New Jersey
Family Lawyer

Vol. 36, No. 1 — September 2015

Chair's Column

Parenting, Lawyering and, Perhaps, Preventing Domestic Violence

by Amanda S. Trigg

In New Jersey and throughout the nation, the longstanding taboo against openly discussing the plague of domestic violence seems to have been lifted. Today, where any of our public or private acts can be easily recorded with the tap of a finger, or captured by lawfully placed security and traffic cameras, it is hard to comprehend how anyone could risk his or her career, livelihood or freedom by impinging upon another person's right to exist without being subjected to assault, threats, harassment, or the multitude of other acts we prohibit pursuant to N.J.S.A. 2C:25-17 *et seq.*

As of June 30, 2015, the legislators seated for the 2014-15 session have introduced 75 bills and resolutions concerning domestic violence. These include proposals to expand our statutory definitions of domestic violence; to change who qualifies for protection under the Prevention of Domestic Violence Act; and to modify how we prosecute, punish and monitor offenders. Among all these quietly sits Assembly Resolution #179, obviously a response to the highly publicized acts of domestic violence by several players of the National Football League. It reads:

> **AN ASSEMBLY RESOLUTION** *urging professional sports leagues and teams to implement a no-tolerance policy concerning domestic violence with severe repercussions.*
>
> **WHEREAS**, *More than 40 million women in the United States have experienced some form of domestic violence in their lifetime and stopping domestic violence is a national priority that requires long-term, meaningful investment; and*
>
> **WHEREAS**, *New Jersey law enforcement agencies reported 70,311 domestic violence offenses in 2011; and*

WHEREAS, *The National Football League (NFL) has recently fallen under scrutiny for its poor handling of domestic violence cases involving some of its players; and*

WHEREAS, *Professional football has been the most popular sport in the United States for nearly 50 years and NFL viewership has been trending upward, making NFL players household names and fueling admiration and ultimately emulation of players' actions by America's youth; and*

WHEREAS, *A national study by the Kaiser Family Foundation examining children's perceptions of athletes' behavior, both on and off the field, found that many children are learning lessons about sports and life from famous athletes, and 73 percent of children surveyed ranked famous athletes among the most admired people in their lives; and*

WHEREAS, *Of the 10 highest rated broadcast television shows in 2013-2014 watched by viewers between the ages of 18 and 49, four were sports-related, evidencing the level of exposure that professional sports leagues enjoy in this country; and*

WHEREAS, *Professional sports leagues and teams must demonstrate to their players, partners, advertisers, fans, and, most importantly, America's youth that domestic violence will not be tolerated in professional sports; and*

WHEREAS, *Professional sports leagues and teams must further demonstrate that they are serious about domestic violence issues and that any individual associated with professional sports committing acts of domestic violence will face immediate and severe punishment; and*

WHEREAS, *It is in the best interest of the citizens and residents of this State for this House to address the alarming rise of domestic violence in professional sports by urging all professional leagues and teams to implement a no-tolerance policy concerning domestic violence and establish severe repercussions for violations of the policy with all monetary fines donated to related victim funds; now, therefore,*

BE IT RESOLVED *by the General Assembly of the State of New Jersey:*

- *1. This House urges all professional sports leagues, including all major and minor leagues and teams, to implement a no-tolerance policy concerning domestic violence with severe repercussions with all monetary fines donated to related victim funds.*
- *2. Copies of this resolution, as filed with the Secretary of State, shall be transmitted by the Clerk of the General Assembly to the Commissioner of the National Football League, the Commissioner of the National Basketball Association, the Commissioner of the National Hockey League, and the Commissioner of Major League Baseball.*

The resolution opens as if its factual basis is the prevalence of domestic violence against women. However, on Oct. 24, 2014, the national conversation became much more gender neutral, due to the publicity surrounding Hope Solo's arrest. Solo, the much admired goalkeeper for the 2015 American Women's soccer team, allegedly committed aggressive acts against her sister and nephew. Charges were pending against her while the 2015 World Cup tournament proceeded, leading to unfavorable comparisons between Solo, who participated fully in her team's games, and other professional athletes who have found themselves suspended, fired, or benched in similar circumstances.

When we talk about the number of high-profile domestic violence cases involving athletes, it is important to be aware that both men and women can and do commit domestic violence. It may be that inappropriate aggression, if not entirely gender neutral, is not just a problem for male athletes, but a problem for athletes more generally. Certainly, the behavior of these athletes does affect children, adolescents and others who seek to emulate their positive qualities while selectively ignoring their foibles and flaws. I believe, however, that placing the blame for violent behavior solely upon the athletes themselves wrongly absolves the rest of us of some legitimate responsibility.

Every day, well-intentioned, proud parents send their children to soccer practice, football games, baseball tournaments, tennis matches and swim meets. It is so widely accepted that children are likely to be involved in extracurricular sports that the basic child support guidelines award presumptively includes the cost of "recreational, exercise or sports equipment."[1] We prioritize physical fitness in our children, and rightfully so. If, however, we deliberately encourage anyone to develop his or her ability to dominate against opponents on the sports field, we have a responsibility to teach that athlete how to manage that prowess off the field. On the field, a well-trained athlete learns how to harness adrenaline and aggres-

sion; we reward him or her with applause, economic benefits and adoration. Who teaches the athlete how to properly control his or her deliberately developed instinct to fight, rather than flee, in the face of a confrontation?

The New Jersey State Bar Association, and specifically the Family Law Section, supports Chief Justice Stuart Rabner's *Ad Hoc* Committee on Domestic Violence,[2] which is presently considering policies and procedures from various perspectives, and will hopefully issue some recommendations to improve the current system. We also support the Legislature's A-2163/S-2481,[3] which would establish a New Jersey Task Force on Domestic Violence to comprehensively study the current law and policies concerning domestic violence and abuse, with the goal of making recommendations for legislation and strategies to create more effective policies.

As of the writing of this column, AJR 179, quoted in its entirety above, has not yet been passed, nor is there a companion resolution in the Senate. However, its message reflects the national conversation around sports, impressionable children, admiration of physical prowess and the need to start talking about how to safely cultivate that power in men and women, starting with our boys and girls. Family law attorneys routinely craft parenting plans to define legal custody insofar as it addresses discipline and therapeutic intervention for children, who may craft elaborate parenting schedules to accommodate schedules for sports enthusiasts and prodigies. When children have impairments that we classify as 'special needs,' we customize a parenting plan. We can, and should, do the same for our child athletes, who deserve no less than a candid assessment of their needs if they are to become successful, productive and responsible adults, on and off their playing field of choice. ■

Endnotes

1. N.J. Rules of Court, Appendix IX-A, para. 8.
2. https://www.judiciary.state.nj.us/pressrel/2015/pr150217a.pdf.
3. http://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A2163http://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A2163.

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.

Outgoing Chair's Column

I Truly Am One Lucky Girl!

by Jeralyn L. Lawrence

It is truly bittersweet to end my term as chair of the Family Law Section of the New Jersey State Bar Association, a position I had looked forward to for many years. As my installation as chair grew near in May 2014, I knew the job was going to be a lot of hard work and a tremendous amount of responsibility. I saw the challenge of balancing hours at my desk versus the hours necessary to commit to the section. What I did not fully anticipate was the reward I would reap from this experience. It has certainly been rewarding in the sense of personal satisfaction, without a doubt, but the greatest reward has been the experience of working with the extraordinary team of talented and committed members and affiliates of our section. It is an experience I will treasure forever.

As I take my seat as immediate past chair of our section and watch our new chair, Amanda S. Trigg, oversee the 2015-2016 term, I cannot help but reflect on the many successes of the last year and admire the dedication of our members in continuing to positively impact the lives of our clients and their families. I look forward to watching our section progress in the same vein this coming year and years to follow, with all the spirit and enthusiasm we have demonstrated thus far.

As many of you know, this past year the section celebrated its 50th anniversary and honored its 44 previous chairs for their leadership and love of our section. We owe an immense debt of gratitude to our previous chairs for taking a small, intimate section and working to ensure its success and growth. Without their enduring advocacy of our section, and the influence they have had on its members, I truly believe we would not be the amazing section we are today. There is no doubt we are a collection of eccentric, brilliant, hardworking, and sometimes even over-worked professionals, who have built our livelihood around the betterment of the practice of law in our state. To be named the 45th chair of this remarkable section, and to be able to sit among these esteemed and prestigious individuals, is an accomplishment I wear with much pride, and one I still find surreal.

This year, we honored Madeline Marzano-Lesnevich with the prestigious Saul A. Tischler Lifetime Achievement Award for all she has done for our treasured section. We recognized the Honorable Thomas H. Dilts, J.S.C. (Ret.), with the Eugene Serpentelli Award during our Annual Meeting in Atlantic City, honoring his many generous contributions to the practice of family law. On behalf of the section, I congratulate these recipients on their awards and thank them for their valuable involvement with the section.

It was a privilege to be a part of some of the unique events the section enjoyed this past year, such as the New Jersey State Bar Association's Mid-Year Meeting in Paris, where the section hosted two seminars and coordinated a section lunch on a riverboat on the Seine River, as well as a scavenger hunt.

The Family Law Symposium also proved to be a great success. Several hundred of our colleagues gathered and spent the bulk of the weekend together, nourishing our spirits with friendship and collegiality, and our brains with discussions of a multitude of contemporary and cutting-edge family law topics. It was an honor to coordinate and moderate this year's symposium, as it allowed me to advance the platform I set my heart and sights on completing as chair of the Family Law Section during my term. Our time was spent broaching topics consistent with the overall objective of facilitating change in certain significant areas of law, and it was exciting to see my vision coming full circle with the remarkable presentations by the panelists. I was truly inspired by the passion, commitment and interest of all of the speakers at the Family Law Symposium, and wish to thank each of them again for their contributions and insight related to such challenging issues.

Further into the year, a group of over 300 of our members, sponsors, family and friends traveled to Key West, Florida, for our section's Annual Retreat and enjoyed the opportunity to nurture and build our precious business relationships and friendships. This retreat, which

was our most attended to date, helped bring us closer on both professional and personal levels. Planning the retreat in Key West was a labor of love. My memories of the trip will last a lifetime. During the retreat, the officers were delighted to bestow this year's Wally Award on Lizanne Ceconi and Kim Rennie for embodying the motto of our section—work hard, play hard.

In a more local event, many female members of the Executive Committee, as well as its sponsors and contributors, gathered to discuss Sheryl Sandberg's book, *Lean In: Women, Work and the Will to Lead*. This event was coordinated with the intent to discuss and appreciate the female perspective and challenges of our practice. Accomplishing more than just that, we shared some laughs and some tears, as we got to know each other a little better and share the stresses of our work-life balance, which were not only relatable, but inspiring to those who are often met with roadblocks in the struggle to find such a balance.

This year, we also lobbied actively with members of the Legislature and testified in Trenton to enact statutes that would positively affect our practice and to meaningfully impact pending bills. We worked to maintain a political presence and build close relationships with members of the Legislature to mutually benefit our platforms. Of great significance during my term was the enactment of the new alimony statute on Sept. 10, 2014. This was a Herculean task, celebrated by many of our members and advocates, to change New Jersey's alimony laws. We must thank our state's legislators for their hard work and dedication over the course of many months to achieve a final product that was ultimately enacted into law. No one person was single-handedly responsible for these labors. Rather, we owe a collective recognition to our coalition of steadfast, tireless and determined professionals I am honored to be associated with. I recall endless days and sleepless nights for members of our section, especially my fellow officers, devoted to seeing this process through. But all of the angst pales in comparison to the culmination of those efforts on Sept. 10, 2014, and the feeling of having played a part in such significant change will live with me forever.

Another remarkably proud moment for our section also came on Sept. 10, 2014, when the New Jersey Family Collaborative Law Act was signed into law. Collaborative divorce is a kinder, gentler, child-focused way to divorce, and to have a statute recognizing the process in New Jersey is extremely significant and meaningful to me, personally.

In an effort to continue to integrate politics into our profession, the section's publication, the *New Jersey Family Lawyer*, agreed to feature a new column entitled the *Legislative Corner*, in which members of our Legislature are interviewed by our officers or editors. This provides our readers with insight into the legislator's position on pending legislation, already enacted law, and other informative topics for a personal glimpse into the goals of our state's politicians. The *New Jersey Family Lawyer* continues to publish a terrific periodical, and this year's editions were remarkable. I thank the entire editorial board, especially Charles F. Vuotto Jr. and Ronald G. Lieberman, for all their efforts on our behalf.

The section continues to dedicate much time and effort in the legislative ballpark, working tirelessly in drafting both an interstate relocation statute and a college contribution statute. When I reflect on this past year, these two statutes are the endeavors of which I am most proud. To have a vision of two substantive areas of the law that certainly required change, and then to appoint committees to review the law and draft legislation, allowing the Executive Committee to review and revise the legislation and reach consensus, and to finally lobby this legislation in Trenton, was a thrill. These two statutes are the epitome of the power and strength of our section, and examples of what we must do whenever we identify problematic areas in our profession. It is imperative that we identify issues, speak up, and work together to fix what negatively impacts all of us, making this practice better in the process. Our section does this effectively, and we must continue to have a voice in the legislative process.

Fortunately, Assemblyman Troy Singleton has sponsored both our college contribution statute and our interstate relocation statute. Senators Peter Barnes and Loretta Weinberg will be the Senate sponsors for the college contribution statute, and Senator Barnes will sponsor the relocation bill. We are well on our way of effectuating change in these two substantive areas of law. Without question, this upcoming year will be just as prosperous and successful as the last, with (hopefully) the enactment of these two pivotal statutes drafted by our section. We extend a heartfelt thank-you to Assemblyman Singleton, and Senators Barnes and Weinberg for continuing to support our mutual objectives, goals, and desires to improve the practice of family law. Another heartfelt thank-you goes to Derek M. Freed, Robin C. Bogan, and the College Contribution Sub-Committee, as well as Ronald G. Lieberman, Sheryl Seiden, and the Relocation

Sub-Committee, for drafting these two bills for our practice with much diligence and care.

This past year, the section played a noteworthy role in proposing changes to the Court Rules and Evidence Rules, and drafting Court Rules pertaining to arbitration. Many of the rules we proposed or provided input on have now been implemented and have become part of the fabric of our practice. With much credit to our Children's Rights Sub-Committee, we are also awaiting, from the Administrative Office of the Courts, the implementation of the Kids Count Program into the Parent Education Program currently mandated by the family court. Our gratitude goes to the many sub-committees of the Executive Committee for generating thorough and comprehensive reports, and dedicating time to see these advancements through.

Not only has the section contributed significantly in the political realm, we continue to contribute our time and resources to very valuable affiliations. Whether volunteering our time through early settlement panels, serving as economic mediators and custody mediators, or giving generously to charitable organizations such as Lawyers Feeding New Jersey or the Children's Hope Initiative, we never falter in our commitment, to fulfill our reputation as a generous and proud organization. The success of the section is dependent on its membership and, particularly, the efforts of those who volunteer their time and efforts to preserve the good nature of our organization. Our members and affiliates deserve the credit for making this a good year for the section.

Our section would not be the success it is without our overwhelmingly generous sponsors. Not only do our sponsors allow us to coordinate and organize incredibly meaningful events, they provide the opportunity to integrate professions and build relationships and resources we could not otherwise achieve. This year, the section held a cocktail party for sponsors to demonstrate our appreciation for the opportunity to continue to cultivate such valuable relationships. We thank all the sponsors, particularly our sponsors for Key West, specifically, EisnerAmper, LLP; David Landau & Associates; Len, Cindy and Matt Rossine; LaRocca Hornik Rosen Greenberg & Blaha; Norris McLaughlin & Marcus, PA; SAX/BST; WithumSmith+Brown, PC; Financial Research Associates; Friedman, LLP; Marcum, LLP; The Sweeney Group at Morgan Stanley; Wiss & Company, LLP; Breakwater Title Agency, LLC; Cowan Gunteski & Co., PA; Paritz & Company, PA; R.I.C.H. Planning Group, LLC; Rosenberg Rich Baker Berman & Company; Rotenberg Meril Solomon Bertiger & Guttilla; Shimalla Wechsler Lepp & D'Onofrio, LLP; Smolin Lupin & Co., PA; The Bianchi Law Group, LLC; The Falcon Financial Group, LLC; The Principal Financial Group; The Tomaro Financial Group and USI Affinity, for making many of our events possible, and for enhancing them with their attendance and unbridled support.

As my term as chair closes, it is with a heavy heart that I say goodbye to one of the most meaningful experiences of my career. The opportunity to participate in, and in some instances organize, the activities held by the section this past year has been so gratifying to my practice, my family, and my life. The section has enhanced my vision for our profession more than I thought possible, and I believe has become the vessel for change in the practice of family law. I owe a debt of gratitude to my fellow officers of the section—Amanda S. Trigg, Timothy F. McGoughran, Stephanie F. Hagan, Michael A. Weinberg, Brian Schwartz, and Sheryl Seiden— who supported me in my duties and responsibilities as chair. I also wish to thank the entire Family Law Executive Committee, which never hesitated to tackle an objective or call to action. I would like to thank the members of our section who continue to support the section year-to-year and make up an organization I am proud to be a part of. I also thank the staff of the New Jersey State Bar Association, especially Denise Gallo, for assisting, coordinating, and organizing many events for the Family Law Section, as their diligence and expertise enhanced any event under their leadership.

I have commented in earlier columns about what I perceive to be the extraordinary collegiality and professionalism of the Family Law Section. No effort, act or experience this past year has altered my opinion regarding the members who populate our section. It has been an honor to serve as chair, and a privilege to watch the section grow in both quantity and vitality over the years. To be affiliated with such a group is an experience I will not soon forget. Thank you for your unconditional support, encouragement, participation and commitment to our section. I cannot imagine a more diplomatic legacy with which to be associated. I look forward to continuing to work with each of you and to foster the relationships I have made through the Family Law Section for many years to come. For having had this experience, I truly am one lucky girl. ■

Editor-in-Chief's Column

Increased Cost and Complexity Regarding Gold-Sealed Judgments

by Charles F. Vuotto Jr.

Within this issue of the *New Jersey Family Lawyer* is a notice to the bar dated Nov. 3, 2014, indicating that due to the revision of the Family Division filing fees pursuant to Rule 1:43 and N.J.S.A. 2B:1-7, all certified copies require a payment of $25. As a result, attorneys and self-represented litigants will no longer receive gold-sealed copies of the final judgment of divorce or qualified domestic relations order (QDRO) without paying a fee. A courtesy non-certified copy will be provided at no cost, however.

Aside from the additional cost to clients, one major problem with this change in protocol is the added time and expense associated with counsel's involvement in assisting clients after uncontested hearings in obtaining a gold-sealed copy of the judgment of divorce. For instance, in order to obtain a gold-sealed copy of the judgment of divorce, at the conclusion of the uncontested hearing, the parties (and presumably their counsel) must leave the courtroom, go to the finance unit, wait in line to make payment, and then, after payment has been made, return to the courtroom or the judge's chambers and present a receipt in order to obtain the gold-sealed copy. This process will usually involve waiting at not only the finance unit, but also waiting while attempting to catch the eye of courtroom personnel to make the request for the copy, which may mean either interrupting a current proceeding or waiting until the proceeding is concluded. In the alternative, at any time, in person or via mail, the parties may report to or mail a written request to the matrimonial intake unit with a check or money order to obtain a certified copy.

In either of these instances, the workload of the court staff will be increased. Under the current practice, a judge's assistant conforms copies of the orders and is able to certify the copies as true because that assistant has created the copies. Once the chain of custody is broken, court staff asked to later certify a copy as a true copy will have to review it against the original (which may or may not be readily accessible) in order to properly do his or her job.

This additional procedure will not only increase the time and aggravation for litigants and their counsel in obtaining certified gold-sealed copies of judgments of divorce after uncontested hearings, but also will increase the cost due to the $25 fee and the cost associated with counsel billing them to assist in this process. It will also place added burdens on the court and its staff.

It is respectfully suggested that there are several ways this process could be modified to avoid the problems set forth above. For example, the $25 fee could be added to the initial filing fee when a dissolution action is filed. Alternatively, if the court is compelled to assess a $25 filing fee when placing the gold seal on the final judgment of divorce, the cost could be charged to the superior court filing fee accounts established by many firms. Union County appears to be following this procedure by asking attorneys to complete a form prior to the uncontested hearing with their superior court filing fee account number so the parties can receive the gold seal at the time of the uncontested hearing.

Any avenue in which the clients have the option to 'prepay' the $25 filing fee would certainly save time and money for clients at the time a final judgment is entered. For the cases that are settled prior to a court appearance, the proposed final judgment of divorce can be submitted in advance of the uncontested hearing, the $25 fee can be advanced, and the 'wait time' associated with obtaining the gold-sealed final judgment of divorce (and attendant counsel fees) can be avoided. Regarding qualified domestic relations orders, the parties and/or counsel should submit the fee with their request for the gold-sealed copy.

It must also be noted that charging $25 for a certified gold-sealed copy of a final judgment of divorce seems excessive to the author. However, in reality, the cost is going to be much more, as stated above. Going from the

judge's courtroom at the end of the uncontested hearing to the finance unit, waiting in line, paying the fee and then returning to the judge's chambers or courtroom with the receipt, will conservatively add an hour to each client's counsel fee simply to attempt to obtain a gold seal. Thus, cumulatively, the clients will pay anywhere between a few hundred dollars to a thousand dollars, all for a $25 gold seal.

Although the aforementioned concerns consider litigants represented by counsel, the new procedure will also affect *pro se* litigants, who may be impatient with the process. Not realizing the importance of a gold seal on a final judgment of divorce, many *pro se* litigants might avoid the process and leave the courthouse with an uncertified copy, which is essentially useless in the event retirement assets need to be divided or a spouse seeks to revert to a prior name, get remarried or address other circumstances in which a gold-sealed judgment would be necessary.

On a separate note, the author believes the filing fee for a substitution of attorney or representation letter appears to be unfair. For example, clients will be charged $35 simply because their lawyer's firm changes names. This adds a financial burden upon clients who, in many cases, already have difficulty paying for their attorneys.

In conclusion, the author is aware that Jeralyn L. Lawrence, immediate past chair of the NJSBA Family Law Section, has written to Thomas H. Prol, president-elect of the NJSBA, to seek his assistance in addressing these concerns. It is the author's hope that Prol can address these rules successfully with the Supreme Court, and conserve costs on behalf of all clients and the Judiciary. ■

The author would like to thank Jeralyn L. Lawrence (immediate past chair of the Family Law Section of the NJSBA), as well as Noel S. Tonneman and Cheryl E. Connors, of Tonneman, Vuotto, Enis & White, LLC, for their assistance with this column.

NOTICE TO THE BAR

Rule 1:43-Fees Established Pursuant to N.J.S.A. 2B:1-7 and Filing Procedures - EFFECTIVE Nov. 17, 2014

On October 31, 2014, the Supreme Court adopted Rule 1:43 ("Filing and Other Fees Established Pursuant to N.J.S.A. 2B: 1-7"), setting out the schedule of those filing fees and other fees payable to the court revised or established as authorized by N.J.S.A. 2B:1-7 (L. 2014, c. 31, s. 12), to be effective November 17, 2014. The Court's Order and new Rule 1:43 are published with this notice.

In addition to providing notice as to the revised fees, this notice also sets forth the filing procedures associated with applying the fees for documents received after business hours beginning on November 14, 2014. Documents requiring a fee set forth in Rule 1:43 that are received by the Judiciary in person or through the mail after 4:30 p.m. on Friday, November 14, 2014 will be given a filed date of November 17, 2014 and will be required to pay the new fee amount. Documents received on or after November 17, 2014 also will be required to pay the new fee amount. Documents with incorrect fees will be returned to the sender by mail, pursuant to Rule 1:5-6(c), as "received not filed".

Documents electronically filed through the Judiciary's electronic filing systems (JEFIS, eData, eCourts) that are electronically received after 4:30 p.m. on November 14, 2014 will automatically be given a filed date of November 17, 2014 and will be required to pay the new fee amount. Documents electronically received on or after November 17, 2014 also will be required to pay the new fee amount. Documents with incorrect fees will be returned to the sender electronically, pursuant to Rule 1:5-6(c), as "received not filed."

Questions regarding this notice may be directed to Michelle M. Smith, Clerk of the Superior Court, at michelle.smith@judiciary.state.nj.us or (609) 984-4200.

_____

HON. GLENN A. GRANT, J.A.D.
Acting Administrative Director of the Courts

Dated: November 3, 2014

SUPREME COURT OF NEW JERSEY

It is ORDERED that Rule 1:43 ("Filing and Other Fees Established Pursuant to N.J.S.A.28: 1-7"), setting out the schedule of filing fees and other fees payable to the court revised or established as authorized by N.J.S.A. 28:1-7 (L. 2014, c. 31, s. 12), is adopted to be effective November 17, 2014.

For the Court,

Chief Justice

Dated: October 31, 2014

Rule 1 :43. Filing and Other Fees Established Pursuant to N.J.S.A. 28:1 -7 [Corrected 11-07-14)

The following filing fees and other fees payable to the court, revised and supplemented by the Supreme Court in accordance with N.J.S.A. 28:1-7, are established effective November 17, 2014. All other filing fees or other fees not here listed are unchanged by the process set forth in N.J.S.A. 28:1-7.

All State Courts

Fee Subject		Authority
Affixing Court Seal	$10.00	N.J.S.A. 22A:2-20
Exemplification	$50.00	N.J.S.A. 22A:2-20
Certified Copy of any document	$15.00	N.J.S.A. 22A:2-19
Non-Party Notice of Appearance Fee (except for Special Civil Part)	$50.00	N.J.S.A. 22A:2-37.1
Recording Instruments not otherwise provided for	$35.00	N.J.S.A. 22A:2-7

Supreme Court

Fee Subject		Authority
Notice of Appeal or Cross Appeal; Petition and Cross Petition	$250.00	N.J.S.A. 22A:2-1
For Certification or Review		
First paper filed if not in a pending case or if made after judgment entered	$50.00	N.J.S.A. 22A:2-1

Superior Court, Appellate Division

Fee Subject		Authority
Notice of Appeal or Cross Appeal	$250.00	N.J.S.A. 22A:2-5
First paper filed if not in a pending case or if made after judgment entered	$50.00	N.J.S.A. 22A:2-5

Superior Court, Law Division, Civil Part

Fee Subject		Authority
Complaint	$250.00	N.J.S.A. 22A:2-6
Filing of First Paper by Anyone Other than the Plaintiff	$175.00	N.J.S.A. 22A:2-6
Motion	$50.00	N.J.S.A. 22A:2-6
Complaint in Multicounty Litigation	$250.00	N.J.S.A. 22A:2-6
Answer in Multicounty Litigation	$175.00	N.J.S.A. 22A:2-6
Motion in Multicounty Litigation	$50.00	N.J.S.A. 22A:2-6
Civil Law Writs	$50.00	N.J.S.A. 22A:2-7
Order to Show Cause	$50.00	N.J.S.A. 22A:2-6
Assignment of Judgment (not an allowable taxed cost)	$35.00	N.J.S.A. 22A:2-7
Warrant to Satisfy Judgment (not an allowable taxed cost)	$50.00	N.J.S.A. 22A:2-7
Wage Garnishment	$35.00	N.J.S.A. 22A:2-7
Warrant for Arrest	$35.00	N.J.S.A. 22A:2-7

Superior Court, Law Division, Special Civil Part

Fee Subject		Authority
DC Motion (including Orders to Show Cause)	$25.00	
Small Claims Complaint	$35.00	N.J.S.A. 22A:2-37.1
Tenancy Complaint	$50.00	N.J.S.A. 22A:2-37.1
Initial Pleading for more than $3000	$75.00	N.J.S.A. 22A:2-37.1
Initial Pleading for $3000 or less	$50.00	N.J.S.A. 22A:2-37.1
Writ of execution or replevin	$35.00	N.J.S.A. 22A:2-37.1
Warrant of Removal	$35.00	N.J.S.A. 22A:2-37.1
Wage Garnishment	$35.00	N.J.S.A. 22A:2-37.1
Warrant for Arrest	$35.00	N.J.S.A. 22A:2-37.1
DC Answer to Complaint or 3rd Party Complaint	$30.00	N.J.S.A. 22A:2-37.1
Filing of Appearance	$30.00	N.J.S.A. 22A:2-37.1
DC or Small Claims Jury Demand	$100.00	N.J.S.A. 22A:2-37.1
Answer with crossclaim, counterclaim, 3rd party claim for $3000 or less	$50.00	N.J.S.A. 22A:2-37.1
Answer with crossclaim, counterclaim, 3rd party claim greater than $3000	$75.00	N.J.S.A. 22A:2-37.1
Small Claims Counterclaim	$30.00	
Filing Complaint or Other Initial Pleading	$5.00	N.J.S.A. 22A:2-37.1
Against Each Additional Party Reservice of Summons or Other Original Process by Court Officer: One Defendant (Plus Mileage)	$3.00	N.J.S.A. 22A:2-37.1
Reservice of Summons or Other Original Process by Court Officer: Each Additional Defendant (Plus Mileage)	$5.00	N.J.S.A. 22A:2-37.1
Writ of Possession	$35.00	N.J.S.A. 22A:2-37.1
Assignment of Judgment (not an allowable taxed cost)	$35.00	
Warrant to Satisfy with docketed judgment (not an allowable taxed cost)	$35.00	
Warrant to Satisfy without docketed judgment (not an allowable taxed cost)	$15.00	
Advertising Property under execution or any order	$50.00	N.J.S.A. 22A:2-37.1
Selling Property under execution or any order	$50.00	N.J.S.A. 22A:2-37.1

Superior Court. Law Division. Chancery Part General Equity

Fee Subject	Fee	Authority
Filing Complaint	$250.00	N.J.S.A. 22A:2-12 and -13
Filing Answer	$175.00	N.J.S.A. 22A:2-12 and -13
Order to Show Cause (General Equity and Foreclosure)	$50.00	N.J.S.A. 22A:2-12 and -13
Filing Motion	$50.00	N.J.S.A. 22A:2-12 and -13
Foreclosure Complaint	$250.00	N.J.S.A. 22A:2-12 and -13
Foreclosure Answer	$175.00	N.J.S.A. 22A:2-12 and -13
Foreclosure Motion	$50.00	N.J.S.A. 22A:2-12 and -13
Foreclosure Writs	$50.00	
Foreclosure Assignments	$35.00	N.J.S.A. 22A:2-12 and -13

Superior Court. Law Division. Chancery Part Family

Fee Subject		Authority
Filing Divorce Complaint (all types)	$300.00 $275.00 to court	N.J.S.A. 22A:2-12 and 52:27D-43.24a
Filing First Responsive Pleading in Dissolution Matter	$175.00	N.J.S.A. 22A:2-12
Motions in Dissolution Matters	$50.00	N.J.S.A. 22A:2-12
Order to Show Cause (Dissolution Only)	$50.00	N.J.S.A. 22A:2-6
Post-disposition Application/Motion in Non-Dissolution Matters	$25.00	

Superior Court. Law Division. Criminal Part

Fee Subject		Authority
Expungement Application	$75.00	N.J.S.A. 2C:52-29, 22A:2-25
Permit to Carry Handgun	$50.00	N.J.S.A. 2C:58-4
Municipal Court Appeal	$100.00	N.J.S.A. 22A:2-27
Appeal of denial of permit to purchase handgun or firearms purchaser ID card	$50.00	
Bail/Post/Discharge	$50.00	N.J.S.A. 22A:2-29

Superior Court, Probation Division

Fee Subject		Authority
Probation Out-of-State Supervision Fee (probationer transferred to NJ from another state/jurisdiction for supervision in NJ)	$25.00 per month	Interstate Compact for Adult Offender Supervision (ICAOS), Rule 4.107(b)(1)

Superior Court Clerk's Office

Fee Subject		Authority
Docketing or recording judgment		
in the judgment and order docket	$35.00	N.J.S.A. 22A:2-7
Recording assignment, subordination, cancellation, postponement, or release of judgment	$35.00	N.J.S.A. 22A:2-7
Issuing or recording executions	$35.00	N.J.S.A. 22A:2-7
Issuing or recording any other documents	$35.00	N.J.S.A. 22A:2-7
Signing and issuing a subpoena	$50.00	N.J.S.A. 22A:2-7
Filing all papers related to civil bail	$30.00	N.J.S.A. 22A:2-7 ($5) and 22A:2-29 ($35)
Entering judgment by confession	$50.00	N.J.S.A. 22A:2-7

Tax Court

Fee Subject		
Filing motion in non-small claim, local, or state (small claims remains $0)	$50.00	Court Rule 8:12
Filing fee for non-small claims cases	$250.00 Court Rule 8:12	N.J.S.A. 22A:5-1(a),
Counterclaim in non-small claims cases for one parcel (non-taxing district)	$250.00	Court Rule 8:12
Counterclaim in non-small claims cases by taxing district	$250.00	Court Rule 8:12
Additional contiguous parcel/condo in common ownership for counterclaim by a taxing district in non-small claims cases	$50.00	
Filing fee for state and local property small claims cases	$50.00	
Counterclaim in small claims for one parcel (non-taxing district)	$50.00	Court Rule 8:12
Counterclaim in small claims by taxing district	$50.00	Court Rule 8:12
Additional contiguous parcel/condo in common ownership for counterclaim by a taxing district in small claims	$10.00	Court Rule 8:12

Note: Adopted October 31, 2014 to be effective November 17, 2014.

Executive Editor's Column

Ethical Issues Involving Unrepresented Litigants

by Ronald G. Lieberman

This author recently met with a potential client who had been served with a divorce complaint and an acknowledgment of service from his wife's attorney. Upon review, the acknowledgment of service appeared unusual. It indicated the husband was not only acknowledging service of the divorce complaint, but he was also waiving his right to file a responsive pleading *and* consenting to the entry of a default judgment against him. It was that acknowledgment of service that prompted this column about issues of fairness and advocacy when family law practitioners deal with unrepresented or self-represented litigants.

Treatment of Unrepresented Opponents

It has long been the law of this state that self-represented litigants are not entitled to greater rights than litigants who are represented by counsel.[1] Additionally, all litigants are to be afforded procedural due process and have the judicial system protect their procedural rights.[2] The acknowledgement of service, waiver of the right to file a responsive pleading, and consent to the entry of a default judgment did not seem to be in keeping with the protection of the litigant's due process rights.

The more this author considered this document, the more questions arose. In providing such a document to an unrepresented litigant, was the wife's attorney acting appropriately? Was counsel running afoul of any ethics rules? What if the self-represented litigant contacted that attorney to ask questions about the acknowledgment of service? How, if at all, could the wife's attorney answer these, as well as other questions?

Several states have recently reported a dramatic increase in filed cases where at least one party was self-represented.[3] Given this statistic, family law practitioners will have to face ethical issues relating to the fair treatment of unrepresented opponents.

What exactly does it mean to take unfair advantage of an unrepresented opponent? One viewpoint is that zealous advocacy on behalf of a client requires that an attorney 'take advantage' of an opportunity that is presented, whether it stems from the facts, the law, or the lack of skill or experience of the opposing party. By extension, this argument would ethically permit an attorney to 'take advantage' of a self-represented litigant.

Conversely, one may have the perspective that the Rules of Professional Conduct preclude the exploitation of the ignorance of the law and/or the facts when a litigant is self-represented, as such conduct is prejudicial to the administration of justice.[4] Does the attorney need to clarify his or her interests in the matter, explain how the process works, or even provide notice of the consequences of the document to the unrepresented opponent? When does fairness to the unrepresented opponent begin to serve as a detriment to the attorney's own client?

To most lay people the language of the law is foreign, the procedures are largely unknown, and the substantive principles of the law are beyond their knowledge. When a lawyer confronts an unrepresented opponent, often that lawyer quickly recognizes the unrepresented person does not clearly understand the attorney's role in the process.

Existing ethics rules assume all litigants are represented by lawyers of their own choosing who are responsible to effectively represent their interests. Of the 55 ethics rules in the current Rules of Professional Conduct, three expressly address contact with unrepresented individuals. Only one of these rules truly applies to family law practitioners.

RPC 4.3 applies to all contact with unrepresented persons, and reads:

> Dealing with Unrepresented Person; Employee of Organization: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer

> shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder, or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

This rule prohibits deception about the lawyer's interests; however, it does not require the attorney explain what his or her role is in the process to the self-represented opponent. Instead, an attorney's duty to make reasonable efforts to correct a misunderstanding in his or her role in the litigation only comes about if the unrepresented litigant misunderstands the lawyer's role in the litigation. The trigger to that misunderstanding is not defined in the RPC.[5]

The Rules of Professional Conduct do not seem to protect against overreaching by unscrupulous attorneys who would have an unrepresented opponent sign away his or her right to answer a divorce complaint, while simultaneously consenting to the entry of a default judgment against him or her.

Proposed Changes to the Ethics Rules

As illustrated above, family law practitioners may often find themselves faced with an ethical dilemma when dealing with unrepresented litigants. The attorney must represent his or her own client zealously, but also ensure he or she does not take advantage of the self-represented litigant. One way to resolve this problem would be through a modification of RPC 4.3. For example, RPC 4.3 could be modified to: 1) direct the attorney to explain his or her role in the legal process; 2) provide general legal information to an unrepresented opponent; and 3) refrain from supplying legal advice to an unrepresented person, other than to suggest the person obtain his or her own lawyer.

The author understands the blurry distinction between providing an unrepresented litigant with information and providing legal advice. Notwithstanding that difficulty, if an attorney explains the process and alternate choices available to the unrepresented opponent *without influencing the choice*, the distinction becomes clearer.

This author's suggested modifications to RPC 4.3 arise out of consideration of the bounds of advocacy from the American Academy of Matrimonial Lawyers, Section 3.2, which provides as follows:

> Once it becomes apparent that another party intends to proceed without a lawyer, the attorney should, at the earliest opportunity, inform the other party in writing as follows:
>
> 1. I am your spouse's lawyer;
> 2. I do not and will not represent you;
> 3. I will at all times look out for your spouse's interests, not yours;
> 4. Any statements I make to you about this case should be taken by you as negotiation or argument on behalf of your spouse and not as advice to you as to your best interests; and
> 5. I urge you to obtain your own lawyer.

The author is mindful that not all self-represented opponents are alike. Some may be sophisticated and able to maneuver through the legal system on their own. Others, though, may be intimidated by the language, processes, and procedures of the legal system. With the suggested modifications to RPC 4.3, an attorney would know that he or she can make certain disclosures to the self-represented litigant without fear of compromising his or her duty toward his or her client.

Conclusion

Luckily, in this author's experience, few family lawyers decide their client's interests are of such importance as to require them to exploit the ignorance of an unrepresented party. Most family lawyers are secure enough in their legal abilities to know that positive results for a client are obtainable without infringing upon the unrepresented litigant's procedural and substantive rights. But, such results need to be obtained professionally and civilly, without taking advantage of a self-represented litigant.

The vast majority of family law practitioners do not need to be told how to behave when dealing with self-represented opponents. Unfortunately, there are a few lawyers who need a reminder, as demonstrated by the

attorney who would have the author's potential client sign away his procedural and substantive rights. The vast majority of family law practitioners treat self-represented opponents with the respect and dignity they deserve. But, there will be a few who do not, thinking that it is in their or their client's best interests not to do so. A modification of RPC 4.3 would go a long way toward restoring needed balance to our legal system.

Endnotes

1. *Rubin v. Rubin*, 188 N.J. Super. 155, 159 (App. Div. 1982).
2. *Ibid*. *See also Midland Funding, LLC v. Alfano*, 433 N.J. Super. 494, 500-01 (App. Div. 2013).
3. http://bottomline.nbcnews.com/_news/2012/08/20/13375779-courts-flooded-withpoorer-americans-representing-themselves?
4. *See* RPC 8.4(C)-(D).
5. The two other Rules of Professional Conduct addressing self-represented litigants have no practical application to the family law practitioner. RPC 1.13 compels an attorney to explain the identity of the client when the attorney realizes the organization's interests conflict with the participants in the organization. RPC 3.8 requires a prosecutor to inform a self-represented criminal defendant that he or she has the right to counsel, but imposes no independent duty on the prosecutor to clarify his or her interest in the case.

Meet the Officers

Chair—Amanda S. Trigg

Amanda S. Trigg is a partner with the law firm of Lesnevich, Marzano-Lesnevich & Trigg, LLC, in Hackensack, where she exclusively practices family law. Trigg is certified by the Supreme Court of New Jersey as a matrimonial law attorney and is a fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers. Prior to becoming an officer of the Family Law Section Executive Committee, she chaired the Legislation Sub-Committee for three years and received the New Jersey State Bar Association's annual advocacy award. She is an associate managing editor of the *New Jersey Family Lawyer*. Trigg served on the Supreme Court of New Jersey's Statewide Bench-Bar Liaison Committee on Family Division Standardization. She frequently moderates and lectures for the Institute for Continuing Legal Education and the New Jersey State Bar Association, and contributes toward continuing legal education presentation for the American Academy of Matrimonial Lawyers. In 2013, 2014 and 2015, *New Jersey Monthly Magazine* honored her as one of the Top 50 Women Lawyers in New Jersey. Trigg earned her B.A. from Brandeis University and her J.D. from Emory University School of Law.

Chair Elect—Timothy F. McGoughran

Timothy F. McGoughran is the founding partner of the Law Office of Timothy F. McGoughran, LLC, where he works with two associate attorneys and retired Superior Court Judge Eugene A. Iadanza. He served as municipal prosecutor for the township of Ocean from 2000 to 2011 and has served as municipal court judge in Ocean Township since Jan. 2012. He is a member of the Family Law Section Executive Committee of the NJSBA as well as the Family Law Committee of the Monmouth County Bar Association. With the Monmouth Bar Association he has served as co-chair of the Family Law Committee (2009-2011) and president of the association (2007-2008), and still serves as a trustee. In addition to the New Jersey State Bar Association Family Law Section Executive Committee, he is a member of the NJSBA Military and Veteran's Affairs Section Executive Committee and Legal Education Committee. He serves as the trustee for Monmouth County on the NJSBA's Board of Trustees for the term of 2013-2017 and presently co-chairs the Meeting Arrangements and Program Committee as well as the Legislation Committee. He has been recognized by the NJSBA with the Distinguished Legislative Service Award in 2010 and 2013, and by the Monmouth Bar Association Family Law Committee with the Family Lawyer of the Year Award in 2012. McGoughran is a regular speaker and presenter at numerous symposiums regarding various facets of law and ethics. He graduated from the University of Pittsburgh with a B.A. in political science in 1982. He graduated from the University of Seton Hall School of Law with a J.D. in 1986.

First Vice Chair—Stephanie Frangos Hagan

Stephanie Frangos Hagan is a named founding partner in the law firm of Donahue, Hagan, Klein & Weisberg, LLC, and has limited her practice exclusively to family law for more than 28 years. She is a graduate of Seton Hall Law School and received an undergraduate degree from Rutgers. She is a frequent lecturer and panelist for the NJSBA/ICLE and the Morris and Union County bar associations on a variety of family law topics, including alimony, child support, custody, equitable distributions, civil unions and other important family law issues. Hagan serves as a blue ribbon panelist for the Essex, Union and Morris County family law early settlement programs and is a court-approved family law mediator and certified by the American Academy of Matrimonial Lawyers as a family law arbitrator. She has been a member of the Executive Committee of the NJSBA Family Law Section for more than 18 years. Hagan was formerly chair of the Morris County District Fee Arbitration Committee, and was installed as an officer of the Morris County Bar Association and as a trustee of the Morris County Bar Foundation in Jan. 2014. She is scheduled to be installed as president of the Morris County Bar Foundation in Jan. 2017 and as president of the Morris County Bar Association in Jan. 2019. She was named one of the Top 50 Female Super Lawyers in 2014 and 2015 and one of the Top 100 Lawyers in 2015.

Second Vice Chair—Michael A. Weinberg

Michael A. Weinberg is co-chair of the family law department of Archer & Greiner. As a partner in the matrimonial department, he concentrates his practice in matrimonial and family law. Weinberg is co-chair of the Camden County Bar Association Family Law Section Executive Committee, and currently serves as an officer on the New Jersey State Bar Association Family Law Executive Committee. He is a matrimonial early settlement panelist for Burlington, Camden and Gloucester counties and has also recently been named as a certified matrimonial attorney by the New Jersey Supreme Court's Board on Attorney Certification.

A master in the Thomas S. Forkin Inns of Court, Weinberg is a former chair of the Membership Committee. He has lectured for ICLE, the American Academy of Matrimonial Lawyers, American Trial Lawyers Association, and the National Business Institute, and has appeared on the television programs "Legal Lines" and "Legally Speaking." A former adjunct professor at Burlington County College, he assisted with the bankruptcy and divorce chapter in the 2002 and 2006 editions of *New Jersey Family Law Practice*.

Weinberg received his B.S. from Bentley College and his J.D., *magna cum laude*, from Capital University Law School, where he was published in the *Law Review* and was a selected member of the 1993 National Moot Court Team. He was a law clerk to the Honorable Charles A. Little.

Secretary—Sheryl J. Seiden

Sheryl J. Seiden is a partner with Ceconi & Cheifetz, LLC, in Summit, where she practices family law exclusively. She graduated *magna cum laude* from New York Law School, where she served as the managing editor of the *New York Law School Law Review.* She received her B.A. in justice from the American University in Washington, D.C., where she graduated *cum laude.* Seiden is licensed to practice law in New Jersey and New York. She is a fellow of the American Academy of Matrimonial Lawyers (AAML). Prior to becoming an officer of the Family Law Section, Seiden served as a co-chair of the Legislative Sub-Committee, and a co-chair for the Young Lawyer Family Law Sub-Committee of the Family Law Section. She is a member of the Union County and Essex County bar associations. She has also volunteered for Partners for Women and Justice and has lectured for the Institute for Continuing Legal Education and Union County Bar Association on family law issues, as well as lecturing at the Family Law Symposium. In Nov. 2014, Seiden argued for AAML *amicus curiae* in *Gnall v Gnall* before the Supreme Court of New Jersey.

Immediate Past Chair—Jeralyn L. Lawrence

Jeralyn L. Lawrence, of Norris McLaughlin & Marcus, P.A. in Bridgewater, devotes her practice to matrimonial, divorce, and family law, and is a trained collaborative lawyer and divorce mediator. She serves as the immediate past chair of the New Jersey State Bar Association Family Law Section, president of the Somerset County Bar Association and a senior editor for the *New Jersey Family Lawyer.* Certified by the Supreme Court of New Jersey as a matrimonial law attorney, she is a fellow, sits on the American Academy of Matrimonial Lawyers Board of Managers and has been certified by the academy as a family law arbitrator. Lawrence serves on the New Jersey Supreme Court District XIII Attorney Ethics Committee, and is a barrister of the Central New Jersey Inns of Court. She is a member of the New Jersey Women Lawyers Association, the New Jersey Supreme Court Matrimonial Certification Committee, the New Jersey Association of Justice, and the New Jersey Association of Professional Mediators. In 2008, 2009, 2010, 2013 and 2014, Lawrence was named as one of the Top 50 Female New Jersey Super Lawyers. She was honored with the NJSBA Distinguished Legislative Service Award in 2007, 2013, and most recently in 2014 for her cumulative and diligent efforts on alimony reform, as well as open adoption records and electronic monitoring on domestic violence. She was a recipient of the 2014 New Jersey Professional Lawyer of the Year Award from the New Jersey Commission on Professionalism in the Law, and was a *New Jersey Law Journal* 2015 Attorney of the Year finalist. Lawrence earned her B.A. from Kean University and her J.D., *summa cum laude*, from Seton Hall University School of Law.

Summer Parenting Time: A Determination Based on a Child's Age, Existing Agreements, and Attempting to Avoid Unnecessary Parental Conflict

by Francesca S. Blanco

When summer arrives, children are naturally excited about the end of another school year and looking forward to enjoying their leisure time. Unfortunately, this exciting time for children brings with it an uncertainty and stress for divorcing or separated parents. Instead of enjoying the summer vacation, parents have to resolve the details of how, when and where the children will spend summer vacation. Attorneys are tasked with trying to assist their clients in amicably resolving summer parenting time issues without the necessity of motion practice. Indeed, given motion practice schedules, as well as the Judiciary's already overburdened calendars, the issue of extended summer parenting time may be moot by the time the motion is even heard and adjudicated.

This article is designed to help practitioners address and resolve summer parenting time-related issues. While some readers may not differentiate these issues from 'regular' parenting time issues, the author has distinguished the concepts for purposes of this article.

The Parenting Time Standards: Best Interests of the Child

While New Jersey remains without a specific parenting time statute,[1] case law provides guidance concerning a child's summer vacation schedule based on factors such as the child's age, health and whether there already exists a written parenting time arrangement. When asked to decide custody and parenting time conflicts, the courts are guided by the best interests of the child.[2] The conditions, subject to which parenting time is granted, are controlled by the best interests of the child.[3] The objecting parent has the burden of proving the proposed parenting time schedule is not in the child's best interest.[4]

The best interests standard focuses on the "safety, happiness, physical, mental and moral welfare of the child."[5] Family lawyers are well aware that parents can and do disagree concerning what is in the child's best interests. Ultimately, if the parties cannot reach an agreement on the issue, a judge, and not a mental health expert or other professional, is charged with determining custody and parenting time issues based on a child's best interests.[6]

No Bright-Line Test to Determine What Constitutes an Appropriate Amount of Summer Vacation Parenting Time

How much summer vacation time is appropriate for a given child? The answer depends on many factors, such as a child's age in connection with the desired amount of parenting time. It is also directly related to the degree of parental conflict.

In *Cipriani v. Fontana*, the Appellate Division found that the trial court engaged in a "mistaken exercise of discretion" by allowing eight consecutive weeks of summer vacation time between a three-year-old child and the non-custodial parent.[7] In reaching its decision, the Appellate Division noted that none of the five experts testified at the time of trial that it was in the child's best interests to spend that amount of time away from either parent.[8] This, despite the trial court trying to minimize the child's "discomfort" in traveling between her mother's home in New Jersey and the father's home in Pennsylvania by permitting the mother to visit with the child in Pennsylvania during the extended summer vacation.[9] The trial court expressed concern that the child had not previously spent this much time away from the custodial parent.[10] At issue was also the child's health condition, and how that might impact upon extended parenting time.[11]

Family law attorneys facing these kinds of summer parenting time issues should not wait until the last minute to seek court intervention, and should discuss retaining experts to address whether extended summer parenting time is in a child's best interests.

As highlighted above, factors such as a child's age, special circumstances/needs, and whether the amount of summer parenting time sought is reasonable based on the parents' prior practices are relevant to the court's analysis of whether extended summer parenting time is in a particular child's best interests. For instance, in *Kennedy-Gallagher v. Sadoff* the Appellate Division found the trial court had discretion to reduce a parent's summer parenting time from three weeks to two weeks.[12] In making its determination, the trial court, consistent with the parties' prior agreement, held that a nearly 13-year-old child should not be forced to fly between New Jersey and Florida for parenting time with her father while chaperoned by a stranger, when the child expressed reluctance to doing so.[13]

Prior Parenting Time Agreements Matter

What happens when a child's age-related events are reasonably contemplated at the time of the parties' written agreement and one parent later seeks to shorten the extended summer parenting time with the other parent because he or she is experiencing what the author refers to as ESPTR (extended summer parenting time remorse)? The Appellate Division addressed this scenario in *Rosenthal v. Whyte*.[14] In *Rosenthal*, the parents of a five-year-old child agreed that a non-relocating parent would enjoy five consecutive weeks of summer parenting time.[15] The Appellate Division upheld the applicable portions of the parties' matrimonial settlement agreement, because the moving party failed to show the agreement was no longer in the child's best interests.[16] The *Rosenthal* court found the parties' contemplation that the child would enter kindergarten on a date certain nullified the contesting party's ability to make a *prima facie* showing of a change in circumstances.[17] As such, the parties' agreement was enforced.[18]

When drafting parenting time agreements, family lawyers should consider addressing extended summer parenting time not only in the year of the particular agreement, but also future time modifications based on the child's age, and other activities (such as summer camp and, perhaps, summer school). Parents should consider their child's wants and needs as the child matures in age, engages in extracurricular activities, and socializes with friends and peers. Disagreements over extended summer vacation time should not be another opportunity for parents to battle for their own sake, rather than for the child's best interests.

Simply stated, a child's age and circumstances matter, and should be considered when developing a written parenting time plan. When considering extended summer parenting time terms for older children (for example, children ages eight, nine or 10), perhaps a non-modifiable provision of a certain number of consecutive or non-consecutive weeks should be included in the subject agreement. Parents of younger children (for example, infants to age five), may consider including an extended summer parenting time schedule, and expressly agree to revisit the issue as the child ages.

Where appropriate, parents facing extended summer parenting time issues should consider alternatives to litigation, such as mediation or collaboration. While the matter will likely be referred to mediation if litigation is commenced, parents may consider private mediation prior to seeking court involvement. If there is already a parenting time agreement in effect, it should be carefully reviewed to determine if the parents have already agreed that any disputes must be mediated (or collaborated) before either party may file a motion.

Plenary Hearing May be Warranted if Disputed Issues of Material Fact Exist

The trial court is often faced with evaluating whether a plenary hearing is needed each time a parent seeks to modify extended summer parenting time over the other parent's objection. In *Rosenthal*, a parent agreed to his ex-wife's relocation from New Jersey to New York so long as he, in part, could have five consecutive weeks of parenting time.[19] Two years after the parties reached this agreement, the former spouse filed an application seeking to reduce her ex-husband's parenting time.[20] The mother contended that a change in circumstances had occurred warranting modification of the summer parenting time schedule, as the parties' five-year-old child was entering kindergarten and had become involved in extracurricular activities.[21] In denying the mother's request, the Appellate Division held, "A party seeking modification of a judgment, incorporating a PSA regarding custody or visitation, must meet the burden of showing changed circumstances and that the agreement is not now in the best interests of the child."[22] The Appellate Division also noted that where the events are foreseeable and specifically contemplated when the agreement was executed, those same events do not constitute a *prima facie* change in circumstances warranting a review of the parties' agreement.[23] Further, the court determined that a plenary

hearing to address the summer parenting time issues was not warranted because there was not a sufficient showing in the moving papers of disputed issues of material, as opposed to insignificant facts.[24]

By contrast, in *Millan v. Fair* the Appellate Division held that a plenary hearing was required to determine an appropriate parenting time schedule for a seven-year-old child, though the issues did not specifically involve extended vacation time.[25] *Millan* makes mention of the subject parent's enjoying parenting time on the weekend preceding a Monday holiday to continue parenting time until 6 p.m. of the Monday holiday, and the parties were to "split" Christmas Eve through Dec. 26 and the remainder of the Christmas school break.[26] Where the trial court imposed its own views concerning children's schedules and "the transition time from the weekend to Monday" and the impact on the parties' child, the appellate court, while recognizing that "[e]stablishing a parenting time schedule is a matter of judicial discretion, based upon a determination of the child's best interests," remanded the matter for a plenary hearing because there was not "sufficient credible evidence to sustain the exercise of the court's discretion."[27] The *Millan* court notes that "trial judges must avoid the imposition of personal views on subjects as a substitute for necessary, fact-finding which must only be grounded in the sufficient credible evidence presented in the record."[28] Finally, the court noted that a mediator cannot act as an evaluator pursuant to Rule 1:40-5(a)(3), and a court-appointed custody or parenting time evaluator cannot also serve in the dual role of parenting coordinator.[29]

Court Rules that May Impact Summer Vacation Parenting Time Issues

When facing extended summer vacation parenting time issues, practitioners should familiarize themselves with the following rules:

Rule 5:8-1 provides practical guidance and direction concerning "genuine and substantial" custody and/or parenting time issues.[30] It states, "the court shall refer the case to mediation in accordance with the provisions of R. 1:40-5 [Mediation in Family Part Matters]."[31] In other words, if parents disagree over one week of time, for example, it would likely not qualify as a 'genuine and substantial' parenting time issue. Also, practitioners should carefully consider the importance of advance planning. Genuine and substantial parenting time issues and motion practice should not wait until the last minute. Parents should know in advance of filing any motions with the court that their matter "shall" be referred to mediation.[32]

Rule 5:8-5(a) requires that in any family action in which the parties cannot agree to a custody or parenting time/visitation arrangement, the parties must each submit a custody and parenting time/visitation plan to the court no later than 75 days after the last responsive pleading, which the court shall consider in awarding custody and fixing a parenting time or visitation schedule.[33] This rule is helpful because it provides both parents with an opportunity to tell the court what they want by way of parenting time, including extended summer parenting time.[34] Compliance with this rule also compels both parents to clarify in writing what each seeks.[35] The hope is that the parents' act of exchanging custody and parenting time/visitation plans will initiate and/or facilitate meaningful settlement discussions between them.

Per Rule 5:8-5, a custody and parenting time/visitation plan "shall include but shall not be limited by the following factors:

1. Address of the parties.
2. Employment of the parties.
3. Type of custody requested with the reasons for selecting the type of custody.
   - **a)** Joint legal custody with one parent having primary residential care.
   - **b)** Joint physical custody.
   - **c)** Sole custody to one parent, parenting time/visitation to the other.
   - **d)** Other custodial arrangement.
4. Specific schedule as to parenting time/visitation including, but not limited to, weeknights, weekends, vacations, legal holidays, religious holidays, school vacations, birthdays and special occasions (family outings, extracurricular activities and religious services).
5. Access to medical [and] school records.
6. Impact if there is to be a contemplated change of residence by a parent.
7. Participation in making decisions regarding the child(ren).
8. Any other pertinent information.[36]

Critically, in addition to setting forth the requirements of a custody and parenting time/visitation plan, Rule 5:8-5(b) requires the court to "set out in its order or judgment fully and specifically all terms and conditions relating to the award of custody and proper support for

the children."[37] Moreover, Rule 5:8-5(c) indicates "failure to comply with the provisions of the Custody and Parenting Time/Visitation Plan may result in the dismissal of the non-complying party's pleadings or the imposition of other sanctions, or both. Dismissed pleadings shall be subject to reinstatement upon such conditions as the court may order."[38] Although failure to comply with Rule 5:8-5(c) 'may' (not shall) result in dismissal of the non-complying party's pleadings, being aware of this particular rule may help the complying parent obtain necessary information.[39] Also, failure to comply may result in a favorable counsel fee award to the compliant parent.

Rule 5:3-3(a) provides, "Whenever the court, in its discretion, concludes that disposition of an issue will be assisted by expert opinion, and, whether or not the parties propose to offer or have offered their own experts' opinions, the court may order any person under its jurisdiction to be examined by a physician, psychiatrist, psychologist or other health or mental health professional designated by it."[40] As discussed earlier, depending upon the circumstances, expert testimony may be required in determining whether it is in the child's best interests to grant or deny a parent's request for extended summer parenting time.

Rule 5:3-3(b) indicates that mental health experts who perform custody/parenting time evaluations shall conduct strictly non-partisan evaluations to arrive at their view of the child's best interests, regardless of who engages them.[41] The experts should consider and include reference to the criteria set forth in N.J.S.A. 9:2-4,[42] as well as any other information or factors they believe are pertinent to each case.[43]

Rule 5:8-6 holds that where the court finds the custody of children is a genuine and substantial issue, it shall set a hearing date to occur no later than six months after the last responsive pleading is filed.[44] The court, in order to protect the children's best interests, is to conduct the custody hearing in a family action prior to a final hearing of the entire family action.[45] As part of the custody hearing, the court may, on its own motion or at a litigant's request, conduct an *in camera* interview with the child(ren).[46] In the absence of good cause, the decision to conduct an interview shall be made before trial.[47] If the court elects not to conduct an interview, it shall place its reasons on the record.[48] If the court elects to conduct an interview, it shall afford counsel the opportunity to submit questions for its use during the interview and shall place on the record its reasons for not asking any submitted questions.[49] A stenographic or recorded record shall be made of each interview in its entirety.[50] Transcripts shall be provided to counsel and the parties upon request and payment for the cost.[51] However, neither parent shall discuss nor reveal the contents of the interview with the children or third parties without the court's permission.[52] Counsel shall have the right to provide the transcript or its contents to any expert retained on the issue of custody.[53] Any judgment or order pursuant to this hearing shall be treated as a final judgment or order for custody.[54]

Conclusion

The primary focus of this article concerns extended summer parenting time issues. The author is hopeful practitioners were reminded of, or have gained a new appreciation for the applicable New Jersey statutes, court rules and case law. As illustrated throughout the article, while it may appear straightforward, upon close scrutiny the issue of summer vacation parenting time can be fraught with many issues. ■

Francesca S. Blanco is the sole member of the Law Offices of Francesca S. Blanco, LLC.

Endnotes

1. The author understands that she is in the minority in disagreeing that the custody factors set forth in N.J.S.A. 9:2-4(c) apply when establishing parenting time schedules.
2. *See Wilke v. Culp*, 196 N.J. Super. 487, 497 (App. Div. 1984), *certif. denied*, 99 N.J. 243 (1985).
3. *See Hallberg v. Hallberg*, 113 N.J. Super. 205, 209 (App. Div. 1971); *L. v. G.*, 203 N.J. Super. 385, 400 (Ch. Div. 1985).
4. *See id*. at 209.
5. *See Fantony v. Fantony*, 21 N.J. 525, 536 (1956).
6. *See Mackowski v. Mackowski*, 317 N.J. Super. 8, 13 (App. Div. 1998).
7. *See Cipriani v. Fontana*, 2014 Unpub. Lexis 951, 30 (App. Div. April 28, 2014).

8. *See id* 31.
9. *See id*. at 34.
10. *See id.*
11. *See id*. at 5.
12. *See Kennedy-Gallagher v. Sadoff*, 2006 N.J. Super. Unpub. Lexis 1835, 13-14 (App. Div. Nov. 20, 2006).
13. *See id*. at 11.
14. *See Rosenthal v. Whyte*, 2011 N.J. Super. Unpub. Lexis 2936 (App. Div., Dec. 5, 2011).
15. *See id*. at 3
16. *See id.* at 9 (*citing Abouzahr v. Matera-Abouzahr*, 361 N.J. Super. 135, 152 (App. Div.), *certif. denied* 178 N.J. 34 (2003)).
17. *See id*. 2011 N.J. Super. Unpub. Lexis 2936 at 10-11.
18. *See id.*
19. *See id*. at 2.
20. *See id*. at 1 and 2.
21. *See id*. at 9.
22. *See id*. at 9 (citations omitted).
23. *See id*. at 10-11.
24. *See id*. at 11-12 (citations omitted).
25. *See Millan v. Fair*, 2007 N.J. Super. Unpub. Lexis 932, 8 (App. Div. Jan. 30, 2007).
26. *See id*. at 5.
27. *See id*. at 8.
28. *See id*. at 11.
29. *See id*. at 12.
30. R. 5:8-1.
31. *Id.*
32. *Id.*
33. R. 5:8-5(a).
34. *See id.*
35. *See id.*
36. *Id.*
37. R. 5:8-5(b).
38. R. 5:8-5(c).
39. *See id.*
40. R. 5:3-3(a).
41. R. 5:3-3(b).
42. N.J.S.A. 9:2-4
43. R. 5:3-3(b).
44. R. 5:8-6.
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *See id.*

The Ins and Outs of Fee Arbitration in New Jersey

by Bonnie C. Frost

Lawyers deserve to be paid for the services they render to their clients. Despite that fact, clients may contest or simply decline payment of the fees they owe to their attorney. In an effort to assist both litigants and lawyers in resolving these fee disputes without either side filing a lawsuit, the New Jersey Supreme Court instituted the concept of fee arbitration. This statewide program is composed of volunteer attorneys and laypeople who serve on local fee arbitration committees that screen and adjudicate fee disputes between an attorney and his or her client.

The Importance of the Fee Arbitration Process in New Jersey

The New Jersey Supreme Court has continuously reaffirmed the importance of the fee arbitration process in the state. Indeed, in 2011, in the case of *In re Saluti*, the New Jersey Supreme Court suspended an attorney from practicing law due to his failure to pay a fee arbitration award, despite the fact that the attorney had filed for bankruptcy protection.[1] In the *Saluti* decision, the Supreme Court stated, "Those who seek the privilege of membership in the legal profession are required to submit to fee arbitration committee proceedings."[2]

Since 1978, fee arbitration committees have been used to promote "public confidence in the bar and the judicial system."[3] Former Chief Justice Robert Wilentz observed:

> If it is true—and we believe it is—that public confidence in the judicial system is as important as the excellence of the system itself, and if it is also true—as we believe it is—that a substantial factor that erodes public confidence is fee disputes, then any equitable method of resolving those in a way that is clearly fair to the client should be adopted....The least we owe to the public is a swift, fair and inexpensive method of resolving fee disputes.[4]

The *Saluti* Court echoed this sentiment, stating "the fee arbitration committee scheme is...important...because it facilitates the expedited resolution of fee disputes between attorneys and clients and fosters public confidence in the legal profession."[5]

In his or her pre-action notice advising a client on an intent to collect an outstanding fee, a lawyer must indicate that the fee arbitration program exists.[6] Notice of a client's right to fee arbitration in a retainer agreement is not a substitute for the 30-day letter advising a client of the fee arbitration process. If the client chooses fee arbitration, all litigation that has begun must cease.

Fee arbitration is a fast, inexpensive, and confidential way of resolving fee disputes. Every attorney should keep detailed time records from the inception of the representation in order to defend his or her fees at a hearing.[7] In family matters, attorneys must bill "no less frequently than once every 90 days."[8]

The Importance of (and Limits to) Retainer Agreements, and Full Written Disclosure

The most important document that *must* be signed by the attorney and the client in every matrimonial matter is the retainer agreement.[9] It is also one of the most important documents reviewed at a fee arbitration hearing. A retainer agreement is a contract between the attorney and the client that will be enforced, as long as its terms are not overreaching. Therefore, any terms that an attorney wants enforced regarding the representation must be included.

RPC 1.5(b) provides, "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation." In *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, the Appellate Division explained the burden each attorney has to present a retainer that sets forth clearly all charges for which a client will be billed.[10] "The written statement required by RPC 1.5(b) must disclose all charges for which the client will be financially responsible."[11] Full and complete disclosure of all charges that may be imposed upon the client is also necessitated by RPC 1.4(c), which reads, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make

informed decisions regarding the representation." The Appellate Division questioned, "If the client does not know what charges and costs beyond the hourly rate he may be exposed to, how can the client be expected to make an informed decision regarding representation?"[12] This obligation regarding retainer agreements in family matters is more fully set out in Rule 5:3-5 (a)(1) through (10). For example, Rule 5:3-5(b) specifically disallows a non-refundable retainer because it could lead to fee overreaching.

Some retainer agreements may include a clause for the parties to arbitrate fee disputes under general arbitration principles. While an arbitration clause is not often seen in matrimonial retainer agreements, it is enforceable only if it clearly states the client nevertheless has an absolute right to fee arbitration and the retainer explains all of the consequences of an election to arbitrate.[13] Such a provision in a retainer agreement does not, however, meet the attorney's obligation to provide notice that a client may avail him or herself of fee arbitration procedure but, "agreements between attorneys and clients generally are enforceable as long as they are fair and reasonable."[14]

The enforceability of specific terms of retainer agreements was addressed in *Hrycak v. Kiernan*.[15] In *Hrycak*, the Appellate Division upheld a clause in a retainer agreement that provided the client would pay an additional attorney's fee if his attorney had to institute litigation to collect a fee that had already been awarded in fee arbitration.[16]

In stark contrast to the Appellate Division's *Hrycak* decision, a trial court held a retainer provision to be *unenforceable* that added one-third of the outstanding legal fees to the client's bill if the attorney was forced to file suit to collect fees.[17] In holding the provision unenforceable, the trial court reasoned that under such an agreement, there is the potential for an attorney to receive an unreasonable fee if little work was necessary to enforce the additional fee claim.[18]

Commencing the Fee Arbitration Process and the Jurisdiction of the Fee Arbitration Committee

To begin fee arbitration, a client must file a request with the secretary of the local fee committee in the county where the lawyer maintains an office and pay a $50 administrative filing fee. Critically, only a client can choose to pursue fee arbitration.[19] Upon receipt of the client's filed fee arbitration request, "A Fee Committee may, in its discretion, decline to arbitrate fee disputes in which persons who are not parties to the arbitration but have an interest that would be substantially affected by the arbitration," or "in which the primary issues in dispute raise substantial legal questions in addition to the basic fee dispute, or if the total fee charged exceeds $100,000."[20]

In the unpublished decision of *Wolkoff v. Larner*, the Appellate Division affirmed the decision of both the fee arbitration committee and the Disciplinary Review Board to decline to hear a fee dispute between a client and her attorney while the matrimonial matter regarding whether or not her spouse would have to contribute to her fees was pending.[21] The *Wolkoff* court stated, "A decision by the Law Division requiring appellant's ex-husband to pay some, or all, of her counsel fees could have mooted some or all of the fee dispute between appellant and [her attorney]....If any fee dispute remained, the Law Division's determination of the reasonableness of [the fee]... even if not binding...could have informed the hearing panel's determination, which similarly must 'be made in accordance with RPC 1.5,'...."[22]

Substantial legal questions (such as those involving attorney malpractice) can also appear in a fee arbitration claim, which may lead the fee arbitration committee to decline to hear the dispute. The committee does not have jurisdiction to decide claims for monetary damages resulting from legal malpractice, although it may consider the quality of services rendered in assessing the reasonableness of the fee pursuant to RPC 1.5.[23]

Fee arbitration committees can refuse to arbitrate fees that total in excess of $100,000; however, there are nuances to this rule. For example, if the attorney has asserted he or she is owed $101,000, arbitration will not be permitted. If the attorney's total fee is $110,000, but the client has paid $25,000, then the fee in dispute amounts to $85,000 and the fee arbitration committee has discretion to decide the dispute. Indeed, because the fee arbitration process is intended to help the parties resolve their fee dispute quickly, a case such as this might be docketed even though the total fee is in excess of $100,000.

There is a time limitation to using the fee arbitration process. The fee arbitration committee does not have jurisdiction to arbitrate a fee in which no attorney services have been rendered for more than six years from the last date services were rendered.[24]

Practical Lessons about Approaching Fee Arbitration

In reviewing these rules, two practical lessons emerge. First, an attorney must be ready to advocate

why a large fee is reasonable in relation to the results obtained, even if the result was not favorable for his or her client. Frequently, family law litigants are upset about the result, and therefore choose not to pay the fee they owe their attorney. They take this position despite the fact that the result was not a reflection of the quality of services the lawyer performed.

Next, attorneys should send out their 30-day pre-action notice to the client shortly after services have been completed if it appears there is a dispute regarding the fee. An attorney should not wait until five years and 11 months has expired to serve a pre-action notice, which would then foreclose a client from pursuing fee arbitration, a process a client may well be hearing about for the first time in the pre-action notice.

The latter practice was addressed in the case of *Nieschmidt Law Office v. Leamann*.[25] In that case, the court noted it was the plaintiff/lawyer who delayed in filing its complaint for fees until the statute of limitations was about to expire, making it impossible for the lawyer to give the required 30-day pre-action notice within the period of time mandated by the rule. The court held that the "imminent" running of the statute of limitations did not excuse the attorney's failure to provide the required notice, and if the statute had run precluding a new notice and an amended complaint, the fee action would be barred.

The Manner in Which Fee Arbitration Occurs after Docketing

Once the fee arbitration secretary dockets the matter, an attorney fee response form is sent to the attorney requesting a response to the allegations, a copy of bills, any written retainer agreement, and any applicable time records. The attorney must serve a copy of the response on the client and pay a $50 administrative filing fee within 20 days after receiving the client's initial request for arbitration.

The attorney may join a third party, and any other "attorney or law firm that the original attorney claims is liable for all or part of the client's claim."[26]

If an attorney believes another attorney or another law firm is liable for all or part of the client's claim for fees, he or she must add the other attorney or law firm to the arbitration in the response. This issue arises when a lawyer changes firms and a client later files a fee arbitration request naming the lawyer at the *new* firm when the work performed and the money collected was with the lawyer's *prior* firm. If the prior law firm is not added, it can be problematic for the lawyer. For example, the fee arbitration panel could determine the lawyer must refund money to a client but the money that was paid for the disputed fees was collected not by the lawyer but by the prior law firm. A lawyer can avoid this problematic scenario by adding his or her prior law firm to the arbitration claim.

Once the client has filed the request and the lawyer has responded, a hearing is scheduled. Usually, one request for an adjournment is granted.

If the dispute involves fees of less than $3,000, the arbitration panel hearing the case may consist of a single member, as long as that member is an attorney. In cases involving fees of $3,000 or more, the matter is heard by a three-member panel, composed of two lawyers and one public member who is not an attorney.

There is no discovery explicitly provided for in the fee arbitration process and, therefore, it is important for lawyers to include as much information as practicable to support the claim for fees in response to the client's initial submission. It would also be beneficial for the attorney to take the file itself to the hearing in case a panel member does not believe a certain amount of work was done on a file. For example, attorneys who specialize in non-family law matters may be the arbitrators and may have no family law experience. In such a circumstance, the attorneys may not understand the amount of work that went into the representation, especially if there are complicated motions, orders to show cause, or appeals.

Lawyers and clients alike can subpoena witnesses to fee arbitration hearings. The committee secretary will issue a subpoena upon request; however, a party must show the information to be subpoenaed is relevant and material for the panel to determine the reasonableness of the fee.

At the hearing, the burden of proof is on the attorney to prove by a preponderance of evidence that the fee charged was reasonable. Therefore, the attorney is the first witness to testify and must be ready to present his or her case. It is important to study the bills that have been sent to the client beforehand, so if an attorney finds a mistake or a duplication of fees it can be pointed out at the beginning of the hearing.

At the hearing, the lawyer may cross-examine the client and the client may cross-examine the lawyer. Each party has a right to be heard, as well as to cross-examine and present witnesses.

The fee arbitration hearing is confidential. Both parties have a right to be present at all times during

the hearings with their attorneys. The rules of evidence need not be observed. All parties to the proceeding will be sworn in, despite the fact that no recording is made. Under special circumstances, the panel may accept testimony of a witness by phone or videoconference.[27]

After the hearing, the panel is required to prepare a written explanation of its determination within 30 days. Unfortunately, this may not always happen and, when it does not, both litigants and attorneys are disserved.

The Right to Appeal

Either party may appeal the determination of the committee within 21 days of the receipt of the decision to the Disciplinary Review Board.[28] There are three grounds for appeal: 1) failure of a member to be disqualified in accordance with Rule 1:12–1; 2) substantial failure of the committee to comply with procedural requirements of Rule 1:20-A, or other substantial procedural unfairness, that has led to an unjust result, or fraud on the part of any member of the committee; and 3) a palpable mistake of law by the fee committee that has led to an unjust result.

Most appeals are brought to the Disciplinary Review Board on two bases: 1) an allegation that the fee committee did not comply with procedural requirements, and 2) that there was a mistake of law that led to an unjust result. Frequently, the alleged procedural failure is that a party did not receive notice of the hearing, or that the panel did not permit each side to adequately present the case and cross-examine the other party. The arguments in support of a claim that the committee made a palpable mistake of law leading to an unjust result range from mathematical errors to assertions that the conclusions are not supported by the testimony or the documentary evidence submitted.

The Disciplinary Review Board meets 10 months of the year and reviews ethics grievance appeals, as well as fee arbitration appeals. The decision to grant or deny an appeal is made by the full Disciplinary Review Board, and the board's decision is final. The parties have no right to appeal the board's decision to the New Jersey Supreme Court.

Ethical Implications of a Fee Arbitration Determination

When a fee arbitration committee renders its decision, the determination is sent to the director of the Office of Attorney Ethics. The attorney and the client have 30 days from the receipt of the fee arbitration committee's determination to comply if there has been no appeal. If an attorney does not pay a refund to a client within 30 days, the client typically notifies the fee arbitration secretary, who refers the matter to the Office of Attorney Ethics for enforcement, which results in an application to the Supreme Court to temporarily suspend the lawyer for failure to comply with a fee award. Usually, this motion spurs attorneys to comply and refund the money due to the client pursuant to the determination.

In certain circumstances, an attorney may ignore his or her obligation to refund money due to a client. In the *Saluti* decision, the New Jersey Supreme Court found it was necessary to suspend an attorney for failure to pay a fee award to "redress his blatant disregard of award entered by the Committee in the exercise of it disciplinary authority as delegated by the Court."[29] This discipline is meant to "bolster the fee arbitration process and to retain public confidence in the committee's authority to resolve claim disputes."[30]

If the client owes money to the attorney and has not paid the sum within 30 days of receipt of the arbitration determination, the attorney may bring a summary action pursuant to Rule 4:67 to obtain judgment in the amount of the fee or refund. The trial court does not have jurisdiction to review the fee arbitration committee's fee determination. That review function is exclusively reserved for the Disciplinary Review Board under Rule 1:20A–15(l).[31]

Unfortunately, family law matters have generated 37 to 40 percent of all fee appeals each year. This represents a 300 percent increase over the next most frequently appealed determinations, which relate to criminal matters and account for 14 percent of all arbitrated matters.

If the client has filed an ethics grievance against the attorney with whom arbitration is sought, the secretary of the ethics committee may defer determination of the grievance if it is felt that the grievance contains aspects of a fee dispute, thereby permitting the fee arbitration committee to determine the reasonableness of the fee. Often after the fee controversy is decided, no ethics grievance follows.

Conversely, it is the duty of the fee arbitration committee to refer any matter that it concludes may involve ethical misconduct or raises a substantial question regarding an attorney's honesty, trustworthiness or fitness as a lawyer, including fee overreaching, to the Office of Attorney Ethics for investigation.[32]

Final Practice Tip

Having set forth the fee arbitration process, as well

as the ethical implications that arise out of it, the author wishes to provide the following final practice tip. It is recommended that the attorney send the 30-day letter to the client as soon as it is clear the client may not pay the bill. If this 30-day letter is sent promptly, the attorney can hope the client opts to utilize the fee arbitration process. As this process is designed to resolve disputes and foster public confidence in the legal profession, it provides an ideal setting for the resolution of a less-than-ideal situation.

Bonnie Frost is a partner at Einhorn, Harris, Ascher, Barbarito & Frost, PC, in Denville.

Endnotes

1. *In re Saluti*, 207 N.J. 509 (2010).
2. *Id.* at 515, *citing In Re LiVolsi*, 85 N.J. 576, 597-99 (1981).
3. *Saffer v. Willoughby*, 143 N.J. 256, 262 (1996).
4. *LiVolsi*, *supra*, 85 N.J. at 601-02.
5. *In re Saluti*, *supra*, 207 N.J. at 516.
6. R. 1:20A-6.
7. *Mayer v. Mayer*, 180 N.J. Super. 164, 167 (App. Div. 1981).
8. R. 5:3-5(a)(5).
9. R. 5:3-5(a).
10. *Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J. Super. 510,530 (App. Div. 2009).
11. *Id.* at 531.
12. *Ibid.*
13. *Kamaratos v. Palias*, 360 N.J. Super. 76 (App. Div. 2003).
14. *Cohen v. Radio Elecs. Officers Union*, 146 N.J. 140, 155 (1996). *See also Gruhin & Gruhin, P.A. v. Brown*, 338 N.J. Super. 276, 280 (App. Div. 2001).
15. *Hrycak v. Kiernan*, 367 N.J. Super. 237 (App. Div. 2004).
16. *Id.* at 241.
17. *See Gruber & Colabella, P.A. v. Erickson*, 345 N.J. Super. 248 (Law Div. 2001).
18. *Ibid.*
19. R. 1:20A-3(a)(1).
20. R. 1:20A-2(b)(1)(2).
21. *Wolkoff v. Larner*, 2014 N.J. Super. Unpub. LEXIS 2555,*6-7 (App. Div. Oct. 24, 2014),
22. *Ibid.* (Internal citations omitted.)
23. *See* R. 1:20A-2(c)(2).
24. R. 1:20A-2(c)(4).
25. *Nieschmidt Law Office v. Leamann*, 399 N.J. Super. 125 (App. Div. 2008).
26. R. 1:20A-3-(2).
27. R. 1:20A-3(b)(4).
28. R. 1:20A-3(c)(d).
29. *In re Saluti*, *supra*, 207 N.J. at 516.
30. *Ibid.*
31. *Linker v. Co. Car Corp.*, 281 N.J. Super. 579 (App. Div. 1995).
32. R. 1:20A-4.

Commentary:

The Role and Responsibility to Supervise Spousal Agreements: What is Supervisory Control and What Does it Mean?

by Frank A. Louis

A fertile area for argument too frequently ignored by lawyers is the role and responsibility of a court in reviewing spousal agreements for enforcement or modification. A court is not a passive participant equivalent to an umpire calling balls and strikes. The legal framework imposes certain duties and obligations on the court that can be merged with the arguments typically advanced by counsel.

The principles set forth in this article are potentially applicable in a number of different issues limited only by counsel's creativity; they include support, modification, enforcement, setting aside agreements and assuring initial orders are fair when entered. The principle rests primarily on the role, and the author contends, the responsibility of the court to review, analyze and enforce only agreements that are fair and equitable. Whenever a court enforces an order or agreement that means, in effect, the court has found it to be fair and equitable; absent such a finding enforcement should not be granted. This is not merely theory; rather, it is based on multiple Supreme Court cases holding judges have a role and responsibility in enforcing agreements, but because of strong public policy considerations there are limitations in their power to enforce agreements—and only certain agreements can be enforced. A review of the governing Supreme Court cases confirms a court is required to be an active participant in the analysis of the agreement with a well-defined obligation: to only allow those agreements the court finds to be fair and equitable to be enforced.

This judicial responsibility emanates not only from policy considerations but has been confirmed by the Supreme Court. One of these cases is over 50 years old. Thus, lawyers have been ignoring this vital tool for half a century. Interrelating the court's responsibility with advancing a client's position is an approach that yields not only fruitful results, but assures the end result is fair.

Discussion

Over 50 years ago, in *Schlemm v. Schlemm,* the Supreme Court held courts not only had the power, but the responsibility, to exercise "supervisory control" over spousal agreements.[1] This obligation was imposed on a court to be "continuing."[2] This was not an isolated allocation of judicial responsibility. In fact, this principle has been reasserted repeatedly; yet, nonetheless, it is rarely, if ever, utilized by lawyers.

In *Peterson v. Peterson*[3] the Supreme Court reaffirmed enforcement of agreements to be a "judicial responsibility" and that such agreements were subject to "judicial supervision."[4] *Peterson* mirrored the judicial responsibility created 20 years earlier in *Schlemm*. Thus, for over half a century courts have had the *responsibility* to supervise spousal agreements to assure only certain agreements were enforced—those a court found to be fair and equitable.

A court's power to enforce spousal agreements is not unlimited; it is circumscribed by the court's responsibility to enforce agreements, which operate in the future, but only so long as the agreement remained fair and equitable.[5] This judicial responsibility comes into play whenever the circumstances change.[6] This responsibility was made clear by *Lepis* when Justice Morris Pashman explained that alimony defined only a present obligation, since the obligation could only continue if it remained fair and equitable.[7] The duty of support was always "subject to review and modification" if the circumstances change.[8] In fact, *Lepis* characterized the "equitable authority" of a court to modify unfairness "cannot be

restricted."[9] That authority, viewed in conjunction with *Schlemm* and *Petersen,* created an obligation on the court's part to use the authority to prevent unfairness.

In *Schlemm*, the Supreme Court confirmed the judicial authority independent from the statutory grant, to enforce spousal support agreements, but *only* to the extent they were "just and equitable."[10] The importance, if not the primacy of fairness, was again recognized by the Supreme Court in 1970, in *Berkowitz v. Berkowitz*:[11]

> Agreements between separated spouses executed voluntarily and understandingly for the purpose of settling the issue of support for the wife and children *are specifically enforceable, but only the extent that they are just and equitable.*[12]

There was only one interruption in the historical continuum concerning the linkage between fairness and enforceability, but the Supreme Court in *Smith v. Smith*[13] specifically rejected the contractual approach advanced by the Appellate Division decision *Schiff v. Schiff.*[14] In clear and unequivocal language, the *Smith* Court rejected the contractual approach of *Schiff* for one simple reason—it was fair to do so and contractual agreements in family court are not enforceable at law, but only in equity. This distinction is critical since in equity only a spousal agreement that is fair can be enforced. A contract to buy a washing machine at Sears is enforceable at law whether it is fair or not. Spousal agreements, in equity, are measured by a different standard.

Justice Pashman's observation that "contract principles have little place in the law of domestic relations"[15] is best understood in this historical context. The importance of the rejection of a contractual approach, from a historical context, cannot be over-emphasized. It reaffirmed the fundamental principle that a court, in enforcing obligations arising out of the marriage, must look beyond the contract, and, in fact, the author believes courts have the responsibility to do so. The historical precedent confirms the analysis must be whether the support agreement remains enforceable.[16] This historical analysis emphasizes family courts focus not on a contract but on the fairness of the contract.

There is little doubt regarding these principles. While there is certainly a strong public policy suggesting agreements between spouses be enforced, there are *limits* established under law, and only agreements that are fair and just fall within the category of contracts enforceable in equity.[17] Thus, spousal agreements are only enforceable if they are fair and equitable. *Edgerton v. Edgerton*[18] should be reviewed, which cited two Supreme Court decisions for that principle, which is the foundational predicate of practice.[19] Thus, since 1960 and the *Schlemm* decision, fairness has been standard.

If a court denies a motion to modify or set aside an agreement, that court is, in effect, enforcing the agreement; but, a court may only enforce an agreement if an independent finding has been made that the agreement or order is fair and equitable at enforcement. That is, and has been for over half a century, the responsibility a court has in exercising supervisory control over spousal agreements.

What Does Supervisory Control Mean?

Having established a court has supervisory control and responsibility, the question is what does that mean? What that responsibility is and how it or the required judicial scrutiny should be implemented has not adequately been addressed by lawyers or the law. This is, nevertheless, a critical tool in the arsenal of advocacy. An examination of how the words "supervisory" or "supervision" has been interpreted is instructive.

Black's Law Dictionary uses the terms "oversee," "watch over" and "direct." The dictionary further notes that it is "work under the gaze of someone who can direct corrective tender advice." The term "control" has been defined by *Black's Law Dictionary* as "directing influence," "to regulate" or, of particular note here, "to hold from action." The 13th edition of the *Judicial Dictionary* defines "control" as being synonymous with "superintendence, management or authority to direct, restrict or regulate."

State v. Smith[20] involved the definition of supervisory/disciplinary power. In responding to the jury's request for a definition, the judge observed that while the law does not provide an exact definition, he referred to *Webster's New Collegiate Dictionary* using terms "superintend and oversee"—that someone who superintends is some who is "exercising the charge and oversight of or to direct."

In *New Jersey Turnpike Authority v. AFSCME,*[21] the court had to address the term "supervisors." Interestingly, it referred to (in Footnote #2) a Connecticut statute that used terms such as "overseeing or reviewing the work," "exercising judgment and adjusting grievances" and "exercising authority that requires the use of independent judgment." These definitions coalesce and make it clear

contextually that before a court can enforce any agreement, it must independently examine not only the terms of the agreement and how it was executed, but do so in the context of the prevailing legal standards. That standard requires a finding by the court that the agreement is fair and equitable. It must view the issue and conclude, through the prism of whether in the final analysis, in a mixed question of fact and law, the agreement is fair. A denial of a motion means a court found the agreement to be fair, and this point must be made crystal clear not only in the briefs but on oral argument. It is one thing to deny a motion; it is yet another to make the necessary findings of fact and conclusions of law under Rule 1:7-4 that continued enforcement is fair and equitable.

Given this legal framework, when seeking to modify an agreement the issue should be briefed and argued that the court has the *responsibility* to exercise its supervisory control and make independent findings of fact that the agreement is fair before it decides the motion, since the practitioner will contend a court cannot enforce a spousal agreement that is neither fair nor equitable. It is far easier for a court to simply deny a motion to modify than to make findings of fact and conclusions of law that the existing order or agreement remains fair and equitable.

How to Use This Principle: A Cautionary Note

The author believes one of the consequences of the logical extension of the arguments here, and, at times, the unfocused language of the courts, is the potential confusion in addressing agreements dealing with support as opposed to and distinct from equitable distribution. The references above that a court is without power to enforce an agreement that is neither fair nor equitable has inherent limits when viewed from the overall perspective of the law. As a general proposition, equitable distribution is not subject to modification, except in two instances.

First, there is the right of a court to restructure the terms of an executory equitable distribution provision so long as that restructuring does not alter the essential economic benefits of the agreement. That principle was established by Justice (then Judge) Virginia Long in *Connor v. Connor*.[22] Secondly, equitable distribution is a judgment and, as such, it is subject to modification under Rule 4:50-1. This is an argument rarely used, generally unknown, but nonetheless clearly set forth in the case law since a court controls its own judgments.[23] Third, the courts have expressly held equitable distribution is subject to Rule 4:50-1(f).[24] This is an issue upon which the author has written before.

Thus, while certain limited rights exist to modify equitable distribution, it is not the premise of this article, nor is there any legal justification, to simply argue that equitable distribution is not enforceable if no longer fair and equitable. That undermines the nature of equitable distribution and ignores the substantial differences between asset division and support. It is implicit in the law's DNA that support is always subject to modification when it is no longer fair and equitable, but equitable distribution must be viewed differently since important policy considerations exist, most notably the desirability of finality that trumps modification, particularly if the equitable distribution provision has been fully implemented. Changes in value of an asset already distributed, either up or down, cannot provide a basis to modify years later. Even if one utilizes string citations from the cases cited herein that enforcement would be unfair and inequitable. The policy considerations are fundamentally different than with support. Modification of equitable distribution, while appropriate under the law, is best dealt with within the existing but, nonetheless, limited legal framework established by *Connor* and pursuant to Rule 4:50-1.

The use of the argument is limited only by counsel's creativity. Clearly, it is potentially most effective in an application to modify or set aside an agreement. In that context, the argument is that a court must grant the relief to modify or set aside unless it finds, both as a matter of fact and law, that the agreement is fair and equitable. Critical to the argument is the reality that when a court denies an application to set aside or modify an agreement it is, as a matter of law, finding that it is fair and equitable. That point must be emphasized in the presentation.

The principle may also be utilized in modification motions, and can be utilized particularly in response to a contention that an alleged change in circumstance is temporary. Whether temporary or not, the agreement must still be fair. While this argument may no longer be necessary in light of the new statute, the presentation is essentially the same—if the court denies the request to modify support, it is enforcing the order, thus finding it to be fair and equitable.

The author has utilized the argument in a different context, where establishment of support was in issue because of a contention the payor had limited cash flow that was necessary to capitalize a failing business. Therefore, the cash flow must be allocated not only between the plaintiff, defendant and the children, but also the business, which would otherwise fail. Since a court has the responsibility to enforce only orders that are fair and equitable, it should only enter one that is fair and equitable.

The responsibility is to assure that its order does not result in a loss of a marital asset, since that most clearly would violate the supervisory responsibilities it has to preserve assets. This principle goes hand-in-hand with a long-established legal doctrine only recently referenced in a family part case by Lawrence R. Jones, J.S.C. In *Clementi v. Clementi,*[25] Judge Jones noted that "when a complaint for divorce is filed the assets are then in *custodia legis*." Therefore, related to this overall supervision a court has is the responsibility to assure assets are available to be distributed at final hearing. It is for that simple, yet fundamental, reason that courts grant restraints regarding disposition of assets. This is done for a central, common-sense reason: If assets are not available at final hearing they cannot ultimately be distributed. The Appellate Division, in *VanderWeert v. VanderWeert,*[26] noted once a complaint is filed the marital estate is, in a practical sense, in "*custodia legis*." A literal description of that Latin term is "in the custody of the law." If these assets are in the court's custody then it logically follows the court has a responsibility in exercising that supervisory control to assure the assets remain available at final hearing.

Conclusion

From the lawyer's perspective, the argument is interesting because it changes the dynamic between the court and counsel. Rarely do lawyers suggest that the court has such an active role in the process; yet, the Supreme Court, in discussing supervisory control, used terms such as "duty" and "responsibility." Duty and responsibility require action. The most effective argument will be to inter-relate the court's responsibility and duty in entering an order to the facts of a case. When arguing that a court has a responsibility and a duty to enter a certain type of order, most critically one that is fair and equitable, that may well give the court some pause to assure they are doing precisely what they are duty-bound and responsible to do: enter an order that on the facts is fair and equitable. That requires, arguably, a more detailed analysis, which is the lawyer's responsibility to provide, and an explanation of why the opposing party's suggested resolution is neither fair nor equitable. This should not be an abstract presentation, but rather directly linked to the facts of the case and, most importantly, the ability of a litigant to either make the payments or to survive on the payments being ordered. ■

Frank A. Louis is a partner with Louis & Russell in Toms River.

Endnotes

1. *Schlemm v. Schlemm*, 31 N.J. 557, 580 (1950).
2. *Schlemm* at 580.
3. *Peterson v. Peterson*, 85 N.J. 638, 634 (1981).
4. *Peterson* at 644. (Emphasis added).
5. *Lepis v. Lepis*, 83 N.J. 139, 148-149 (1980).
6. *Chalmers v. Chalmers*, 65 N.J. 186, 192 (1974); *Martindale v. Martindale*, 21 N.J. 341, 352-353 (1956); *Boorstein v. Boorstein*, 142 N.J. Eq. 135 (E & A 1948).
7. *Lepis* at 146.
8. *Ibid.*
9. *Lepis* at 149.
10. *Schlemm* at 581-582. (Emphasis added).

11. *Berkowitz v. Berkowitz*, 55 N.J. 564 (1970).
12. *Berkowitz* at 569. (Emphasis added).
13. *Smith v. Smith*, 72 N.J. 350 (1977).
14. *Schiff v. Schiff*, 160 N.J. Super. 546 (App. Div. 1971) *cert. den.* 60 N.J. 139 (1972).
15. *Lepis* at 148 *citing Smith* at 360.
16. *Lepis* at 148.
17. *Peterson v. Peterson*, 31 N.J. 638, 642 (1981); *Carlsen v. Carlsen*, 72 N.J. 363, 370-371 (1977); *Guglielmo v. Guglielmo*, 253 N.J. Super. 531, 541 (App. Div. 1992).
18. *Edgerton v. Edgerton*, 203 N.J. Super. 160, 171 (App. Div. 1985).
19. *Peterson* at 642 and *DiGiacomo v. DiGiacomo*, 80 N.J. 155, 158 (1979).
20. *State v. Smith*, an unreported opinion (2007 WL 162219) (N.J. Super. A.D.).
21. *In New Jersey Turnpike Authority v. AFSCME*, 289 N.J. Super. 23 (App. Div. 1996).
22. *Connor v. Connor*, 254 N.J. Super. 591, 601 (App. Div. 1992).
23. *See Welser v. Welser*, 54 N.J. Super. 555, 563 (App. Div. 1959); *Biddle v. Biddle*, 150 N.J. Super. 185, 192 (Ch. Div. 1977); *Busch v. Busch*, 91 N.J. Super. 281, 286 (Ch. Div. 1960).
24. *Schwartzman v. Schwartzman*; *Rosen v. Rosen cf. Packo v. Packo; Ganther v. Ganther.*
25. *Clementi v. Clementi*, 434 N.J. Super. 529, 539 (Ch. Div. 2013).
26. *VanderWeert v. VanderWeert*, 304 N.J. Super. 339, 349 (App. Div. 1997).

Commentary:

Custody and Parenting Time/Visitation Plans: What are They and Why Do We Do Them?

by Amy Wechsler

Rule 5:8-5 requires the submission of custody and parenting time/visitation plans "in any family action in which the parties cannot agree to a custody or parenting time/visitation arrangement."[1] Based on personal experience, as well as an informal survey of experienced family law attorneys practicing in the majority of the counties throughout the state, the author believes this is an example of a court rule that is often ignored, rarely enforced, and of questionable utility.[2]

Still, one starts with the premise that a rule is a rule, and this rule was not only adopted in 1983, it was amended in 1992, in 1999, and again in 2000. Thus, on four separate occasions over nearly two decades, the Supreme Court determined and reconfirmed that custody and parenting time/visitation plans matter and are required to be submitted when custody is not resolved. This requirement is reinforced in the form of the case management order issued under Rule 5:5-7, which provides, "The Custody/Parenting Time Plan, required pursuant to R. 5:8-5" is to either be attached to the order or submitted by a specified date.[3] This article outlines the requirements for custody and parenting time/visitation plans (custody plans), including the content and the timing for submitting them. It will discuss how custody plans are handled in practice, and why, in light of their limited utility, potential for prejudice, the author believes there is good reason to change the rule.

The Requirements of a Custody Plan

In all cases in which custody is an issue, parties are to file a custody plan no later than 75 days after the last responsive pleading has been submitted.[4] Failure to submit a custody plan may result in the dismissal of pleadings or other sanctions.[5] The Appellate Division determined that these plans are also to be submitted in post-judgment matters involving hearings when a party seeks a change of custody.[6] The requirement to submit a custody plan is not limited to dissolution matters, as the rule does not exempt litigants in non-dissolution actions from this same obligation.

Rule 5:8-5 provides that custody plans must include:

1) The addresses of the parties;
2) Information regarding the parties' employment (likely name and address of employer, although this is not specified);
3) The type of custody sought, including the reasons, with the options being: a) joint legal custody with one parent "having primary residential care," b) joint physical custody, c) sole custody to one parent and the other parent having "parenting time/visitation," d) an unspecified "other" arrangement;
4) The proposed parenting schedule, "including, but not limited to, weeknights, weekends, vacations, legal holidays, religious holidays, school vacations, birthdays and special occasions (family outings, extracurricular activities and religious services)";
5) Access to medical records;
6) The "impact" of any proposed change of residence by a parent;
7) Participation in decision-making regarding the children; and
8) "Any other pertinent information."[7]

Rule 5:8-5 does not contain other requirements for custody plans and, critically, there is no provision requiring updates to the original plan.

When Do Parties Submit Custody Plans?

In cases in which custody or parenting time is contested, lawyers frequently do not submit custody plans, or do so substantially beyond the 75-day period set forth in the rule. More often, lawyers submit them either: 1) pursuant to different time frames they establish in the initial case management order, 2) after custody mediation has failed to bring the parties to agreement, or

3) after custody evaluations have been completed. In each of these instances, the deadline is well past the 75-day time frame set forth in Rule 5:8-5.

The effort required to draft the custody plan does not explain the lack of submission. Based on the language of the rule, these plans need not contain substantial detail. Most marital settlement agreements and custody judgments are far more detailed and thorough. Thus, the actual preparation of one of these plans is not an onerous requirement. Given that the requirements of the rule are not burdensome or unreasonably demanding, the question remains regarding why many lawyers fail to submit them. The answer lies within the different posture of cases when they are filed in the family part.

In some cases, litigants know whether they can settle custody and parenting time issues almost immediately. Lawyers presumably discuss custody and parenting time early in the litigation, and communicate about these issues to determine whether there is a dispute. In these cases, the 75-day requirement seems to be a reasonable amount of time to know whether that dispute is amenable to quick or easy resolution. When it is, the rule does not apply; rather, it is designed for cases in which custody cannot readily be resolved. Thus, in some instances litigants know early on whether the issue remains contested, so the time frame itself should not pose a barrier to submission.

In other cases, the 75-day period is an insufficient amount of time for parties to have attempted to resolve custody, including having attended mediation, exchanged discovery, engaged in negotiations, and reached either resolution or impasse. A decision about custody is among the most important decisions, if not *the* most important decision, a parent will make in his or her lifetime. Like many time frames in the divorce process, rules such as the 75-day time limit imposed by Rule 5:8-5 fail to consider the emotional impact of divorce. The rule assumes that both litigants are prepared to end their marriage and have: 1) had sufficient time to research and understand options for arrangements each believes will best serve the children's needs and the parents' respective abilities to provide housing and care; 2) communicated those arrangements to the other side; 3) determined areas of agreement and disagreement; and 4) engaged in meaningful discussions regarding whether they can resolve areas of disagreement.

In the author's experience, by the time the custody plan is due under the rule, many divorcing parents are still reeling from the idea of divorce, and have not formed a clear idea of any aspect of their futures, including the custody arrangements that will best serve the children and the family's needs. Parenting plans may depend on where parties will live, a determination that requires disclosure and an understanding of family finances. It may be unreasonable to force a client to formulate and articulate a plan on these critically important and life-altering issues within an arbitrary and relatively short time frame, before discovery has been completed, and without an understanding of the feasibility of various arrangements and options.

Some lawyers who file custody plans wait until clients have been to mediation in order to ascertain whether the parties were able to resolve their issues in that process. Mediation cannot be expected to succeed or fail in a single session. A viable mediation process requires more of an investment, and a good mediator may spend several sessions with parties in order to resolve impasses and help them reach an agreement.

In many instances, case management orders call for the use of a custody expert, a custody neutral assessment (CNA) or a custody and parenting time investigation by court staff, even though, at the point of completing that order, it may not be clear which, if any, of these tools will actually be needed. Custody experts rarely begin, let alone complete, their evaluations within 75 days from the last pleading in a case. CNAs and custody investigations may take many weeks, if not months, to complete. The submission of a custody plan during mediation or in the midst of a CNA, investigation or evaluation not only may not be helpful, but, depending on how the custody plan is drafted, could serve to derail negotiations or prejudice the evaluation or investigation.

Though the language of the rule should encompass all family matters in which custody issues are disputed, it appears custody plans are never actually required in non-dissolution matters. Neither the non-dissolution kit published by the Judiciary nor the Family Division's non-dissolution operations manual makes any mention of a requirement to file a custody plan.[8] In both divorces and non-dissolution cases, custody and parenting time issues can be complex and difficult to resolve. If the purpose of the custody plan is to assist in resolving cases, it makes no sense to require it in one case type, but not the other.

The Nature of Custody Plans

Although case management orders provide for parties to insert a date for submitting custody plans, which would likely extend beyond the 75-day period, there is no apparent authority identifying the purpose of these plans or the basis for allowing them to be prejudicial to the parties who submit them. The rule states that the Court "shall consider" the plan when awarding custody or fixing the parenting schedule.[9] This means that the content of custody plans is intended to be prejudicial to the party submitting the plan. Attorneys should be aware of this and exercise caution in what they include when drafting the plans. It may be ill-advised to formally state a client's position on custody and parenting time issues at a relatively early point in a case, before all the facts are known and before parties have had a chance to research, understand and discuss options.

There is no requirement that parties reveal their settlement positions on other issues at the start of a case. Parties submit case information statements, which are descriptions of facts that do not contain proposals or state the parties' positions on issues. As a general proposition, settlement positions are set forth only in protected settlement discussions, without prejudice, and not to be disclosed to the court pursuant to NJRE 408. Consistent with this practice, early settlement panel statements provide parties' positions on financial issues, and, although these are given to the opposing side and to the panelists, they are afforded protections in that they are non-binding, do not end up in court files, and are not intended to be considered by judges when deciding financial issues at the time of final hearing.

In stark contrast, custody plans are not afforded any of these protections. Accordingly, when deciding how to present a client's position on custody and parenting time issues, counsel must evaluate multiple factors, including how forcefully positions should be stated, how detailed positions are to be outlined, and how much room for future negotiations is to be included. Each of these considerations has pitfalls. For example, if the position stated was extreme (either to leave room for negotiations, or because subsequent events or evaluations have led to a modified view), a court could conceivably view the position as unreasonable and as creating unnecessary litigation, thereby forming a basis for a counsel fee award.

In cases involving custody experts, the timing set forth in the rule, or a deadline set in a case management order, requires parties to outline their positions on custody before the evaluation is completed, or before the evaluation process even begins. In those cases, attorneys may be reluctant to (and may not) submit custody and parenting time plans until after receiving the expert's report. This may be to avoid prejudicing the expert or because, without a better understanding of the children's needs, it may be premature to set out a parenting plan before reviewing the expert's findings and recommendations.

Another concern with the prejudicial nature of Rule 5:8-5 is that, although the court is mandated to consider custody plans, there is no guidance on what weight should be afforded to them, or in what ways or for what purpose they should be considered. In many instances, a party's position on custody and parenting time may change as the case progresses, based on discovery, an expert's analysis, on parental misconduct, on evolving developmental needs of the children during the *pendente lite* period (which may go on for years), on shifting views and positions, or on a better understanding of the ramifications of various custody arrangements. A document submitted to the court early in the case may have little or no relevance at the time of final hearing, yet due to the prejudicial nature of Rule 5:8-5, may affect a decision made one, two, or three years later at a trial.

The Purpose of Custody Plans

Judges routinely decide custody issues and parenting schedules in the context of *pendente lite* motion practice, so Rule 5:8-5 impliedly instructs judges to consider custody plans at that time. The author views this, however, as unnecessary. As noted, Rule 5:8-5 does not require the custody plan to contain significant detail. Motion papers will set forth each party's custody/parenting time position in far more detail and contain a rationale for the position. If a party submits his or her custody plan as an exhibit, it will likely be less comprehensive than the party's certification, or at least, duplicative and unnecessary. If the plan deviates from the party's *pendente lite* request, the lawyer must determine how to explain the difference, without adding confusion and distraction. In other instances, the custody plan may not even be a part of the motion record, even though it has been filed pursuant to Rule 5:8-5.

Given that judges do not review, and may not even see, these plans until the time of a hearing, the author questions their purpose and value. In counties where cases take two years or longer to reach trial, custody plans filed at the beginning of the litigation will likely be outdated by the time of a final hearing, and, as stated above, there is no requirement that the custody plans be amended during litigation. In a hearing, each party will testify and present a custody and parenting time proposal that is far more comprehensive than what the rule requires in the written plan submitted months (if not years) before the hearing takes place. The plan or proposal that a party submits at trial will be far more relevant and current and, if an expert has been involved, it may also be better informed, thorough, and detailed. Again, there is no direction for the weight a judge would give the original plan submitted months or years earlier.

If the purpose of Rule 5:8-5 is to place the other party on notice regarding the specific contested custody and/or parenting time issues, the author believes there are less prejudicial ways to accomplish such a goal. Notice of the general issues can be confirmed in the initial case management order, which requires parties to identify disputed issues, including custody and parenting time. The identification of a custody dispute in a case management order occurs weeks before a plan must be submitted (provided case management is timely scheduled by the court), and includes a provision for retention of custody experts.

Parties can explore their differences regarding custody and parenting time issues during the mandatory mediation that occurs. In custody and parenting time mediation, the parties are provided with a forum for exchanging and discussing their proposals in a confidential and protected process that fosters a frank exchange of positions and ideas.[10]

Case information statements are submitted early in a case to provide the court with a factual description of the parties' finances. Courts could similarly request a description of current parenting arrangements, without requiring parties to submit written proposals.

Conclusion

As a rule that is rarely followed or enforced, the author believes there is questionable value to maintaining the requirements of Rule 5:8-5, especially the requirement that custody plans be filed not more than 75 days after the filing of the last responsive pleading. The preparation and filing of custody plans is an added expense for clients when they may be premature and vague.

When the case is ripe for an intensive settlement conference or hearing, parties can provide their positions on all of the disputed issues, whether custody or financial, in the form of an intensive settlement conference memorandum, pre-trial memorandum or other submission required by the court. If it makes sense for parties to advise one another of their custody positions earlier in the litigation, they author suggests they can do so in the form of a custody position statement submitted in the context of custody mediation, much like early settlement panel statements are submitted on financial issues, without prejudice to either party. These custody position statements can be exchanged prior to attending custody mediation to assist the parties in articulating their concerns and proposed plans. However, the author believes at no time should these statements be submitted to the court, reviewed by judges, or be prejudicial to the parties in the event the court is later called upon to decide custody and parenting time. ■

Amy Wechsler is a partner in Shimalla, Wechsler, Lepp & D'Onofrio, LLP, in Warren.

Endnotes

1. New Jersey Court Rule 5:8-5
2. In addition to personal observation and experience, several experienced matrimonial attorneys practicing in at least 16 New Jersey counties responded to a brief survey about their experience with custody and parenting time/visitation plans. For nearly every attorney and in most of the counties, these plans are either not submitted at all, or are submitted after mediation or custody evaluations, well outside the 75-day time frame of Rule 5:8-5.
3. There is no corresponding form referencing these plans in non-dissolution matters.
4. R. 5:8-5(a).
5. R. 5:8-5(c).

6. *Luedtke v. Shobert*, 342 N.J. Super., 202, 218 (App. Div. 2001).
7. R. 5:8-5(a).
8. See Non-dissolution 'FD' case—How to file a non-divorce application, New Jersey Courts, CN 11492, July 2012; and Non-Dissolution Operations Manual, N.J. Judiciary Family Division, Dec. 2007.
9. *Ibid.*
10. Mandatory custody mediation was not uniformly in place in 1990, when Rule 5:8-5 was adopted. With mandatory custody mediation, parties are generally required to submit their positions on custody and parenting time to the mediator or the program coordinator. These submissions are not maintained in the court's files or provided to the judge.