New Jersey
Family Lawyer

Vol. 34, No. 5 — May 2014

Chair's Column

Random Notes From the Chair

by Brian Schwartz

Each morning, for most of my life, the first thing I do is read the sports page. I know what you are thinking—in the age of the Internet and 24-hour sports coverage, what 'news' is in the sports page that I have not already heard or seen. But it is the stories, the commentary, the observations of the sports columnist that still draw me to the newspapers (and, yes, I still have the actual newspaper delivered—not some Internet version).

My favorite of the sports sections are the random notes—the section that has a comment or two, followed by "…" leading directly into the next comment. This section is filled with witty or informative 'one offs.' In this column, I now get to combine my love of sports writing with my love of family law.

During the last week in March, many of us spent a fine few days in Austin, Texas, on the Family Law Retreat. I had the pleasure of leading a panel on the topic of (what else?) alimony. We discussed the guidelines bill, the Family Law Section Executive Committee-sponsored bill and the theories of the American Law Institute. But as we debated (lamented?) the state of alimony in New Jersey, we also had the privilege of hearing from two family lawyers from Texas—Sherri Evans from Houston and Jimmy Vaught from Austin. In Texas, you cannot receive alimony unless you have been married at least 10 years. Even then, the level of alimony is extremely limited—not to exceed five years. As they listened to our concerns about the potential changes to alimony, they shook their heads. I guess it is all a matter of perspective…

The Administrative Office of the Courts is supporting a bill to revise the law concerning child support (S-1046 and A-2721); more particularly, the bill provides that child support will automatically terminate at the age of 19. Although there are exceptions to this automatic termination (including agreement to another date, a child being enrolled in post-high school education, or a child having a mental or physical disability that existed prior to attaining age 19), our section has raised concerns. For example, at present a party paying child support through the probation department has the burden of demonstrating that his or her child is emancipated. This new bill, should

it pass, will shift the burden to the custodial parent to prove child support should continue. My understanding is that the impetus for this bill is administrative in nature; that is, there are a number of 'open' cases in the probation department for children who long ago were emancipated, but there is no order for emancipation. As such, the cases remain open. While I understand the administrative nightmare this may be, shifting the burden to (generally) unrepresented custodial parents who lack the knowledge or understanding of how and under what circumstances they can have child support continued is unfair. A simple solution may have been to change the termination age from 19 to 22, but that is just one man's opinion…

Also, interestingly, the bill provides that either the custodial parent or *the child* may petition the court for a continuation of support. I can hear the phone ringing with reporters on the line already…

In Nov. 2013 (but not approved for publication until March 10, 2014), the Honorable Sohail Mohammed, from Passaic County, concluded that, "Balancing the relevant factors, the court finds that they overwhelmingly favor the mother's interests over the father's application for his notice and appearance at the child's birth."[1] Regardless of one's opinion on the ultimate outcome, it is a well-written, well-reasoned opinion balancing the rights of mothers and fathers prior to the birth of a child…

I applaud the immediate past president of the bar association, Ralph Lamparello. From his first day on the job he was committed to a platform of judicial independence. At the Annual Meeting in Atlantic City last May, Justice Barry Albin began with a stirring, impassioned presentation on the importance of judicial independence. (If you have not seen or read this, google Justice Barry Albin Judicial Independence or find the text at http://www.rutgerslawreview.com/wp-content/uploads/archive/vol66/issue2/Albin.pdf. It is a must for all attorneys.) Thereafter, Ralph organized a distinguished panel on the topic of judicial independence, with commentary from both sides of the issue from the panelists addressing the issues currently facing New Jersey. He has continued by convening a Task Force on Judicial Independence. This is a fight in which we must all join.

Quoting Justice Albin:[2]

> *Judges cannot and should not operate in the political sphere. The judicial reappointment process is a matter within the exclusive domain of the other branches of government. Yet, in that process, judicial independence is at risk. Although judges have no role to play in the reappointment process, you do — you are citizens, you are stakeholders in our system of justice. You have a very good reason to be concerned about the reappointment process. When you appear in a courtroom, you do not want the judge to have any considerations affecting his or her judgment other than the application of the law to the facts. Nothing else should matter. A judge should not be looking in the rearview mirror.…*
>
> *Friends, we know that day has arrived. Doing justice should not be a bad career move. Judges must do their jobs, summoning the courage to do what is right, without regard to whether they please some or offend others, and without regard to their judicial careers. Our judges will continue to do justice in their courtrooms, but they cannot fight for an independent judiciary. That is your fight. And for those of you willing to wage that battle, Godspeed.*

The Family Law Section has never shied away from fighting the good fight. I implore all of you to participate. Write to the governor. Write to your legislator. Let them know that we stand with our judges. ■

Endnotes

1. *Plotnick v. DeLuccia*, ___ N.J. Super. ___ (Ch. Div. 2014).
2. Hon. Barry T. Albin, Associate Justice of the New Jersey Supreme Court, "The Independence of the Judiciary," May 2013.

Inside this issue

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

Editor-in-Chief's Column

The Fight Over Where We Meet and Other Mundane Madness

by Charles F. Vuotto Jr.

As practitioners, we know that it is easy to get sidetracked and dwell on issues that are mundane instead of meaningful to the client. Those situations do nothing to move the litigation forward and often worsen the animosity between parties, and even between counsel. Taking the high ground is not just a slogan; it should be a basic tenet of the civility in the practice of law.

Everyone has surely experienced the following situation on at least one occasion: In the course of representing a client in a matrimonial action, you and your adversary agree that a four-way settlement conference may be helpful. You are the first to offer your office as the location for the meeting, along with suggested dates. Your adversary responds by selecting one or more dates and, notwithstanding your initial invitation to use your office, insists the meeting must occur at his office. You discuss the issue with your client and make the wise choice not to fight over where the initial meeting occurs, but you explain to your adversary that in fairness, if multiple office meetings are to occur, they should be alternated between your respective offices.

The next meeting is scheduled and your adversary objects to coming to your office.

Sometimes the objection is that your office is out-of-county or your office is further from the courthouse than his office. Sometimes he argues that his client does not want to pay for him to travel to your office (although it is perfectly fine for your client to pay for you to travel to every meeting). Sometimes your adversary provides no explanation whatsoever. Simply put, unless there are very good reasons (not the ones just mentioned), this mundane madness should stop. It is neither professional nor courteous. It is quite common for each attorney's office to be different distances from the courthouse. It is often common for certain attorneys to practice out-of-county. Further, one party not wanting to incur the cost of his or her attorney traveling should not be a basis to insist that all meetings occur in one attorney's office. Although the wisest choice may be to just concede the issue and move on, no attorney should be placed in that situation.

Common courtesy and professionalism dictate that if multiple office meetings are going to occur in a case, those meetings should be alternated unless there is a very good reason to do otherwise. Very good reasons do not include that one's office is in county or closer to the courthouse, or that a client simply does not want to bear the costs of his or her attorney traveling. A good reason may be that one attorney's office does not have adequate conference room space, or that both parties find one office more convenient than the other. In the latter case, shouldn't both parties share the cost of the traveling attorney?

These issues create unnecessary litigation costs for parties. Although it would be nice if these issues did not need to be discussed and written about, the reality is that these mundane disputes occur from time to time and are counter-productive to the resolution of the client's case.

There are other examples of mundane madness that clog up attorney time. For example, I have heard of disputes about simultaneous exchanges of case information statements, or who goes first when taking a deposition, or arguing about a nominal amount of unreimbursed medical expenses when the costs of attorney time are quadruple the contested amounts.

These mundane disputes bring to mind the fight over the size and shape of the table to be used at the Paris peace talks during the Vietnam War. The table debate went on for a long while, and the various proposals were well-documented in the press. The North Vietnamese wanted a big circular table, where all the parties had a seat. The South Vietnamese wanted a big rectangular table, so that both sides would face each other. The toughest issue was that Saigon and the Vietcong wouldn't sit at the same table. They ended up with North and

South sitting at a circular table, with the other parties (Vietcong, U.S.) having smaller square tables around the periphery.[1] Let's hope that we never stoop so low. To quote Rodney King, "Can't we all just get along?"

Endnote

1. https://answers.yahoo.com/question/index?qid=20061209171016AAcxAtc

Executive Editor's Column

So Long to 'Check the Box' Pleadings in FD Matters? Perhaps the Long-Awaited End is Near

by Ronald Lieberman

Practitioners long rued the day in 2011 when the Administrative Office of the Courts enacted systematic changes in the way that non-dissolution proceedings were handled by the family part.[1] Those changes created what the Appellate Division in *R.K. v. D.L.*[2] called "'check the box' form pleadings"[3] with numerous restrictions on how non-dissolution proceedings were handled as compared to dissolution proceedings, potentially affecting due process and other constitutional rights of non-dissolution litigants.[4]

Since Sept. 2011, practitioners have been confined to using homogenous pleadings geared toward *pro se* litigants to address non-dissolution/FD matters, with little room for explanatory statements or complementary exhibits because of the creation of mandatory uniform complaint forms. There was no differentiation between actions initiated by a *pro se* litigant or a litigant represented by counsel. The recent decision of *R.K.*, which, for the first time, leveled some not-so-subtle criticism at the current FD process, may now lead to a long-awaited return to advocacy in initial pleadings in FD matters.

In *R.K.*, family tragedy gave rise to a grandparents visitation action. Through counsel, the plaintiff grandparents sought to initiate a complaint for grandparent visitation, but their filing of an attorney-drafted complaint was rejected because they did not use the mandatory unvarying complaint form.[5] Attorney-drafted complaints were being rejected for filing by the clerk's office as a matter of policy.[6] The Appellate Division took the opportunity to underscore the systemic problems with the FD process.

The Appellate Division noted that non-dissolution matters are to be considered summary actions without the benefit of discovery pursuant to the directive from the Administrative Office of the Courts.[7] However, the Appellate Division then held that "a complaint seeking grandparent visitation as the principal form of relief should not be automatically treated by the Family Part as a summary action requiring expedited resolution, merely because it bears an FD docket number."[8] Furthermore, the court noted that a summary action "can be inconsistent with sound principles of judicial case management, and potentially inhibit the grandparents' due process rights to prosecute their case in a manner likely to produce a sustainable adjudicative outcome."[9]

As rights afforded to grandparents in a custody and parenting time action against biological or adoptive parents have been significantly curtailed,[10] the *R.K.* case begs the question: why would only grandparents be entitled to such a modification of the FD mandates listed in Rule 5:4-4, and not other litigants?

That question of fairness came to light when the Appellate Division in *R.K.* mentioned the effects on due process implicated by the FD process:

> As a matter of sound principles of judicial case management and consistent with rudimentary notions of due process, a verified complaint prepared by an attorney, seeking grandparent visitation as the only form of relief, should not be rejected by the Family Part as facially deficient for filing, merely because it was not presented using a standardized form complaint intended to be used primarily by pro se litigants as a means of facilitating their access to the court.[11]

The *R.K.* court further found that "a litigant should not be penalized for retaining an experienced family law attorney to present their case to the court in the form of a professionally drafted pleading."[12] Should not that due process protection be extended to all custody matters under the non-dissolution docket?

As the Appellate Division held in *R.K.*, it is a matter of "basic respect to the legal profession" to believe "that a complaint prepared by an attorney contains a far

more comprehensive presentation of the facts and legal principles involved in a case than a standardized form document…At the very least, an attorney-drafted pleading should be treated no differently than one prepared by a pro se litigant."[13] The Appellate Division thoughtfully, and thankfully, recognized that rejecting complaints prepared by attorneys outside the standardized format "displays a disrespect for the work-product of professionally trained and highly experienced family law attorneys…A policy that automatically rejects attorney-drafted pleadings ironically makes sound judicial management of these kinds of cases harder."[14]

Further, the *R.K.* court pronounced that grandparent visitation matters would no longer be considered summary, but instead would now be labeled "as a contested case" and be referred "for individualized case management by a Family Part judge" with specific detail regarding which actions the family part judge should then undertake when managing that case.[15]

The language set forth above from *R.K.* can and, in the author's opinion, should easily be read to apply to FD matters other than grandparent visitation cases, such as relocation cases, initial determination of custody, and changes in custody. Why would latitude be provided in grandparent visitation cases but not relocation matters? The rights afforded to the two parents in a relocation litigation are greater than the rights afforded to grandparents. Further, relocation cases are among the most "difficult and often heart-wrenching decisions"[16] because the left-behind parent will face a reduction in quantity if not quality of parenting time, through no fault of his or her own. Moreover, best interests is not the standard in grandparent visitation cases,[17] but is the standard in all other custody matters. Should not the best interests of a child be handled in ways other than a summary, check the box, standardized format? Yet, as presently constituted relocation cases are summary and now grandparent visitation matters are not. That dichotomy cannot stand.

The movement away from Directive 08-11 in non-dissolution cases should be extended from grandparent visitation matters to all matters where the best interests of a child is the legal standard. All non-dissolution cases involving custody with the best interests of the child as the legal standard are ill-suited for summary proceedings. Effective and meaningful advocacy, especially in areas involving the best interests of children, cannot be done appropriately in form pleadings and with check the box homogenous papers. There should be discovery, exploration of mediation, decisions about *pendente lite* relief, determinations about any stipulations, opportunities to retain experts, and calendaring of plenary hearing dates in those best interests cases. Summary actions should be limited to child support matters only where child support guidelines worksheets are being performed and income is available or can be imputed.

As the Appellate Division in *R.K.* held:

> Family-related disputes are even more stressful and emotionally debilitating than other types of civil disputes because they often touch the very core of our most intimate experiences, force us to confront our most difficult moments, and require us to reveal the most private details of our lives.[18]

It is hoped that the Administrative Office of the Courts reads *R.K.* and in short order issues a directive that revamps the well-intended but ill-suited current FD process in all matters where the best interests of the child is the legal standard. ■

Endnotes

1. Directive 08-11 issued on Sept. 2, 2011, by Judge Glenn A. Grant, Acting Administrative Director of the Courts.
2. 434 N.J. Super. 113 (App. Div. 2014).
3. *Id*. at 130.
4. Ronald G. Lieberman, Esq., A Critical Review of our Current FD Process is Warranted, 33 *N.J. Family Lawyer* 6 (No. 4., Feb. 2013).
5. *R.K.*, *supra* note 2, at 134.
6. *Id*.
7. *Id*. at 131.
8. *Id*. at 133.
9. *Id*.
10. *Moriarty v. Bradt*, 177 N.J. 84, 116-117 (2003), *cert. denied*, 540 U.S.1177 (2004).
11. *R.K.*, *supra* note 2, at 134.
12. *Id*.
13. *Id*.
14. *Id*. at 135-36.
15. *Id*. at 137-38.
16. *Morgan v. Morgan*, 205 N.J. 50, 54 (2011).
17. *Moriarty*, *supra* note 10, at 116.
18. *R.K.*, *supra* note 2, at 139.

Demystifying Misunderstood Evidentiary Concepts—Part One

by Curtis J. Romanowski

Arthur T. Vanderbilt, law dean and New Jersey chief justice (1888-1957), once stated, in describing the qualities of a truly great lawyer: "Unless a lawyer has had experience as an advocate, it is difficult to see how he can be a thoroughly competent counselor, for he will not be able to evaluate his client's cause in terms of the realities of the courtroom… Advocacy is not a gift of the gods. In its trial as well as its appellate aspects, it involves several distinct arts, each of which must be studied and mastered."[1]

"A trial before a court without a jury in the Family Court does not provide a license to dilute the rules of evidence...."[2] "Rules of evidence are the palladium of the judicial process. To suffer intrusions into time tested concepts limiting the use of secondary evidence destroys the vitality of that judicial process...It offends fair play to disregard evidentiary rules guaranteed by the force of common sense derived from human experience. Venerable rules of evidence should not be casually discarded to accommodate convenience and speed in the gathering and presentation of facts or evidence."[3]

In fact, the law of evidence is the only thing that stands between a litigant and denial of due process of law on the basis of information that lacks in validity at some level. Unlike the rules of court, where "any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice,"[4] the rules of evidence may not ordinarily be relaxed in the absence of specific authority, either within the rules themselves or in statutes.[5] In fact, where the rules of court and the rules of evidence conflict regarding the admissibility of certain evidence, the rules of evidence should control, because they were enacted through the joint participation of the three principal branches of government and cannot, therefore, be circumvented by the Supreme Court acting alone under its rule-making power.[6]

Forty-one states now have evidence codes patterned directly after the federal rules. New Jersey is among them. Readers are encouraged to examine the New Jersey Rules of Evidence (N.J.R.E.) and the Federal Rules of Evidence (Fed. R. Evid.) side by side, in order to appreciate some of the differences, since they are similar, yet not identical.

Never Question the Relevance of Truth, But Always Question the Truth of Relevance

Relevancy is the basic requirement of evidence. It is the minimal test that all evidence must pass before it may be considered by the trier of fact. Evidence must possess logical relevance, that is, some probative worth, or it will be excluded.[7] In determining whether an item of evidence is relevant, judges look to experience and logic. There is no legal formula for accomplishing this. It is, quite simply, the judge's call. Determining relevance is, however, a legal question; the judge's determination on that point is not entitled to deference.[8]

"All relevant evidence is admissible [except as otherwise provided in the N.J.R.E. or by law]."[9] From a logical perspective, the rule regarding relevance is intended to bring a measure of logic and focus to the trial process. That being said, how many times have experienced judges been heard asking in disgust, "Just where are we going with this?" This is unfortunate, since in the author's view, hearing a question like this emanating from the bench reflects a serious skill issue on the part of the examining attorney.

Questioning witnesses about undisputed elements should be kept to a bare minimum. Stipulations should be entered into prior to trial or requests for admissions[10] should be served. If, on the other hand, witnesses are being questioned about facts in dispute, the following patterns of plausible inference[11] have proven extremely useful to the author in sharpening the pencil of inquiry:

Meta Pattern: Probability—This is the likelihood that something will occur again based on its past performance (measured by occurrences divided by opportunities). In practice, this means the more something occurs, the more it is believed it will occur again; a *propensity*.[12] This is by far the most frequently applied pattern. By contrast, if something that is not very probable occurs, it tends to

validate the cause and effect belief that predicted it.

The focus in both instances is on developing the *belief*. In the first instance, as something is noticed as happening more than once, it is natural to start speculating about what cause or condition might have brought it about. A belief then emerges about the cause and effect relationship, which is strengthened with every recurrence. In the second instance, a preexisting unsupported *hunch* is validated and elevated to a belief because it predicted that something truly unusual, non-routine or out of character was about to happen, and it did. The pattern is akin to inductive reasoning, where broad generalizations are made from specific observations. It has its place in the scientific method and is used to form hypotheses and theories.

Verification of a Consequence—If a particular belief (B) implies a particular consequence (C), and that consequence is verified, then it makes the belief more plausible; however, it does not prove it. The degree of plausibility will be stronger if there is a lack of other probable causes. That is, *if* B implies C *and* C is true, *then* B is more credible. This pattern anticipates: 1) successive verification of several consequences, as well as 2) verification of an improbable consequence (an extreme).

This pattern is closely related to the first, but focuses instead on *occurrences* or *consequences*. In this pattern, the beliefs are already established and are being tested. The belief is tested to satisfaction either by *repeating the experiment* through verification of multiple consequences, or by confirming a highly unlikely or extreme result. This pattern is at the heart of hypothesis testing and related to deductive reasoning, which is used to apply hypotheses and theories to specific situations. It also satisfies the scientific requirement of falsifiability, which strives for questioning hypotheses instead of proving them.[13]

Contingency—If a belief (B) presupposes (or requires as a pre-condition) some event or phenomenon, and this contingent event (C) is verified, then it makes the belief more plausible. The degree of plausibility will be stronger if the contingent phenomenon would not probably occur, in and of itself. *If* B presupposes C *and* C is true, *then* B is more credible. This pattern is synonymous with the concept of circumstantial evidence.

Inference from Analogy—A belief (B) is more plausible if an analogous conjecture (A) is proven true. If the analogy cannot be shown to be true, but it can be shown to be credible, then it still increases the plausibility of the analogous belief. *If* B is analogous to A *and* A is true, *then* B is more credible. This pattern is not only used to relate the facts of the matter to existing case law, it is also instrumental in creating persuasive rhetoric.

Disprove the Converse—The plausibility of a belief (B) increases if a rival conjecture (C) is disproved. *If* B is competing with C *and* C is false, *then* B is more credible. Determining which party has been the primary custodial parent is an example of this pattern's application.

Comparison with Random—This is a corollary to disprove the converse. If a belief can be shown to predict a particular result with better than random accuracy, then it is more credible. A noncustodial parent's belief that the children will inexplicably become ill whenever they are scheduled to visit with them is illustrative.

Relevance, while at the very heart of the power of persuasion in the courtroom, often yields to that which the client deems important to address or, even worse, to the lawyer's need to be *sensational*. Both can be huge, distracting errors. Discernment in this area relates most keenly to convincing a judge to favorably listen at trial. The author would venture that any lawyer, even one otherwise weak in the laws of evidence, will make a favorable impression on whatever judge he or she stands before, merely by scrupulously sticking to what is relevant, and doing so in a compelling, story-telling manner.

If the Evidence I'm Attempting to Introduce was Not Prejudicial to My Adversary, I Wouldn't Have Bothered

No less a judicial personage than Learned Hand has said of the limiting instruction that it foists upon the jury "a mental gymnastic which is beyond, not only their powers, but anybody[] else['s]."[14] No human being can do this. It contradicts everything known about schema, decision realization, and the human cognitive process. A quarter century later, Hand referred to such an instruction as a "placebo" because it does "violence to all our habitual ways of thinking."[15]

Assuming that Judge Hand would include judges in the realm of "anybody else," the notion of limiting the use to which evidence is put is equally specious in bench trials as in jury cases. That being said, practitioners must be ever vigilant when it comes to preventing inappropriate evidence from slipping into consideration. Beyond prevention, it becomes quite difficult to un-ring the dented bell of cognition.

Under N.J.R.E. 402, all relevant evidence is admissible. However, even relevant evidence can be excluded

from consideration by the fact finder under certain circumstances. Under N.J.R.E. 403:

> Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.

In this context, "jury" is synonymous with "judge," while "prejudice" denotes the risk that the admission of the evidence will tempt the judge to decide the case on an improper basis. "In exercising its discretion on this question, the trial judge must rely upon his experience, knowledge and understanding of human conduct and motivation."[16] But what if the judge perceives the evidence or testimony prior to ruling, or even after?[17] Doesn't this leave Judge Hand's *mental gymnastic* problem?

While excluding relevant evidence on Rule 403 grounds is helpful, the broader strategic mission must extend to containing the detrimental effects of all damaging evidence, whatever the grounds for objection. This includes taking steps to facilitate the court's recollection of earlier evidential rulings that were helpful to the case, or proximate to the court's deliberations, findings and conclusions.

There is at least one relatively recent case where the trial judge made the correct evidentiary ruling, but then apparently forgot having done so, continuing on to consider previously excluded evidence. Quoting from *Morgan*, the New Jersey Supreme Court made reference to the trial court's letter opinion:[18]

> Because Dr. Wolf–Mehlman based her conclusions regarding psychometric testing almost exclusively on her conversations with Dr. Dyer, the trial court sustained a hearsay objection. In ruling, however, the court went on to recount what Dr. Dyer had said to Dr. Wolf–Mehlman, word for word, as if it was Dr. Wolf–Mehlman's own opinion.[19]

Ideally, such properly excluded evidence should be made quite salient to the judge in summation, much like a curative instruction to a jury, so that it can be purposefully and consciously excluded from the court's decision-making process. By understanding the proper treatment of preliminary questions of admissibility, practitioners can better frame the task of strategically *encapsulating* damaging evidence.

Preliminary Questions of Admissibility; a Less Constrained Terrain

As N.J.R.E. 101(a)(2) notes, "Except as provided by paragraph (a)(1) of this rule [Rule 500 privileges], these rules may be relaxed in the following instances to admit relevant and trustworthy evidence in the interest of justice: …(E) proceedings to determine the admissibility of evidence under these rules or other law." Although the committee commentary to 101(a)(2) notes that "[t]hese exceptions are limited to: [A through E]," the Supreme Court in *Kinsella v. Kinsella,*[20] quoting *Callen v. Gill,*[21] found that the rules may be properly relaxed in child custody cases because the "best interests of the child" take precedence over the due process concerns implicated in the usual adversarial situation.[22]

Furthermore, in cases alleging child abuse or neglect, the rules of evidence are supplemented by statute and court rule.[23] Nevertheless, in *DYFS v. B.M.*[24] it was held that, in order for a report to be admissible under Rule 5:12-4(d), it must comply with N.J.R.E. 803(c)(6). The Court concluded that interpreting the rule "to authorize a more relaxed standard for the admissibility of hearsay evidence in an action for termination of parental rights than applies in other civil litigation would be inconsistent with the procedural protection the Supreme Court has held must be extended to the fact-finding process in an action for termination of parental rights."[25]

> [This brings us to] Rule 104 (a) When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for Rule 403 or a valid claim of privilege….

Attorneys often advance hearsay objections in this context, only to be overruled.[26] This often happens when certifications of other qualified experts are introduced[27] during the course of expert witness qualification, for the proposition that the expert under *voir dire* in *104(a) mode*

had reached his or her conclusions through methods that are not generally accepted (or perhaps eschewed) in the profession,[28] or that the expert was opining beyond his or her professional qualifications.[29] The knowledgeable advocate realizes that hearsay evidence is admissible for the purpose of making the required preliminary determination.[30] Affidavits may likewise be satisfactory evidence on which to base a N.J.R.E. 104(a) determination, with a consequent saving of time and inconvenience.[31]

In order to qualify for a full preliminary hearing under Rule 104(a), where there is a challenge to the admissibility, the challenging party must make a threshold showing that an arguable issue exists regarding the challenged evidence.[32] However, a judge sitting without a jury on a non-criminal matter would appear to have boundless discretion in determining when or if the hearing request will be granted. In fact, there are cases that could be cited to support the general rule that a trial judge should not rule on the admissibility of particular evidence until it is actually offered at trial.[33] This is because—in some, but by no means in all instances—the context and atmosphere of the trial will normally assist the judge in making the proper ruling more expeditiously.[34] The practitioner's task is to identify the evidential issues that make the most strategic sense to handle in advance, and then to make a compelling argument to the judge for permitting it.

Of course, another alternative for parties seeking to keep damaging evidence *encapsulated* is to make a motion *in limine* prior to trial pursuant to guidelines set forth in Rule 104.[35] The *in limine* motion lends itself perfectly to pretrial determinations about the specific law the trial court will apply to a given issue (which determination also aids in the 11th hour settlement of some cases). However, in the context of many exclusionary requests, the *in limine* approach is suboptimal. It might actually create curative opportunities for the adversary that would not otherwise be available. Objections involving insufficient foundation and *net opinions* by experts immediately come to the author's mind.

This is the age of experts, and family law cases are seeing their share, including proponents of *junk science* (which is how practitioners generally refer to the other side's expert). A few years ago, the author had a case where the adversary was offering the opinions of a so-called *mitigation expert*. The witness had written a self-published book. In challenging his qualification, the author offered comments from the book's dust jacket, which explained that his work involved positively spinning a client's profile, primarily in the context of qualifying them for immigration status and reducing their sentences in criminal actions. Upon examination, he was unable to state whether the college that allegedly conferred his Ph.D. in psychology was even American Psychological Association (APA) accredited. Judicial notice was requested of the APA listing of all accredited colleges, where his college was not listed.

His written report was executed on the same day as his one and only interview with his client. He *stenographically* reported everything his client told him as true, in contravention to the convergent data validity principle. He also went on to diagnose the author's client with various personality disorders, including psychopathology, without ever having met him. The only peer-reviewed journals for which he was published were on the topic of facility design. The author cites to this anecdotal example as an instance where, despite the state's liberal posture on qualifying expert witnesses and leaving deficiencies for the weight given the testimony, this witness should not have been permitted to testify, thereby consuming costly resources.

It has been the author's experience that family part judges in New Jersey vary widely on how they will treat Rule 104(a) issues. Some will grant the request for a 104(a) hearing in advance of trial and some will categorically refuse such requests. Others will prefer to intersperse 104(a) segments (like expert witness qualification) within the trial itself.

Of course, the advantages of convening pretrial 104(a) hearings are considerable. By excluding or limiting the scope of expert testimony or eliminating objectionable evidence prior to trial, another opportunity to settle the case, enter into stipulations or reduce the number of issues to be tried is created. There might have been an admissibility dispute between counsel concerning key articles of evidence, where a determination one way or the other would greatly inform the prediction of trial outcome, leaving less to competitive speculation.

When the pre-trial 104(a) hearing results in the disqualification of an expert, limitation on the permissible scope of their testimony, preemption of the expert's reliance on certain data sources,[36] or the inadmissibility of "net opinions,"[37] significant trial and preparation time can be saved. By ascertaining in advance whether expert opinion included in an admissible hearsay statement will be excluded if the declarant has not been produced as

a witness, arrangements can be to secure the necessary witnesses' testimony at trial.[38]

Another advantage is primacy and recency, premised upon the *serial position effect.*[39] By situating key admissibility determinations at the threshold of trial (primacy) and then *reminding* the court of the favorable disposition of those issues in summation (recency), practitioners can help judges optimize their decision-making. Having these determinations made in a discrete hearing or series of hearings, practitioners are able to compartmentalize the experience as well as the record for ease of reference. It also facilitates the flow of the proceedings to follow.

Similarly, the advantages of obtaining pre-trial determination of the admissibility of contested real, demonstrative or documentary evidence should be readily apparent. Compare and contrast this to the arguably inapposite preference of some trial judges to refrain from moving real or documentary proofs into evidence until the conclusion of trial. Respectfully, the author has never understood this approach. In the extreme, the author believes the practice is tantamount to having to wait to see if the murder weapon will be accepted into evidence until the completion of a nine-month trial. More moderately stated, the syntax of this method lends itself to the elicitation of otherwise superfluous oral testimony, while the admissibility issues remain in suspense.

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Endnotes

1. Arthur T. Vanderbilt, The Five Functions of the Lawyer: Service to Clients and the Public, 40 *A.B.A.,* No. 1 (Jan. 1954), p. 31.
2. *Matter of Charles B.,* 83 A.D.2d 575, 577 (Second Dept. 1981).
3. *Wagman v. Bradshaw,* 292 A.D.2d 84, 91 (Second Dept. 2002).
4. N.J. Ct. R. 1:1-2(a).
5. Biunno, Weissbard and Zegas, *Current N.J. Rules of Evidence,* Comment 2 to N.J.R.E. 101(a).
6. *See, e.g. Ramos v. Community Coach,* 229 N.J. Super. 452, 456-458 (App. Div. 1989).
7. Slough, Relevancy Unraveled, 5 *U. Kan. L. Rev.* 1 (1956).
8. *W.J.A. v. D.A.,* 210 N.J. 229, 238 (2012); *N.J. Div. of Youth & Family Servs. v. A.R.,* 419 N.J. Super. 538, 543 (App. Div. 2011).
9. N.J.R.E. 402; *United States v. Shannon,* 137 F.3d 1112 (9th Cir. 1998), overruled in part on other grounds by *United States v. Heredia,* 481 F.3d 1188 (9th Cir. 2007) (in Fed. R. Evid. 401, 402 context).
10. N.J. Ct. R. 4:22-1.
11. G. Polya, *Mathematics and Plausible Reasoning Vol. II, Patterns of Plausible Inference,* Princeton University Press, 1968.
12. *Cf.* N.J.R.E. 404 and 406.
13. *See generally The Logic of Scientific Discovery*, translation of *Logik der Forschung*, London: Hutchinson, 1959.
14. *Nash v. United States*, 54 F.2d 1006, 1007 (2nd Cir. 1932).
15. *Delli Paoli v. United States*, 229 F.2d 319 (2nd Cir. 1956).
16. *State v. M.L.,* 253 N.J. Super. 13, 25 (App. Div. 1991); *State v. Allison,* 208 N.J. Super. 9, 17 (App. Div. 1985); *McCormick on Evidence,* § 185 at 541 (3rd Ed. 1984).
17. *See N.J. Ct. R.* 1:7-3.
18. *Morgan v. Morgan,* 205 N.J. 50 (2011).
19. *Id. at* 59.
20. 150 N.J. 276, 318 (1997).
21. 7 N.J. 312, 318 (1951).
22. *Accord Peregoy v. Peregoy,* 358 N.J. Super. 179, 199 n.14 (App. Div. 2003).
23. *See New Jersey Div. of Youth and Family Servs. v. L.A.,* 357 N.J. Super. 155, 166 (App. Div. 2003).
24. 413 N.J. Super. 118, 132-133 (App. Div. 2010).
25. *See also New Jersey Div. of Youth and Family Servs. v. G.M.,* 198 N.J. 382, 402 (2009); *and see New Jersey Div. of Youth and Family Servs. v. J.Y.,* 352 *N.J. Super.* 245, 259-260, 264-265 (App. Div. 2002).

26. However, the author has recently witnessed more than just a few attorneys objecting to the marking of certain exhibits *for identification.*
27. *See* N.J.R.E. 101(a)(5).
28. *Frye v. United States,* 293 F. 1013 (D.C. Cir.1923); *State v. Harvey,* 151 N.J. 117 (1997).
29. *See* N.J.R.E. 702.
30. *D'Arc v. D'Arc,* 175 N.J. Super. 598, 601-602 (App. Div.), *cert. den.* 85 N.J. 487 (1980), *cert. den.* 451 U.S. 971 (1981); *Hill v. Cochran,* 175 N.J. Super. 542, 546-547 (App. Div. 1980).
31. *See* N.J.R.E. 101(a)(5) and Comment 5 to N.J.R.E. 101(a). *See also State v. Cardone,* 146 N.J. Super. 23, 28 (App. Div. 1976), *cert. den.* 75 N.J. 3 (1977).
32. *See State v. Long,* 119 N.J. 439, 487 (1990) and *State v. Ortiz,* 203 N.J. Super. 518, 522 (App. Div.), *cert. den.* 102 N.J. 335 (1985).
33. *See, e.g. State v. Cary,* 49 N.J. 343, 352 (1967).
34. *State v. Hawthorne,* 49 N.J. 130, 143 (1967); *Berrie v. Berrie,* 252 N.J. Super. 635, 641-642 (App. Div. 1991); *Ratner v. General Motors Corp.,* 241 N.J. Super. 197, 206-207 (App. Div. 1990); *Bellardini v. Krikorian,* 222 N.J. Super. 457, 464 (App. Div. 1988).
35. Goodman, Motions *in limine*, *New Jersey Lawyer* (Winter 1986), p. 30.
36. *See* N.J.R.E. 703.
37. *See Kaplan v. Skoloff & Wolfe, P.C.,* 339 N.J. Super. 97, 103-104 (App. Div. 2001) (expert's report in legal malpractice case constituted net opinion because it offered no evidential support establishing a duty of care, referenced no written authorities or standard practices in the profession, and relied on a single anecdote to support its conclusion).
38. *See* N.J.R.E. 808; *New Jersey Div. of Youth and Family Servs. v. M.C. III,* 201 N.J. 328 (2010); *Clowes v. Terminix Intern., Inc.,* 109 N.J. 575 (1988); *State v. Matulewicz,* 101 N.J. 27 (1985); *In re Cope*, 106 N.J. Super. 336 (App. Div. 1969). *See also Liptak v. Rite Aid, Inc.,* 289 N.J. Super. 199 (App. Div. 1996); *Gunter v. Fischer Scientific American,* 193 N.J. Super. 688 (App. Div. 1984); *Lazorick v. Brown,* 195 N.J. Super. 444 (App. Div. 1984).
39. See Hermann Ebbinghaus, *Memory: A Contribution to Experimental Psychology* translated by Henry A. Ruger and Clara E. Bussenius, Teachers College, Columbia University (1913); James Deese and Roger A. Kaufman, Serial Effects in Recall of Unorganized and Sequentially Organized Verbal Material, *Journal of Experimental Psychology*, Vol. 54(3), 180-87 (Sept. 1957) ; Bennet B. Murdock Jr., The Serial Position Effect of Free Recall, *Journal of Experimental Psychology*, Vol. 64(5), 482-88 (Nov. 1962).

ESI and the Litigation Hold in the Family Part

by Kimberly A. Packman

Since the amendment to the Federal Rules of Civil Procedure (FRCP) in 2006 began to address the discovery of electronically stored information (ESI), technology has come a long way. Just think of all of the new devices you have traded in or acquired over the last seven years, not to mention how many times you may have updated your profile on various social media websites.

Despite the length of time the federal rules have been established, there remains little guidance for the state court litigator, specifically the family law practitioner, regarding the use and preservation of ESI. The courts and legislatures in the various states that have attempted to create their own unique set of rules regarding electronic discovery are hampered by their inability to evolve at the same frenetic pace as technology. Furthermore, despite the state court litigator's more frequent trips to the courthouse, admittedly they are not dealing with the same massive and complex amounts of electronic information as were the corporate litigants and government entities in many of the leading federal cases.

Nevertheless, most state courts, New Jersey included, have adopted some variation of the 2006 amendments to the federal rules. Despite a practitioner's home turf being state court, familiarity with the federal rules relating to the production and preservation of ESI, the New Jersey court rule counterparts, and the benchmark *Zubulake*[1] and *Pension Committee*[2] opinions cannot be overstated.

A Recap of the Federal Rules and State Counterparts

The amendments to FRCP 34 for the first time included electronically stored information as a distinct category of discovery and allowed the requesting party to specify the form of production. New Jersey Court Rule 4:18-1 essentially mirrors the federal rule, including the directive that if the request does not specify the forms for producing ESI, a responding party shall produce the information in a form in which it is ordinarily maintained or in a form reasonably usable.

FRCP 16 and 26 pertain to discovery conferences, initial disclosures and the identification of e-discovery issues. More specifically, FRCP 26(f) requires that the parties "meet and confer" regarding discovery prior to the initial conference with the court and FRCP 16(b) provides a checklist of topics to be discussed with the court, including but not limited to, form and manner of production, cost allocation, retention and preservation issues, and issues regarding relevance, privilege and the need for waivers. Similarly, New Jersey Court Rule 4:5B-2 pertains to case management conferences and provides, in part, that the resulting order may include provisions for disclosure of discovery of ESI and any agreements the parties reach for asserting claims of privilege or protection as trial preparation material after production.

A review of the New Jersey Chancery Division, Family Part Rule 5:5-7 pertaining to case management conferences in civil family actions includes no such reference to ESI. However, the scope and applicability of the Part I and Part V rules are not mutually exclusive. Arguably, the lack of inclusion of this language in Rule 5:5-7 is not intended to exclude the possibility of discovery of ESI in family part matters.

FRCP 26(b)(2)(B) provides that a party need not provide discovery of ESI from sources the party identifies as not reasonably accessible because of undue burden or cost. New Jersey Court Rule 4:10-2(f) includes identical language.

FRCP 33 and New Jersey Court Rule 4:17-4(d) mirror each other and provide a mechanism whereby the party upon whom the request is served can make business records available for inspection to the propounding party in lieu of answering the interrogatory.

FRCP 45(d) and New Jersey Court Rule 1:9-2 pertain to subpoenas and include ESI as material that may be gathered through the use of this discovery tool.

Both FRCP 37(b) and New Jersey Court Rule 4:23-5 outline the sanctions that might befall a litigant who fails to comply with discovery or preserve ESI. Yet each set of rules provides a "safe harbor" in FRCP 37(f) and New Jersey Court Rule 4:24-6 that recognizes the reality of routine deletion of ESI and prohibits the imposition of

sanctions for a failure to produce ESI that was lost as a result of a routine, good faith operation of an ESI system. The discussion becomes whether or not electronic evidence was deleted purposefully or negligently and whether the sanctions for either circumstance should differ.

Preservation of ESI

The preservation of discovery is certainly not a new or novel concept. It is now incumbent upon the family law practitioner to understand technology and be knowledgeable in issues relating to technology.[3] These issues include, but are not limited to, data retention and preservation, data processing, searching and production, privacy and privilege.

It has become abundantly clear that best practices call for the proper management and preservation of ESI, not only during discovery but even before litigation commences. Judge Shira Scheindlin held in *Zubulake* that the duty to preserve evidence relevant to the litigation attaches at the time that litigation is "reasonably anticipated," or "when a party should have known that the evidence may be relevant to future litigation."[4] In other words, it is not necessary for the complaint to have been filed or for discovery to have been propounded for this duty to arise.

New Jersey has adopted this standard. Magistrate Judge Joel Schneider for the United States District Court for the District of New Jersey commented that the duty to preserve relevant evidence "arises not only during litigation but also extends to that period before litigation 'when a party should have known that the evidence may be relevant to future litigation.'"[5]

So when does the knowledge of litigation arise? Arguably, for the family law practitioner, this would occur during the initial consultation. For the litigant, that knowledge might arise even sooner. Many litigants seek the advice of counsel *because* of something they found on the home computer, or on a spouse's phone or a social media website. The potential use of such information during litigation is quite obvious when the information is very often the catalyst, or perhaps the 'last straw,' that led to the individual contacting an attorney. Therefore, a proactive approach to the preservation and production of ESI is required.

The Litigation Hold Letter

A critical first step in managing the ESI in a matter is the issuance of a litigation hold letter. Such a letter consists of written notice to the adversary and, more importantly, to the client, not to destroy or alter any ESI. An effective litigation hold notice to the client should be sent immediately upon representation, particularly if the practitioner is aware of the possible use of ESI, whether helpful or damaging to the client. The client should be advised to remove potentially damaging posts, pictures or statements from their social media websites, but not to destroy these items, lest the attorney and the client expose themselves to bad-faith spoliation penalties.

There is little downside to erring on the side of caution and immediately sending out a letter to the adversary, *pro se* or represented, placing them on notice that ESI exists and that it should not be destroyed because doing so is akin to the spoliation of evidence.

Practice Tip: Drafting a Litigation Hold Letter

So, what should the litigation hold letter say? As each case and each case's ESI is different and factually unique, the litigation hold letter is most effective when it is not a form letter, but rather specifically tailored to the facts of the matter. The letter can be directed to any individual who has access to the relevant information. It should clearly identify the information sought to be preserved and consist of a warning not to destroy the information; a request to preserve the information, even if removed or taken down from a website; and a request to terminate any automatic deletion in the future.

Keep the letter short, easy to understand and interesting enough to hold the reader's attention. Providing a warning of the risks of non-compliance as a result of willful or accidental deletion should satisfy this prerequisite. These risks include penalties in the form of monetary sanctions, counsel fee awards, adverse inferences, summary judgment and dismissal. Unless the practitioner is able to specifically pinpoint a particular incident or moment in time, do not limit preservation by mentioning a specific date.

It is also recommended that the practitioner avoid including information about the litigation, investigation, or the intended use of the document since the letter, if obtained through discovery, could lead to statements or admissions otherwise privileged between counsel and client. Keep in mind that the litigation hold letter, while arguably privileged, may itself be discoverable.[6]

The ongoing obligation bestowed upon counsel to monitor compliance with the litigation hold is best served by the periodic reissuance of the litigation hold letter to the client and the adversary.

Failure to Issue a Litigation Hold Letter

The failure to issue a litigation hold letter originally constituted gross negligence, since the failure was likely to result in the destruction of relevant information.[7] This *per se* negligence was easily proven by demonstrating that a litigation hold letter was never issued, leading to spoliation sanctions. The party alleging the spoliation only needed to demonstrate that a litigation hold was not issued. Whether or not the subject matter of the deleted ESI was relevant, a critical but often difficult to prove prerequisite to obtaining spoliation sanctions, became moot.

In *Chin v. Port Authority of New York & New Jersey*, the Second Circuit rejected this standard and held that the failure to issue a litigation hold letter was one of several factors to be considered by the court in exercising its discretion to issue sanctions.[8] In so doing the *Chin* court stated "the better approach is to consider [the failure to adopt good preservation practices] as one factor" in the determination of whether discovery sanctions should issue.

Good preservation practices? How many family law litigants have any preservation practice at all? Once again, the distinction between the litigants at the federal level and those in the state court arena is accentuated. Litigation hold letters typically are directed to a corporate audience with document retention practices already in place. Being well versed in, and educating the client and the adversary by defining ESI and recommending how to preserve this type of information, is becoming a necessity and not an option.

Regardless of where an attorney practices, the fear of sanctions, with little to no showing of intent or prejudice to the other party, has caused prudent counsel to circulate a litigation hold letter to the proper individuals ensuring the preservation of documents at the earliest possible point.

The United States Courts' Advisory Committee on Civil Rules has proposed various amendments to the Federal Rules of Civil Procedure that if adopted will significantly affect the issuance of sanctions for failure to preserve ESI. Under the proposed rule, negligent behavior would no longer be punishable. Rather, sanctions for spoliation would require a finding that the innocent party was substantially prejudiced and that the failure to preserve was "willful" and in "bad faith."[9] The proposed amendment also identifies five factors for the court to consider when determining when the duty to preserve arose. The effect is a much more difficult standard for the innocent party, the party alleging spoliation, who might not be able to identify exactly what may have been destroyed.

Striking a balance between the willful destruction of evidence as opposed to the negligent and routine deletion of information continues to evolve. One advantage to dealing with ESI in the family part is that the willful destruction of potential evidence is arguably much easier to prove than in the larger federal cases. It is relatively easy to point to deleted text messages or emails and the not-so-coincidental removal of a Facebook page or other social media websites.

Conclusion

With the pervasiveness of technology in everyday life, it is a safe bet that the use of ESI will become even more prevalent in family part matters. Accordingly, a call for more direction and clarity in the state court rules, particularly the family part rules, is not unreasonable.

Fortunately for the family law practitioner, individuals in this age of social media appear to be just as proud of their accomplishments as others are of their shortcomings. Typically, whether intentionally broadcast or sent out over the web by a 'friend,' it is amazing what can be found through a simple search of a client's or an adversary's client's name.

The moral of the story—be diligent. Perform a search of the client's name and the adversary's client's name immediately upon being retained. Become familiar with the types of social media and use of electronic information utilized by the parties. Find out what is out there and accessible without passwords or privacy access codes on social media pages and accounts. Then issue a litigation hold letter to the client and the adversary as proactive protection. The litigation hold letter should become an integral and routine part of any case, to be filed with the regularity of case information statements, insurance affidavits, and the propounding of discovery. Until bright line rules and specified obligations are available, it is better to be safe than sorry. ■

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Endnotes

1. *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).
2. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp.2d 456 (S.D.N.Y. 2010).
3. Comment 8 of ABA Model Rule 1.1: Competence has been amended to reflect that in order to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing education and comply with all continuing education requirements in which the lawyer is subject.
4. *Zubulake*, 220 F.R.D. at 217.
5. *Major Tours, Inc. v. Colorel*, 2009 WL 2413631 *4 (D.N.J. Aug. 4, 22009) *citing Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).
6. *Rambus Inc. v. Infineon Technologies AG*, 220 F.R.D. 264, 270-71, 280-91 (E.D. Va. March 17, 2004) (supported on the grounds of spoliation and the subject matter privilege waiver rule, defendant moved to compel production of documents related to the plaintiff's "document retention, collection, and production of documents"); *Kingsway Financial Services Inc. v. Pricewaterhouse-Coopers LLP*, 2006 WL 1295409 (S.D.N.Y. May 10, 2006)).
7. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d at 465.
8. *Chin v. Port Authority of New York & New Jersey*, Nos. 10-1904-cv(L), 10-2031-cv(XAP), 2012 WL 2760776 (2nd Cir. July 10, 2012).
9. The definition of willfulness and bad faith were open for public comment until Feb. 15, 2014.

Inconvenient Forum Under the New Jersey UCCJEA

by Marisa Lepore Hovanec

Interstate jurisdiction is not an issue typically at the forefront of the New Jersey family law practitioner's mind. Accordingly, it is possible the Appellate Division's recently published decision in *S.B. v. G.M.B.*[1] went unnoticed by many. However, in that decision the Appellate Division shed some light on a portion of the New Jersey Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) that was previously somewhat unclear (*i.e.*, exactly how inconvenient a forum New Jersey must be in order to defeat the exclusive and continuing jurisdiction to which an existing custody case is otherwise entitled pursuant to UCCJEA). As such, the matter is deserving of some attention.

Pursuant to Section 14 of the UCCJEA, a court of this state that has properly made an initial child custody determination consistent with the act has "exclusive, continuing jurisdiction" over the determination until:

> (1) a court of this State determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) a court of this State or a court of another state determines that neither the child, nor a parent, nor any person acting as a parent presently resides in this State.[2]

Notwithstanding the foregoing, pursuant to Section 19 of the UCCJEA, New Jersey may also decline to exercise its jurisdiction at any time if it determines that it is an "inconvenient forum" under the circumstances, and that a court of another state is a more appropriate forum.[3] For that purpose, Section 19 directs that the following eight factors are to be considered:

> (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) the length of time the child has resided outside this State;
>
> (3) the distance between the court in this State and the court in the state that would assume jurisdiction;
>
> (4) the relative financial circumstances of the parties;
>
> (5) any agreement of the parties as to which state should assume jurisdiction;
>
> (6) the nature and location of the evidence required to resolve the pending litigation, including the testimony of the child;
>
> (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) the familiarity of the court of each state with the facts and issues of the pending litigation.[4]

While it was well settled prior to the Appellate Division's decision in *S.B. v. G.M.B.* that a New Jersey court could not decline to exercise jurisdiction pursuant to Section 19 of the UCCJEA without a full analysis of all the foregoing eight factors, it remained somewhat unclear exactly what circumstances would substantiate a refusal to exercise jurisdiction.[5] In light of *S.B. v. G.M.B.*, there is at least some insight into what circumstances do *not* substantiate such a refusal.

In brief, the defendant/wife in *S.B. v. G.M.B.* filed a domestic violence action against the plaintiff/husband in May of 2011 and obtained a final restraining order (FRO) against him in June 2012.[6] The husband pleaded guilty to a third-degree offense with regard to the event that gave rise to the FRO, and in July 2012 began a three-year probationary term.[7]

In the meantime, the parties' marriage was dissolved in May 2012 by way of dual judgment of divorce incorporating the parties' property settlement agreement (PSA).[8] Pursuant to the PSA, the husband consented to the wife removing the children of the marriage to Ontario, Canada, on the condition that New Jersey would retain

exclusive jurisdiction over all matters relating to child custody and parenting time.[9]

The wife moved to Canada with the children in Aug. 2012.[10] In Sept. 2012 the husband moved before the New Jersey trial court to enforce Labor Day parenting time and modify the parenting time location from Canada to New York on the basis that his criminal conviction barred his entry into Canada.[11] While considering the husband's enforcement application, the trial judge made the *sua sponte* finding that New Jersey was "an inconvenient forum within the meaning of N.J.S.A. 2A:34-71" and that it was appropriate for Ontario to exercise jurisdiction. The husband appealed this determination.[12]

Initially, the Appellate Division noted that the question of whether Canada is a more appropriate forum was dispositive, and the record below, did not permit a finding that Canada was a more appropriate forum.[13] More specifically, the Appellate Division held that whereas there was no guarantee the husband, in light of his criminal record, would be permitted to leave New Jersey or enter Canada to participate in court proceedings there, Canada was not an "appropriate forum" for the child custody matter. As such, the Appellate Division reversed the trial court's decision on those grounds.[14]

However, the Appellate Division did not stop its analysis there. Notwithstanding the dispositive nature of its finding that Canada was not an appropriate forum, the Appellate Division also included in its decision a rare analysis of the eight factors set forth in Section 19 of the UCCJEA. In doing so, the Appellate Division made the following notable findings:

> With respect to the second factor, i.e. the length of the children resided outside of New Jersey, the Appellate Division found that the fact that the children had resided outside of New Jersey for only one month at the time of the initial motion highly favored New Jersey retaining jurisdiction;[15]
>
> With respect to the fifth factor, i.e. any agreement of the parties as to which state should assume jurisdiction, the Appellate Division found that the trial judge erred in giving little or no weight to the parties' unambiguous agreement in the PSA that New Jersey would retain exclusive jurisdiction over the case despite the Wife and children moving to Canada since the Wife received valuable consideration – the Husband's consent to the removal – in exchange for that provision;[16]
>
> As to the sixth factor, i.e. the nature and location of the evidence, the Appellate Division found that it would also more likely favor New Jersey retaining jurisdiction because the children spent their entire lives there compared to one month in Canada at the motion;[17]
>
> And, as to the eighth factor, i.e. the familiarity of the court of each state with the facts and issues of the pending litigation, the Appellate Division found this factor to favor New Jersey retaining jurisdiction as well, since the Canadian court had no familiarity with the case while the New Jersey trial judge had presided over and made findings of fact in the domestic violence matter as well as the uncontested divorce hearing.[18]

While *S.B. v. G.M.B.* certainly does not close the case on when New Jersey constitutes an inconvenient forum for purposes of the UCCJEA, its analysis is helpful to family law practitioners and judges in that it may assist them in identifying those cases when it does not. ■

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Endnotes

1. 434 N.J. Super. 463 (App. Div. 2014).
2. N.J.S.A. 2A:34-66.
3. N.J.S.A. 2A:34-71.
4. *Id.*
5. *See, e.g., Horton v. Horton*, 2012 WL 6698732 (N.J. Super. A.D.); *DeVito v. Jones*, 2012 WL 3101313 (N.J. Super. A.D.); *K.E.P. v. M.P.*, 2008 WL 2511794 (N.J. Super. A.D.).
6. 434 N.J. Super. at 468.

7. *Id.*
8. *Id.*
9. *Id.* at 469.
10. *Id.*
11. *Id.* at 469-70.
12. *Id.*
13. *Id.* at 472-3.
14. *Id.*
15. *Id.* at 476.
16. *Id.* at 477.
17. *Id.* at 477-9
18. *Id.* at 479-80.

Commentary: Using Scientific and Clinical Knowledge to Challenge Child Custody Experts—A Rebuttal to C.R. Barbrack Esq.'s Article

by Madelyn Simring Milchman, Eileen A. Kohutis, and Richard S. Diamond

Christopher R. Barbrack's article, "Using Cross-examination to Challenge Child Custody Experts,"[1] which appeared in the Feb. 2013 issue of the *New Jersey Family Lawyer*, calls attention to the risks created by weakly reasoned expert opinions where the connection between the data collected and the recommendations offered is "loosely coupled."[2] The author then goes on to critique the entire child custody evaluation practice based on what he called irresponsible practices and a lack of adequate theoretical and scientific knowledge by practitioners. After voicing the author's personal point of view, the article offered a suggested cross-examination outline, which is based on the author's personal biases and might therefore be misleading, in our opinion, to other practitioners. Conversely, while acknowledging the existence of problems within the field (like any field), we offer a perspective on deconstructing expert opinions through a better understanding of the scientific and clinical epistemologies utilized.[3]

Are Child Custody Evaluations Unethical?

At the commencement of the article's two-pronged analysis, it cites the case of *In the Matter of the Suspension or Revocation of the License of Marsha J. Kleinman, Psy.D.* as "illustrative" of the ways in which child custody evaluators (CCEs) "often do damage in the child custody determination process."[4] We disagree. In fact, Dr. Kleinman's practices evoked a sense of outrage among practitioners engaged in child custody evaluation work. The fact that the New Jersey Board of Psychological Examiners revoked Dr. Kleinman's license is testimony to the consensus in the profession that her conduct was irresponsible and violated law and professional ethics.

Dr. Kleinman is the exception, rather than the rule. The entire profession should not be measured against her, any more than the family law profession should be judged by those who have been sanctioned for unethical or improper practices.

Are Child Custody Evaluations Based on Science?

Second, the article's assertion that there is a lack of theoretical and scientific knowledge to guide child custody evaluators' recommendations is based on out-of-date references. The article bases its critique on Joseph Goldstein, Anna Freud and Albert J. Solnit's *Beyond the Best Interests of the Child*, published in 1973, and Goldstein, Solnit, Sonja Goldstein, and Freud's *The Best Interests of the Child: The Least Detrimental Alternative*, published in 1996. He characterizes these works as "seminal" and justifies his complete disregard of more current research by saying "these authors…discussed all of the major issues that exist today in the child custody arena. These texts are as fresh as if they were written last year."[5] This statement by the author also reflects his personal opinion.

While the article correctly notes that these works shifted the focus from parents' rights to children's needs and that the understanding of children's needs at the time these books were published was based on psychodynamic theory, it then concludes by stating family lawyers today "rarely, if ever come across a (child custody evaluation) that generally and exclusively uses psychodynamic theory."[6] It should be understood that psychodynamic theory as a foundation for child custody recommendations is not the current basis of expert opinions in this arena. Readers should be aware of the seismic shift in the current understanding of the need to base CCEs on scientific methodology, data, and reasoning.[7] Furthermore, today's practitioners are required to follow multiple sets of professional guidelines and standards that inform

child custody evaluators of the procedures necessary to accomplish this shift.

Readers should also be informed that the *Best Interest* books by Solnit and his colleagues are understood as products of their historical moment and cultural context, and are outdated. The appropriate resources to understand the foundations of current CCEs are the best practice guidelines and standards contained in the *Regulations of the N.J. Board of Psychological Examiners*,[8] the American Psychological Association's *Specialty Guidelines for Forensic Psychology*,[9] and the Association of Family and Conciliation Courts' *Model Standards of Practice for Child Custody Evaluation*.[10] These guidelines and standards informed the American Academy of Matrimonial Lawyers' *Child Custody Evaluation Standards*.[11] They all acknowledge the need to relate the evaluation of a particular case to the scientific knowledge that is relevant to that case. Furthermore, authoritative treatises in the field[12] concisely summarize the scientific research that informs these guidelines and standards, and these treatises are readily available to attorneys. They are not scientific articles that require technical expertise in psychology to understand.

Can the Best Interests of the Child be Evaluated Scientifically?

The Barbrack article then sums up by stating that there is no clear theoretical definition or empirical analysis of the "best interests of the child" (BIC) to guide the recommendations of all child custody evaluations.[13] While the aforementioned statement is correct, it is not because the field lacks the knowledge to analyze the impact of various custody options on the child, but because this impact requires a case-dependent analysis of multiple variables interacting with each other and with the broader family and social context, all of which change over time. While it is intrinsically impossible to predict the outcome of such complex variability, it is not impossible to identify the areas of scientific and clinical knowledge that must be considered in crafting a well-reasoned expert opinion.

Indeed, since the New Jersey Board of Psychological Examiners issued *Specialty Guidelines for Psychologists Custody/Visitation Evaluations*,[14] recently incorporated into their *Regulations*,[15] 15 areas of knowledge have been identified: 1) child growth and development; 2) psychological testing; 3) parent-child bonding; 4) scope of parenting; 5) adult development and psychopathology; 6) family functioning; 7) child and family development; 8) child and family psychopathology; 9) impact of divorce or family dissolution on children; and 10) impact of age, gender, race, ethnicity, national origin, language, culture, religion, sexual orientation/identity, disability, and socioeconomic status. When necessary, knowledge in the following five additional areas is identified: 11) physical, sexual or psychological abuse of spouse or children; 12) neglect of children; 13) alcohol or substance abuse that impairs parenting ability; 14) medical/physical/neurological impairment that affects parenting ability; and 15) other areas. Permit holders are not allowed to conduct these evaluations because of these complexities.

Theoretical or empirical attempts to define a BIC standard that would apply broadly to many cases risks reducing this complexity to a few measurable variables that would be expected to be shared by a large number of cases. This may not even be possible without doing grave injustice to the particular characteristics of families and their inherently unpredictable changeability over time in response to equally unpredictable changing circumstances. These opinions always depend on integrating the mass of case-specific facts with the many areas of scientific knowledge that are relevant to understanding the impact of these facts on the children. Such integration is "an amalgam of scientific and clinical expertise, in which multiple kinds of evidence are 'interrelated, interlocked, and intersected in a whole greater than the sum of the parts.'"[16]

Can Tests Assess Good Parenting?

The article's criticism of psychological tests leads to the dismissal of the Rorschach inkblot test, but it does not inform the reader about the nature of the controversy surrounding it, its current status, and the responsible ways in which evaluators may use it. Further, the article refers to the kinetic family drawing as a test when it is not. It is not standardized and has no norms or scores. It is merely an interview procedure, used, if at all, to build rapport with a child. The suggestion that cross-examining attorneys should ask if a test is 100 percent reliable is unreasonable. No test is 100 percent reliable. The article's position that reliability decreases over time ignores some tests whose results are quite stable over time (*e.g.*, intelligence tests) whereas others are quite responsive to circumstances and change considerably over time (*e.g.*, tests of traumatic stress). Finally, there are scientifically valid and reliable measures that are specifically and directly relevant to parenting—such as the Parent Child Relationship Index, the Parenting Stress Index, and the

Child Abuse Potential Inventory—though they are not tests of parenting as a whole.

Parenting, like the BIC standard, is a complex construct. Psychological tests cannot measure parenting directly without reducing its complexity to a few variables. A direct test of parenting would be no more than a static, time-frozen and overly simplified measure that would only represent what the 'average parent' generally does to produce outcomes in the 'average child.'

In contrast, expert opinions about parenting refer to a particular family with a particular history seen at a particular time and in a particular context. They are intrinsically inferential, based on logical and scientific reasoning that integrates multiple areas of scientific and clinical knowledge as they apply to particular case-specific facts. The appropriate role of psychological testing in a CCE is as a tool to generate hypotheses about a particular parent by comparing the parent's test results to the scores considered average, above average, or below average for the particular test. These hypotheses must be tested with case-specific evidence. Clinical tests of personality and psychopathology, such as the Millon Clinical Multiaxial Inventory-III and the Minnesota Multiphasic Personality Inventory-2, are useful to the extent that parenting quality depends on the personalities of the parents and any clinical disorders or symptoms from which they might suffer. They can help an evaluator hypothesize, collect case-specific data, and reason about such issues as: Does this parent's elevated depression score mean he or she is too depressed to take care of his or her child? Is this parent's elevated anxiety score consistent with case-specific data indicating that he or she is making the child too fearful? Is his or her elevated antisocial personality score supported by case-specific evidence that his or her child's moral development is impaired?

Regulations, best practice standards, and professional guidelines all agree that tests used in CCEs should have adequate scientific reliability and validity as measurement instruments. Further, the knowledge on which the test is based should also have adequate scientific reliability and validity. If an evaluator uses a test that has a weak scientific knowledge base or that lacks scientific reliability and validity as a measurement instrument, then that evaluator is practicing inexpertly.

Conclusion

The Barbrack article concludes by lauding the benefits of collaborative or cooperative divorce. These are two alternatives to the litigated divorce. However, these alternatives have their limitations as well, and if the collaborative process breaks down because the parties are unable to resolve their differences with or without the assistance of outside professionals, then they proceed to the litigated process. Experts must have a solid scientific and clinical foundation on which to base their opinions regardless of whether they are advising parents collaboratively, mediating conflicts, or providing expert testimony. The type of legal proceeding does not change the need for trustworthy expert opinions or the legal and ethical mandates to provide them. Barbrack's article favors a collaborative process in order to eliminate or reduce the perceived need for expert evaluations in child custody disputes. However, the article does attorneys a disservice when it misrepresents the nature of CCEs and, as a result, fails to guide their use of mental health expert testimony.

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Endnotes

1. Christopher R. Barbrack, Using Cross-Examination to Challenge Child Custody Experts: A Step Along the Way to a More Productive Use of Psychologists in Resolving Child Custody Disputes, 33 *N.J. Family Lawyer* 4, at 10 (Feb. 2013).
2. *Id.* at 14.
3. M.S. Milchman, 2011, The Roles of Scientific and Clinical Epistemologies in Forensic Mental Health Assessments, *Psychological Injury and Law,* 4(2), 127 -139.
4. Barbrack, *Cross-Examination*, *supra*, at 11.
5. *Id.* at 12.

6. *Id.* at 13.
7. J.W. Gould and D. Martindale, 2007, *The Art and Science of Child Custody Evaluations*, NY: Guilford Press.
8. New Jersey Board of Psychological Examiners, 2013, *Regulations,* Chap. 42, Subchapter 12.
9. American Psychological Association, 2011, *Specialty Guidelines for Forensic Psychology.*
10. Association of Family and Conciliation Courts, 2006, *Model Standards of Practice for Child Custody Evaluation.*
11. American Academy of Matrimonial Lawyers, 2011, *Child Custody Evaluation Standards.*
12. Gould and Martindale; J.R. Flens and L. Drozd (Eds.), 2005, *Psychological Testing In Child Custody Evaluations*, NY: Haworth Press.
13. Barbrack, *Cross Examination*, *supra*, at 12.
14. New Jersey Board of Psychological Examiners, 1993, *Specialty Guidelines for Psychologists Custody/Visitation Evaluations.*
15. New Jersey Board of Psychological Examiners, 2013, *Regulations,* Chap. 42, Subchapter 12, at 68-69.
16. Milchman, 2011, *quoting* Young, 2007, at 51.