domestic Violence Appeal Rights Forms and Colloquies (Corrections to Two Attachments) Dated October 13, 2009

Directive #01-09, dated April 13, 2009, promulgated appeal rights forms and colloquies for use in domestic violence contempt and juvenile delinquency dispositions. Through a production error, the juvenile delinquency appeal rights forms (both the English-language version and the Spanish-language version) appended to that directive were not the correct versions that the Supreme Court had approved. This supplement merely replaces the incorrect juvenile delinquency appeal rights form with the correct form.

CASE LAW

***Crespo v. Crespo*, 201 N.J. 207 (2010) [*Per Curiam*]**
The PDVA is Constitutional

The constitutionality of the Prevention of Domestic Violence Act was upheld by this unanimous ruling of the Supreme Court. All aspects of the act were upheld for reasons set forth in the Appellate Division decision by Judge Fisher.

***J.S. v. J. F.*, 410 N.J. Super. 611 (App. Div. 2009) [Judge Fisher]**
Jurisdiction in "Dating" Cases

"Dating" in the context of the PDVA is a loose concept defined differently by different socio-economic groups and generationally. The definition is not subject to "slavish adherence to any formula," and the court must consider the parties' own understanding of their relationship as colored by socio-economic and generational influences, according to this appellate decision.

At final hearing, the defendant argued, among other things, that the parties were not in a dating relationship as defined by the PDVA. The act defines "a victim of domestic violence" as including "any person who has been subject to domestic violence by a person with whom the victim has had a dating relationship." N.J.S.A. 2C: 25-19d. The Legislature did not define "dating relationship." The trial decision *Andrews v. Rutherford*, 363 N.J. Super. 252, (Ch. Div. 2003), lists six factors to be considered in assessing whether a dating relationship exists. Judge Fisher, in the *J.S. v. J.F.* decision, does not specifically endorse or reject the *Andrews* factors, but agrees that the act is to be liberally construed in favor of the legislative intent to eradicate domestic violence and to protect a person in a "dating relationship."

In the *J.S.* case the defendant argued that he was not in a dating relationship because their relationship was purely "professional," that is, their interactions occurred when the defendant "frequented local clubs where plaintiff worked as a dancer." At first he asserted that plaintiff was his paid escort at Thanksgiving dinner at his parents' home. On questioning by the judge, he acknowledged that he did not pay her to come with him for Thanksgiving dinner.

The court rejected the contention that a relationship which includes payment of consideration for the other party's time precludes the finding of a dating relationship. Rather, the court recognizes that most claims of a dating relationship turn on what the particular parties view as a "date." *Id.* at 615-616. In upholding the trial court's decision that this was a dating relationship, the appellate panel said:

> 'Dating' is a loose concept undoubtedly defined differently by members of different socio-economic groups and from one generation to the next. Accordingly, although *Andrews* suggests some useful factors, courts should vigilantly guard against a slavish adherence to any formula that does not consider the parties' own understanding of their relationship as colored by socio-economic and generational influences.

Comment: *J.S v. J. F,* when read in conjunction with *Tribuzio v. Roder*, 356 N. J. Super. 590 (App. Div. 2003), makes clear that in determining jurisdiction under the PDVA the act should be liberally construed and the court should not slavishly adhere to factors but consider all of the circumstances and the understandings of the parties.

***S.D v. M.J.R.*, 415 N.J. Super. 417 (App. Div. 2010) [Judge Payne]**
FRO Should Have Been Granted

It is not a valid defense to entry of an FRO that defendant's conduct, which meets the definition of sexual assault, is consistent with and not violative of his religious and cultural teachings and norms, according to this appellate decision.

The plaintiff, age 17, and her husband, the defendant, both were residents of Morocco and adherents to the Muslim faith. They were wed in Morocco in an arranged marriage and one month later they came to New Jersey. During their less-than-six-month marriage, the defendant's conduct included, in retaliation for her not cooking, stripping the plaintiff naked, pinching her breast and genitals causing bruising, and having sexual intercourse without her consent and over her objections. After approximately six months of marriage, the defendant attempted to divorce his wife in the presence of the Imam. The plaintiff filed her domestic violence complaint shortly thereafter. The Imam testified at trial that "a wife must comply with her husband's sexual demands.... However, a husband is forbidden to approach his wife 'like an animal.'" *Id*. at__.

The trial judge found that the defendant had harassed and assaulted the plaintiff, but rejected her allegations that her husband sexually assaulted her when, on numerous occasions, he forced her to have sexual intercourse with him without her consent and over her objection. The trial judge concluded that the complained of conduct occurred, but that the defendant lacked the

requisite criminal intent, because he was acting consistent with his religious and cultural teachings. Further, the trial judge denied the request for an FRO and dismissed the complaint under *Silver v. Silver*, 387 N.J. Super. 112, 127 (App Div 2006), finding that a final restraining order was not necessary to protect plaintiff even though she had established several predicate acts.

In a comprehensive opinion, the appellate court reversed the trial court decision and remanded the matter for entry of an FRO holding:

1. "We are concerned that the judge's view of the facts...may have been colored by his perception that, although defendant's sexual acts violated applicable criminal statues, they were culturally acceptable and thus not actionable—a view that we soundly rejected." *Id.* at 440. Religious and cultural views, rules and norms do not provide a defense to criminal conduct.
2.. A restraining order should not be denied or found to be unnecessary because there is a no-contact order as a condition of bail in a parallel criminal proceeding.
3. The trial judge acted erroneously in concluding that an order was unnecessary under *Silver* because the parties had separated, were going through divorce proceedings in Morocco, and that the assaults were a "bad patch" in a short-term marriage. The plaintiff was pregnant at the time of the hearing and would necessarily have future contact with respect to the child. "We construe the judge's characterization of the violation that took place as a 'bad patch' and plaintiff's injuries as not severe as manifesting an unnecessarily dismissive view of defendant's acts of domestic violence. *Id.* at 440. ■

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