New Jersey Family Lawyer

Volume 27 • Number 3
January 2007

CHAIR'S COLUMN

An Example of What We Do

by Ivette Alvarez

Last August, the officers of the Family Law Section Executive Committee met with many of the chairs and vice chairs of the county Family Law Committees in order to exchange ideas. During those meetings, we heard that much of the good work the section does is unknown to others, including its members. Thus, the genesis of this column. My apologies to the members of the section's executive committee, for this column will deal with what to them is old news, but what would not otherwise be known to the majority of the section's members.

Recently, the Disciplinary Review Board recommended to the Supreme Court that a member of the bar, Peter Jacoby, be suspended for three months because he pled guilty to simple assault as a result of an act of domestic violence. The vote of the board was divided, with three members disagreeing with the majority. The majority relied *on In re Magid*,[1] in which the Supreme Court stated that in the future it would "ordinarily suspend an attorney who is convicted of an act of domestic violence."

Concerned about what appears to be a *per se* rule, a member of the bar brought the *In re Jacoby* decision to the attention of John DeBartolo, former chair of the section and a current member of the executive committee. He raised the decision at the next monthly meeting. Following a spirited debate, the members voted, after airing concerns about: 1) the results of a three-month suspension on an attorney's practice; 2) the fact that Mr. Jacoby had not been found to have committed an act of domestic violence, but had instead pled to a simple assault; 3) the very serious nature of the act, which included choking the victim; 4) the very serious consequences to the victim, which included months of rehabilitative therapy; 5) the fact that this was a one-time event for Mr. Jacoby, who otherwise had no history of domestic violence and after much counseling for Mr. Jacoby, Mrs. Jacoby joined in asking for leniency.

We asked that, in the event Mr. Jacoby were to petition the Supreme Court for review, that the New Jersey State Bar Association Board of Trustees take a position

on behalf of all attorneys and submit an *amicus* brief to the Supreme Court. We asked for the NJSBA to argue that there should not be a *per se* rule for the suspension of an attorney who is found to have committed an act of domestic violence, but rather a ruling on a case-by-case basis. A *per se* rule: 1) may keep victims from prosecuting their claims because of the certain interruption of income and resulting economic harm to the family; 2) will cause serious harm to an attorney's practice; 3) will cause harm to the attorney's client, who now must look for another attorney for representation; and 4) will cause harm to the attorney's partners and associates.

Mr. Jacoby petitioned the Supreme Court for review. The matter was presented to the NJSBA Board of Trustees, who, after much equally spirited debate lead by various members of our section (Dale Console, Robert O'Donnell, Paris Eliades, Kimarie McDonald, and me), voted to support the section's request and submit an *amicus* brief. With only days to go before the Oct. 10, 2006, hearing before the Supreme Court, Dale Console undertook the lead in writing the *amicus* brief. You can view it at http://www.njsba.com/committees_sections/sites/newsletters/uploads_newsletters/102JacobyBriefOct182006.pdf.

While the NJSBA was not permitted to argue on Oct. 10, the *amicus* brief was accepted and is part of the record for consideration.

By the time you read this column, a decision will probably have been rendered. Kudos to all members of the Family Law Section Executive Committee and the NJSBA Board of Trustees for taking a position that carefully weighs the competing concerns. This is an example of what we do! ■

ENDNOTE

1. 139 N.J. 449 (1995).

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EDITOR'S COLUMN:

Timing Should Not Be Everything; Fairness Must Control

by Cary B. Cheifetz

It recently occurred to me how strategic timing factors into judicial decision making and our cases. This revelation was underscored by the recent case of *Larbig v. Larbig*.[1] In *Larbig,* approximately 20 months after the entry of the property settlement agreement (PSA) and final judgment divorce, Mr. Larbig moved for modification of his alimony, child support, and equitable distribution obligations, claiming his business was in decline and his personal income had diminished significantly. The factual basis regarding the payor's financial abilities were contested and need not be addressed here, because the trial court did not hold a hearing to resolve the factual disputes of the parties. Instead, the trial court "focused on the fact that defendant's motion was filed a mere twenty months after the parties' execution of the PSA and the entry of the JOD [judgment of divorce]."[2]

In affirming the trial court's decision, the Appellate Division approved of this analysis, stating that the payor had not demonstrated that, even if the allegations were true, the change was anything other than temporary. Citing *Lepis v. Lepis,*[3] the Appellate Division noted that the request for modification based upon a temporary change in circumstances has consistently been denied.

Query: How long must circumstances endure to warrant modification? The Appellate Division answers:

> There is, of course, no brightline rule by which to measure when a changed circumstance has endured long enough to warrant a modification of a support obligation. Instead, such matters turn on the discretionary determinations of Family Part judges, based upon their experience as applied to all the relevant circumstances presented, which we do not disturb absent an abuse of discretion. We are satisfied that, in finding the alleged changed circumstance to be temporary at that point in time, Judge Dilts did not abuse his discretion. The timing of the motion certainly warranted that conclusion. In the same vein, Judge Dilts correctly determined not to permit discovery or a plenary hearing. Neither compulsory discovery nor a plenary hearing is required until a movant provides sufficient evidence of a material changed circumstance.[4]

If *20 months* is not a sufficient amount of time after the entry of a judgment of divorce, what is? Commonly, matrimonial lawyers review financial circumstances of parties over a five-year period in order to minimize the possibilities of divorce planning. Does that mean there is a presumption that 60 months must pass before one is entitled to a review of support based upon a change of circumstances? I would certainly hope not.

Frankly, I think that most practitioners need to be concerned about the applicability of *Larbig*. Imagine the facts of *Larbig* in a different setting. Imagine that the payor is negotiating the terms of his or her settlement agreement, and is confronted with 20 months of declining income. Certainly, there would be discovery and a verification process for those allegations. The result would very likely be that support might be based on a formula or some form of averaging, taking into account the good years with the bad. Absent divorce planning, the payor would not be estopped from arguing that support should be lesser due to the decline. Why is that result different from that of Mr. Larbig?

In a world where many divorced families struggle to support two households, equitable relief must be afforded when abilities to pay support are impaired, even if they are on a temporary basis. Should there not be a full analysis of each party's ability to withstand the change of circumstances by looking at each one's financial circumstances, including their respective access to liquid assets? The financial pain should be allocated equitably between the parties. The matrimonial part, given its equitable resources, can, temporarily and without prejudice, restructure financial obligations, increase the duration of time for which they need to be paid, or through its continued supervision review the duration and amounts based upon the changing nature of each party's abilities.

Linking relief to a subjective decision regarding whether a

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FROM THE EDITOR-IN-CHIEF *EMERITUS*

Securing Our Section's Future

by Lee M. Hymerling

Our section chair is to be commended for taking the initiative by appointing a committee of distinguished and experienced section members to study and make recommendations for the amendment of our section's bylaws. The committee's work is of paramount importance to the future of our section. That future will only be secured if we now guarantee that our section's leadership and executive committee represent all family lawyers in New Jersey, paying appropriate deference to geography, gender, ethnicity, and age, while at the same time assuring representation of those who have lead the section in the past and those who have been privileged to serve on the bench. Our section leadership and executive committee should never be allowed to be the province of any firm or county. To do less would be to breed disrespect, and, over time, prompt the disenchantment of our section's membership.

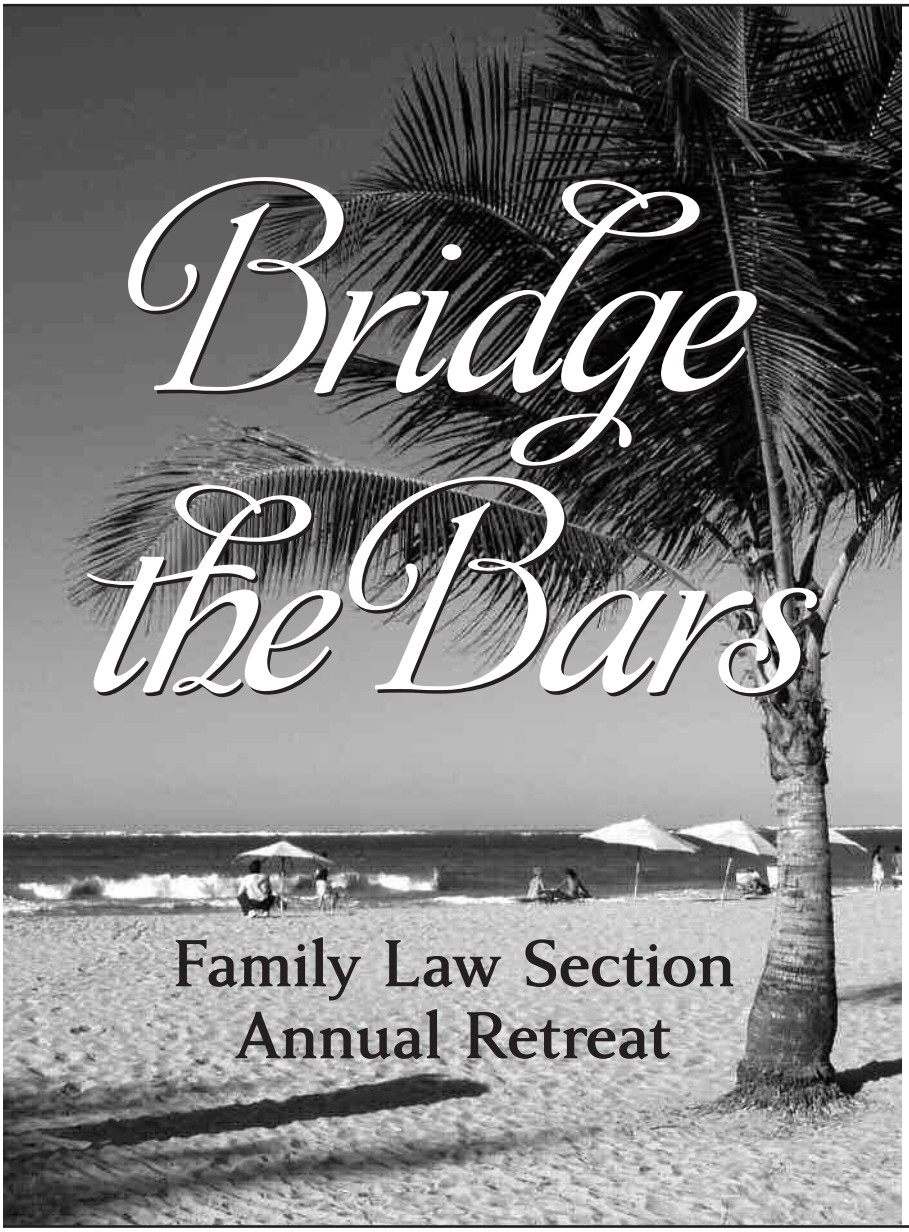
Many years ago I had the privilege, while serving as chair of our section for two years, to spearhead the expansion of the section's executive committee to assure statewide representation. In some ways, where we now find ourselves has parallels to where I found myself as I went "up the chairs" in the late 70s and early 80s. So long ago, those then in leadership intuitively knew that our section, to achieve its full potential, needed to expand its membership and broaden the sources from which we drew our leadership. Some of today's most senior and revered of our section's elders, most of whom came from New Jersey's most populous northern urban counties, understood what had to be done and allowed me two years to accomplish what was accepted to be a needed result. Their foresight, rather than my leadership, led to an expansion of the then-executive committee by approximately 300 percent, and made possible so many initiatives, including the *New Jersey Family Lawyer*, the Family Law Symposium, as well as statewide meetings. The challenge for today is no less than what was the challenge so long ago. Twenty-five years later, the principles that guided the transformation of our section remain as relevant today.

This column will address not only the composition of our section's leadership and executive committee, but also other matters that deserve consideration. Most of what will be discussed focuses on our bylaws. This column also will suggest other initiatives that need not wait until the amendment of our bylaws.

All of this must be considered within the context of acknowledging that ours is a wonderful section of which we all should be proud. Our section's program, from our legislative initiatives to our willingness with NJSBA approval to present *amicus* positions to the Supreme Court and advice to its committees, and from the *Family Lawyer* to our fabulous retreats, is, or at least should be, the envy of the bar. What our section has done and continues to do has earned justified widespread respect. And all of us should be particularly proud that, less than six months from now, one of our own, Lynn Newsome, who this year was honored with our Saul Tischler Family Law Section Award, will serve as president of the New Jersey State Bar Association.

As I discuss both the present bylaws and the amendments that I urge, I start from the premise that the bar and public is best served by a vibrant Family Law Section drawing from the strength of both distinguished and developing family lawyers from all parts of the state. From Cape May County in the south to Warren County in the north; from the urban counties on the Hudson to the rural counties along the southern Delaware; from our state's capital in Mercer County to the beautiful shores of Ocean and Atlantic county, jammed within New Jersey's small geography are many family lawyers whose experience, if they can be drawn into our section, should continually energize what the Family Law Section does. Our section's leadership and executive committee must be representative of family practitioners and family practice throughout our 21 counties and 15 vicinages. Proper attention also must be paid, in nominating our officers and appointing our executive committee, not only to geography, but also to gender, ethnicity, and age. This will ensure a broad representation and a level of experience while balancing all interests.

Our current bylaws provide for a chair, a chair elect, a vice chair, a second vice chair, and a secretary,



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all of whom are elected at an annual meeting. Each office carries a term of one year, beginning at the close of the following year's annual meeting, with no officer being permitted to serve a second consecutive term in office, but regaining eligibility after not having served as an officer for at least one term. Traditionally, although not by bylaw, our officers also have included the immediate past chair, bringing the former chair's experience to the inner sanctum of our section's leadership. I suggest that the current officer positions, including the immediate past chair, should be recognized in our revised bylaws as the section's *steering committee*, with the authority to speak for the section when circumstances preclude convening the full executive committee. I also suggest the bylaws provide that the steering committee be required to be consulted in appointing committees and appointing executive committee members.

Although I was privileged to have served as chair for two consecutive years, I believe that the basic format of six officers, including the immediate past chair, should be continued. The bylaws should, however, clearly provide that no more than one member or associate from any firm should serve in any year in any of the officer/steering committee capacities. To do otherwise would be to ignore the reality of the talent and diversity contained within our section's membership. To do otherwise would be to discourage the worthy from aspiring to section leadership. To do otherwise would, by definition, preclude the breadth of leadership our section should foster.

Article IV of our current bylaws provides that section officers should be nominated by the nominating committee, the names of whom should be published in the *New Jersey Family Lawyer*, not later than six weeks prior to the annual meeting, with additional nominations permitted from the floor on petition.

Under our current bylaws, the nominating committee is composed of the immediate past section chair and two section members who shall be appointed by the present section chair. I urge two amendments to this provision. Although it should be chaired by the immediate past section chair, the nominating committee should have a broader composition, which assures greater geographical diversity. I specifically recommend that the nominating committee should consist of not fewer than five members, no more than two of whom should come from any particular region of the state. I suggest that the counties should be divided into three seven-county components, basically drawn on geographic lines. Although the immediate past section chair should serve as chair of the committee, a designee of the chair elect also should serve on the committee in addition to the members who will assure that family lawyers from all regions of the state participate in the process.

Although I do not urge the adoption of a provision in the bylaws, I hope that time will prove that there usually will be a section member coming from the traditional southern counties of Burlington, Camden, Gloucester, Salem, Cumberland, Cape May, and Atlantic, as one of the section's six leaders. Sadly, both in its officers, as well as its executive committee, these counties have not been proportionately represented.

Some will claim that the lack of southern participation is because attorneys from the traditional southern counties do not seem willing to involve themselves given the distance between their offices and where our executive committee meetings and section events are calendared. That is probably true, but that should not be the end of the story. There is no reason why, over the course of approximately nine or 10 executive committee meetings per year, two of those meetings could not take place in South Jersey, just as there is no reason why two of the executive committee meetings could not be calendared in the north. Just as the Turnpike and Parkway have north-bound lanes; so too are there south-bound lanes. Fully recognizing the desirability of having most meetings in the Law Center, in recognition of the difficulties of those from the south traveling north, occasionally those from the north should be expected to travel south.

I am not suggesting that this be done by bylaw, but I am suggesting that it should be done by practice. Such an initiative need not be delayed. Woe to our section if it turns out that lawyers from the north prove as unwilling to travel south as some claim that lawyers from the south refuse to travel north.

Although considered by some to be a delicate topic, I also strongly urge that the section should schedule its functions in a manner more sensitive to geography. I say this notwithstanding the huge successes of recent meetings. Often, our section's annual dinner takes place in the far north, and recently our seasonal party took place in Newark. In the future, thought should be given to locating these functions where it is more likely that all, or at least more, will attend. The section should never be regarded as largely the province of one part of our state.

The executive committee poses a problem of representation as well. The executive committee under our bylaws now consists of the five sitting officers, the immediate three past section chairs, 32 additional persons appointed by the chair (including at least one representative from each of the 15 vicinages), two co-chairs of our Young Lawyers Subcommittee, and the editor-in-chief and executive editor of the *New Jersey Family Lawyer.* The bylaws further permit a maximum of 10 members *emeritus,* consisting of past section chairs. That

would mean that under our bylaws, our executive committee will usually consist of a total of 54 members: five section officers; three past chairs, 32 persons at large; 10 members *emeritus*; two representatives of the *Family Lawyer* and two young lawyers.

Although the number is seemingly large, I urge the addition of a maximum of three additional members, bringing the grand total to 57. I specifically suggest that the three additional slots be assigned to distinguished retired judges, not only to recognize their past service to the bench, but also because of the wisdom they would share with the executive committee. I am mindful that historically retired judges have been appointed. That practice is salutary, and should be incorporated into the bylaws.

I recommend that the bylaws be changed to assure that there is at least one member from each county rather than each vicinage; that including all special members (officers, members emeritus, retired judges, young lawyers and retired judges), no more than three members come from any one firm and that no more than eight members come from any one county. I urge county rather than vicinage representation because of the practice differences even between counties in the same vicinage. If the NJSBA's Board of Trustees, an entity with a membership comparable in size or smaller than our existing executive committee, can have county representation, so too should we.

The firm and county distributive totals should include all members regardless of the nature of the category—officer, *Family Lawyer,* member *emeritus*. Legitimate debate may take place regarding the specific numbers selected. What is clear, however, is that the talent of the matrimonial bar is sufficient that no one firm nor county should be allowed to dominate. If these rules mean that some who have served with distinction in the past might have to choose between continued service or permitting a younger member of their firm to serve, so be it. The interest of our section as a whole must predominate over the interest of individuals or individual firms.

This is a crucial time for our section and for its leadership. This is in some ways a test of our willingness to assure our section's future. No criticism is intended by this column. The past is the past. We should all proceed and cherish the promise of the future.

I look forward to the results of the bylaws committee that our chair was so right to appoint. I respectfully seek her consideration, and that of our other officers, of some of the other suggestions I now propose. ■

*(**Editor's Note:** The editorial board of the* New Jersey Family Lawyer *endorses the theme of this editorial without commenting on any of the specific proposals.)*

EDITOR'S COLUMN

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change is temporary or permanent, instead of focusing on actual economic circumstances, converts these applications to nothing more than tactical supports. Under these circumstances, the focus must be on eliciting the impact and implications of the application on the payor and the payee, weighing that impact, and creating a result that is fair to each party and their children. ■

ENDNOTES

1. 384 N.J. Super. 17 (App. Div. 2006).
2. *Id* at 22.
3. 83 N.J. 139, 151 (1980).
4. *Larbig,* at 23.

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COMMENTARY

Parenting Coordination and Parenting Coordinators: CDR With Teeth

by John E. Finnerty Jr.

Parenting coordination is a form of complementary dispute resolution (CDR). It is intended to assist families intertwined in high-conflict cases to implement the parenting plan that has been adopted, either by judicial decision or by consent. Parenting coordinators deal with implementation issues such as accommodating the need to switch weekends or holidays, setting pick-up and drop-off locations and times, transportation responsibilities, daily interactions, and other issues of responsibilities for children that polarized parents have demonstrated a historic inability to resolve.

Our litigation dispute resolution system always has been premised upon the view that parties should be encouraged to settle their differences peacefully by negotiating their own agreements to deal with and resolve disputed issues. Public policy makes voluntarily resolution of disputes even more important when it comes to personal disputes involving family-related issues, particularly those pertaining to children.

Historically, mediation was favored as a way to encourage parties to talk and agree upon resolutions so they could keep control of their lives. Open discussion was fostered by the knowledge of each litigant that whatever was said was confidential; therefore, the discussions (including any offers of settlement) would not get back to the person who ultimately had to make the decision in the event the matter could not be resolved. Mediation was premised upon the mental health therapeutic model that encouraged openness; the absence of consequences for revelations; and the hope that openness would result in learning, insight and change.

In theory, mediation is a wonderful opportunity for people of good will and common sense to come together through the assistance of a trained facilitator to air concerns and perspectives, and to put in place a plan that enables the family to keep control of itself. However, if a failed relationship has spawned feelings of rage, resentment, hurt or mistrust, then collaboration and objective deliberation may not result in resolution. In those circumstances, mediation will result in a substantial expenditure of time and money, with no conclusion and with no ability of the professional who is involved to be able to provide input that may be helpful to the ultimate finder of fact and decision maker.

Failed mediations of any issue must go back into the court system for determination by a judge. Disputes about time-sharing plans or custodial designations require courts to make those determinations, usually after custodial evaluations have been completed. Parenting coordination is not intended to deal with such disputes. However, issues such as travel or vacation schedules, pick-up and drop-off locations, modes of transportation, telephone communication, and other such implementation issues, can overwhelm the court system and be expensive for litigants to present for resolution. Belabored judges are just not equipped to deal with adjudicating the overwhelming number of applications pertaining to telephone call times, transportation responsibility, pick-up locations and the other daily implementation issues that parents must work out. These issues are difficult enough in a functioning marriage; but, in a failed marriage, they become nearly impossible, with a potpourri of boiling emotions rising out of control.

Parenting coordination is another complementary dispute resolution alternative with a transition back into the system in an efficient manner. People who cannot keep control of their family and create their own resolutions are given a forum with a trained professional who teaches, cajoles, defuses, and, when all else fails, has the ability to make recommendations that (as opposed to mediation) can be made public.

Parenting coordination is another complementary dispute resolution alternative with a transition back into the system in an efficient manner. People who cannot keep control of their family and create their own resolutions are given a forum with a trained professional who teaches, cajoles, defuses, and, when all else fails, has the ability to make recommendations that (as opposed to mediation) can be made public. As they go through the process of trying to solve their problems and reach an accord, parents know that nothing is private and that anything can be reported out, that the person who is trying on the one hand to broker a compromise, ultimately has the power to make a recommendation that can significantly influence the judge who must decide the case. Knowledge of this power should, in theory, promote reasonable reactions by the parents to recommendations made by the coordinator.

Moreover, if parenting coordination is unsuccessful, at least it focuses and refines the issues and the background of the issues. Coordination is another tool available to process conflicts, to focus issues, and to obtain expertise from a trained professional that will assist in the decision-making process if that professional is unable to broker a consensual resolution.

Attorneys must accept parenting coordination for what it is—another complementary dispute resolution technique that if unsuccessful integrates into the litigation system. Consequently, parenting coordination, if it is to be properly and safely utilized, must have checks on arbitrary actions and one-sided communications. There must be agreement on who can be a parenting coordinator and the training and/or licensure that will be required, as well as the circumstances that should warrant appointment of a parenting coordinator.

Absent consent, parenting coordinators should not be appointed in every situation in which there is a dispute. Rather, they can be effective in those situations where the parents have historically demonstrated an inability to communicate and compromise. There also must be focus on how and whether parenting coordinators are to be used when there are domestic violence retraining orders in place. There needs to be a Court Rule that regulates parenting coordination, so that it is employed uniformly throughout the state, with public notice of procedures and standards.

At this point there is not a rule on parenting coordinating, but there is a pilot project being developed, which is based on the proposed rule recommended by the Practice Committee to the Supreme Court this past summer. The pilot is currently being designed for five counties; however, it has not yet been fully defined. Before it can be implemented, the Supreme Court must approve it. In the interim, parenting coordination continues *de facto* throughout the state. Although the Court has not yet been persuaded fully, it has not prohibited the *de facto* appointment of parenting coordinators, and one suspects that may be because the practice of appointing coordinators has become widespread throughout the state. Coordinators have been mentioned with approval in many judicial decisions, reported and unreported.[1]

One issue is whether the Supreme Court, when it adopts the pilot program, will allow the practice to continue *de facto* in other counties or restrict the practice to that set forth in the pilot and the counties proposed for the pilot. This issue should be addressed head on in the pilot program protocol and regulations. Traditionally, a pilot allows a practice or procedure in specifically designated counties on a trial basis before considering it for statewide use. Since parenting coordination has been implemented *de facto* for years throughout the state, restriction of the practice to five counties could cause a serious disruption in use of this CDR method.

The goal of parenting coordination—to assist high-conflict families in constructing a framework of cooperation—was built on a foundation that is an oxymoron. High-conflict families do not regularly or easily, if at all, construct frameworks of cooperation and compromise. But parenting coordination with trained, competent professionals does offer to these individuals assessment and education, while attempting to manage conflict and ultimately provide the insights obtained from the assessment to the ultimate trier of fact who must make a determination.

Since the Supreme Court has authorized a pilot project for parenting coordination, it is appropriate to raise questions and issues to be further considered.

IDENTIFICATION OF ISSUES

What issues should parenting coordinators be able to consider, and how are those issues to be identified? Some generic forms of order that are currently being used to appoint coordinators offer no issue definition, and often give parenting coordinators *carte blanche* over anything that comes up in the family. One such order sets forth:

> The Parent Coordinator is authorized to make recommendations about issues, which may include, but are not limited to the following:
>
> - Dates, times, places, and conditions for transitions between householders.
> - Temporary variation from the schedule for a special event or particular circumstances;
> - Children's participation in recreation, enrichment, and extracurricular activities, programs, and travel.
> - Child-care assignments.
> - Clothing, equipment, toys and children's personal possessions.

- Discipline and behavior management of children.
- Information exchange (school, health, social, etc.) and communication about the children.
- Arrangements for healthcare reimbursements.
- Clarification of provision in the court-ordered parenting plan, including but not limited to, holiday and vacation plans.
- Communication with the children when they are in the other household.
- Coordination of additional services for either of the parents or children (*e.g.* psychological testing, alcohol or drug monitoring/ testing, psychotherapy, anger management, parenting class, etc.).

tence of domestic violence restraining orders should not *per se* preclude the use of parenting coordinators. It is in relationships where parties cannot interact that they most need third-party assistance. But answers to the following questions need to be provided in connection with the use of parenting coordinators when domestic violence restraining orders are in place:

1. Should victims of domestic violence be able to (or forced to) sit in the same room with the perpetrator and a coordinator?
2. Should victims be compelled to sit in the same room with the abuser whether they want to or not?
3. Should a victim be able to opt out of the process?
4. Can parenting coordination work if the parenting coordinator does not have access to both parents at the same time?
5. If there are to be exceptions to allow parenting coordination to come into play with domestic violence orders in place, how is a parenting coordinator supposed to assure the victim's security?

Concern about the historical cycle of control in domestic violence scenarios should be alleviated, because unlike mediation, the abuser's power should be countered by the coordinator's ability to intervene, make recommendations, and report on what he or she observes during parenting coordination sessions. In other words, the abuser will not have control and will not be able to manipulate the victim, because the coordinator's input will be available to the court.

[P]arenting coordination, if it is to be properly and safely utilized, must have checks on arbitrary actions and one-sided communications. There must be agreement on who can be a parenting coordinator and the training and/or licensure that will be required, as well as the circumstances that should warrant appointment of a parenting coordinator.

The practice committee's proposed rule amendment sets forth that issues are to be circumscribed and defined in the order of appointment. It further provides that litigants would be able, by consent, to submit additional issues to the parenting coordinator. Parenting coordinators should not be given free access and entrée to raise issues about the parties' parenting styles or family issues that neither wishes addressed, or that a court has not determined should be addressed after a request by one parent or notice to the other.

DOMESTIC VIOLENCE

If domestic violence issues are involved, appointed parenting coordinators must have training in domestic violence issues.[2] If there are substance abuse issues, the coordinator should have some sophistication in substance abuse problems or access to professional assistance in that regard. The exis-

TRAINING AND QUALIFICATIONS OF PARENTING COORDINATORS

The coordinator's essential functions involve assessment, education, and conflict management, and if unable to facilitate a consensual resolution, informed recommendations. Certainly, trained mental health professionals, such as licensed social workers, psychiatrists, psychologists, or family therapists, probably qualify as appropriate parenting coordinators, or do they? Should such licensure be sufficient for coordination work, or should there be additional forensic or conflict training requirements for even licensed or certified mental health professionals? Should a non-mental health professional (for example, an attorney) be designated and appointed as parenting coordinators?

The proposed rule provides that if the parties consent, the court may designate a non-mental health layman, including an attorney licensed in New Jersey, to be a parenting coordinator "so long as they are qualified by experience or training." If a non-professional is agreed to as a parenting coordinator, then what qualifications do they need to be able to bill for their services? If the parties have a common neighborhood friend they trust and respect, and they ask that person serve as their parenting coordinator, should that individual be able to act in that capacity, despite a complete lack of training? Can that person earn money for his or her services, or is this service an unauthorized practice by a non-licensed civilian?

If laymen, including attorneys,

are allowed to be parenting coordinators, then what experience or training should they be required to have to fulfill that function? The author feels strongly that only mental health-trained professionals should be allowed to be parenting coordinators, unless the parties agree to designate such a person. If the parties agree to designate such a person, then they probably do so because they repose confidence in that person.

The author does not believe that attorneys qualify to be parenting coordinators by virtue of being attorneys. People trained in the mental health field, by virtue of their training, learn to become aware of their own personal biases, prejudices, and passions, which may influence their perspective and analysis of issues. There is no similar assurance that an attorney or other layperson will have such insight. Even a certified matrimonial attorney, by virtue of that certification, does not demonstrate sophistication and awareness of issues pertaining to personal emotional conflict. If attorneys or laymen are to be involved, should they be required to have mediation training? If attorneys or laymen are to be involved, should they be required to have their own therapy for a period of time so that it may be presumed that they have insight into and perspective about their own issues, which might interfere with them making objective assessment of what they observe?

COMMUNICATING WITH THE COORDINATOR

The models of proposed standards from the Association of Family and Conciliation Courts (AFCC) suggest that there should be open, *ex parte* communication between the coordinator and anyone involved. In other words, there may be separate communication between the attorneys and the coordinators, not necessarily on notice to the adversary attorney. Attorneys should not be permitted to initiate *ex parte* contact, to lobby or interject a partisan perspective the adversary attorney is unaware of at the time it is occurring. How can one be expected to counter an advocate's perspective if that attorney is not even aware that it is has been communicated?

The proposed rule allows attorneys to communicate with the coordinator, but only in writing and on notice to the adverse party or counsel. Section (h) of the proposed rule references that counsel may communicate in writing with the parenting coordinator provided copies are delivered to other counsel or *pro se* parties simultaneously. It does not address the issue of oral communication, but the implication is clear—such communication is forbidden. However, it probably would be wise to make clear in any formal rule that there should be no oral communication between counsel and the coordinator unless both are involved in a conference call.

The proposed rule does not specifically address the nature of communications that may occur between the coordinator and the litigants, or third parties with whom the coordinator should deem it appropriate to speak. Certainly, it is understandable that litigants may initiate contact with the coordinator, or vice versa, about issues without the other present. As long as the other person has an opportunity to present his or her view before recommendation is made, this seems practical and realistic.

Similarly, with respect to the parenting coordinator's communications with third parties such as teachers, therapists, and the like, each side should be able to address whatever is said, and the coordinator needs to share with the litigants any information received, as it is received.

However, the proposed model order of appointment, paragraph 8, goes further than the rule. It indicates that the parties and the attorneys will have the right to initiate or receive oral one-sided communications with the coordinator, but the fact of the communication will be made known to the other party reasonably contemporaneously with its occurring through confirmatory written memorialization. The author feels the proposed model order of appointment should be amended so that it is consistent with the proposed rule.

Coordinators seem to believe that it is important that they have unilateral access to each party between sessions, if either party feels a need to communicate or the parenting coordinator feels a need to communicate about something that has been discussed or brought up. There seems to be conflict between coordinators about whether or not they should have unilateral *ex parte* access to attorneys. There is a rational distinction between counsel and litigants in this regard, and attorneys should not have unilateral *ex parte* access to the coordinator. If there is a need for communication, the author feels it should be done on a conference call.

Parenting coordinators have authority by virtue of being able to make recommendations as non-partisan designees. It is reasonable to presume the recommendation of non-party designees will have significant impact on the judge's decision. Therefore, fairness dictates that communications to and with advocates should not be *ex parte*, but rather be on notice, with either both sides participating or both sides receiving whatever written communications have been exchanged and being given an opportunity to respond and initiate their own perspective. Any *ex parte* communications may result in an impression that may be incorrect, and if the other side is not even aware of the communication there is no ability to counter the advocated issue.

Coordinators should be able to seek information from third parties that is relevant to the scope of their assignments. Litigants should be

required to sign any authorizations required by the coordinator to obtain information, including authorizations to school personnel, treating physicians, and other people who may have objective factual information about the status of the children.

RETAINER AGREEMENTS

The author recently participated in a seminar on parenting coordinators in Sept. 2006. The seminar materials included diverse retainer agreements used by various people who act as coordinators. Parenting coordinators should not be able to define in their retainer agreement the scope of their work, or the procedures and protocol to be followed. If a rule for parenting coordinators is adopted, that should be the basis of engagements by coordinators. Coordinators' retainer agreements should simply reference that they will perform their function in accordance with any rule that is adopted and/or the terms of the order of appointment, and set how their services will be billed and paid.

The absence of a rule allows each coordinator to use different retainer agreement models. There is no uniformity in this practice around the state. This is another reason why the court should act quickly to either determine that coordination is not an appropriate instrument or vehicle or that it is, and implement the practice uniformly throughout the state with a clear rule and model order of appointment. Pending adoption of a rule, the coordinators should define the terms and scope of their agreement by reference to the order of appointment.

ABUSE OF THE PARENTING COORDINATOR PROCESS AND TERM OF APPOINTMENT

Unlike mandatory economic mediation and county custody and parenting time mediation, which are free programs, parenting coordination can be expensive. One parent or another can abuse the parenting coordination process by continually insisting that issues be reviewed by the coordinator. One check on such unreasonable conduct is a definition of the issues to be submitted in the order of appointment. Presumably, the parties will either have agreed on those issues and entry of a consent order designating a coordinator or the issues of coordination will have been determined by a court based upon submissions where issues are presented. Those issues should not be expanded, unless approved by the court, if one party does not consent to it. This will be a check on the cost of the process and inappropriate motivations by one participant to act irresponsibly toward use of the parenting coordinator.

Moreover, the initial order of appointment should set forth a precise term for the parenting coordinator's assignment, or for review regarding whether the parenting coordinator's services are still necessary.[3] Such a term will help focus participants. Moreover, there should be a milestone at which time the court must assess whether the process is achieving the desired goal of resolving disputes and keeping the parties out of the system. There may be cases where parenting coordination simply is not effective. In addition, in some cases, the parenting coordinator who had been appointed may not be a good fit with the personalities or difficulties of the litigant. These issues may need to be addressed by the court, and a fixed term of initial assignment creates a formal timetable for review of these issues.

A parenting coordinator should not automatically have a lifetime assignment. Moreover, each litigant must have a way of presenting to the trial court feelings of being aggrieved by the coordinator's recommendations or the inappropriateness of the methodologies used by the parenting coordinator. There should be a grievance procedure for resolving disputes with the coordinator and for the parenting coordinator's exit, either at his or her request or the *bona fide* request of the litigant. In short, there must be accountability and an ultimate arbiter, and that must be the court. ■

ENDNOTES

1. *See Rylick v. Rylick*, Dkt. No. A-0499-04T5 (App. Div. 2005); *Jergensen v. Jergensen*, Dkt. No. A-1280-04T1 (App. Div. 2005); *Rodriguez v. Crane,* Dkt. No. A-3828-0T45 (App. Div. 2005); *Tommaso v. Topoliski,* Dkt No. A2020-05T1 (App. Div. 2006).
2. What training is required should be defined by the Administrative Office of the Courts.
3. The proposed rule does not make this suggestion. Although the proposed model order of appointment discusses termination of the coordinator's assignment, there is no suggestion that there should be an automatic review after a prescribed period of time to monitor effectiveness and continued need for the coordinator. Such a review would seem the more preferable course.

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A New Twist on Equitable Distribution of Stock Options: *Robertson v. Robertson*

by Michelle F. Altieri

Equitable distribution of assets involves tallying up the parties' real property, bank accounts, retirement accounts, and/or brokerage accounts and dividing them between the parties. Practitioners rely upon their respective clients' case information statements and perform the rote tasks of deciding whether one party will retain the marital home or whether it should be sold; whether stocks should be divided in kind or whether one party should retain the asset with a corresponding credit to the other; whether grandma's wedding band should stay in the husband's family or the wife should retain it (since grandma *bequeathed* it to the wife on her death bed).

On occasion, however, equitable distribution issues become much more complex. This is especially true when a question arises regarding whether an asset is part of the marital estate, and therefore subject to equitable distribution, or is exempt from distribution. Determining which assets are included or excluded from the marital pot is not as simple as it seems from a brief reading of the statute.

> In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, *which was legally and beneficially acquired by them or either of them during the marriage*. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage by either party by way of gift, devise, or intestate succession shall not be subject to equitable distribution, except that interspousal gifts shall be subject to equitable distribution.[1]

The phrase "legally and beneficially acquired during the marriage" can at times be problematic. The general rule is that only assets acquired during the marriage are distributed upon divorce.[2] The filing of the complaint for divorce, in most instances, signifies the end of the marriage for purposes of inclusion of assets in the marital estate.[3] However, assets acquired both before the marriage and after the filing of the complaint for divorce can lose their immunity and become subject to equitable distribution. Thus, a gray area exists that practitioners must be aware of before applying the statute in an *ad hoc* fashion.

For instance, there are numerous cases with respect to real property purchased before the marriage in the name of, and with the assets of, one party that ultimately is converted to marital property, either through an inter-spousal gift[4] or through contributions that the non-titled spouse made to the property during the marriage.[5] Likewise, other premarital assets, such as an interest in a business, may be eligible for equitable distribution where the asset increases in value during the marriage and the increase is attributable in whole or in part to the efforts of the non-owner spouse.[6]

In these cases, the courts will draw a distinction between passive immune assets—assets whose value fluctuations are a product of market conditions—and active immune assets—assets whose increase in value is the result of the labors of one or both of the spouses.[7] These cases demonstrate that the family part, a court of equity, will strive to ensure that a non-titled spouse is not deprived of his or her fair share of an asset when the circumstances so warrant.

At the opposite end of the spectrum are those assets acquired either after the marriage has broken down or after the filing of the complaint for divorce. A tension often exists in these cases between the recognized premise that assets acquired after the "marital enterprise or partnership no longer exists should not be so included" in the marital estate[8] and a spouse's right to share in an asset "acquired by gainful labor during the marriage or as a reward for such labor"[9] albeit received after the cutoff date.

An interesting case in this regard is the Appellate Division decision in *Robertson v. Robertson*.[10] In *Robertson*, the husband moved from the marital home on July 31, 2001, and filed for divorce on Sept. 20, 2001. At the time of the parties' separation, the husband had been employed by Double Click. However, he had commenced an employment search in May or June of 2001. On Sept. 17, 2001, three days prior to the filing of the complaint for divorce, the husband began his employment with USA Interactive, and was issued stock options in

connection with his new position.

The issue in the case was whether the stock options awarded were subject to equitable distribution. The trial court determined that the options were acquired before the filing date, and therefore the asset was includable in the marital estate. The trial court awarded the wife a one-half interest in the stock options the husband had been issued with USA Interactive.

On appeal, the husband argued that the stock options awarded to him were immune from distribution, as they were awarded to him after separation, and further, that the options had not yet vested at the time the complaint for divorce was filed. The Appellate Division agreed, and reversed the trial court's determination. In reaching its conclusion, the court held that the stock options were received "as an inducement to commence employment, not as a recognition for past performance with the company…"[11]

> There is no evidence that the vesting of those options over a subsequent period of four years was designed for any purpose other than as a means to insure the husband's continued employment with the company. As such, the options in no fashion represented compensation attributable to the couple's joint marital endeavors.[12]

The Appellate Division in *Robertson* distinguished this case from the facts of the New Jersey Supreme Court's decision in *Pascale v. Pascale*,[13] where the wife was awarded stock options during the course of her continued employment but 10 days *after* the complaint for divorce was filed.[14] The Supreme Court held that the stock options were subject to equitable distribution despite being awarded subsequent to the filing date as the options were received as "a result of efforts expended during the marriage."[15]

> The inequity that would result from applying inflexibly the date complaint rule is obvious. [The husband] would be denied the benefit of stock options that were earned by [the wife] during the marriage, but were not awarded to her until slightly after the marriage terminated. Serious mischief could arise under such a hard-and-fast rule. For example, a spouse considering divorce might file her complaint just before she expects to receive a large bonus or commission, simply to deny her spouse the benefit of that asset when the court determines value of the marital asset.[16]

The *Robertson* court found that the passage of time between the husband's departure from the home on July 31, 2001, and the filing of the complaint on Sept. 20, 2001, coupled with the start of his new employment on Sept. 17, 2001, made this situation different from *Pascale*, as the award of options was not the product of joint marital efforts but merely an incentive to new employment.[17]

An interesting facet of the *Robertson* decision is that the court rejected the wife's argument that her husband's ability to obtain his position with USA Interactive was a direct result of the skills and experience achieved during the marriage.[18] In other words, the husband would not have obtained the job, and ultimately the options, without the efforts set forth during the marriage. This argument is compelling.

While the opinion does not provide sufficient facts surrounding the husband's position with both of his employers to determine his profession or the type of business he was engaged in, the Appellate Division does acknowledge that the wife was correct in her argument that the husband's qualifications for his new employment came from experience with his old employer. Consequently, the Appellate Division's holding seems inconsistent with the oft-cited principle that assets that are the fruits of labor expended during the marriage are marital property subject to equitable distribution.[19]

However, the Appellate Division reasoned that accepting the wife's argument would allow "a supportive spouse to claim assets accruing throughout the worklife of the divorced partner, regardless of when the divorce occurred. Such a result would be clearly inequitable, and thus contrary to the principles of equitable distribution."[20]

The Appellate Division's holding seems harsh in light of the existing case law on this issue. It is true that a party to a divorce may achieve skills and experience during a marriage that will enable him or her to increase his or her wealth and obtain assets for years following the divorce, and that those assets or increased wealth should not be subject to some future claim for equitable distribution. But in those situations where an asset is acquired during the marriage and is directly related to skills acquired or efforts expended during the marriage (as was the case in *Robertson,* where everyone seemed to agree that the skills the husband used to obtain his new job and stock options were achieved during the marriage), should that asset not be considered apart of the marital estate? Indeed, that has been the result in other cases addressing this issue.

For example, in *Reinbold v. Reinbold*, the Appellate Division held that the husband's enhanced pension—acquired two months after the final judgment of divorce was entered—was subject to equitable distribution.[21] The parties had agreed that the wife would receive half of the husband's pension acquired from the date of the marriage to the date of the divorce complaint.[22] Two months after judgment was entered, the husband was offered an early retirement incentive package, which increased the value of his pension.[23] The husband qualified for the early retirement incentive because he had attained the age of 55, and had over 10 years of service with his employer.[24] The issue became whether the wife was entitled to share in the increase in

value of the pension.

In answering in the affirmative, the Appellate Division held that the asset was earned during the marriage, as the husband had met all of the qualifications for receiving the enhanced pension during the marriage; that is, the husband had attained the age of 55 and had already devoted 28 years of service to his employer during the marriage.[25]

The court concluded:

> No effort on his part beyond what took place while he was married to plaintiff caused the accretion of his pension. To be sure, accretion due solely to the diligence and industry of a party go to him or her alone. That is not the case here. Here, defendant received the benefit of the pension incentive package because of his age and as a reward for his length of service which was attributable to his efforts during the marriage.[26]

The holdings of *Reinbold* and *Robertson* seem to be at odds. The *Reinbold* court distributed to the wife a portion of the enhanced pension because her husband made no endeavors after the marriage to obtain the asset (*i.e.* the enhanced pension was earned during the marriage). Conversely, the *Robertson* court refused to distribute the husband's stock options, as the court concluded that they were awarded as an inducement to commence employment.

It does not appear from the facts of *Robertson* that Mr. Robertson undertook any efforts after the breakdown of the marriage to qualify himself for his new position. In fact, to the contrary, it seems that his qualifications were achieved entirely during the marriage. It is very unlikely that Mr. Robertson's new employer would have offered a position, which included stock options, had he not had the skills acquired during his previous employment occurring during the marriage.

It also appears that the Appellate Division was influenced by the fact that the Robertsons had separated two months prior to his new employment. This is particularly problematic in that the Supreme Court has specifically rejected the rule that separation alone is the "terminal date of the marriage for purposes of equitable distribution."[27]

In *Portner,* the Supreme Court specifically reaffirmed its prior holdings that, for purposes of equitable distribution, the marriage ends upon the filing of the complaint for divorce absent a separation agreement and actual physical separation.[28]

In conclusion, it appears that the *Robertson* decision is in direct contradiction to the line of cases that had preceded it, and perhaps will be limited in the future to its specific facts. However, it certainly clouds what had seemed to be well-settled law in this particular area of equitable distribution. ■

ENDNOTES

1. N.J.S.A. 2A:34-23(h) (emphasis added).
2. *Elkin v. Sabo*, 310 N.J. Super. 462, 472 (App. Div. 1998).
3. *See Portner v. Portner,* 93 N.J. 215, 221 (1983).
4. *Pascarella v. Pascarella*, 165 N.J. Super. 558, 564 (App. Div. 1979)(holding that the marital residence, which had been purchased prior to the marriage, was a marital asset, since the husband executed a deed and conveyed to title to his wife and himself as tenants by the entireties during the marriage); *Perkins v. Perkins*, 159 N.J. Super. 243, 246 (App. Div. 1978).
5. *See Mol v. Mol*, 147 N.J. Super. 5, 7 (App. Div. 1977).
6. *See Weiss v. Weiss*, 226 N.J. Super. 281 (App. Div. 1988), *certif. denied*, 114 N.J. 287 (1988); *Scherzer v. Scherzer*, 136 N.J. Super. 397 (App. Div. 1975), *certif. denied*, 69 N.J. 391 (1976). In these cases, the premarital portion of the interest remains immune from equitable distribution. *Id.* at 400-01.
7. *See Valentino v. Valentino,* 309 N.J. Super. 334, 338 (App. Div. 1998).
8. *Portner v. Portner*, 93 N.J. 215, 219 (1983).
9. *Reinbold v. Reinbold*, 311 N.J. Super. 460, 469 (App. Div. 1998).
10. 381 N.J. Super. 199 (App. Div. 2005).
11. *Id.* at 205.
12. *Id.*
13. 140 N.J. 583 (1995).
14. *Id.* at 607.
15. *Id.* at 610.
16. *Id.*
17. *Robertson*, 381 N.J. Super. at 205.
18. *Id.* at 205-06.
19. *Reinbold*, 311 N.J. Super. at 469-70.
20. *Robertson*, 381 N.J. Super. at 205-06.
21. 311 N.J. Super. at 471-72.
22. *Id.* at 462.
23. *Id.* at 463-64.
24. *Id.* at 464.
25. *Id.* at 470.
26. *Id.* (Citations omitted).
27. *Portner,* 93 N.J. at 223. Justice Garibaldi discusses in detail the Court's interpretation of the statutory phrase "during the marriage" for purposes of determining those assets that are includable in the marital estate. In rejecting the date of separation, the Court opined that the parties' physical separation alone "is an unworkable determinant for pinpointing the terminal date of the marriage for purposes of equitable distribution, as it would lead to a judicial inquiry into the circumstances of a separation and would introduce all the difficulties we have consistently sought to avoid." *Id.*
28. *Id.* at 219 (*quoting Brandenburg v. Brandenburg*, 83 N.J. 198, 209-10 (1980)).

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Appointed Counsel in Cases Involving Children

Responsibilities and Considerations

by Judith A. Hartz and Leonard A. Peduto Jr.

Parenting time disputes present difficult issues for practitioners and judges. These cases all too often are, or become, contentious and hostile. In certain cases, the struggle is over where and with whom the child should live, while others involve allegations of sexual abuse, or extreme emotional or physical abuse, or alienation of a child's affection from a parent. Whether real, imagined or fabricated, the allegations made in these cases can have a dramatic impact on the children involved. The conduct of one or both of the parents has the potential for harmful and sometimes devastating consequences to the child's physical or emotional well-being, and to a parent's relationship with the child.

Family part judges confronted with contested issues have the discretion to appoint experts to aid the court in making a final determination.[1] The New Jersey Rules of Court and statutory law also allow the court to appoint counsel for a child and/or a guardian *ad litem* under the appropriate circumstances.[2] Our courts have held that "...the appointment must not be routine but must be reserved for those actions in which the child or the court clearly requires the specific assistance the appointee can render whether as law guardian or guardian *ad litem*."[3]

The roles of a court-appointed counsel and a guardian *ad litem* are quite distinct, a factor the court must consider before making the appointment. Attorneys appointed to serve in either capacity must be aware that they will be confronted with unique ethical, legal and practical situations in fulfilling their role.

THE LAW GUARDIAN—RULE 5:8A

Rule 5:8A provides:

> In all cases where custody or parenting time/visitation is an issue, the court may, on the application of either party or the child or children in a custody or parenting time/visitation dispute, or on its own motion, appoint counsel on behalf of the child or children. Counsel shall be an attorney licensed to practice in the courts of the State of New Jersey and shall serve as the child's lawyer. The appointment of counsel should occur when the trial court concludes that a child's best interest is not being sufficiently protected by the attorneys for the parties. Counsel may, on an interim basis or at the conclusion of the litigation, apply for an award of fees and costs with an appropriate affidavit of services, and the trial court shall award fees and costs, assessing same against either or both of the parties.

Under Rule 5:8A, which was first adopted in 1989, the court may appoint counsel for a child in a case where custody, parenting time or visitation is in issue. The court may do so on an application by either party or by the child or on its own motion. The standard articulated in Rule 5:8A for making such an appointment is relatively straightforward: The court is empowered to appoint counsel for a child whenever the court concludes that "...*a child's best interest is not being sufficiently protected by the attorneys for the parties...*" (emphasis supplied).[4]

In defining counsel's duties, the rule states that the appointed attorney "...shall serve as the child's lawyer..." However, the official comment to Rule 5:8A adds another layer to counsel's assigned duties; that is that counsel is to act as "...an independent legal advocate *for the best interests of the child*..." (emphasis supplied). In fact, that language often appears verbatim in the order appointing counsel for a child under Rule 5:8A.

From the viewpoint of the practicing family law attorney, considerable tension can, and frequently does, arise from those inevitable interactions implicating the child's *best interests* and the seemingly narrow command of Rule 5:8A, as amplified in some of the case precedents, that the attorney is to serve as the *child's lawyer*. This tension may be greatly exacerbated if the court has not, at the same time, appointed a guardian *ad litem* (GAL) for the child under Rule 5:8B.

In contrast to the designated role of the child's counsel under Rule 5:8A (also referred to as the law guardian, particularly in Division of Youth and Family Services abuse

and neglect and termination of parental rights cases), the GAL's express mission is to "…represent the best interests of the child or children …"[5] The Appellate Division illuminated this basic distinction in *Matter of Adoption of a Child by E.T.*[6]

In *E.T.*, the court observed that a law guardian's role is to "zealously advocate the client's cause." In contrast, a GAL assists the court in determining the child's best interest. This functional differentiation, as it surfaces in the case law, can be traced back to statements appearing in the 1994 Family Division Practice Committee Report[7] that were excerpted, quoted and applied in the seminal decision in *Matter of M.R.*[8]

The discussion of counsel's role in *Matter of M.R.*, in the analogous context of an action for the guardianship of a developmentally disabled 21-year-old woman, is highly instructive. Yet, despite the sound guidance offered there, the opinion in *M.R.* does not rescue Rule 5:8A counsel from the quandary of being called upon to advocate what is or may be in the best interests of his or her client. The Supreme Court's analysis in *Matter of M.R.* focused on whether a developmentally disabled woman had sufficient mental capacity to make an informed decision as to where she wanted to live (and with which of her parents) and the derivative question of what appointed counsel's obligations would be to the client in the event the client was considered able to make that decision.[9]

This general subject—where and with whom children will reside—arises all too often in those dissolution cases when parents (like those in *M.R.)* cannot agree in good faith on arrangements for residential custody and/or co-parenting time for their child or children. In *M.R.,* the court reasoned that if the woman did have the capacity to make a decision about where she would live, counsel appointed to represent her was bound to advocate vigorously for that choice.[10] To support this view, the Court properly referenced RPC 1.2(a) (an attorney should "…abide by [the] client's decisions concerning the objectives of representation…") and RPC 1.3 (an attorney should "act with reasonable diligence …in representing the client…").[11]

The court ruled in *M.R.* that "…[t]he attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes…" However, that easy to follow principle is subject to a broad *caveat.*

Counsel's role "…does not extend to advocating decisions that are patently absurd or that pose undue risk of harm to the client…"[12] As part of its suggested guidelines to "…assist the attorney for an incompetent…" (pending the amendment of Rule 4:86), the Court imparted additional content to this *caveat.*[13] The Court noted that "…[o]n perceiving a conflict between that person's preferences and best interests, the attorney may inform the court of the possible need for a guardian *ad litem*…"[14] Of course, that reporting process, of necessity, would involve having an attorney make a judgment in the first instance about what is or is not in the client's best interests. This kind of social/psychological evaluation was precisely what the court felt attorneys should not be called upon to do, since it diluted effective advocacy for the client and forced the attorney "…to make decisions concerning the client's mental capacity that the attorney is unqualified to make…"[15]

The recent explication of these principles in a published opinion did little to diminish the potential dilemma facing Rule 5:8A counsel. In *Division of Youth & Family Services v. Robert M.*,[16] the defendants, who had four children of their own, adopted three Russian children. The oldest adopted child died as a result of suspected severe physical abuse by the defendants. The Division of Youth and Family Services (DYFS) filed a complaint for protective services and was granted immediate custody, care and supervision of all of the children.

As the case moved forward, including the initiation of a criminal prosecution, the family part judge granted a motion by the defendants to exclude certain evidence, including the gruesome findings of an autopsy report and statements made by the children about their parents' abusive punishment practices. After trial, the family part found that the two surviving adopted children had been abused by reason of excessive corporal punishment, and ordered continued care and custody by DYFS.

The family part dismissed the DYFS complaint for continuing custody of the defendants' four biological children on the grounds that DYFS had failed to prove abuse or neglect of those children. DYFS then appealed.

After a discussion of the evidence and substantive issues raised on appeal, the Court found it "…necessary to comment on the different views of some counsel and the trial judge respecting the proper role of a R. 5:8A law guardian…." in abuse and neglect cases brought by DYFS.[17] After reviewing the pertinent authorities, the Court closed its opinion with the following:

> During oral argument, one of the law guardians remarked that the wishes of children are dreams. True. But the judge entrusted with these difficult and often heart-rending decisions must be advised of a child's wishes if justice is to be done. Law guardians are obliged to make the wishes of their clients known, to make recommendations as to how a child's desires may be accomplished, to express any concerns regarding the child's safety or well-being and in a proper case to suggest the appointment of a guardian *ad litem*.[18]

What makes the opinion in *Robert M.* such an intriguing (and frustrating) read for the family lawyer is that the Appellate Division went to great lengths to recapitulate the different positions staked out by four separate law guardians on the issue of whether the defendants' four natural and the two surviving adopted children should be returned to them. The Appellate Division also dutifully noted the family part judge's reactions to each of those arguments.[19] However, for whatever reason, the Appellate Division did not take the next step. It never offered a particularized analysis regarding the propriety (or impropriety) of what each law guardian had contended and why that did or did not fit within the scope of what Rule 5:8A counsel should do for his or her client under the circumstances.

The Appellate Division reversed the trial court's rulings excluding the autopsy and the statement evidence (which were relevant and material on the issue of parental fitness). What makes the *Robert M.* holding even more fascinating is that the Appellate Division remanded the case for further proceedings to consider the excluded evidence and, more significantly, whether the evidence of the defendants' emotional and physical abuse of their adopted children, resulting in one child's death, would be sufficient to sustain findings that the defendants had the capacity to inflict emotional and/or physical abuse upon their other children, and whether, under those conditions, they were unfit parents.[20] DYFS had advocated that position at trial. The law guardian for the surviving adopted children (who, it would appear, were probably less than seven years old at the time of trial) joined in that argument, both regarding her clients and the biological children.

The family part judge criticized the law guardian for the adopted children for, among other things, not delineating her clients' wishes in her summation. The family part judge advised the law guardian that she was withholding disposition regarding the adopted children until counsel informed the court of her clients' wishes. She also admonished the law guardian that she was facing possible removal and the appointment of a substituted law guardian if she did not inform the court of her clients' wishes.

The law guardian thereafter made a submission that set forth her legal position but, apparently, did not state what her clients' wishes were. The family part judge proceeded to decide the matter without appointing a substitute law guardian.

The basic lessons of *M.R., E.T.* and *Robert M.*, and how Rule 5:8A counsel may apply them, can be succinctly summarized. The first duty of Rule 5:8A counsel is to confer in person with his or her new client. Counsel needs to learn from that client, firsthand, what the client's wishes are with respect to the specific issue or issues before the court.

Children may be reluctant to talk to counsel initially, particularly about their parents and about proposals for future living arrangements, education, religion, health concerns or visitation. They sometimes fear that, by doing so, they are being disloyal to one or the other parent, or that they may offend or hurt their parents, or that they will "get them in trouble with the judge."

The law guardian must carefully explain to the client that the client's comments will be kept in strict confidence and that counsel will only impart to the court that which the client permits to be told.[21] A law guardian must take the time necessary to explore with his or her client why that client is seeking whatever is being sought. One not only needs to fully understand a client's wishes, but also assure that any statement to the court actually constitutes the child's wishes. Regardless of a law guardian's own feelings, he or she is obliged to communicate the client's wishes, on the record, to the court (and to counsel for the parents or to the parents, if not represented). The law guardian is also bound to advocate that position in proceedings before the court. Of course, this entire process may be explained easier than it can be accomplished.

THE GUARDIAN *AD LITEM*—RULE 5:8B

Rule 5:8B provides, in pertinent part:

> In all cases in which custody or parenting time/visitation is an issue, a guardian *ad litem* may be appointed by court order to represent the best interests of the child or children if the circumstances warrant such an appointment. The services rendered by a guardian *ad litem* shall be to the court on behalf of the child. A guardian *ad litem* may be appointed by the court on its own motion or on application of either or both of the parents. The guardian *ad litem* shall file a written report with the court setting forth findings and recommendations and the basis thereof, and shall be available to testify and shall be subject to cross-examination thereon. In addition to the preparation of a written report and the obligation to testify and be cross-examined thereon, the duties of a guardian may include, but need not be limited to, the following:
>
> 1. Interviewing the children and parties.
> 2. Interviewing other persons possessing relevant information.
> 3. Obtaining relevant documentary evidence.
> 4. Conferring with counsel for the parties.
> 5. Conferring with the court, on notice to counsel.
> 6. Obtaining the assistance of independent experts, on leave of court.
> 7. Obtaining the assistance of a lawyer for the child (Rule 5:8A) on leave of court.

8. Such other matters as the guardian *ad litem* may request, on leave of court.

A significant difference between a Rule 5:8A (counsel) and a Rule 5:8B (GAL) appointment is that a GAL may be any appropriate person, such as a social worker or mental health professional, and need not be an attorney. The GAL's services are to the court, in contrast to the role of attorney for the child to provide legal advocacy for the child. Rule 5:8B defines the GAL's role as an independent fact-finder, including interviewing persons with relevant knowledge, reviewing documents, meeting with the parties and the child, and reporting to the court.[22] A GAL serves as an officer of the court.[23]

Of particular evidentiary significance is the GAL's ability to communicate directly with the parties and the child outside of the presence of their counsel. An attorney for the child is not able to communicate directly with the parties, but is able to engage in privileged communications with the child.[24] Communications between the child and a GAL are not privileged, nor are communications between the parties and a GAL.

A written report including the results of the GAL's fact-finding and investigation is to be submitted to the court.[25] The report may be extremely helpful to the court, particularly during the pendency of an action where the court has not yet held a hearing and is faced with conflicting affidavits from the parties about significant issues relating to the child. By providing information and insight the court may not otherwise have, the GAL's involvement may assist the court in making preliminary decisions.

Since a GAL's responsibility is to provide a service to the court, the obligation to advocate the child's wishes does not exist. The GAL is to make recommendations to the court based on the child's best interests. From a practical perspective, this may pose some difficulty for a GAL, especially if he or she has no psychological training or background.[26] Very often a GAL is an attorney who may or may not have any background, education or training in child psychology. Therefore, the GAL's evaluation or recommendation is based on his or her own judgment regarding what may or may not be in the child's best interest. A GAL may, however, seek the assistance of "independent experts" on leave of court, which may assist the GAL in protecting the child's best interest and making a recommendation to the court.[27]

A GAL must be available to testify at a hearing or trial, and is subject to cross-examination on his or her report. This is very different than counsel for the child's role at a hearing or trial, which is to zealously represent the child, meaning actively participating at the hearing or trial by subpoenaing witnesses and filing an appeal of a decision, if necessary. A GAL has no obligation to file or participate in an appeal.[28]

From a practical point of view, a GAL may be helpful to a court and to the parties involved in a contentious parenting time dispute by facilitating a resolution. For example, in *Anyanwu v. Anyanwu*,[29] a highly contentious matrimonial case involving, among other compelling issues, a return of a child from Nigeria, the appellate court suggested that the trial court consider the appointment of a GAL to represent the interests of the child. The husband and father of the child had been incarcerated for civil contempt for refusal to comply with an order directing him to arrange for the return of the child to the United States from Nigeria, where she was residing with relatives. It was noted that the GAL could "proceed under the authority of the court and act impartially to report to the court on issues of Nigerian law and customs" and seek assistance of relatives in the United States and Nigeria.[30] The court further noted that a GAL may be able to assist the parties in mediating their dispute consistent with the best interest of the child.[31] A GAL also may be able to provide insight into the parties' ability to agree, communicate and cooperate in matters relating to the child or regarding the interaction and relationship of the child with its parents and siblings.[32]

In *Gyimoty v. Gyimoty*,[33] the trial court appointed an attorney to serve as GAL in a case involving a custody and visitation dispute. The attorney conducted various interviews, reviewed certain documents and prepared a 20-page report, which considered the best interests of the children and made recommendations. The report of the GAL assisted the parties in reaching an agreement on the disputed issues.

A GAL may not, however, undertake the role of mediator. In *Isaacson v. Isaacson*, the Appellate Division held that the same individual cannot serve both as guardian *ad litem* and mediator based on the "inherent conflict between a mediator's obligation to respect the confidences of the parties and [the] concomitant responsibility as guardian *ad litem* to serve as an officer of the court..."[34]

Yet another example of an appointment of a GAL is *Ridley v. Ridley (Dennison)*.[35] As a sanction for a mother's frustration of the father's post-judgment visitation with the parties' three children, the court appointed a GAL for the purpose of "working towards re-establishment of a relationship" between the father and the children.[36] The responsibilities of the GAL included meeting with and interviewing the children, monitoring and verifying the steps taken by the mother to encourage contact between the children and their father, communicating with the children's therapist and reporting to the court on a periodic basis regarding the status of the case. The mother was entirely responsible for the payment of fees of the GAL.

CONSIDERATIONS IN THE APPOINTMENT OF A LAW GUARDIAN AND A GAL

It is conceivable that the appointment of both an attorney for the child and a GAL may be warranted. The child may benefit from the attorney's zealous advocacy, while the court may require the assistance of a GAL. Moreover, the attorney and the GAL for the child may have to take different positions. The child's attorney may advocate a position based on the child's wishes, while the GAL may make a recommendation that he or she believes is in the child's best interests, although inconsistent with the child's wishes. The following illustrations may serve to underscore this point:

- Counsel for the child may find himself or herself in a very difficult position when the client is a young child (less than seven years of age). Appointment of Rule 5:8A counsel may not be reasonable or appropriate for a young child for various reasons. Many young children do not really know what their wishes are (or are truly torn between their parents and therefore undecided). Others are not capable of formulating and/or expressing themselves, except at a very basic level that may or may not be helpful to the task of representing that child. Other younger children, while intelligent and expressive, do not always reveal themselves to counsel in a consistent and reliable manner. This mode of communication with your client (as with any client) may evidence, or at least suggest, a lack of due and proper deliberation before making decisions. Inasmuch as Rule 5:8A counsel is not technically allowed to foray into a full scale best interests type of evaluation for his or her client, the cases involving these groups of children are perhaps better handled, in the first instance, with a GAL rather than Rule 5:8A counsel.
- Alternatively, a child may, not surprisingly, entertain wholly unrealistic expectations bordering on the dreams referenced in the *Robert M.* opinion. For example, if the two surviving adopted children in *Robert M.* had told their law guardian that they wanted to stay with their adoptive parents, despite the evidence of persistent physical and emotional abuse inflicted upon them and their deceased brother, and the likelihood that it would continue, counsel would not be properly representing and serving the clients by simply informing the court of that *wish* without taking further action. In such a case, where the whole best interests issue surfaces so conspicuously, Rule 5:8A counsel would have a duty to the client (and the court) to do some or all of the other things discussed in *Robert M.*, including, for example, requesting the appointment of a GAL.
- Worse yet, some children may labor under the baleful influence of one or even, on occasion, both parents, who see nothing wrong with violating the traditional principles of neutrality that are supposed to envelop and protect children in these unfortunate disputes. Children will succumb to the exertion of parental pressure to take a side. When this red flag is hoisted, counsel for the child needs to seek the court's immediate assistance to stop this form of witness tampering and protect the client against untoward parental intrusion. Otherwise, the whole point of a process geared to ascertaining and conveying the child's wishes may be lost or so contaminated that it is useless to the court and, more importantly, your client.

It appears that a law guardian and/or a GAL are immune from a suit for negligence brought by a disgruntled parent.[37] Case law in other jurisdictions squarely holds that GALs enjoy the benefits of quasi-judicial immunity from suits for negligence at least with respect to those actions that are within the scope of their appointment.[38] Law guardians, in contrast, are more than likely not immune if it is the child who brings the action.

CONCLUSION

Courts should carefully consider what they believe is necessary for a child before making the appointment of a law guardian or a GAL in a particular case—independent advocacy of the child's wishes or protection of the child's best interests. Rule 5:8A counsel need to respect the boundaries of their appointment as a child's attorney while remaining ever mindful of their client's best interest. The GAL should recognize that they play a vital role in shaping not only the definition of the issues involving the child but also the appropriate resolution in the child's best interests. The harmonization of the roles of a law guardian and a GAL may greatly assist the court by providing more comprehensive information about a child and a fuller understanding of what may or may not be in the child's best interests. In this way, the persons who should be the court's primary concern—children—will receive all of the legal protection they rightfully deserve. ■

ENDNOTES

1. Pressler, *Rules Governing the Court of the State of New Jersey*, Rule 5:3-3(a) and (b).
2. *See* Pressler, *Rules Governing the Courts of State of New Jersey*, Rules 5:8A and B and N.J.S.A. 9:2-4 (c).
3. *In Matter of the Adoption of a Child by E.T.*, 302 N.J. Super. 533, 541 (App. Div. 1997).
4. *See* Rule 5:8A.
5. Rule 5:8B.
6. 302 N.J. Super. at 533.
7. Supreme Court Civil Practice Committee, Report (1994), reprinted in 3 *N.J.L.* 36 (1994).
8. 135 N.J. 155, 174-5 (1994).
9. *Id* at 175.

10. *Id.*
11. *Id.* at 176, *citing* the Rules of Professional Conduct.
12. *Id.*
13. *Id.* at 177.
14. *Id*, at 177-8.
15. *Id.* at 177 (citation omitted).
16. 347 N.J. Super. 44 (App. Div. 2002), *cert. den'd* 174 N.J. 39 (2002).
17. 347 N.J. Super. at 68.
18. *Id.* at 70.
19. *Id.* at 61-62.
20. *Id.* at 68.
21. *See In Re Maraziti*, 233 N.J. Super. 488, 494 (App. Div. 1989) (attorney-client privilege applies to any communications made in the course of a law guardian's representation as attorney for children).
22. *See generally Isaacson v. Isaacson*, 348 N.J. Super. 560, 574 (App. Div. 2002).
23. *Id.* at 577.
24. *See In Re Maraziti*, 233 N.J. Super. at 494.
25. Rule 5:8B
26. The official comment for Rules 5:8A and 5:8B states that "[if] the primary function of the GAL is to act in the capacity of an expert, then the court should ordinarily appoint a GAL from the appropriate area of expertise."
27. *See generally Matter of Baby M*, 109 N.J. 396, 464 (1988). (GAL retained experts who testified at trial on child's "best interest"); *see also P.T. v. M.S.*, 325 N.J. Super. 193, 216 (App. Div. 1999) (court must decide custody and visitation issues consistent with a child's best interests and cannot abdicate its decision-making role to an expert).
28. Rule 5:8B(a).
29. 339 N.J. Super. 278, 294 (App. Div. 2001)
30. *Id.*
31. *Id.*
32. *See* N.J.S.A. 9:2-4(c) for the factors to be considered by a court in making a custody determination.
33. 319 N.J. Super. 544, 546 (Ch. Div. 1998).
34. 348 N.J. Super. 560, 577 (App. Div. 2002). *See also* R. 1:40-4 (no disclosure made by a party during mediation shall be admitted as evidence against that party and no mediator may participate in any subsequent hearing or appear as a witness or counsel for any person in the same or any related matter.).
35. 290 N.J. Super. 152, 161 (Ch. Div. 1996).
36. *Id.*
37. *See, Delbridge v. Office of Public Defender*, 238 N.J. Super. 288 (Law Div. 1989) *aff'd o.b. sub.nom.*, *A.D. v. Franco*, 297 N.J. Super. 1 (App. Div. 1993) *certif. den.* 135 N.J. 467 (1994) *cert. den.* 513 U.S. 832, 115 S. Ct. 108, 130 L. Ed. 2d 56 (1994); *see. e.g., P.T. v. Richard Hall Commuinty Mental Health Care Center*, 364 N.J. Super. 546 (Law. Div. 2000), *aff'd* 364 N.J. Super. 460 (App. Div. 2003), *certif. den.* 180 N.J. 150 (2004).
38. For a general discussion of this issue and the public policy underpinnings for the grant of immunity to a GAL, *see Paige K.B. by Peterson v. Molepske*, 219 Wis. 2d 418, 580 N.W. 2d 289 (Wis. Sup. Ct. 1998); *Billups v. Scott*, 253 Neb. 287, 571 N.W. 2d 603 (Neb. Sup. Ct. 1997); *Fleming v. Asbill*, 326 S.C. 49, 483 S.E. 2d 751 (S.C. Sup. Ct. 1997); *Tindell v. Rogosheske*, 428 N.W. 2d 386 (Minn. Sup. Ct. 1988); *Sarkisian v. Benjamin*, 62 Mass. App. Ct. 741, 820 *N.E.2d* 263 (Mass. App. Ct. 2005); *Bluntt v. O'Connor* 291 A.D. 2d 106, 737 N.Y.S. 2d 471, 478-477 (4th Dept. 2002) *lv. to app. den.* 98 N.Y. 2d 605, 746 N.Y.S. 2d 279, 773 N.E. 2d 1017 (Ct. App. 2002); *Delcourt v. Silverman*, 919 S.W. 2d 777 (Tex. App. 1996) *cert. den.* 520 U.S. 1213, 117 S. Ct. 1698, 137 L. Ed. 2d 824 (1997) *reh. den.* 520 U.S. 1283, 117 S. Ct. 2472, 138 L. Ed. 2d 227 (1997); *State ex rel. Bird v. Weinstock*, 864 S.W. 2d 376 (Mo. App. 1993); *Penn v. McMonagle*, 60 Ohio App. 3d 149, 573 N.E. 2d 1234 (Ohio App. 6 Dist. 1990).

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Thirty Days Until Trial

by Kathryn Marie Laughlin

For years, attorneys have been told by members of the bench that more than 95 percent of all dissolution cases settle before trial. Accordingly, many lawyers prepare a file during the pendency with the *knowledge* that this particular file, like nearly every other, will settle prior to trial. This settlement preparation may include some of the following: service of, but not necessarily receipt of complete responses to, discovery demands; comparative market analyses for real estate, but not necessarily a stipulation of value; oral opinions concerning the value of assets (such as business interests or pensions) but no formal, written reports from experts. Often, lawyers will cite their desire (and that of their clients) to keep counsel fees as low as possible. But what happens when, despite recommendations at the early settlement panel and the attendance at mandatory economic mediation, your case has not settled, and the trial judge has given you a firm trial date in 30 days?

The difficulty with obtaining late discovery is that many times the figures generated from a home appraisal or a business valuation require either an additional appraisal or valuation of further discovery, as one party believes the figure is too high or too low. Unfortunately, the date for completing discovery and obtaining valuation reports is beyond the case management order discovery timeframes, which will generally not be extended by the court. Worse, you are generally faced with a pre-trial order from the court demanding pre-trial memorandum, witness lists, exhibit lists and binders, and stipulations. You have 30 days to prepare your case, and your file.

First, any discovery deficiencies should immediately be identified in writing to an adversary with a request to be answered within a certain time frame. If your adversary is reluctant (or just unwilling) to provide missing or updated documentation, serve him or her with a notice in lieu of subpoena in accordance with Rule 1:9-1 and Rule 1:9-2, demanding that the adverse party appear at trial with the missing or updated documents. Although not the most efficient means of obtaining discovery, it will at the very least allow for a manner in which to obtain the documents.

Another useful tool is to serve a request for admissions pursuant to Rule 4:22-1. If there are particular facts you want to have the adverse client admit, or in order to limit testimony, serving a well-crafted request for admissions can serve that purpose.

While you are attending to obtaining discovery, attention must be paid to discovery information supplied on behalf of your client. Your client's answers need to be amended as necessary. The standard response of "to be supplied," too often remains as a final answer for discovery. Discovery submitted to an adversary using a catchall phrase such as "to be supplied" as an answer remains incomplete. Incomplete answers that are not updated can be damaging and bar evidence and testimony from trial.

As an example, an interrogatory request asks to have a witness list and is answered with "to be supplied," and is never updated. Neither counsel makes an issue of the witness list not being completed. Counsel would like to introduce witnesses at the time of trial, and the adversary objects. The witness can be barred from trial.

As standard practice, any time any discovery is answered with a catchall phrase, a letter to the client should be generated identifying the remaining information required to be submitted to an adversary.

Prior to trial, the parties must file an amended and updated case information statement, which is due to the court 20 days prior to trial.[1] If the case information statement is not updated or amended 20 days prior to trial, the court has the discretion to bar the information.[2] This can dramatically impact claims for alimony, child support and equitable distribution. The court file will already contain the original case information statement filed with the initial pleadings;[3] however, Rule 5:5-2 provides an ongoing obligation during the litigation to update and amend a client's case information statement. An outdated case information statement will allow the court to reach its own conclusion on the needs of a client concerning issues such as alimony, child support and equitable distribution.

Many trial court judges require a witness list with a brief identification of the witness and summary of the intended testimony; notice to the court of any stipulations of issues; and pre-marking exhibits (including joint exhibits). This creates an obligation on the part of attorneys to meet in advance of the trial in order to coordinate witness-

es, exhibits and stipulations. For example, counsel should discuss setting aside specific time slots—even if it means calling witnesses out of order—to accommodate experts. Additionally, counsel should agree upon joint exhibits—such as tax returns, bank statements, brokerage statements and the like—and which attorney will be preparing the joint exhibit binders.

Next, counsel must begin the process of preparing witness testimony. Time must be set aside to draft an outline and review the outline with the client and any lay or expert witnesses. These meetings should help refine the outline. Additionally, counsel should develop—if it has not been done already—a theme for the case. All of the testimony and documentary evidence of your case should then, somehow, incorporate this theme. A good theme will make the case interesting for the trial judge and will help in the drafting of the pretrial memorandum.

The 30 days prior to trial can be chaotic; organization can help reduce the chaos. Clearly, managing a case from the start as if it were going to be tried—creating trial notebooks from the beginning, complying with discovery deadlines established in the case management order and obtaining all needed reports in advance of trial, just to name a few items—makes counsel better prepared in the stretch run. However, when you are faced with trial in 30 days, these tips should help you be better prepared to face the chaos. ■

ENDNOTES

1. R. 5:5-2(c).
2. *Id.*
3. R. 5:5 -2 (a).

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