New Jersey Family Lawyer

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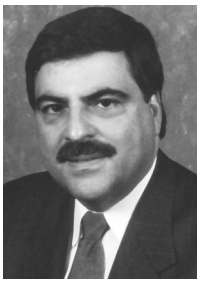
OUTGOING CHAIR'S COLUMN

What's Important in Family Law Today

by John DeBartolo

This volume of the *New Jersey Family Lawyer* contains two very engaging sections. *First,* there is an interview with four assignment judges from throughout the state. Significantly, each has sat as a trial judge in the family part. This interview gives insight into the unique daily challenges administering the court system presents to assignment judges. Although each knows firsthand the important role our family courts play in the lives of our citizens, he or she must balance the competing needs of the other divisions in allocating precious resources. I thank Judges Graham Ross, Linda Feinberg, Valerie Armstrong and Eugene Serpentelli for their time and insight. Perhaps the interview will make us a little more sympathetic as we grumble about the perceived inadequacies of the system and the chronic unmet demands for personnel and resources in the family part. Perhaps, also, the administrators, policymakers, legislators, and freeholders will take heed and recognize the demands proper administration of the family part places upon judges, staff, and the physical plant, and they will make the necessary budgetary allocations.

Second, the issue of college, or more precisely, responsibility for the college education of children of divorced and separated parents, is examined. As every practitioner knows, the payment of college expenses is one of the most vexatious issues in divorce and post-judgment cases. Tuition, room and board, books, supplies, and fees have skyrocketed at private and public colleges and universities. What may have been a little-discussed provision of a property settlement agreement years ago has come back to haunt many a parent. An agreement to pay for college in accord with each parent's then-financial ability after exhaustion of all available financial aid is not an easy provision to be analyzed and applied by a court years after the fact. Remarriage, the birth of subsequent children, workforce downsizing, and economic difficulties cause many parents to claim they have limited or no ability to contribute to a child's college education, despite the child's academic



achievements and potential. Additionally, with the accessibility and popularity of post-graduate education, could parents be responsible for that expense as well?

Also explored are issues concerning parental alienation and its relation to contribution; jurisdictional issues regarding contribution toward college; and the use of 529 plans and similar savings vehicles to assist in funding educational expenses.

Those of us with college-age children know what an exciting, bewildering, and stressful time it is for a young woman or man choosing a college. We owe it to our children to avoid increasing the stress with parental battles over who will pay. The cost of legal fees for one contested motion frequently exceeds the cost of the student's tuition for that semester. Simply reciting the criteria of *Newburgh v. Arrigo*[1] without some financial planning may no longer be enough in our property settlement agreements.

Much attention has been given to marital lifestyle in settling and trying cases, which begs the question: Doesn't marital lifestyle include educational planning for the children and concomitant sacrifices by both parents? We must explore new and creative ways to avoid future disputes when we negotiate property settlement agreements and try cases. Effective use of 529 plans, educational savings plans, payroll deduction plans, invasion of IRAs for educational expenses, and use of home equity loans, are only a few of the options available.

Finally, I note that I write this column shortly after the decision of the New Jersey Supreme Court in *Weishaus v. Weishaus.*[2] Upon learning of the grant of certification by the Court, the officers of the Family Law Section requested, and received, permission from the New Jersey State Bar Association Executive Board to move for admission as *amicus curiae.* The Court granted our motion to file a brief and present oral argument. Bonnie Frost, first vice president of the section, and I authored a brief on behalf of the section. Bonnie is an exceptional

New Jersey State Bar Association

The power of your dues dollars

This year, the NJSBA successfully lobbied for passage of new laws important to lawyers and their clients, including legislation which…

- Clarifies that a power of attorney does not generally give the attorney-in-fact the authority to make gifts of the principal's property
- Revises and codifies arbitration practices and agreements
- Establishes the "Commission to Review Criminal Sentencing;" and provides the NJSBA with representation on the Commission
- Concerns workers' compensation for occupational disease claims and workers' compensation benefits rates for surviving dependents
- Clarifies the fee schedule for certain service of process fees in the Special Civil Part
- Allows release of Administrative Office of the Court records concerning domestic violence to the surrogate in adoption proceedings
- Provides that information about the location of a shelter for victims of domestic violence shall not be a public record
- Validates certain marriages solemnized by persons who were not authorized to solemnize marriages
- Provides for instruction for elementary, middle, and high school students in the dynamics of domestic violence and child abuse
- Allows fiduciaries to employ and compensate accountants from fiduciary funds and permits certain out-of-state banks to be treated similarly as New Jersey banks
- Permits property owners to waive requirements for certain land surveying work
- Exempts rentals between closely-related business entities from the sales and use tax.

In addition to these new laws, the New Jersey State Bar Association is working on these critical issues:

- Vigorously opposing the $75 attorney assessment to bailout high-risk specialty doctors and reimburse medical students for their student loans.
- Advocating new uniform laws, including the Uniform Mediation Act, and the Uniform Probate Code.
- Urging legislative reform in the area of legal guardianship, adverse possession and federal Medicaid compliance.
- Supporting the creation of a Business Part in the Law Division of the New Jersey Superior, as well as legislation to reduce court transcript fees in municipal court, and to create a municipal court conditional discharge program.
- Advocating reform to New Jersey's verbal threshold and automobile insurance laws.
- Promoting legislation to add a new cause of action for divorce based on irreconcilable differences, as well as working on legislation concerning child support, adoption, genetic testing and the payment of college education expenses by divorcing spouses.
- Pursuing legislation that ensures consumer protection by regulating home improvement contractors.
- Advancing legislation that creates a restrictive driver's license program for DWI offenders in limited circumstances.
- Monitoring charitable immunity legislation, land use and workers' compensation bills.
- Promoting legislation to establish an Administrative Law Judges Retirement System.
- Encouraging a sound fiscal budget for the Judiciary, Legal Services of New Jersey and the Office of Public Defender.

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writer, and our success in this matter is due in large part to that brief. I thank her for her time and effort.

Our position was very clear and direct; it is unnecessary to require a stipulation, or judicial finding, of marital lifestyle in settled cases. We argued that focusing on only one of the alimony factors in a settled case was inappropriate and counterproductive to the settlement process, and to the future financial status of dependent spouses. We emphasized the complex, emotional, and multifaceted process involved in most settlement negotiations. Finally, we alerted the Court to the increased cost and aggravation to litigants that lifestyle stipulations and hearings cause.

On November 17, 2003, the argument took place before the entire Court. Pursuant to the NJSBA bylaws and rules, the president speaks on behalf of the association and is designated to appear and argue the association's position in *amicus* matters before the courts. Karol Corbin Walker graciously acceded her role of advocate to the chair of the section. I am most appreciative of Karol's actions; this was a case that needed to be argued by a family lawyer.

Approximately a dozen members of the section attended the argument. Candidly, I was as apprehensive of how my oral argument would be perceived and critiqued by my colleagues, as I was about how it would be received by the justices. The justices asked many questions that demonstrated they had read and considered the issues briefed. There was no doubt that each and every justice recognized the impact that *Crews v. Crews*[3] has had on the daily practice.

In a recent volume of the *New Jersey Family Lawyer*, Editor-in-Chief Mark H. Sobel wrote that the grant of certification signaled to him that the Court did care about "life in the trenches." Indeed, the message from the bench that day was that each and every justice cares about this practice and the families we serve. The decision of the Court to revisit *Crews* and permit trial courts to approve consensual support agreements without rendering marital lifestyle findings adopted our fundamental argument. We are very pleased.

The opportunity to appear and argue the underlying policy considerations on behalf of the organized bar in such an important case is a unique professional opportunity. However, I do not take any personal glory in the event, and I hope readers of this publication do not view this column as a self-congratulatory missive. My appearance was simply due to the luck of the draw; I happened to be chair of the section at the time. There are literally hundreds of members of the section and the association who could have eloquently argued our position. Indeed, the arguments made by me were hardly original; rather, they represented the thoughts, concerns, and analysis I have heard and debated with fellow family lawyers in the three and one-half years since the opinion in *Crews*. My role that morning was to bring to the Court the concerns of the thousands of members of this section and the NJSBA. I stress that the opportunity presented to me is a direct result of involvement with this association and section.

Anyone who reads this publication, who practices family law, and who wants to become involved, stands as equal a chance of someday appearing before the Court and arguing on behalf of this association. After all, if a lawyer from a small firm in Red Bank can do it, so can you. Become more active; write articles for the *Family Lawyer* or *New Jersey Lawyer Magazine;* serve on your county bar association family law committees; join the young lawyers group of this section; ask to join the executive committee. As cliché as it sounds, the future of this section is in your hands. As the old lions move on, young ones must step up. You can and should contribute to your profession and make a difference. ■

ENDNOTES

1. 88 N.J. 529 (1982).
2. 180 N.J. 131 (2004).
3. 164 N.J. 11 (2000).

FROM THE EDITOR-IN-CHIEF

Re-Evaluating the Risk Reward Ratio of Tort Claims in Matrimonial Actions

by Mark H. Sobel

One of the significant strategic implications of the utilization of the offer of judgment rule is that the rule provides for certain consequences as a result of the non-acceptance of the offer. Those consequences include, but are not limited to, awards of counsel fees, cost of litigation and interest on the money recovered.

The ability of a matrimonial practitioner to include within a divorce complaint various tort claims seeking financial relief was firmly established by the New Jersey Supreme Court determination in *Tevis v. Tevis*.[1] That decision effectively provided another arrow in the quiver of the divorce lawyer. The inclusion of tort claims within a matrimonial action for such legitimate grievances as the assault by one spouse on another effectively and appropriately raised the stakes in a matrimonial action as one party saw its potential equitable distribution diluted by the potential recovery by the victim of the tort within the divorce action.

As with all strategic advantages in our adversarial system, the envelope was then pushed to the limit as lawyers sought to obtain what was perceived as an additional strategic advantage by having these marital tort claims tried before a jury rather than a judge. That additional strategic advantage was, in theory, approved by the Supreme Court in *Brennan v. Orban*,[2] allowing the tort case to be heard by a jury under certain facts.

There have been few (if any) jury trials of these issues subsequent to the decision in *Brennan*, as most trial courts have utilized the doctrine of ancillary jurisdiction to keep the tort claim within the family part under the court's power "to dispose of ancillary legal claims and award monetary damages."[3] However, there still exists both the threat of a jury and, more importantly, the significant strategic advantage of asserting monetary claims for bad acts within the confines of a divorce litigation.

It would seem that the inclusion of such *Tevis* claims in a divorce action was essentially a riskless strategic advantage, since it carried with it the threat of substantial financial penalties with very little concomitant risk to the party alleging such a tort. As a result, a review of complaints over a period of years would reveal the inclusion of what could be considered less than substantial tort claims. Intuitively, attorneys and ultimately the court began to sense that the insertion of such claims had little to do with the actual commission of a tort, and much to do with the strategic imperative of filing such a claim to exert leverage in the matrimonial action. The risk/reward ratio of filing such a claim in light of an extremely insightful opinion in *Borchert v. Borchert*[4] requires a re-evaluation of that strategy.

In *Borchert,* the defendant-husband (in his counterclaim) included six counts alleging various torts and seeking damages. The alleged torts were for false arrest, infliction of emotional distress, defamation of character, tortious interference with perspective economic advantage, outrage and malicious abuse of process. While the opinion does not reveal the underlying facts, a subsequent motion resulted in the dismissal of five of the six tort counts and the amendment by the court of the sixth tort count from an abusive process to a malicious prosecution count.

Subsequently, the defendant who filed a tort claim sought to utilize the offer of judgment procedure as set forth in Rule 4:58-1. While normally this offer of judgment procedure is utilized by the alleged defendant in a tort claim, the rule allows either party the opportunity to make an offer of judgment. One of the significant

strategic implications of the utilization of the offer of judgment rule is that the rule provides for certain consequences as a result of the non-acceptance of the offer. Those consequences include, but are not limited to, awards of counsel fees, cost of litigation and interest on the money recovered. In *Borchert*, the plaintiff-wife sought to prevent the husband from utilizing the offer of judgment rule, citing the fact that Rule 4:58-1 specifically deletes from its parameters "matrimonial actions."

In *Borchert*, the trial court examined the inter-relationship between the offer of judgment rule and its consequences with Rule 5:3-5 regarding imposition of counsel fees in matrimonial actions and the factors upon which it is based. Prior to an amendment to Rule 5:3-5, a key standard in terms of imposing counsel fees had been one of establishing the bad faith of the other party. That was effectively replaced in amending Rule 5:3-5 with the reasonableness of the parties.

The *Borchert* court determined that such an amendment put Rule 5:3-5 in close proximity with the theory of the consequences for the non-acceptance of an offer of judgment as articulated in Rule 4:58-1. Now, under either rule, the lack of reasonableness carries the similar consequence of a court imposition of counsel fees or other types of financial relief. Thus, the trial court in *Borchert* determined that the ultimate consequence of a non-acceptance of an offer of judgment was in all aspects very similar to the same analysis the court would utilize under Rule 5:3-5. Thus, the consequences theoretically should be the same, and in fact pursuant to the court's determination now are.

In *Borchert* the court held that notwithstanding the language excluding matrimonial actions from offers of judgment, specific language limited to *matrimonial actions* rather than *family actions* was a significant distinction.

In reviewing the Supreme Court's analysis in *Brennan*, the trial court illustrated that matrimonial actions and the various financial components of such matrimonial actions (*i.e.* spousal support, child support, equitable distribution, payment of debts, payment of education expenses etc.), are often and should be closely interrelated, and therefore the ability for the utilization of an offer of judgment rule in such confines is either extremely limited or of no real assistance. In essence what would the offer of judgment be for isolated amounts on isolated issues? Must such an offer of judgment include all issues, since matrimonial practitioners (as we all know during negotiations of property settlement agreements) repeat the mantra that we are only agreeing to this specific provision within the confines of a *total agreement*?

A tort claim is strikingly different. It is separate and distinct. It carries with it its own individual and identifiable relief. Its inclusion in a divorce action is the inclusion of a claim regarding a discreet series of facts, which results in the imposition of a financial determination for compensatory and/or punitive damages. As the court in *Borchert* said:

> by contract, tort claims seek payment of a sum of unliquidated damages… in this context, the offer of judgment procedure can be an effective mechanism for encouraging settlement of such claims.

The court thus determined that the offer of judgment rule was applicable in *Tevis*-type claims within divorce actions. The language of Rule 4:58-1 exempting the offer of judgment rule from matrimonial actions did not include within it any action within the family part, and thus did not require the tort claims which by mere happenstance of having been part of a divorce litigation rather than a separate Law Division action could no longer avail itself of the established offer of judgment procedure.

The ramifications of this ruling can and should be carefully examined by matrimonial practitioners. As has been said in the area of removal cases where the pendulum has swung back and forth and the playing field has become somewhat more level, or in the area of mutual payment of experts which again has seemingly become somewhat more level, the strategic advantage of filing a *Tevis* claim now must be examined within the context of receiving or making an offer of judgment. In sum, there is now tangible *risk* to a *Tevis* claim that has less than significant merit and may have been included more for strategic reasons than financial reasons.

The court's opinion in *Borchert* establishes one thing clearly and convincingly: The reasonableness of the parties during their matrimonial action will have significant implications regarding the imposition of fees and costs. That is how it should be. That is what Rule 5:3-5 mandates, and now with the court's opinion in *Borchert* there is (with apologies to Sammy Sosa) perhaps some cork in the *Tevis* arrow within the quiver of the divorce attorneys potential stratagems.

In view of that, it is imperative that prior to filing a *Tevis* claim the risk/reward ratio be re-examined, and subsequent to the filing of a *Tevis* claim the strategic implications of making an offer of judgment pursuant to Rule 4:58-1 should likewise be examined. Most importantly, there is now an effective response to a less than substantial *Tevis* claim, which can and should be utilized in such situations. ■

ENDNOTES

1. 79 N.J. 422 (1979).
2. 145 N.J. 282 (1996).
3. *See Brennan v. Orban, supra* at 293.
4. Approved for publication May 14, 2003.

Conversations With the Court

The following is the transcript of an informative teleconference held on February 13, 2003, between Judges Graham T. Ross, A.J.S.C.; Eugene D. Serpentelli, A.J.S.C.; Linda R. Feinberg, A.J.S.C. and Valerie H. Armstrong, A.J.S.C.; and family law attorneys Mark Sobel, Frank Louis and Lee M. Hymerling.

MARK SOBEL: This is something that the *Family Lawyer* has attempted to do and we really thank the four judges for taking their time to do it because we have the unique opportunity to have four assignment judges, who either fortunately or unfortunately, have spent a considerable amount of time in family law and what we wanted to do is kind of in different ranges, some of it more particular than others, is get your views and impressions of different issues that family lawyers are being confronted with now in the Family Court System in hopes that we can provide our readers sort of some commentary from people who have kind of worked in the trenches and now have a broader prospective over, in some cases, a lot of years. And so with that being said, one of the things, I guess to just maybe kind of start, and I think that knowing that none of our judges are particularly shy, we will sort of kind of have it free flowing if we can in terms of this is one of the inquiries that we had was in terms of the cry I guess we get from the people that are concerned with, that we're concerned with, which is our clients, they're telling us and have told us that its really divorce reform, you know the process takes too long and it costs too much. And from your perspective, both from everything from sitting on family court trials, to doing the case management, to being assignment judges, is if you could kind of give us your perspective on things, if you had a wish list so to speak, what you might be desiring would happen within the system to help kind of ease that situation or produce that result in a better fashion.

JUDGE ROSS: Without being shy, Mark, as you said, I think the problem is when we speak to lawyers, you're the ones who delay it—not the court. And I don't mean that in a nasty way. You're the ones who have said, well we need more time; we need more discovery; we can't simply allow our clients to resolve issues without having this discovery or that discovery; that information; this information. The single best thing that happened in terms of the efficiency, and I use that term loosely as well, was Best Practices. And I commended the bar, I continue to commend the family bar, it's one of the only bar's who stepped up to the plate (as opposed to the civil and criminal bars who, quite frankly, didn't want to do this and they really, and still are not on the same page). The family part said, look we'll work with you and in fact you did work with us, we've gotten much more efficient and efficiency translates into less time, which means less dollars. When they talk about it taking too long, they mean it costs too much money. That's the bottom line no matter how you cut the cake. When a litigant says it takes too much time it means it costs me too much, and we have done miraculous things in terms of the efficiencies that we now have in the dissolution section. I mean, very few cases are over a year old. The backlog reduction has been significant; it's been impressive in almost every single county. Again, it's not necessarily the courts—we're ready to go. I mean we can rock and roll much, much quicker than you can. And it's a question of what information do you really have to have in order for you to feel comfortable or allow your clients to feel comfortable in making these cases ready. Now saying that, there is also economic mediation. There are a number of other things that we are all in favor of because we, as you know, cannot do a case at a time. One trial at a time means we will never ever finish, so we've got to use other ways. So the Best Practices is obviously one thing and we can go from there.

MR. HYMERLING: Judge Serpentelli, you've been with the Practice Committee since its inception and with the Pashman Committee before that. How do you respond to the court system's answer to the question that Mark posed, things just take too long.

JUDGE SERPENTELLI: Are you asking me what I believe what the court system's response is?

MR. HYMERLING: Sure.

JUDGE SERPENTELLI: Well, I'm not so sure we have a response. I generally would agree things take too long. There's no question about it. In too many cases. Now, I think Judge Ross is correct that we are moving faster in a lot of areas and the large percentage of our cases are not needlessly paced. But there are delays in sectors of the family court

that are really unsatisfactory. For example, when we do have to try a matrimonial, in too many instances it's taking us too long to get to them for whatever the reasons are. And I think some of it is court related. I think we are still overwhelmed, and I think we have more than we can handle, and I do think that translates into delays. A lot of it I do agree is related to trying these cases to a fare thee well and too many motions, and a lot of other things that are outside of our control.

MR. HYMERLING: Judge Armstrong?

JUDGE ARMSTRONG: Well, I agree with Judge Ross that there is a direct correlation between the cost of the litigation and the length and time that it takes. In my vicinage, Vicinage One, which is Atlantic and Cape May, the very issues that you've raised, costs and the time, became a real concern to us going back to the mid 1990s and, we just established a firm resolve to do something about it, and, I think that, and particularly talking about the matrimonial cases, I think that the system that we ultimately put into place which is more commonly known now throughout the state because we've done a lot of talking about it, I think has proven that you can cut down the cost and you can cut down the time, and almost every matrimonial case in Vicinage One is resolved in a year or less. We have very, very few trials, and I think this is attributable to the fact that the ground rules here are firmly established, they've been communicated, everybody understands how you play ball down here when you have a matrimonial action and there really are no surprises and the expectations have been made known to the attorneys, they seem to like the system, and our judges who handle the matrimonial cases manage them very tightly. So, frankly, I've been very pleased with what we've been able to do here and it demonstrates to me that it is, you know that it is possible. As I said, we have very, very few cases that go over a year old in the matrimonial area. But I think this question of time and money is relevant really to any type of litigation that you have from the family part in that we as a judiciary need to be sensitive to it and we need to hold the lawyers and the litigants accountable in terms of time frames and what the expectations are and to communicate those expectations very clearly to them.

MR. HYMERLING: Judge Feinberg, one of the themes that you advocated during the period of the special committee was aggressive case management, and certainly we now see throughout the state case management orders generated in any one of several ways. Do you see the level of case management that you had hoped to achieve when those recommendations were made?

JUDGE FEINBERG: I think so. I mean at least in my county we do individual calendars so every judge is assigned a case when it comes in. Within 30 days of the filing of the answer there is a case management conference. And I find that works very, very well. Discovery is identified in terms of time; the valuations that need to be done are done and there is a really, I think, very vital and strong relationship with the bar. The problem that I have encountered is when it comes time to then move that case along, often times the attorneys and, you know they have a lot of cases, and they are very, very busy, but often times the timeframes that are identified in the case management order, much to the chagrin of the court, are not adhered to. And then you get a phone call or a letter requesting an extension. I think the court has done a lot to move these cases quickly, not only through differentiating case management and mandatory case management conferences at Best Practices, but I think the stumbling block is that often times those are extended because attorneys are asking for additional time so that delays the process. What I have attempted to do in Mercer is to tell the lawyers, listen, you know those time periods are real, I expect you to comply. For the most part that happens but when there is a delay, I think it is because of problems with discovery. I think that's a real, real, real, real problem.

JUDGE SERPENTELLI: But I believe we are still not, and perhaps I am wrong, on a statewide basis, that we are still not in a position to reach trial date certainty as we are at least here in Ocean in the civil matter. I mean, you get a trial date in Ocean, you get it tried 90–95 percent within the week and normally on the day or next day in our Civil Division. I don't think we can make those kinds of guarantees in family.

JUDGE ROSS: But I think we can Gene, with the *caveat* that you have a sufficient number of family judges prepared to try cases.

JUDGE SERPENTELLI: Well whatever.

JUDGE ROSS: If that becomes problematic…

JUDGE SERPENTELLI: That's the whole *caveat*.

JUDGE ROSS: Well, I understand that. But that's why, and I agree with Linda and Val and quite frankly, we looked at Atlantic County when Val was the chair, when I was the chair, we looked at Atlantic to see what Atlantic was doing right. And what they were doing right was aggressive case management. And if you've got judges assigned to cases early on, a specific judge, one case one judge, one judge one family.

JUDGE ROSS: If you have aggressive case management with individual judges you do have the opportunity to have a trial date certainty because you can hopefully then get those things flushed out. That's what Vince does. That's what Max does. That's what the better judges do. Some of the judges in Middlesex do that. And that's what we do in Somerset and Hunterdon. You get the judge to say look, it's a real order. This case management order is a real order and we sit down, either by telephone and/or in person, and tell me now what the prob-

lems are so I can address them and give you what will be a relatively real trial date.

JUDGE SERPENTELLI: Yeah, so does that mean that aggressive case management can overcome what I heard you start off with that it's the lawyers fault?

JUDGE ROSS: Yes.

JUDGE SERPENTELLI: Ok.

JUDGE ROSS: I think it can Gene. I really do. Because, you need, you see, from my perspective, the lawyers are not as credible as they can and should be. And I'm not saying that's a bad thing. Don't get me wrong and when you read this tape it's going to look like I'm critical of the lawyers, I'm not, if you will be honest with me and tell me what your real problems are as opposed to coming to me with made up stuff. I can't deal with made up stuff. I can deal with real problems. This is a partnership, and its only going to work if the lawyers walk the same path with the, with the court, and the case management order is the single most important part of that case. It really is. It sets up the timeframes. It sets up the issues. And realistically whether there is economic mediation or not, you can get involved in those things—is it a blue ribbon case? Is it going to go to arbitration? We talked about that the other night at the Family Law Section meeting, there are a lot of things that can be done still within that 12-month period which keeps the case within the disposition goal.

JUDGE FEINBERG: You know the other thing is that I think there is also possibly a training issue that maybe in the judiciary we need to address because not all judges are as effective in case management.

JUDGE ROSS: That's true.

JUDGE FEINBERG: People like myself, and Tom and Val and some of the judges who are getting real strict compliance are judges who are very good at case management. So that when the lawyers walk in they know, listen, they're in this particular court, I've got to make sure I get it done. That could be a training issue. The other issue, I think, is that a lot of lawyers have difficulty with client control.

JUDGE ROSS: Right.

JUDGE FEINBERG: And you can tell it's the lawyer, but ultimately, you know when you're talking about discovery and document production, ultimately the client's got to come up with that and I think that maybe lawyers need to be trained in terms of making sure that their clients understand that this is not something that can wait and that they're going to have to produce the documents timely. So, I think it's probably a training issue or some issue that, you know lawyers are going to have to learn how to control their clients, and make sure clients understand. And I even thought at times that sometimes it might not be bad to have a client in the courtroom and say listen, these are strict deadlines because when the case management order is signed, generally the lawyers send it in. The client is not there and the client is sort of isolated, so either you have the client there which is probably unrealistic or you really emphasize to the lawyer, you need to communicate to your client now that this order has to be complied with. And if you do that, and then maybe we train judges better in case management. Maybe, maybe that would help.

JUDGE ROSS: But see, Linda when you say, and you're right, there's credibility in the judge before whom you are appearing in terms of how strict is that judge going to be. And by luck of the draw, like it or not, then you get somebody like me—I was very difficult when it came to putting cases off for frivolous reasons—what I thought to be frivolous. But the lawyers knew that when they stepped into the courtroom. The other judges may not be quite as understanding, and I use that term loosely, as I was, but that doesn't mean that there should be form over substance, its still a court of equity. But realistically, all the judges should react the same at least out of the gate as should the lawyers. They should expect that this is what the deal is going to be. And you're right Linda, it is a training issue for lawyers and for judges.

FRANK LOUIS: May I just respond to something Judge Feinberg said about the training issue and it's not simply the entry of the case management order, it's following on it and the difference that I noticed in Atlantic County and some of the counties where I've been where it's effective is the ability of the court to make themselves available to deal with problems by telephone. And to effectively and practically deal with the issues that come up that create delays. Lawyers are required to file motions to resolve those issues as opposed to getting a judge on the phone. There is inherent delay and there is no time for that delay anymore. That's one thing and the second thing is that there is a statistical problem in the first 90 days. That's not necessarily a judge problem—that's not a lawyer problem and that is for example, case management conferences are in some counties set when the responsive pleading is filed as opposed to when the adverse party is identified and it could be a difference of two weeks or a month between that time period and there's no reason to waste that time. We have to identify in the first 90 days what we can do to expedite cases. That's where I see that the system, maybe files a motion, maybe doesn't file the answer in as timely a manner but it doesn't get listed for case management even though the system knows who the lawyer is.

JUDGE FEINBERG: Let me tell you Frank, I'd like to see a system where before you file a motion you got two lawyers in a case that are required to initiate a telephonic conference to resolve…

JUDGE ROSS: I agree, that would be great.

JUDGE FEINBERG: That would be fabulous.

FRANK LOUIS: I think there are some motions and you do have that and more specific answers in discovery. Interrogatories.

JUDGE FEINBERG: Yeah, but that's only that you have to notify your adversary and try to work it out. My point is maybe before they file any motion, unless it's a serious emergent matter, try to resolve it by phone. Most judges would welcome that.

MARK SOBEL: Well, given what you said, given what you said judge, which would help us in terms of the readership in one of the questions that we wanted to get from you. You all have this kind of perspective of being in family court and now being assignment judges, two things: Number 1, given the importance as I've heard of case management, is that something that must be merely a judge function. That there has to be a judge touching the case for all case management.

JUDGE ARMSTRONG: Mark, we have a system in Atlantic for years where one of our staff, you know, veteran staff, experienced staff, did and continues to do, now we have other staff, but was doing a majority of the first case management conference and it worked great and when we initially suggested that, there was a lot of reaction of horror, like, you can't do that…it would have to be a judge. Well, no. It doesn't have to be.

JUDGE ROSS: No, it doesn't.

JUDGE ARMSTRONG: And we're to the point here in Atlantic where the system is so predictable and so tight that in many cases the lawyers just send in the case management order all filled in; they don't even have to come in, they fill in their own discovery dates, they know what the expectation period is in terms of the outside limits for discovery dates, they know what it is. It's very predictable, they fill it in, they send the order in, and they don't even have to have an actual case management conference. I mean, it works extremely well. Of course in the more difficult or more complex cases, then you have to bring a judge into it. But, a lot of these cases can be managed very effectively by staff and of course, that implies, however, that the staff is communicating directly with the judge who is in charge of that particular case. But, it works very well and has worked very well in our vicinage, you know, for years.

JUDGE ROSS: That's the way we do it, too. You fill your own out and send it in. However, the responsible judge then does review each and every case management order.

JUDGE ARMSTRONG: Absolutely.

JUDGE ROSS: And, I was very difficult when I was doing it. I would not give some of the dates that the lawyer's wanted and it was fine. It worked fine. And you have staff doing it and you don't have to have judge involvement at all.

MARK SOBEL: What if you receive communication from a lawyer that he or she wants to opt out of that and wants to have a judge do the initial case management?

JUDGE SERPENTELLI: Well, tell me why?

MARK SOBEL: The case is complex. I'm anticipating that there is going to be difficulty in terms of getting cooperation. We have legal disputes. This guy's a partner in a lot of businesses, he is a minority and we are going to want to see all the partnership information. I know there is going to be a fight about that.

JUDGE ROSS: I…yes, I'm not going to say no, never no, uniformly and sure if you want something like that, fine. But I don't think honestly in the years that I was doing it, put any case on a complex track. Every one of them is standard or expedited because I didn't think they were complex. I think you can flush these issues out and deal with them other than simply by putting it into a complex track which is obviously problematic.

MR. HYMERLING: Let me ask a question about that. When you have a case with a very large business involving clearly the need for an appraiser or an appraiser on each side if that is the choice, is that something that should have an expedited discovery, and if not, why can't we say it's complex because in fact some of the issues are?

JUDGE FEINBERG: Well why not put it on the standard track?

JUDGE ROSS: Exactly.

JUDGE FEINBERG: I mean, you know, my feeling is if you have a small business where there is a problem with tracing assets, that's more likely a complex case than a big business where you are going to have two appraisers.

JUDGE ROSS: No question.

LEE HYMERLING: But is it realistic to think that in the standard track, isn't that a 120 days of discovery, that that's going to be concluded within that period of time?

JUDGE FEINBERG: Well you know, I'd rather put it there and then if there is a problem you can always deal with it later.

JUDGE ROSS: That's exactly the way to do it.

JUDGE FEINBERG: You know sometimes if you have high expectations, you encourage people to perform.

LEE HYMERLING: But doesn't that give the monied spouse who has all the facts an incredible advantage because the facts can be parsed out and the pressure is really on the other spouse and his or her counsel?

JUDGE ROSS: Well, if you need money, I think you can make that immediate application to get some money. But we have, I mean, Linda, Val and I all really try to appoint a single expert as opposed to one for wife, one for husband. I like to get an agreed-upon expert to just get it started and get it done. But you're not precluded from bringing your own expert in if you don't like the court-appointed expert, but that's the way to move these cases along.

JUDGE FEINBERG: And the other thing is, I mean, my policy is that the lawyers send in the case management order but quite frankly, if any lawyer believes that a confer-

ence is appropriate, I will hold the conference. But you can still put that case involving that business on a standard track. If a lawyer has issues, have a conference. But there is no reason to put it on a complex track.

MARK SOBEL: Judge, if I could just shift gears for a second. Now that you are all assignment judges having elevated from so to speak…

JUDGE ROSS: Some would think it's a demotion, but let's presume it's an elevation. Ok.

MARK SOBEL: The folklore is at least that the family court judgeship and the work of a family court judge is much more intensive, requiring a lot more time because of the variety of things that they are faced with more than perhaps either civil or criminal and that in the most layman-like terms, it is the hardest judicial job at the trial court level for the judge. Given that, perhaps that might be the case. As assignment judges, if you had a wish list and could redirect resources or allocate things, is there something that you think that would suggest to assist? Like for example, and I just say this as an example for where I am going, allow a family court judge to have two clerks or do something to ease that burden perhaps, and move the flow. I say that only so we will not have a situation where motions are pending a long time or for whatever it might be. I throw that open to you in terms of as assignment judges what you might be able to do.

JUDGE SERPENTELLI: So that the basic problem as I see it is there are not enough family court judges in relationship to the total component in our vicinages. I have 40 percent, roughly 40 percent, eight out of 21 judges in the family court. And, I think statewide, that's probably the highest percentage in the state and I think statewide, the average is probably more like 25 percent.

MARK SOBEL: Judge, can I just interrupt one second, and show my lack of knowledge? Is that something the assignment judge gets the right to decide? Like, how many I am going to put in each section so to speak.

JUDGE SERPENTELLI: Yes.

JUDGE FEINBERG: Yes.

JUDGE ROSS: For the most part, yes.

JUDGE SERPENTELLI: Chief justice or the administrative director could quarrel with that, and the ultimate authority is with the chief. But I have been allowed that discretion now for quite some time, and I haven't had any objection to it and of course, you have to balance off and make sure you're getting your job done in the other sectors and I find it much easier to get the job done in civil and criminal in the way I believe it should be done and I think that that is a very fundamental problem and it translates into happier family court judges. I don't have judges asking to come off family. I have judges in there five years and I don't get any pressure to take them off. I think that's a starting point. Now, yes, are there other things we can do? I think so. I'll leave that to the other family judges.

JUDGE FEINBERG: Yes, I would, say Mark, I mean, I sort of equally divide the judges, and I'll tell you, and the family judges work very, very hard and they have to deal with the emotional aspect, but I'll tell you, on the civil judges that I have, they've got like 150 motions every two weeks, I mean they're really, really working very hard as well. Giving two clerks…every family part judge does have a clerk. I mean, it's always hard when you're comparing workloads because although the family court judges are working very hard and they have to deal with the emotional aspect of it, the civil judges in a lot of counties are working really, really hard as well.

JUDGE SERPENTELLI: Don't you think, Linda, if you asked, a reasonable civil, or a criminal judge, who had been in family, where they worked harder, wouldn't they say family? Even with the motion load?

JUDGE FEINBERG: I'm not sure.

JUDGE SERPENTELLI: No?

JUDGE FEINBERG: I'm not sure. My civil judges, they're doing 150 or more motions.

JUDGE SERPENTELLI: Yes, but it's what they can control as opposed to the interruption of their workload and…

JUDGE FEINBERG: I know…

JUDGE SERPENTELLI: And, and I mean, I think the nature of the work is set and then, of course, the emotional level.

JUDGE FEINBERG: Yeah, the emotional, yeah.

JUDGE ROSS: So I think that's the difference though, Gene, you're right. I think it's the emotional work versus the actual physical time spent that is the telling barometer in terms of the effort being put forth. Everybody, even the criminal judges, work hard for the most part, I mean they really do. It's just that when they go home at night, they don't have to worry about what they did that day.

MR. HYMERLING: One of the concerns that many family lawyers have expressed is that very often the family assignment becomes the initial entry level assignment, if you will, within the judiciary. That is obviously not uniform, and there are occasionally very experienced judges who are rotated into family. But the experience also, many feel, is that within two or three years, the judge will be transferred elsewhere and that you don't get more than two or three years from a judge sitting in family. Very often those years being at the beginning. Is that perception a fair perception? Is that something that is in the public interest, and has it changed at all over the last several years?

JUDGE ARMSTRONG: I just wanted to make a comment a little bit on the last question and then talk about this issue. I agree with Judge Feinberg at least here in this instance. All of our judges and our various positions are working extremely hard, and of course it's always nice to have more resources. But if they're not there,

then how do you deal with them? The thing about family is that it is somewhat more intense in terms of the emotional issues that we get and the thing that makes it, I think, really exhausting at times is the fact that every decision is a judge decision. We don't have a jury to you know, to render the decision and plus every decision that a family judge makes you have to explain it, you have to give reasons for it. So that's what makes it really intense at times. But with regard to this issue about judges rotating out fairly quickly, I have to say, and I'm not sure who else, I think somebody else commented on this, but, our Family Division judges in here really have quite a bit of longevity. Now I have two new ones who had come in the past year, but for the most part, our family judges don't want to leave family. Consequently we've let them stay and they're doing just a great job. But I think there are a couple of critical things in terms of longevity in family, and the first thing is, and this is something that we had been doing here for quite some period of time, but it is now the policy, to get that intense training up front when a new judge comes into family, you know before they have to go out on the bench. Let them try to get to be somewhat comfortable. But the other thing is, that in family, a judge can get burned out on a particular type of subject matter. I mean, how long can you continuously do domestic violence without really feeling the effects of it? And so that's where I think that having a good PJ (presiding judge) in place can really make a difference because then they can rotate among the family judges the subject matter if somebody leaves and that's something that we've done here. I know when I was the PJ, I would periodically inquire and I know Judge Segal, our current presiding judge does, periodically inquire to judges, are you getting burned out in juvenile? Have you had enough domestic violence for a while? And then we would make the appropriate shift and we have such cooperation here that the other judges in family recognize that they may have to slip out of a particular subject matter for a while to give somebody else a relief. So I think with the right type of management and sensitivity to the intensity of it, the burnout factor, that it is very possible to have judges who will want to stay in family. At least that's been our experience here.

MR. HYMERLING: Statewide judge…and the other three judges, statewide, is that the experience that we are keeping—let's say, a third of the judges in family, after their first three years—more than a third rather?

JUDGE FEINBERG: Yes and this is really sort of interesting. I've got five judges; at least three, maybe even four, want to stay in family. I think part of that is, number one, we're training people better when they get there, but I don't know, but I think the whole concept of being a family part judge used to be that you used to at least consider yourself a second-class citizen. Now family part judges have a tremendous amount of respect in the judiciary, I think the chief has done a lot to encourage that and the former chief justice in terms of making sure the family part judges were considered part of the process, and the current chief justice has continued that, but I think the policy is that if you have a judge in family who is doing a good job and wants to stay there, that that judge should be given the opportunity, absent other circumstances, to stay. Wouldn't you say that, Gene?

JUDGE SERPENTELLI: Yes, that's definitely the policy, and, as I mentioned, in my vicinage a significant number of judges have been there beyond the three years. When I beefed up the numbers, we had a couple of newer judges but, as I said, I don't have anybody asking to come off. Now, that having been said, I do believe that there are vicinages where fairly routine rotation or automatic rotation is still a policy. I certainly know of a couple where I know that to be the fact. I don't think that's good policy and if we're doing that, it is not what the policy of the court was.

JUDGE ROSS: I think former Chief Justice Wilentz recognized that that's what was happening. That the newer judges were being assigned to family, like you know, pay your dues, and the older people, all of the older judges were getting off family. And I think to address that he did institute mandatory rotation. It got to a point, though, after that, that if a judge showed an aptitude and a willingness or desire to stay, and they were doing a good job, they stayed. And family was quite frankly the only division that he made that exception. There was mandatory rotation in the other divisions, except for family.

MARK SOBEL: Judge, can I comment on whether that exists now in your view?

JUDGE FEINBERG: Do you think when you're making the initial assignment, is it something that you as assignment judges look at, the background of that person coming into the bench?

JUDGE ROSS: Absolutely. And that's an interesting question because I've got a new judge about ready to be appointed here with a family background and I'm questioning myself whether I want to send her to family or whether I want to send her to civil.

MARK SOBEL: Why do you question that?

JUDGE ROSS: Because maybe I want her to get a little bit more of a well-rounded judicial education before I have her do something that she clearly can do.

JUDGE SERPENTELLI: You know, the whole issue of whether a judge comes onto the bench without previous family experience and therefore, might, with adequate training, with adequate assistance make a better family court judge then one who's been doing family court work all their life is one you can argue about quite a bit, I've watched it and

I've seen both sides of it and I'm not at all convinced that the mere fact that one has practiced family law is a major advantage.

MARK SOBEL: From the lawyer's perspective, we thought it was the other way around, because it seems that if you did have experience, you weren't going to family.

JUDGE SERPENTELLI: Well, no.

JUDGE ROSS: No.

JUDGE SERPENTELLI: I don't know that that's a factor at all.

JUDGE ROSS: No, I don't think that's true.

JUDGE SERPENTELLI: I'm talking about, given the choice, if I had a very experienced family practitioner and then I had a very fine lawyer who had not practiced in the family arena, I'm not so sure that I would necessarily opt for the family practitioner.

JUDGE ROSS: So, an example, Mark, and not that I'm doing everything right, but Judge Ann Bartlett was a family lawyer. She was recognized statewide as an expert family lawyer. I didn't send her to family. And she has now said you know what, judge, you made the right call. I'm glad you didn't send me to family. I would like to be in family at some point, yes, but this well-rounded experience background that I'm now getting is much better than me simply being focused and/or pigeonholed as a family judge. It's also easier for a family lawyer to *not* do family for the first couple of years because it's tough to tell your peers what to do. It's very difficult, and you take that problem away from a new judge, saying look, go to civil, go to criminal, for a couple of years, you're done with that, or a year or whatever it is, and then you can go back and then that experience is over. Plus you know how to handle lawyers much better then you did when you started.

JUDGE FEINBERG: And the other thing Mark, when a new judge comes in, remember you've got, whatever you have, 19, 20, 30 other judges and part of your decision is going to be based upon whether there is somebody else on another division who would like to make a change, and so it's not only the background of the person or where they'd like to go, but other judges who have expressed an interest.

MARK SOBEL: Judge, how responsive are you to something like that, and does it base in some way, shape or form on seniority? I mean, you know, I've been a judge here for six or seven years, I'd like to try something else out?

JUDGE FEINBERG: I think that there are a lot of factors Mark, maybe somebody's been on the bench a long time, maybe somebody has been doing civil for three years and doesn't have a lot of seniority but now would like to make a move and it's appropriate because I think the sense is that after three years rotation should be considered. It's not just one thing, you don't consider it in a vacuum, it's really a bunch of stuff.

JUDGE ARMSTRONG: We've had a tradition here, it was in existence when I got here in 1991 and since then we've had, I'm the third assignment judge since then, and we've all continued it and it's really helpful. In the spring when the chief justice asks each of the assignment judges to give his or her recommendations for who's going to sit in what division of the court for the next court term, we actually have developed a form which we send out to each of our judges, we have a confidential basis, inquiring, you know, "Are you interested in a change?" Do you want to go to another division? Would you be interested in the presiding judge position if one became available? Are you interested in being the backup equity judge? You know, those types of inquiries. You get all that input, and then that gives you a basis to start from and then if you see that maybe somebody wants to move, you can talk to that judge and you may then go to another judge and see whether he or she is interested in changing. So it's really helpful and really, you know what, you know what they want to do and, frankly here, it's very rare that we have anybody that says that they want to move and you know, it's worked for us. But that's been real helpful. We get them thinking up front and then from there, it gives you a basis of information to work from and, as Judge Feinberg said, it is somewhat of a complex situation in terms of all the factors that you take into account. Whether you're going to transfer a judge from one division to another.

MR. HYMERLING: Changing gears, one of the issues that many lawyers have expressed concern about is the question of motion timing and administrative adjournments because the list was too full. The question focuses upon the fact that we have 16-day notice requirement and that if there are delays, those delays can affect whether relief is accorded promptly, and so I'd like you to comment on the administrative adjournment, the courtroom—or the court list is full. Judge Feinberg, how do you feel?

JUDGE FEINBERG: Absolutely no. That should never happen. I mean a litigant who files a motion timely under the rules is entitled to have his/her day in court. If judges find themselves having too many motions, then they need to come to the assignment judge, because, well, there's a couple of things. Number one, in Mercer County we do motions every week as opposed to every other week, and I think a lot of places do.

JUDGE ROSS: As we do.

JUDGE FEINBERG: If you institute motions every week, then you can accommodate most litigants. But, if a situation arose that you tried everything, there should never be that practice because a litigant is entitled to have his/her day in court.

JUDGE ROSS: I 100 percent concur with Linda. Practically, though, Lee, again, it's a direct reflection on the number of family judges assigned to the particular county, not vicinage necessarily, the county. I remember I was the only family

judge in Somerset. I had 1,000 dissolution cases plus I was responsible for doing juvenile delinquency, termination of parental rights, non-discussion, yada, yada, yada. So I just physically didn't have time and I was doing them every week so I had a limit because I had an afternoon calendar. I would do motions on Friday morning and I would have an afternoon calendar to pick up the rest of the slack. There is nothing in the rule that permits administrative adjournment. There is no such thing. I realize counties do that. It's necessary only if there is absolutely not enough help and quite frankly, and this, I meant to say this before, a lot of these issues are things that a local county family law section should be addressing with their assignment judge/PJ. Certainly with the PJ and I mean regular meetings. Every month, every six weeks, and none of these things should get to a point where it gets out of hand. I know that there's a problem in one of the northern counties with administrative adjournments. I know that.

MR. HYMERLING: Well, having heard both Judge Feinberg and Judge Ross comment on this, we as lawyers know that there are counties where these adjournments happen entirely by an administrative functionary, or we believe entirely by an administrative functionary, and the decision does not even get to the judge's desk because the list has been cut off.

JUDGE FEINBERG: Then you go to the PJ.

JUDGE ARMSTRONG: Absolutely.

JUDGE FEINBERG: And then, if necessary, the assignment judge.

JUDGE ROSS: Correct.

MARK SOBEL: Judges, let me just ask you this from the perspective of the role of an assignment judge, and this is sort of macro v. micromanagement. You view your role as getting involved, for example, and I'm just going to throw out three examples—same-day decisions, tentative decisions, motions every week. Do you view your role as assignment judge to kind of issue directives, because number one, you've had the experience in family part, number two, you're looking at the overall system functioning to say, I, as assignment judge, am going to in my vicinage say that we're going to have this type of system and I'm going to detail it at some level of specificity? Maybe it's going to be those things; maybe it's not. Or is that something that you feel as an assignment judge, you're going to leave to the people within that division?

JUDGE ROSS: Well that's absolutely what you do. Number one, because that's already been agreed that that's the way to go.

JUDGE SERPENTELLI: What Tom?

JUDGE ROSS: That there should be same-day decisions, that I agree that there should be tentative decisions. What was the other one Mark?

MARK SOBEL: Motions every week.

JUDGE ROSS: Every week. I mean, I agree with that.

MARK SOBEL: Yea, but you know, obviously, it's not happening in every vicinage.

JUDGE ROSS: That's true.

MARK SOBEL: And it may not even be viewed by everyone that it's the right thing to do. What my question is as an assignment judge, do you feel it's your role, do you think that it should be going in that direction? You're going to issue a directive to your judges, I want motions every week.

JUDGE ROSS: Yes.

MARK SOBEL: You leave it up to the judge.

JUDGE ROSS: No.

JUDGE SERPENTELLI: I have a strong belief in empowering people and entrusting in them the responsibility, to act in a professional manner, get their job done. I would allow, for example, a presiding judge to make decisions, within obviously Best Practices, which might be in conflict with what I might intuitively think. On the other hand, the result has got to follow and, for example, if we were to have motions every other week as we do here, we can't have a delay that would be resolved by having them every week. So, ultimately, obviously, the responsibility is mine to see to it that we get the job done as we should. I see myself as having oversight on that. Not initially making those sort of determinations and making sure, however, that we reach the results we need to. So I have, for example, had two very fine presiding judges, one following the other, and I've seen them take varying approaches to the same problem and get the job done in the same way and in other cases, I've seen that that hasn't happened. Then I have to sit down with the presiding judge and say, you have really got to look at, for example, doing motions every week, or something of that sort, to make sure we get it done.

JUDGE FEINBERG: I agree with Gene. You do have to empower your presiding judge. There are certain things that are givens, like same-day orders—that's required. My presiding judge came to me several months ago about going to motions every other week and quite frankly, I said to her, if you can get the job done every other week, you can go every other week. That's your call, I said, but you really should consider, you know as opposed to handling 25 motions, you're dealing with 50, you may decide that's not the right way to go. Certain things that are required, you have to make sure happen. On the other hand, certain things that perhaps would work just fine. Even though your position is X, if your presiding judge thinks the right position is Y and they can get the job done doing it Y, and their judges want to do it Y, then I say go for it. When it comes to the point in time when the job's not getting done, you're going to have to go back to my way.

MARK SOBEL: You're not going to make that determination initially. You're going to let the presiding judge make those decisions and see

what happens?

JUDGE FEINBERG: Yes, unless it's something that's required by Best Practices. Then, obviously they have no discretion.

JUDGE ROSS: I do it just a little differently. We have a discussion annually and/or as needed as to any system that's presently in place that a PJ wants to change, and it's an open discussion. I involve my managers, I involve the PJs and in some respects, my trial judges, and we have an open discussion and we openly arrive at a conclusion. Once we reach that conclusion, then you do it and like Linda had said, and Gene too, I expect if you're the one who wants to do it, then get it done because if you don't get it done, I'm going to say to you, you know what, you're responsible for that.

MARK SOBEL: Sure, absolutely.

JUDGE ARMSTRONG: I have just four of the best PJs. It's just a wonderful…

JUDGE ROSS: Oh yada, yada, yada, come on.

JUDGE ARMSTRONG: They are.

JUDGE ROSS: Come on, come on.

MARK SOBEL: Judge.

JUDGE ARMSTRONG: Seriously, I meet with each of my PJs and the division managers at least once a month on a sort of a formal basis. In other words, a set time. But it's very open door, and I talk to all of them many times a month. During those discussions, if there are any of these types of issues that you're talking about, we would discuss it and basically I have such great faith in them that they're going to make the right decision and they do. It's very rare that I have to be autocratic about anything. It's just a great situation to be in as an assignment judge.

MARK SOBEL: What about the issue of continuous day trials?

MR. HYMERLING: Yeah, I was going to raise that. I have in front of me two historic documents, one of those documents is the 1989 Pathfinders Committee Report and the other document is the Pashman II report, and I read from page 71 of the Pathfinders Report "Continuous trials in all dissolution matters must become the rule." How would you judges rate whether we have succeeded?

JUDGE ROSS: But there is a *caveat* with that Lee, what's the *caveat*? "In those vicinages that had at least four family part judges assigned."

LEE HYMERLING: No, that came in the rule afterwards.

JUDGE ROSS: Well, there you go.

MARK SOBEL: Yeah.

JUDGE ROSS: That's a very important *caveat*.

JUDGE FEINBERG: It's happening Lee. I mean as far as I know, that doesn't necessarily mean it has to be the whole day. It may be a morning or an afternoon, but they're consecutive days. I hope that is happening.

MARK SOBEL: As assignment judges, how important do you think that is?

JUDGE ROSS: Extremely important.

JUDGE SERPENTELLI: Very important

MARK SOBEL: That would be something that you would allocate resources to because you thought it was that important.

JUDGE ROSS: Let me tell you something Mark. Here is the reason why. If you know it is time to go, you are now going to put aside everything else that was interfering with your commitment to this case and you are really going to try to resolve it. And you don't do that unless there is a trial date certainty and you know you are next in the box. Once that's the case, let's go.

MARK SOBEL: But as you know, judge, because you have been around a long time, you also need to know it's going to be everyday.

JUDGE ROSS: Absolutely. It gives you greater incentive.

MARK SOBEL: It's hard to try a case for one day if I know I am not going to be back for three months.

JUDGE ROSS: Absolutely right.

JUDGE FEINBERG: Mark, I have heard of stories in counties where there are more than four judges where there are not continuous trials and if that happens, I really think the bar needs to bring that to the attention of the presiding judge, because that's inexcusable. I've heard of cases that are carried several months and there is no way to justify that.

MARK SOBEL: But, how do you deal with this issue, which we hear from the lawyer's perspective? I want to shift to the lawyer's perspective…

JUDGE FEINBERG: They say, I don't want to tell cause the judge will be mad at me.

MARK SOBEL: Exactly. This judge is making the decision, I don't have a jury making the decision, and now I am telling on him to his boss, so to speak. This is going to help me a lot in this trial, right?

JUDGE FEINBERG: Presiding judges can be very discreet. Trust me.

JUDGE ARMSTRONG: Yeah.

JUDGE ROSS: Yeah. Well very rarely, Mark, is a lawyer going to come and say I'm complaining that I am not getting a continuous trial. They are going to complain that I'm not getting a decision for the most part. This judge has reserved, whether he has told us or not, and I can't get an answer, which puts this case in a totally holding pattern. I can't get it resolved unless a judge is going to give me an answer on a motion, right or wrong, up or down.

MARK SOBEL: Apropos is that judge, would you think that as an assignment judge you should institute some time limits for your judges to render decisions?

JUDGE ROSS: They have time limits now. I don't have to institute anything. They know what the time limits are.

MARK SOBEL: But that are not officially recorded anywhere.

JUDGE ROSS: No, they're recorded everywhere, they certainly are recorded.

MARK SOBEL: No, I don't mean that. I mean there is no rule about that. We don't know how it works.

JUDGE FEINBERG: Well, I'll tell you how it works. Once a case is over—in other words, the trial is over and the briefs have been submitted—after 60 days that case goes on a reserve list. Every month when the assignment judges have their meetings, every assignment judge has to account for each case that is on the reserve list and provide a date that that case is going to be completed.

JUDGE ARMSTRONG: That's like the judicial counsel meeting Mark, when all the AJs and the chief justice and Judge Williams meet.

Each case, Mark, the AJ…

Would have to account for each case in our vicinage over 60 days old, this then, causes us to consult with that judge to find out what the problem is with the case and when is it going to get decided and so on and we have to report that.

JUDGE ROSS: That's also a time when you can find out whether there are systemic problems with that particular judge, too, if you see that same name coming up time after time after time.

JUDGE SERPENTELLI: Just to be clear, it doesn't go on 60 days later. It goes on immediately.

JUDGE ROSS: Right, that's true.

JUDGE SERPENTELLI: It's not until a case ages 60 days that it comes up at a Judicial Council meeting. Now, the bigger problem, and we've got to be honest about this, the bigger problem is that there is a suspicion certainly state-wide that a lot of judges aren't putting these matters on the reserve list.

JUDGE SERPENTELLI: This is a problem that I still, after 18 years as an assignment judge, have difficulty in dealing with, and that is, if judges don't report, we don't know unless somehow we learn from other sources. Once in a while you get a complaint from a litigant. Virtually, it takes an awful lot to make a member of the bar complain or get them to complain, and I have in my time had instances where judges have not been reporting these things and suddenly, we got a problem on our hands. And, I ask the bar, for heaven sake, why didn't somebody say something? Now, I understand what you just said Mark, you know, lawyers are very hesitant to do that but we are in a partnership, and if the right atmosphere is created in the county, you would think that there is a trust relationship, that there is not going to be attribution but that somehow, with an appropriate contact, if you can't deal with the assignment judge, that he or she would take that issue up and resolve it. But I have been around long enough to feel and I am quite confident that those reserve lists that we go over each month at the judicial counsel are incomplete.

JUDGE ROSS: No question about that.

MARK SOBEL: Is that the feeling?

JUDGE ROSS: Yes. That's the general feeling.

JUDGE FEINBERG: But I think that all of us emphasize to all of the judges repeatedly that the way judges get in trouble is not because they have a case on the reserve list that they haven't decided but they get in trouble because they are not reporting a case and it doesn't end up on the reserve list and that's a big problem and I'm sure that the other three assignment judges...

JUDGE ROSS: Absolutely. Let me say this to Mark and Lee: If you know, and I mean this almost universally, if you know that there is a judge who is really reluctant or recalcitrant with opinions, you owe it to the judge himself or herself to either: (a) talk to your PJ at a bar meeting or (b) at a county family law meeting and say you know it's getting to be a problem. Most of the family PJs will not jam a guy up or a woman up, they are going to say, look somebody came to me, it doesn't make any difference, is it a problem and they will work the judge.

JUDGE FEINBERG: And you know, I'll tell you the other thing, the judges, the ones who don't have tenure, are going to have to go for reappointment and my feeling is that if the judges are not performing properly or they are not getting decisions out, you really have a responsibility to bring that to their attention, to let them at least try to resolve the issues and my experience has been that they are normally very receptive.

JUDGE ROSS: I agree with that.

MARK SOBEL: With that in mind judge, as an assignment judge would you either talk to the presiding judge or make a recommendation that a judge should have a certain amount of, I'm going to call it "down time," that he is going to be allowed to be in his chambers to render decisions?

JUDGE ROSS: No.

JUDGE FEINBERG: I did that once when I had a judge who had four or five decisions, and I gave that judge some limited down time, but I think that is a dangerous precedent, and I think judges have to learn to manage their time and get things done and use the day for doing what they are supposed to be doing.

JUDGE SERPENTELLI: Mark, if the hole has been dug deep enough, I have been forced on two occasions to allow that. I, of course, have to assure myself that the judge is making the effort, but if they dig that hole deep enough, there is no way they can get out and do their present work in a timely fashion, and in the manner it should be done, I would permit that.

JUDGE ROSS: It should never get to that point, Mark, it really shouldn't. And, quite frankly, you don't want family judges treated any differently than any other judge. You want to raise the bar, then we should know about these problems much, much earlier on than when it gets to a situation where you are going to have to now work in your chambers, either you are going to take vacation and get these opinions done or some other reason, you are going to work weekends and that's not necessarily the best thing either. We should know well before it gets to that point so we can, in fact, address it.

LEE HYMERLING: A related ques-

tion, and I recognized in posing this question that we have a very tight state budget and it's hard to open a New Jersey newspaper and not to see some program jeopardized or some other cut being made, do you believe the family court from a judge point of view is now adequately staffed? To be most specific, and I am not talking about administrative staff, or the like, but simply talking about the judiciary of 450 some superior court or tax court judges, is the family court getting proportionately to other divisions the judge strength that it needs?

JUDGE SERPENTELLI: Well, you mean Lee, by assignment because you know when the judges come in they are not designated as family court judges.

LEE HYMERLING: No, I understand that, I'm saying by assignment.

JUDGE ROSS: I think for the most part, yes.

JUDGE SERPENTELLI: Well, I don't as I said before. I think we could do better in our percentages, and I continue to believe that considering everything, cases are not fungible. A civil judge can have a calendar of 100 small claims special civil part cases in a day and do it quite easily. You have 100 landlord tenant cases, you must be finished by noontime. But even if they are not finished, the stress and strain on them cannot be equivalent to family court handling far fewer cases. I really think with the background that I talked about before, I think the percentage of judges in the family court are not as high as they should be.

JUDGE FEINBERG: You know, it's a complex issue; it really depends. I mean if you have a situation where you've got one or two civil judges who are not well, and you have been down in civil, and your backlog is high, you may have to shuffle and move somebody out of family into civil. You may also find that you have got prosecutors who changed their position in terms of how they process cases and now everything is going to indictment and so you have got a need for more judges in criminal. So it is a very complex process. I think that assignment judges should look at family and understand the needs of family, but in the end I really think, hopefully, that they look at backlog, you know, vacancies and make the determination in terms of what they think they need to get the job done. But I don't think that family is "picked on" or understaffed, if you want to say that, any more than any other division that may have some issues in terms of vacancies or illness or backlog. All those issues need to be reviewed in their entirety when the assignment judge makes the decision in terms of where judges are going to go.

JUDGE ARMSTRONG: I think that we are really fortunate—at least I felt this way—in terms of the recommendations to date that I have made to the chief justice for assignments, I think we have a great deal of discretion as assignment judges. We get people where we want and the chief is very respectful of our recommendations and what our specific needs are in a particular division and so, I think that is something for which we should be very thankful.

JUDGE ROSS: The four of us are more sympathetic to the Family Division than some of the other assignment judges. However, I also look at myself as the gatekeeper for the dam, and if I am finding some water springing out of one part, I have got to shift my resources to where that break is about to occur and I can do that rather fluidly and the chief will allow you to do that on a need basis. We don't have to necessarily get her approval to do that if it is short term. And, we have to look at all of the divisions and we cannot, and I again, as sympathetic as I may be to family, I have got to look at all divisions to make sure that wherever I may have a problem I have got to be able to address it.

JUDGE SERPENTELLI: You know, of course, that's true, and you also add to that mix that you may have some particularly adept judges in the family court who are able to get it done better than if I increase the numbers.

JUDGE ROSS: That's true.

JUDGE SERPENTELLI: Of all things being said, I am not sure we are past some of the attitudes that we have had in the past completely. I think we are doing a lot better and I'm still not sure that we are as committed as we need to be.

LEE HYMERLING: Although this is not something that may interest all of our readers, it will interest a healthy number of our readers. Do you see any of what Judge Page used to call "the other product lines," that is other than dissolution, I'm thinking about termination, abuse and neglect, juvenile that is now at a significant problem level, meaning dispositions taking longer than they should, which would obviously then have an impact upon the dissolution calendar?

JUDGE FEINBERG: Well, children in court, the federal and state regulations are so rigid that I think we have done a spectacular job in child abuse and termination cases. They are moving expeditiously and I think resources have been allocated. But there are other case types that we need to talk about as well. You know there is FD and non-dissolutions, domestic violence...

JUDGE SERPENTELLI: The contempts and domestic violence, some are taking longer than they should.

JUDGE FEINBERG: Right, and most of the lawyers, and I am not being critical. but they deal with FM cases, dissolution and don't have a sense that dissolution is really a very small percentage of the cases we deal with. Yet we do allocate a lot of time to that. Probably about 85 percent of the cases that we deal with are non-dissolution cases.

JUDGE ROSS: The problem, too, Lee, we've talked about this many times, the people who sit on the Family Law Section Executive Committee, the ones who even appear at the county bar family committees,

are dissolution lawyers. There are very few juvenile lawyers which are either PDs or prosecutors, for the most part APs. There are very few DYFS lawyers who really come to these meetings because they just don't. So the voice is really the voice of the dissolution bar as opposed to "the Family bar." We have done remarkably well. And interestingly, the director had indicated that we were supposed to get additional judgeships when the termination of parental rights cases had to get into compliance and the director at that point said well you know what, let's see how well the Family Division judges do because I have a suspicion that as good as they are, they are going to get these cases done without additional judges and, in fact, we did. Now that's a good thing and a bad thing. First of all because maybe the family judges are more conscientious than others but we again move these resources as the need arises but you are never going to get other members of the family bar other than dissolution to come to these meetings because they don't. There is nobody who specializes in non-dissolution cases. Nobody specializes in DV contempts. Nobody specializes in DV cases unless its part of a dissolution case. So the specialized bar is only the dissolution bar.

MARK SOBEL: Apropos of that judge, and one of the things that I wanted to get a feel from all of you on, and I may ask this inarticulately because I just don't know about it, but there is this culture among the lawyers that I guess the assignment judges in some way, shape and form are in competition with each other, if only in the sense that somebody there either at AOC or wherever it is gives out two stars, three stars or one star on a vicinage-by-vicinage basis, depending on how well they are performing on various levels.

JUDGE ROSS: Not true.

MARK SOBEL: The first question I have is do you think that is productive or not productive?

JUDGE ROSS: Well first of all it's not true.

JUDGE FEINBERG: It's not true.

MARK SOBEL: Again, this comes from folklore. What else do family lawyers have to do if they are waiting to be heard except talk about things that are not true. Is there any system where they're actually now I am going to use the word, "grading"? I don't mean that it the "ABC" sense. I mean where they are comparing vicinage to vicinage in terms of what they're doing, not only in family part but if they are in the other parts as well?

JUDGE ROSS: Yes.

JUDGE ARMSTRONG: The key measurement, Mark, is, and you guys correct me if I am not saying this accurately, is backlog.

JUDGE ROSS: Correct.

JUDGE ARMSTRONG: Ok, because it is very tangible and it is very quantitative and it also frankly, most of the times, the disposition for the cases throughout all of the divisions are pretty realistic and that's the key and the key measurement. So that's looked at the end of each court year and were broken into three stars if you are in the top groups two or one if you are in the bottom group but actually…

JUDGE SERPENTELLI: They are actually diamonds.

JUDGE ARMSTRONG: Diamonds.

(laugher)

JUDGE ROSS: It's not like a merit badge though Mark. Don't get the wrong impression.

MARK SOBEL: But lawyers have gotten the wrong impression.

JUDGE ROSS: Well, that's not correct. What that does is identify perhaps a problem that needs some additional information to address and that's all that does, is identify a potential problem.

JUDGE SERPENTELLI: I think the problem is that the lawyers see it as bean counting and this so called diamond report was instituted I don't a couple years ago and the purpose of it is to say, Ocean County in all your case types except juvenile, you are performing up to a median standard, let's say. But take a look here in juvenile, you are only one diamond. Now, you've really got to look around and maybe look at Valerie and Linda, and say, "Gee why are they two or three diamonds and what are you doing that they are not doing?" Now, nobody has ever, to my knowledge, been held accountable beyond what I consider to be reasonable accountability. I mean, we as assignment judges have to be accountable for what we are doing and that is to perform in a reasonably efficient manner.

LEE HYMERLING: Are diamonds taken away if cases aren't disposed of in a year?

JUDGE ROSS: It's not that easy, Lee. It's clearly not that easy, not that simplistic.

JUDGE SERPENTELLI: There is a whole set of factors, and the first time you see a one diamond, it's like take a look at this. The second time, you know it persisted for another three months, what do you do? And then maybe we go a year or more out, it's well how can we help you? Now, I have no problem with that. And it may be that I am doing everything as well as I can do it and still not getting it done, and it could be related to other issues. But what we don't do is have any pressure on…

JUDGE ROSS: No.

JUDGE ARMSTRONG: No, right.

JUDGE SERPENTELLI: We don't have pressure on statistics, we hardly talk about statistics anymore at these judicial council meetings.

JUDGE ROSS: I would never think to compete with Judges Feinberg or Armstrong. There is no way I could compete with them. They are so out of my league.

(Laugher)

JUDGE FEINBERG: That's something that made some sense Ross.

JUDGE ROSS: See, I know where I stand.

JUDGE SERPENTELLI: Let me just finish this thought. As a bar, I would expect you to want us to be accountable. If we are not running our vicinage in a manner that is reasonably efficient and getting the job done for the litigants, the members of the bar and all those we serve,

then we should be accountable.

MARK SOBEL: Does this occur in every division? Not just family, but civil? Criminal?

JUDGE ROSS: It's systemic.

JUDGE FEINBERG: That's according to docket type.

JUDGE ROSS: Correct.

JUDGE ARMSTRONG: You know, its non-dissolution, pre-indictment, auto cases, you know whatever.

JUDGE ROSS: I would say, Mark, to you, that it is still a work in progress. They have been trying to refine it so it is better than it was. It was not good when it started, but we try to measure, it is very difficult to get a measurement device that goes across all counties because some are large, some are small, some have more judges some don't, so it is very difficult.

MARK SOBEL: Judges, do you feel any pressure when you see those types of reports?

JUDGE FEINBERG: Well, we want to do the best that we can, so if we find that our backlog is above the state average we need to start thinking about how we are going to improve what we do. Do we need to allocate resources? Is there something that we can do systemically to help that. I mean, for example, in your law firm, you have got a big law firm. I assume that you go through some evaluation process so that you can ultimately do better, provide better customer support and that's sort of what we're doing.

JUDGE SERPENTELLI: And by the way, it is nothing too different than what we have been doing informally for years. I always took the statistical report at the assignment judge meeting and looked at it and compared myself to other counties.

JUDGE ROSS: We always do it.

JUDGE SERPENTELLI: You know what, we have been here at the bottom of the list in whatever, why is that, and so on. I would initiate that myself. This highlights it.

LEE HYMERLING: Do the reports go down to the specificity of the individual judge, or is it collective by the county?

JUDGE SERPENTELLI: No, by county.

JUDGE FEINBERG: Mark, let me just say one thing. This is not only for family, but for example, in civil they go by track 1 cases, track 2 cases, track 3 cases, track 4 cases. They even break it down by products liability, etc., in criminal they do municipal appeals, post-conviction relief. So it's all divisions and it is very specific and it's not just family.

JUDGE ARMSTRONG: And it's a good thing, I'm glad we have this.

JUDGE ROSS: Absolutely.

LEE HYMERLING: I think that what you are doing is addressing what is a public need. The public wants the judiciary to be accountable, and if the judiciary doesn't have the statistics and then monitor accountability or objective accountability is almost impossible.

LEE HYMERLING: Let me ask two questions that are very family lawyer-oriented. The first question is what advice, and obviously you are not giving advice, but what guidance can you give to the lawyer who does have, whether its labeled a complex case or whether it is labeled the standard track case, but a case that is simply not getting done through nobody's fault within a year? What should that lawyer do?

JUDGE ROSS: You have to identify why it is not getting done.

JUDGE FEINBERG: Ask the judge for a conference.

JUDGE ROSS: Yeah, why isn't it getting done, Lee?

LEE HYMERLING: Well, there could be a plethora of different reasons.

JUDGE ROSS: Tell me, tell me what they are and I can tell you how to address them. If the discovery isn't done because the accountants haven't finished their reports, I think you need to have a conference with the judge to move things along.

MARK SOBEL: I think, judges, what we want to know is the culture of the judge. Is it going to be like we are going to the principal and getting yelled at or is it going to be hey, you guys have a problem here, you know, let's see what we are going to do? We need another expert, this guy isn't getting the report done or I have to free up money to get the depositions done or what the heck it is?

JUDGE ROSS: That's right, and that why you have to talk to the judge.

JUDGE FEINBERG: First of all, Mark, you shouldn't be calling the judge, the judge ought to be calling you if it's a year old.

LEE HYMERLING: A second lawyer issue is, and this goes back even beyond Pathfinders II to the Pashman Report, and in the Pashman Report which believe it or not now is more than 20 years ago, the comment is made "to assure effective representation in matrimonial cases, it is important to provide adequate funds for counsel fees to a financially dependant spouse." The perception of many lawyers is, Pashman notwithstanding, special committee notwithstanding, the amendments to Rule 5:3-5 notwithstanding, it's still difficult to get *pendente lite* fees, and fees are still being reserved.

JUDGE ROSS: What I would say is if you make the case, you should get the relief. I mean, the cases call for certain criteria and the judge should adhere to the case law. I mean I don't know what else to tell you but I don't know whether they are or aren't, Lee. I mean I understand the perception, too, but if you make a case, you should get relief.

MARK SOBEL: Forget about that specific issue, but on a more systemic level tell us your feeling about a judge reserving on an issue until final hearing.

JUDGE FEINBERG: What do you mean, Mark? Reserving *pendente lite* relief?

MARK SOBEL: Reserving the specific request made, it could be perceived, it could be for a lot of different things.

JUDGE ROSS: It's mostly for fees though. [laughs]

MARK SOBEL: Mostly for fees.

JUDGE FEINBERG: Well if there's

an application for prospective fees, that should be addressed specifically, right up front.

JUDGE ROSS: But see, that was one of the things though, and now we've come full circle, these are things that should be addressed in a case management conference early on. Listen, he makes $500,000, she makes nothing. So I'm going to need some fees—address that right up front. He could probably get cooperation and agreement—then I'll give you the fees.

MARK SOBEL: But that can't be done with a staff member.

JUDGE ROSS: No, no. I agree.

MARK SOBEL: Ok.

JUDGE ROSS: Unless, well, it could be done if counsel agree.

MARK SOBEL: Agreed. Let me ask a different question because I know our readers would want to hear.

MARK SOBEL: There's a lot of years of experience that we're talking to. If you could tell us what particularly you found effective and particularly ineffective in somebody appearing before you. I'm not asking for a specific determination on a case, but in terms of technique that you found particularly effective or particularly ineffective.

JUDGE FEINBERG: Well-prepared.

JUDGE ROSS: Oh yeah, absolutely.

JUDGE FEINBERG: Get to the issues and be respectful.

JUDGE SERPENTELLI: And maintaining your credibility with the court.

JUDGE FEINBERG: Yeah.

MARK SOBEL: How do you do that judge?

JUDGE SERPENTELLI: Well, you know, being honest and not…

JUDGE ROSS: Yeah, don't make stuff up.

JUDGE SERPENTELLI: Not raising issues that need not be raised. Conceding issues that should be. Resolving issues that should be resolved, and focusing on those that need a judge's decision.

JUDGE FEINBERG: And don't be emotional.

JUDGE ROSS: Right.

JUDGE FEINBERG: You know, don't buy into your client's craziness. Be specific. You know, get up and say judge, I have three very significant issues and two issues that are less significant and I'd like to address all three. Be organized, meticulous and prepared, and be respectful. You'll win. Even if you lose your case because you don't think you got what you should've, you've won in the eyes of the judge, and in the bottom line for a guy or gal who's practicing over and over again, that's real important.

JUDGE SERPENTELLI: And I would say maintaining as much brevity as possible in pleadings and in oral argument.

JUDGE FEINBERG: Yeah.

JUDGE ROSS:: Let me say this in terms of professionalism. Up until cell phones, quite frankly, most people showed up for court on time. And if there's a single complaint that I have about attorneys, and I have more than one, that's it. Get to court on time. You know, it's a real weak argument, to say, "I'm stuck in traffic." Well, you know what, you should've left earlier.

JUDGE FEINBERG: Right.

JUDGE ROSS: I recall the old days when we were getting up in the morning and it snowed. What a surprise. I didn't know it was going to snow the night before. They now give you five days notice, and they tell you how much it's going to be, when it's going to start and when it's going to end, and if you've got a court appearance scheduled for whatever county, plan accordingly. Do not be late! And once you're there, and hopefully it'll be a half an hour before the court reads your file. I find lawyers, I'm talking about good lawyers, come in, who do you represent — I don't know, let me check. Oh, I represent the plaintiff. And what's your client do? — um... let me look. You know, that's an outrage to me, and it upsets me and other lawyers sitting there saying, wait a minute. Go into the coffee shop and at least read the darn CIS. There is absolutely no substitute for preparation.

JUDGE FEINBERG: Right.

JUDGE ROSS: You will win ultimately every time if you're more prepared then the other lawyer, you ultimately will win.

JUDGE FEINBERG: You can win without winning.

JUDGE ROSS: Absolutely. And that's the other thing, too. While we're talking about it, I don't ever, ever like to hear I won or I lost. I was successful or I was not successful, but those lawyers who go back and literally in the hall say I won, I lost, I won, I lost, my won-loss record is X, I think that doesn't do service to the general public.

MR. HYMERLING: There is a sign that is in chambers, in a judge's chambers and the judge retired more than a decade ago, or about a decade ago, in Burlington County, that reads, "The Judge can declare no victor in a matrimonial cause," and I think that's what all of you are saying.

JUDGE ROSS: Absolutely. I think that's offensive.

MR. HYMERLING: Now, two systemic issues. The first systemic issue is in dealing with motions. How do you feel about the current timing of the rules? Is that something, meaning the 16 days?

JUDGE FEINBERG: I think it works just fine.

JUDGE ROSS: It works fine for me, too.

JUDGE FEINBERG: Leave it alone.

JUDGE ROSS: Yep.

MR. HYMERLING: Judge Serpentelli?

JUDGE SERPENTELLI: Yeah, as far as I know, I think it's ok.

MR. HYMERLING: A second is the issue of tentative dispositions, which are presently a voluntary, albeit encouraged, technique.

JUDGE ROSS: Best thing since sliced bread.

MR. HYMERLING: Pardon?

JUDGE ROSS: Best thing since sliced bread.

JUDGE FEINBERG: It's really fabulous.

JUDGE ROSS: Outstanding.

JUDGE FEINBERG: Except I'll tell

you, Lee, I tell the new judges, not to issue tentative decisions for three months.

JUDGE ROSS: That's true, I agree with that one.

JUDGE FEINBERG: You know a really young judge needs the courtroom, the dialogue and so forth. So in the beginning, it probably doesn't benefit a judge in the beginning. Unless they've had significant matrimonial experience and they know the issues and they know the dynamics of the courtroom, for a judge that doesn't have that background, it probably is not a good thing for at least three months.

JUDGE ROSS: It works extremely well with judges who have credibility with those lawyers, or the lawyers who have credibility with their judges. Mark, wouldn't you like tentative decisions from judges who you respect?

MARK SOBEL: Yes.

JUDGE ROSS: Yeah, because you can…and again, even if you have an issue, that can even be resolved, not necessarily even having come to court, I mean you can do that by telephone with your adversary, but then you can focus and that again is with regard to the preparation, focus on the issues that really mean something.

JUDGE SERPENTELLI: I've got to tell you, I'm not as excited as…

JUDGE ROSS: Oh, I think it's the best.

JUDGE SERPENTELLI: …Tom and Linda are because I've heard the *caveat*. If you've got really good judges, I think it can work well. I can see it putting a less then really good judge in a worse position.

JUDGE ROSS: But you know, Gene, you learn by trial and error, so that judge then is going to get oral arguments requested on every single motion or every tentative that he gives out, and that's fine, and if he or she starts changing his or her mind, they will also see, now wait a minute here, I've got to do a little bit better and that's not necessarily a bad thing. We give oral argument. If you want to come in, come on in. You start changing your mind though, then you don't have as many people saying I waive oral argument as you otherwise would get.

JUDGE SERPENTELLI: Well, is the message to a judge who is perhaps not as strong, I'm not going to change my mind, therefore I won't give a lawyer an opportunity perhaps to correct things?

JUDGE ROSS: I don't think so, I don't think so. You see, I've very rarely changed my mind because of an oral argument. Very rarely.

MARK SOBEL: We know, judge.

JUDGE ROSS: Well, I know. Right or wrong, because I felt, look, just because you're a better showman then the other person doesn't mean you're going to change my mind. That's why I spend a lot of time looking at the papers, looking at the CISs, and I did spend a lot of time. And just because you're better on your feet then the other person isn't going to matter to me. I'm more of a substance over form person. I think, Linda, you're the same way.

JUDGE FEINBERG: Right.

JUDGE SERPENTELLI: And so am I, and I think it would work well for me if I was doing, you know, volume motions in that area or others. I'm not sure it works well for all judges, that's all.

MARK SOBEL: Given the strength of that feeling, judge, I guess Judge Ross first, but all the judges, would that be something you would leave to the individual judge to decide?

JUDGE ROSS: Absolutely.

MARK SOBEL: You would?

JUDGE ROSS: I would. I would leave it to the individual judge to decide. I would strongly recommend it for a lot of reasons. A lot of reasons, the number one being time management.

MARK SOBEL: But you wouldn't demand it?

JUDGE ROSS: I would absolutely not demand it. No.

JUDGE FEINBERG: It's voluntary under the rule, Mark.

JUDGE ROSS: It's voluntary now.

JUDGE FEINBERG: It has to be voluntary.

MARK SOBEL: I understand that, but in your vicinage you can decide what you want to have happen.

JUDGE ROSS: I'm still strongly recommending it; I'm not just ordering it.

MARK SOBEL: Would you go through the point of actually observing the judge, how the new judge…

JUDGE ROSS: I have done that.

MARK SOBEL: Is handling oral argument and either partake it in the sense of you know, here are some comments about things that were happening or not, you're letting the lawyers kind of run, go crazy, or you're limiting this, or would you think about tentative decisions? Would you feel as a assignment judge that that's part of your job?

JUDGE ROSS: Personally, no. I think that's up to the PJ to do that, but I would do it and I have done it. But I think that that should be done by the PJ.

MARK SOBEL: How about you Judge Serpentelli?

JUDGE SERPENTELLI: No, I generally would leave it to the PJ, but I have, I've gotten involved, too. I agree with what Judge Ross and I take it from that Judge Feinberg is saying, that the leaning should be, towards doing tentative decisions. But I would not want to mandate it.

JUDGE ROSS: I agree.

JUDGE SERPENTELLI: There are judges who just couldn't hack it.

MR. HYMERLING: Do you believe that with attrition, with time, and with more and more judges becoming computer literate that, and I'm not suggesting that anybody is computer illiterate, that with time, more and more judges will avail themselves of tentatives?

JUDGE ROSS: Yes.

JUDGE FEINBERG: But, I don't think it's related to computer knowledge.

JUDGE ROSS: Yeah, I don't either.

JUDGE FEINBERG: There are two separate issues.

JUDGE ROSS: Let a judge get to a comfort level. I think you good attorneys get to a comfort level on your motions, you feel comfortable in

your decisions. But a new judge does not feel that comfortable right away.

MR. HYMERLING: Do you think judges are availing themselves of the telephone enough? Meaning avoiding court appearances.

JUDGE FEINBERG: I don't know, but they should be.

JUDGE ROSS: I don't think they are, but they should be. Correct.

JUDGE SERPENTELLI: Yeah, I suspect they are not, but they should be.

MR. HYMERLING: How can we, recognizing that the trip to the courthouse by definition is an expensive proposition for clients, and recognizing that some things can be done by conference call, how do you encourage judges?

JUDGE FEINBERG: …let the local county bar know you want to do it by telephone. Word gets out real quick.

JUDGE ROSS: Correct. And even say it to the judge, "Listen judge, do we have to come back or can we do it by conference call? And I don't know a judge who'll say "No you can't." You know a lot of the judges are in a mode and whether there's local rules or not local rules with a small "l," there still is a way to do certain things in counties where it's not a telephone call, we expect you to come on down. But I think if the lawyers ask to do it by telephone, most, almost all, judges are going to say no problem.

MR. HYMERLING: Although I'm not foreclosing anything from Mark afterwards and I apologize for kind of a wrap-up question, but I made a commitment to Judge Ross about 15 minutes ago.

JUDGE SERPENTELLI: Don't worry about him. He'll talk forever if you just keep going.

MR. HYMERLING: Ok, let me pose a question to each of you. Do you have any particular message that you would like to send to the bar about how the family court in your respective vicinages or from your perspective of the state as a whole is working and how the bar is functioning within the family court?

JUDGE ROSS: I will say this Lee. I am, and you people, meaning the family bar, should be extremely proud of how well you are doing. I am also almost as proud of the Family Division judges and staff. The lawyers have really done a tremendous job and you should be really, really thanked for your willingness to step up in this Best Practices. It has made everything much, much better for the average litigant in the state. It really has. I think you should be complimented, congratulated and I do so. I think we're doing a pretty damn good job. Can we do better? Yes. Could you do better? Yes. But I give, both of us either a B+ or an A to tell you the truth.

JUDGE SERPENTELLI: Yeah, I think everything Judge Ross has said is true. I've been amazed. It's 20 years I've been chair of the Family Practice Committee and a more dedicated and committed and enthusiastic group I have not seen in the bar anywhere. Having said that, I think one thing that has run through our discussion today is that there remains at the local level an absence of a strong partnership as I've seen on the state level in, not only in the Family Division, but in all of our divisions, between the bar and the court, to address and identify through informal and confidential means, the problems that exist in the counties. We really have to strengthen that. There has to be a greater trust in the bar that they can do that, that they can work with the court and that the court will respond. I think so many of these misperceptions, the bean-counting, the fear of calling reserved decisions to the court's attention, really could be eliminated if we were on a more, greater level of partnership in our individual vicinages.

MR. HYMERLING: Judge Feinberg?

JUDGE FEINBERG: Well, I would agree with everything Tom said and everything Gene said. On the state level, I think that the family bar has done a fabulous job and there's a real collegiality and willingness to talk about issues and try to engage in problem solving. I know in Mercer County we have a very strong family bench/bar and we meet every other month from 3:30 until 5:30, talking about issues. Through that process, lawyers become very open, and they feel free to talk to the PJ and even myself as the assignment judge about issues that come up. I think we need to, in those counties, where the county's family bench/bar is not active, we need to make sure that they become active, so that there is that dialogue. And I really think that judges, whether it's in the family part, the criminal part or civil, they want to do well. One of the things that judges experience is that there's very little feedback. Very few lawyers are going to come up and tell you you did a great job, and they're just really not going to tell you you screwed up. And if there is a problem, I think most judges want to know. First of all, judges who will be going through the tenure process, and even those who have tenure, I think that judges take great pride in what they do, so I would encourage really strongly that if members of the bar have a problem, it's better going to the PJ then talking to the lawyers and the community and complaining. I know that gets it off your chest, but I think it's really much more constructive to come to the PJ and talk because the PJ, in a very discreet way and a very non-threatening way, can talk to that judge and in the long run, if your goal is to improve performance, that's the way to do it and I encourage lawyers to do that.

JUDGE ROSS: Let me just say one thing. I would echo even stronger what Linda said, I think that the family bar in each county should make a much greater effort to have regular meetings with the presiding judge. I don't like whiners; I don't like whining judges, nor do I like whining lawyers. And if you get a whiny lawyer in a bar meeting complaining about such and such a judge, and you hear it that way,

that's not the way I want to hear things. If you've got problems, go to the PJ. If it's with a judge, if you've got issue problems, come to a family bar meeting or a county bar meeting. And there are, I would bet you, less then 10 counties who have regular meetings with their family bar. That's what your group should encourage. You have lawyers on the executive committee from each and every county. And if they don't have active family bars in their county, they should be encouraged to get it going. Because every PJ that I know of would be more then happy to respond to that.

MR. HYMERLING: Let me just say that the partnership that you, each of you in one way or another at varying times have referred to, has always been alive and well to the credit, to the great credit of Chief Justice Wilentz and Chief Justice Poritz. This conversation, has been an incredible demonstration of a willingness to talk about common concerns. I know that our readers will be enriched by having an opportunity to see this and I personally thank each of you for participating.

JUDGE ROSS: And I have to say honestly, and I think I speak for the other assignment judges, just because the other assignment judges are not part of this conversation, I would think almost universally, most of those assignment judges agree with what we've said. Almost universally, and I think, too, that we are lucky to have a chief justice and certainly a director who is as committed to this partnership as we are, to make sure that things go as well as they are going. And it's much better then it was 20 years ago, it's much better then it was 10 years ago. But, and I think it could be better then it is. Yet, I think we're doing a darn good job.

JUDGE FEINBERG: We've come a long way.

JUDGE ROSS: Yes we have.

JUDGE FEINBERG: We really have. (laughter)

JUDGE ROSS: It's been a good journey.

JUDGE SERPENTELLI: Unfortunately, there is just too much focus on the lawyers who don't project the professionalism and the involvement of the court, the caring that you people and so many others do. It's a two-way street and we just got to keep doing it and we're going to keep improving.

JUDGE ROSS: I don't see a reason to quit.

MARK SOBEL: It really speaks volumes that not only do you spend so much time in the family part but that you still come to the meetings, you guys are still committed to what's going to happen with the practice. It's really appreciated because it's the best way we get information as to what the assignment judges are thinking.

JUDGE FEINBERG: So let me say this. Somebody once said this to me and I think it's true. You can take a judge out of family, but you can't take the family out of the judge.

JUDGE ROSS: That's true. Very good.

JUDGE SERPENTELLI: Right.

JUDGE FEINBERG: I think that's really true. ■

Drafting College

Awareness of Not Only What is Happening in New Jersey, But Also of Developments in Other Jurisdictions

by Robin Bogan

In this mobile society, family attorneys must watch trends and developments in the law. By anticipating the law's direction, one can aptly draft agreements that allow litigants to prepare for the future. Such forecasting and foresight enables an attorney to draft and negotiate language that is most beneficial to his or her client's interests. Better drafting, and tighter agreements, foster less litigation and, ultimately, happier clients.

An issue worth watching is the college contribution issue. Who is financially responsible to pay for a child's college education and related expenses, and to what extent, when the parents are divorcing or divorced? In 2002, the average annual college cost for a four-year private school was $18,273, and for a four-year public school was $4,081.[1] Tuition fees in 2002 for a four-year private institution increased an average of 5.8 percent, and public institutions increased an average of 9.6 percent.[2] Due to ever-increasing college costs, we must avoid costly mistakes that result from poor drafting of college provisions.[3]

COLLEGE CONTRIBUTION ISSUE IN NEW JERSEY

At this time, there exists no absolute legal obligation in New Jersey for a parent to financially contribute toward his or her child's college education.[4] While in recent years the New Jersey Legislature has discussed enacting a law that would establish a minimum contribution a parent would be required to pay toward a capable child's college expenses, there is no specific statutory authority compelling contribution.[5]

N.J.S.A. 2A:34-23 does provide the court with discretion to make orders "as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just." New Jersey case law further empowers courts with considerable discretion in compelling a parent who is divorcing or divorced to financially contribute to their child's college education provided the child has demonstrated the academic ability to attend.[6] The leading case of *Newburgh v. Arrigo* sets forth 12 factors a judge must consider in evaluating whether a parent should be responsible for contributing to their child's college costs.[7]

New Jersey courts recognize the necessity and importance of college and post-secondary education, including the expenses associated with such education, as part of each parent's responsibility to support their child where the child is qualified and the parents can afford the expense.[8] A college education has become a rite of passage for most young adults who aspire to have a middle- or upper-class standard of living.[9] Each passing year, as the importance of a college education grows, the imposition upon a parent to contribute appears inevitable. Simply put, a college education has become essential for most careers, and opens doors to the best opportunities.[10]

COLLEGE CONTRIBUTION ISSUE IN OTHER STATES

When drafting college education provisions, it is vital for attorneys to be aware that, while New Jersey places greater importance on attaining a college education, this is a minority view. New Jersey is one of only 16 states in which judges have the ability to order a divorced or divorcing parent to be financially responsible for his or her child's college expenses.[11] Most states terminate the parent's child support obligation upon that child reaching the age of 18.[12] In some cases, child support obligations are extended until age 19 if the child is still in high school full time.[13] Thus, awareness of how the college contribution issue is being addressed in other jurisdictions will safeguard parents when drafting agreements in this jurisdiction.

For example, expanding awareness of how the college contribution issue is treated in other jurisdictions must start with Pennsylvania. For almost 30 years, Pennsylvania courts recognized a divorced

parent's duty to pay their children's college education even though no statutory authority imposed such a duty.[14] In 1992, the Pennsylvania courts overturned this well-established legal precedent, and in *Blue v. Blue* held that divorced parents have no duty to pay for their children's educational expenses beyond high school.[15]

In 1993, the Legislature quickly enacted Act 62, a post-minority educational support statute to codify the prior Pennsylvania decisional law before the *Blue* case.[16] However, in *Curtis v. Kline*, the Pennsylvania Supreme Court declared Act 62 unconstitutional, as it violated the Equal Protection Clause of the 14th Amendment.[17] The Court reasoned that the statute treated the children of divorced parents differently from the children of married parents.[18] Under the statute, a child whose parents were divorced was entitled to parental financial assistance for college, whereas there was no corresponding right for a child whose parents were married.[19]

Utilizing the rational basis test, the lowest level of scrutiny, the Court initially determined that Act 62 promoted a legitimate state interest in "obviating difficulties encountered by those in non-intact families who want parental financial assistance for post-secondary education."[20] The Court, however, "perceived no rational basis for the State Government to provide only certain adult citizens with legal means to overcome the difficulties they encounter in pursuing that end."[21]

Other constitutional challenges to statutes similar to Act 62 have failed in New Hampshire, Missouri and Oregon.[22] These decisions recognized the state's interest in having a well-educated populace and in securing higher education opportunities for children from dissolved marriages.[23] These courts also found that a rational basis for these statutes existed. Due to the nature of divorce and separation, these courts reasoned that instances will occur in which children will not receive support from their parents to attend college, despite the parents' financial ability to do so, simply because their parents are divorced.[24] As a result, these courts found the statutes requiring divorced parents to support their children a rational response to that problem.[25]

While these constitutional challenges were unsuccessful, the *Kline* decision has encouraged arguments supporting anti-support bills.[26] Even in New Jersey, a state senator introduced a bill prohibiting courts from issuing orders forcing parents to pay for college as part of a divorce judgment shortly after the *Kline* decision, although the bill did not pass. Nevertheless, attorneys need to be cognizant that the status of New Jersey law is not cast in stone.[27] Clearly, there exists an expansive disparity in what a parent's financial obligation shall be relative to college expenses, and while this disparity may cause confusion from state to state, it provides a platform from which a family law attorney can promote and protect his or her client's position.

DRAFTING COLLEGE PROVISIONS IN PROPERTY SETTLEMENT AGREEMENTS

Being knowledgeable about the law concerning the college contribution issue in New Jersey and other jurisdictions is only half the battle. Our knowledge of the law must be applied when negotiating and drafting provisions concerning payment of college expenses to reflect the interests of our clients. For example, if you are representing the parent who has greater financial responsibility for payment of college and related expenses, language might be included that: a) limits that parent's responsibility based upon his or her involvement in the decision-making process; b) sets aside assets subject to equitable distribution to create a college fund; c) requires a child to apply for all available financial aid and scholarships; d) requires a modification of child support based upon college contribution. Likewise, if you are representing the parent who may have a lesser financial ability to contribute, language might be more inclusive and expansive.

Specifically, the following issues should be considered:

1. **Define College Expenses.** The agreement should delineate what constitutes a college expense.[28] Seek to either limit the definition of college expenses to the basics, such as tuition; room and board; books and miscellaneous fees, or to expand the definition to cover expenses such as laboratory fees; medical insurance; school supplies; tutoring; spending money; computer equipment; studying abroad; travel expenses to and from college; costs associated with joining a fraternity or sorority; off-campus housing and utilities; and the one-time expenses associated with buying necessary items for the child to set up his or her home away from home. College-related expenses might also include preparatory costs incurred *before* the student attends a college or university, such as application fees; SAT and other testing; courses to prepare the student for the SAT; and other admission tests and travel expenses associated with visiting schools the child is considering attending.
2. **Application of Financial Aid, Loans and Custodial Accounts.** The agreement should specify how financial aid, grants and scholarships are to be applied, as well as any custodial accounts for the children. The agreement should also address the issue of student loans, and whether it is the responsibility of the parents or the student to pay back those loans.[29]
3. **Allocation of Financial Responsibility.** The agreement must provide how the remaining expenses are to be divided

between the parties. In some cases, due to the disparity in the parties' incomes and assets, one party may be responsible for all of the child's college and related expenses. In other cases, where the parties either have similar incomes or similar resources, the parties agree to pay the remaining expenses equally. Another option is for the parties to agree to pay the remaining college expenses in proportion to their respective incomes. In this case, the agreement must define "income" and set forth whether it includes salary, bonuses, deferred compensation, unearned income, rental income, and alimony payments. Another consideration is whether income from a second job a party obtains to meet these college expenses should be considered.[30] There may also be consideration for a parent who is voluntarily unemployed or underemployed.

If the parties' children are younger, the agreement should indicate that the parties' respective obligation to pay college expenses should be in proportion to their *ability to pay* at the time when each child is about to enter college.[31] Under these circumstances, a parent who has limited income but ample assets and resources will be responsible for a higher percentage than if his or her income was the only determining factor. If each parent's responsibility will not be determined until later, the agreement should provide that the parties shall exchange financial information approximately nine months to a year prior to each child entering college so there is enough time for the parties to determine their respective obligations. The financial information to be provided should include the parties' W-2s, 1099s and income tax returns for the past three to five years, three most recent pay stubs and a list of assets and liabilities so their respective contributions can be determined. Examining income over a three to five-year time period enables income fluctuations to be taken into consideration.

If the parties agree their obligation will be based upon their ability to pay, there is no easy formula to determine their respective share of college costs. One suggestion is for the parties to provide in their agreement that if they are unable to resolve the issue themselves, they agree to participate in mediation prior to filing an application with the court. Typically, mediation will be a less costly alternative than the litigation costs incurred in having a court make the determination as to how college expenses should be allocated. Written submissions may be insufficient for the court to make a determination, and a hearing on the issue may be required.

4. **Limits on the Duration and Cost.** Additionally, the parties must determine whether they want to limit their obligation to four years of college and college-related expenses. There are times—due to either poor grades, transferring from one college to another, or illness—that a child may need more than four years to complete graduation requirements. The parties should provide in the agreement what circumstances would be permissible for each party to pay for more than four years of college. Additionally, the parties need to determine whether there will be any cap to the cost. Sometimes, parents will utilize the cost of an education at Rutgers University, which is a highly competitive state school, as a benchmark.[32] Further, the agreement should provide whether the parents' responsibility is limited to an undergraduate college education or whether it includes graduate school, law school or medical school.
5. **Choice of School.** The agreement should provide that both parents must mutually agree upon the college, the cost of college and the location of the college. The agreement should also provide that the child's desires and aptitude be taken into consideration in selecting the appropriate school. If the agreement fails to set forth any limits, the parents are virtually giving the child a blank check.[33]
6. **College Provisions in Agreement Superceding State Law.** Due to the constitutional challenges to statutes that provide for parents paying college expenses, the agreement should provide that the parties agree it is their responsibility to contribute to their children's college-related expenses regardless of whether or not the law requires such a contribution. Additionally, if either party moves out of state, there is always the chance another state's law may control due to circumstances that may trigger application of the Uniform Interstate Family Support Act (UIFSA).[34] To the extent that parents contract beyond the scope of a state-imposed duty, a change in the law or another state obtaining continuing exclusive jurisdiction over child support will not allow responsible parties to be absolved from their obligation.[35] Their obligations will then be governed exclusively by contract law.[36]

CONCLUSION

Weathering the storm of issues surrounding a divorced or divorcing parent's obligation to contribute to their child's college education requires attorneys to consider New Jersey law as well as the legal developments in other states. Parties entering into enforceable college contribution provisions that provide for the same level or higher support than the law provides will

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The Alienated Parent and the Duty to Contribute to a Child's College Education

by John J. Trombadore

The starting point in New Jersey of an analysis of a parent's obligation to contribute to a child's college expenses must the Supreme Court opinion in *Newburgh v. Arrigo*.[1] This case stands for the proposition that an otherwise emancipated child may continue to be financially "unemancipated" if the child elects to attend college. The Court articulated the public policy of our state as follows: "...the privilege of parenthood carries with it the duty to assure a necessary education for children."[2]

The *Newburgh* Court set forth 12 separate, relevant factors a trial court must consider in evaluating a claim for contribution toward the cost of a higher education. For purposes of this article, factor 11 is the focus; namely, "the child's relationship to the paying parent, including mutual affection and shared goals, as well as responsiveness to parental advice and guidance."

Justice Stewart Pollock's opinion in *Newburgh* predated N.J.S.A. 2A:34-23(a), which is our current statute on child support. The statute states in a note that the 10 factors listed are to be considered in those cases where the Child Support Guidelines are not applicable. Appendix IX-A, Paragraph 18 of our Court Rules informs us that the guidelines do not apply to a child who is 18 years old and has completed high school, and should not be used to determine parental contributions for college. The guidelines do not consider college costs in determining average marginal costs of raising a child.

Factor 5 of the statutory list is "Need and capacity of the child for education, including higher education." The statute makes no reference to the relationship between the paying parent and the child. Nonetheless, *Newburgh* continues to be the touchstone on college payment issues.

One way of framing the issue addressed here is "when and under what circumstances will an alienated parent be expected to contribute to a child's college expenses?" This issue was analyzed in *Moss v. Nedas*,[3] to the extent that the Appellate Division affirmed a trial court decision to relieve a father of his obligation to contribute to his daughter's expenses at Sarah Lawrence College, based in large part on his having been "cut out of the process" relating to her education. In reading *Moss*, one quickly concludes that decisions relating to alienation/duty to pay for college are fact driven. The Appellate Division concluded:

> Given the subjectivity and impression of this multi-factor analysis, which implies substantial legal discretion in the judge in implementation, we find no abuse of discretion or legal error in eliminating plaintiff's obligation for payment of college expenses.

In recounting the facts the Appellate Division noted that the plaintiff-father had not been appropriately advised and consulted regarding college choices, financial aid or educational goals of his daughter.

In *Gac v. Gac*,[4] the court considered whether a father, estranged from his daughter, should be required to pay half of her college loans after she had graduated. The daughter had refused to have any relationship with her father over many years, and the original trial court denied the father any contact with her due to his abusive conduct toward her mother. The father was required to pay direct child support for his daughter until she graduated college. After his daughter graduated college, the trial court ordered him to pay half of her college loans. The Appellate Division noted that the father was the "architect of his own misfortune," but found that the trial court had emphasized this *Newburgh* factor to the exclusion of the other equally relevant factors, and remanded for a full hearing on all of the 12 *Newburgh* factors.

Juxtaposing *Moss* and *Gac*, we are left with the conclusion that an alienated parent may continue to be liable to contribute to the college expenses of a child if he or she is the root cause of the alienation, but only if all of the *Newburgh* factors are addressed.

In *Farley v. Farley,* an unreported Appellate Division opinion decided on September 24, 2002,[5] the appellate court ignored the alienation between father and daughter because the father had failed to file a motion seeking a consideration of the *Newburgh* factors until after his daughter completed college. In effect, the court applied the techni-

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Graduate School

Should a Parent's Obligation to Contribute Continue Beyond College?

by Debra S. Weisberg

In New Jersey, the case law requiring parents to contribute toward college education expenses in appropriate situations was rooted in public policy and in an effort to ensure that the children of divorced parents would receive the same right and entitlement as those children of intact families. Now, as more and more college graduates are seeking to continue their education by attending medical school, law school or other types of graduate school, the courts increasingly will have to decide whether this public policy should apply to the parents' continuing obligation to contribute toward the costs of graduate school. Concurrently, the courts may be confronted with the question of whether a child is emancipated while he or she attends graduate school.

Previously, the courts in New Jersey have extended a parent's child support obligation beyond graduation from college. In *Ross v. Ross,*[1] the court directed the father to continue to pay child support until the parties' daughter completed her law school education. The court specifically articulated that the threshold consideration was as follows:

> Had there not been a separation and divorce, would the parties, while living together, have sent their daughter to law school and financed that schooling? It would seem clear from the facts, particularly the respective incomes of the parties; the fact of only having one child, and the early indicators in this case of Jane's interest in law school, that the parties in all probability, would have financed Jane's law school education. It should be pointed out, however, that the fact that that question is answered in the affirmative should in no way be dispositive of the issue.[2]

The court provided several factors to be considered, including the cost of the education or the amount of support sought; the non-custodial parent's ability to contribute; the relation of the cost to the type of school in which the child shall enroll; the custodial parent's financial position; the aptitude and commitment of the child; the relationship between the child and the non-custodial contributing parent; and the relationship of the potential education to any prior training, as well as the general relationship to the long range, overall goals of the child.[3]

In *Newburgh v. Arrigo*, the Court recognized that while parents, in general, are not under a duty to support children upon reaching the age of majority, the privilege of parenthood in the appropriate circumstances may carry with it a duty to provide a necessary education for their children.[4] The Supreme Court declared that:

> In the past, a college education was reserved for the elite, but the vital impulse of egalitarianism has inspired the creation of a wide variety of educational institutions that provide post-secondary education for practically everyone. State, county and community colleges, as well as some private colleges and vocational schools provide educational opportunities at reasonable costs. Some parents cannot pay, some can pay in part, and still others can pay the entire cost of higher education for their children. In general, financially capable parents should contribute to the higher education of children who are qualified students. In appropriate circumstances, parental responsibility includes the duty to assure children of a college and even of a post-graduate education such as law school.[5]

The Court went on to identify 12 criteria to be examined when evaluating an application for college contribution.[6]

The Supreme Court in *Newburgh* clearly intended to protect children of divorced families by assuring them a proper and continuing education, which they would have enjoyed but for their parents' divorce. In effect, the Court in *Newburgh* acted in *parens patriae* with respect to a child's right or entitlement to a college education. The reasoning and criteria offered by the Court not only protected children of divorced families, but certainly established strong public policy that a continuing education was of the utmost importance.

In New Jersey, approximately 284,767 students were enrolled in an undergraduate institution and

51,163 were enrolled in a graduate school program by 2002.[7] The New Jersey Commission on Higher Education opined that those states with citizens who attained a high educational level reap greater benefits economically.[8] With respect to educational attainment, New Jersey ranks as one of the top five states.[9] Nationally, New Jersey ranks second in an increase in personal income from attaining an education and first in charitable contributions.[10]

Recently, in an unreported decision, the trial court ruled that a 17-year-old college graduate was not deemed emancipated, and that her father would have to contribute to her graduate school tuition.[11] In that matter, Ellen decided at age 13 to forego high school and commence her college career instead.[12] In 2001, Ellen graduated from Mary Baldwin College in Virginia and subsequently enrolled in a two-year graduate program at Cornell University.[13] She received a $10,000 annual scholarship; however, the selective graduate program was $30,000 per year.[14]

Despite the fact that Ellen graduated college at the age of 17, the Court determined that she was not old enough to be financially and legally responsible to support herself.[15] The Court focused on the fact that Ellen could not take care of herself and, therefore, that her parents had a continuing obligation to be responsible for her.[16] The parties were directed to provide their financial records so the Court could determine the percentages to be paid by each parent.[17]

Certainly the facts in Ellen's case are unique given her age. There are several factors the courts might consider with an application to extend a parent's obligation beyond college. For example, the factors set forth in *Newburgh* would be applied. The courts may consider the current number of students enrolled in graduate school and attempt to determine whether graduate school is a necessity and no longer just for the privileged few, similar to the analysis performed years ago with respect to an undergraduate education. Another consideration is whether either or both parents hold graduate degrees, and who funded their graduate education expenses. In addition, a court may consider whether the child's undergraduate studies, such as prelaw, were specifically selected in contemplation of attendance at graduate school. A more difficult determination for the court to make in this situation is whether the parties would have contributed toward graduate school, after having already contributed toward college, even if they were still married. With the increase in attendance at graduate school over the past several years, the courts will no doubt be faced with increasing applications seeking to compel a parent to contribute toward graduate school and, possibly, to continue child support during that time. ■

ENDNOTES

1. 167 N.J. Super. 441 (Ch. Div. 1979).
2. *Id.* at 445.
3. *Id.* at 445-46.
4. 88 N.J. 529, 543 (1982).
5. *Id.* at 544.
6. *Id.* at 545.
7. *Sixth Annual Accountability Report*, New Jersey Commission on Higher Education in New Jersey, July 2002, p. 18.
8. *Id.* at 34.
9. *Id.*
10. *Id.*
11. Sue Epstein, Judge Tells Parents To Pay Tab, Let Gifted Student Hit Books, *The Star Ledger*, November 16, 2002.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

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The Alienated Parent

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cal laches rule rather than balance the equities. In *Farley* there was no indication that the father was the "architect of his own misfortune" and, to the contrary, he had made genuine efforts to establish a good relationship with his daughter. Under the facts in *Farley,* as reported, it would appear that the appellate ruling was at best severe and at worst insensitive. A substantive, rather than a procedural, application of *Moss* should have at least afforded the father a plenary hearing.

The concept of alienation appears to be relevant only to the issue of higher education expenses, and not to the general duty of both parents to contribute to a child's support needs. Consider, however, whether this concept might be reasonably extended to a child's private school expenses on an elementary or secondary school level. Effective lawyering, which is a goal to which we all aspire, mandates such an analysis in the appropriate case. ■

ENDNOTES

1. 88 N.J. 529 (1982).
2. *Newburgh*, at p. 543.
3. 289 N.J. Super. 352 (App. Div. 1996).
4. 351 N.J. Super. 54 (App. Div. 2002).
5. Docket No. A-1148-01T3. A copy of this unreported opinion may be obtained from Facts-on-Call Order No. 14055, *New Jersey Lawyer* (11/4/02).

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Drafting College

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generally be upheld. With college costs increasing yearly, the stakes are becoming higher, and as a result, careful drafting and artful negotiating of these provisions is essential. Assessing your client's needs against the backdrop of the law in New Jersey and other jurisdictions, is the formula for clear and sunny skies. ■

ENDNOTES

1. *2002-2003 College Costs, Keeping Rising Prices in Perspective*, www.collegeboard.com.
2. Gordon, Tuition Fees Increase as Colleges Feel Economic Squeeze, *The Work Circuit,* October 22, 2002, www.theworkcircuit.com.
3. Ravdin, Prenups to Protect Children, 24 *WTR Fam. Advoc.* 33.
4. Winters & Baldwin, 11 *N.J. Prac., Family Law and Practice* §26.24
5. *Id.* at n.2.
6. *Newburgh v. Arrigo*, 88 N.J. 529 (1982); *Khalaf v. Khalaf*, 58 N.J. 63, 71-72 (1971).
7. *Newburgh*, *supra*, 88 N.J. at 545.
8. *Id.* at 543-44.
9. McMullen, Father (or Mother) Knows Best: An Argument Against Including Post-Majority Educational Expenses in Court-Ordered Child Support, 34 *Ind. L. Rev.* 343 (2001) (hereinafter cited as Father (Or Mother) Knows Best).
10. *Id.* at 345-46.
11. Father (or Mother) Knows Best, 34 *Ind. L. Rev.* at 343. These states include Alabama, Washington D.C., Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, Oregon, South Carolina and Washington. *Id.* at n.2.
12. *Id.* at 343.
13. *Id.*
14. Shannon, Post-minority Educational Support Statutes: Promoting Equal Educational Opportunity by Creating an Equal Protection Problem, 35 *Duq. L. Rev.* 683, 690 (Winter 1997).
15. *Id.* at 690-91 (*citing Blue v. Blue,* 616 A.2d 628, 632 (Pa. 1992)).
16. *Id.* at 691.
17. 542 Pa. 249, 260 (1995).
18. *Id.* at 257-58.
19. *Id.* at 258-59.
20. *Id.* at 258.
21. *Id.*
22. *LeClair v. LeClair*, 137 N.H. 213 (1993); *In re Marriage of Kohring*, 999 S.W.2d 228 (Mo. 1999); and *In re Marriage of McGinley*, 172 Or. App. 717 (Or. Ct. App. 2001).
23. *Kohring*, 999 S.W.2d at 233; and *McGinley*, 172 Or. App. at 727.
24. *Id.*
25. *Id.*
26. Willson, Note: But Daddy, Why Can't I Go To College? The Frightening De-Kline of Support for Children's Post-Secondary Education, 37 *B.C. L. Rev.* 1099, 1112 (September 1996).
27. *Id.*
28. *See Philipp v. Stahl*, 344 N.J. Super. 262 (App. Div. 2001) (holding that a child's college books and supplies are "subsumed" under the umbrella of "normal fees" a parent agrees to pay with college tuition.
29. *See Khalaf v. Khalaf*, 58 N.J. 63 (1971) (ruling that the student should not have to incur student loans to finance his education because had his parents remained married they would have paid those expenses).
30. Ravdin, Prenups to Protect Children, 24 *WTR Fam. Advoc.* 33 (Winter 2002).
31. *See Anderson v. Anderson*, __ N.J. Super. __ (February 20, 2003) holding that when an agreement does not mandate a specific distribution of college costs that the court engaging in a *Newburgh v. Arrigo* analysis to determine the parties' respective obligations is appropriate.
32. *See Moss v. Nedas*, 289 N.J. Super. 352, 354 (App. Div. 1986) (indicating that trial judges sometimes utilize the cost of a Rutgers' education as a guide, but do not necessarily peg the contribution to those costs); *see also*, *Finger v. Zenn*, 335 N.J. Super. 438 (App. Div. 2000) (compelling father to pay 50 percent of child's attendance costs at George Washington University rather than capping his obligation at 50 percent of the cost of attending a state university such as Rutgers University where the agreement did not provide a ceiling).
33. Ravdin, Prenups to Protect Children, 24 *WTR Fam. Advoc.* 33 (Winter 2002).
34. N.J.S.A. 2A:4-30.72 *et al.*
35. *See Lepis v. Lepis*, 83 N.J. 139, 161 (1980) (holding that a court will not be bound by an agreement limiting a parent's financial obligation toward educational expenses to less than allowed under the law).
36. *Id.*

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