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Chair's Column:
The Importance of Self-Care

by Sheryl J. Seiden

As family lawyers, we are entrusted with the responsibility of assisting our clients during the most difficult time in their lives. Not only do we provide legal guidance for our clients, but we also nurture our clients through life-altering decisions. The practice is demanding, the hours are long, the work is hard, and the stress level is off the charts. We are charged with the constant task of problem solving for our clients. As such, it is easy to get caught up in our clients' immediate need for help at the sacrifice of ourselves.

According to the American Psychology Association, lawyers are 3.6 times more likely to suffer from depression than non-lawyers and substance abuse rates are much higher in the legal profession and the general population.[1] As lawyers, we are trained to be pessimistic thinkers.[2] While this way of thinking may lead to higher success within our practice, it also has its detriments. Recognizing that the demands of our profession makes us susceptible to depression and substance abuse, it is even more important that we take steps to avoid against these adversities.

The first step in exercising self-care is to have self-compassion.[3] Self-compassion requires us to be kind and understanding to ourselves even during difficult times, rather than judging and critiquing ourselves for the various inadequacies or shortcomings that we encounter. Self-compassion requires a recognition that being imperfect, failing, and experiencing life difficulties are inevitable, and are part of one's career path. Self-compassion also requires us to be willing to observe our negative thoughts and emotions with openness and clarity, so that we have mindful awareness. In order to be able to exercise self-compassion, one must also take steps to manage one's schedule and enhance one's self-care.

Some practice tips to better manage your schedule:

- **Set boundaries.** Don't overextend yourself. It is hard to say 'no' to a client, colleague or your boss. Learn how to recognize when your plate is full and to explain your timeline for being able to complete the task at hand. I encourage young lawyers to ask their superiors for

guidance on how best to prioritize their work when their plates are full.

- **Set realistic timelines.** We all know that assignments often take longer than expected. Recognize the timeline for completing these projects and start early. Don't procrastinate. Don't leave them to the last minute. Don't be unrealistic in your beliefs of when you can produce a completed project.
- **Set realistic expectations.** Avoid promising something to a client or a boss that you know will require you to infringe on your time to meet this deadline. Be realistic about when you can complete the task at-hand during working hours. Make promises that provide you with a cushion. If you deliver earlier than expected, you exceed expectations, and if not, you at least meet them.
- **Allocate time in your schedule.** As you excel in your career, you will spend more and more time out of the office attending court conferences, motion hearings, four-way meetings, client meetings and mediations. This leaves less time in your office to do the work that is required to prepare for the next court conference, motion hearing, four-way meeting, client meeting and mediation. In order to do so, it is important to block off time in your schedule one day or two prior to the scheduled event to prepare. Consider blocking off time in your schedule to draft the motion papers, court submissions or mediation statements. By allocating the time in your schedule for these assignments, you help achieve the work-life balance that we should all strive to achieve.
- **Speak up.** If you find yourself in a situation where you cannot deliver the work product to a boss or client as promised, speak up as soon as possible. Requesting another day to complete the project might be completely acceptable. You do not know until you ask. There are real emergencies and self-imposed emergencies created by false deadlines. Be cognizant that your boss and/or the client will need time to read the document that you prepare prior to submitting it so you must also not let your last minute production of the document create unnecessary stress on your boss and/or client by providing them with the document at the last minute.

Some tips to exercise self-care:

- **Take a daily break from technology.** Set a time each day when you completely disconnect. Put away your laptop, stop checking your phone, and stop checking email. Consider having a parking station outside of your bedroom for your electronic devices to avoid the instinctive need to check your email, social media and texts immediately prior to going to bed, the minute you wake up or even worse, in the middle of the night. Let's face it, nothing good comes from those first morning emails. Get yourself ready before you prepare to confront those demanding emails.
- **Nourish your creative side.** Creativity is a powerful antidote to help reduce your stress. Try something new, start a fun project, or resume a favorite hobby. Choose activities that have nothing to do with work or whatever is causing your stress. Last fall, the Family Law Section's Young Lawyer Subcommittee (YLS) had an event at AR Workshop in Westfield, where those who attended made a wood project. Last Spring, YLS hosted an event at Stumpy's Hatchet House in Fairfield where lawyers had the opportunity to throw axes at a target. Not only were these a great social event but they served as great stress relievers.
- **Set aside relaxation time.** Relaxation techniques such as yoga, meditation, and deep breathing activate the body's relaxation response, a state of restfulness that is the opposite of the stress response. Find a relaxation technique that works for you and make it part of your daily routine.
- **Get plenty of sleep.** Sleep helps to boost your immune system and allows you to make decisions with clarity. It is important to prioritize sleep just as much as you prioritize your work.
- **Make exercise a priority.** Take care of your body. Exercise improves mood, increases energy, and sharpens focus.
- **Support your mood and energy levels by eating a healthy diet.** Minimize sugar and refined carbohydrates. Eating fresh fruits and vegetables, and lean meat can have a huge impact on your mood and energy levels throughout the day. Stay hydrated by drinking plenty of water.
- **Enjoy your downtime.** It is important to disconnect in the evenings, on the weekends and especially during vacations. By disconnecting, you allow your body to regenerate providing more fuel to get you through your work day in a productive manner.

The lack of self-care can result in the constant stress that can lead to burnout, a problem that we want to save

our lawyers from encountering. When constant stress has one feeling overwhelmed, emotionally drained, and unable to meet constant demands, you may be on the road to burnout. Burnout is referred to as "a disease of disengagement."[4] It is a state of emotional, physical, and mental exhaustion caused by excessive and prolonged stress. The unhappiness and detachment caused by burnout can threaten your job, your relationships, and your health. By recognizing the earliest warning signs, you can take steps to prevent it.

Signs and Symptoms of Burnout

Let's face it, we all have difficult days. Distinguishing between a hard day and the road to burnout requires an examination of the core symptoms of burnout, which include (a) fatigue regardless of how much someone rests or sleeps, (b) a feeling that nothing really matters, (c) a sense that no progress or gain is being made regardless of someone's significant efforts, and (d) a lack of attention.[5] If you experience these symptoms on a frequent basis, then it may be time to seek professional help to avoid burnout.

Burnout is a gradual process. It does not happen overnight, but it can creep up on you. The signs and symptoms are subtle at first, typically becoming worse as time goes on. Think of the early symptoms as red flags indicating there is something wrong that needs to be addressed. If you pay attention and actively reduce your stress, you can prevent a major breakdown. If you ignore them, you may eventually burn out.

It is important to recognize the difference between burnout and stress.

Burnout may be the result of unrelenting stress, but it isn't the same as too much stress. Stress, by and large, involves *too much:* too many pressures that demand too much of you, physically and mentally. However, stressed people can still imagine that if they can just get everything under control, they'll feel better.

Burnout, on the other hand, is about *not enough*. Being burned out means feeling empty and mentally exhausted, devoid of motivation, and beyond caring. People experiencing burnout often don't see any hope of positive change in their situations. If excessive stress feels like you're drowning in responsibilities, burnout is a sense of being all dried up. And while you're usually aware of being under a lot of stress, you don't always realize when you are experiencing burnout.

Utilize the tools available to help you.

The New Jersey State Bar Association (NJSBA) has many outlets for ensuring that its members exercise self-care to reduce stress and avoid burning out from the profession. Several years ago, the Family Law Section introduced Jersey Strong at our section retreats, which has included morning yoga, a walk/runs, and bike rides throughout the city where the retreat is held. We will continue the Jersey Strong campaign at this year's Family Law Retreat in Nashville.

NJSBA also offers a meditation center and stress relief centers at the annual meeting in Atlantic City.

You can also take advance of social and networking events offered by our section or by NJSBA. Not only is this a great way to mingle with colleagues, but these events help serve as a stress reliever for many.

The New Jersey Lawyers Assistance Program (NJLAP) is an organization that is a confidential resource for lawyers in need. The confidential nature of the NJLAP was promulgated by the Supreme Court of New Jersey with the enactment of Rule 1:28B-3 which requires that all records of the organization be maintained confidential and that "[i]n no event, however, shall the identity of program clients be disclosed in the above reports."

The mission statement of NJLAP is as follows: "The New Jersey Lawyers Assistance Program is the free and confidential resource assisting all NJ Lawyers, Judges, Law Students, and Law Graduates achieve and maintain personal and professional well being." The vision of NJLAP is clearly intended to assist legal professionals as it provided: "Never again will a New Jersey Lawyer, Judge, or Law Student have to say, 'There Was Nowhere to Turn.'"

You can find out more information about NJLAP at njlap.org. If you feel that you may benefit from professional assistance in managing your stress or avoiding burnout, I encourage you to take advantage of this complimentary confidential program.

As we are charged with taking care of our clients, we must ensure that we maintain the foundation within ourselves. Having witnessed two workaholic family members experience life-threatening medical issues over the last several months, it made me really understand the importance of taking care of oneself in order to ensure that the foundation for the support that we provide to others is strong. With 2020 upon us, I am hopeful that you will join me in exercising the art of self-care. If you do not take care of yourself, no one else will. Your clients, friends, and family need you, and you need to build the foundation in yourself before you can help care for others.

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Endnotes

1. Jenna Cho. *Attorney suicide: What every lawyer needs to know.* ABA Journal, Jan. 1, 2019.
2. *Id.*
3. The author thanks Wendy Van Besien, a leadership and resilience coach, on the guidance and knowledge that she provided in preparing this article.
4. Kate Managan. *How to Recognize and Prevent Lawyer Burnout.* Lawyerist. August 1, 2019.
5. *Id.*

Inside this issue

Editor-in-Chief's Column

The *Landau* Decision Examined

By Charles F. Vuotto, Jr.

The New Jersey Appellate Division recently clarified a point of procedure when seeking to terminate or modify alimony in light of cohabitation in the case of *Landau v. Landau*[1]. For many years, cohabitation has been the basis to terminate or modify alimony. After the alimony statute was modified on Sept. 10, 2014,[2] a list of factors was put into place for a court to consider when determining whether a dependent spouse receiving alimony was cohabiting. Some of these factors are based on financial information, such as the extent to which the dependent spouse and their significant other share responsibility for living expenses or have intertwined finances. However, it is usually the case that the ex-spouse paying alimony in a post-divorce situation does not have financial information regarding the dependent spouse or their alleged cohabitant. The Appellate Division made it clear that a court cannot compel the dependent spouse or their alleged cohabitant to produce financial information before the court finds that a *prima facia* case of cohabitation has been made. In light of this holding, however, if the court cannot compel the production of financial data of the dependent spouse and or their alleged cohabitant prior to the finding that a *prima facie* case has been made, should the financial factors included in the statutory list be deemphasized when determining whether a *prima facie* case has been made?

The question presented by this case was whether the changed circumstance standard of *Lepis v. Lepis*[3] continues to apply to a motion to suspend or terminate alimony based on cohabitation following the 2014 amendments to the alimony statute, N.J.S.A. 2A:34-23(a). The Appellate Division determined that the party seeking modification still has the burden of showing the changed circumstance of cohabitation so as to warrant relief from an alimony obligation[4]. The Appellate Division held that the 2014 amendment to the alimony statute did not alter the requirement that "[a] prima facie showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status."[5]

Paragraph (n) of the new alimony law, addresses cohabitation and reads as follows:

> ***Alimony*** may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.
>
> When assessing whether cohabitation is occurring, the court shall consider the following:
>
> (1) **Intertwined finances such as joint bank accounts and other joint holdings or liabilities;**
> (2) **Sharing or joint responsibility for living expenses;**
> (3) Recognition of the relationship in the couple's social and family circle;
> (4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
> (5) Sharing household chores;
> (6) Whether the recipient of ***alimony*** has received an enforceable promise of support from another person within the meaning of subsection h. of *R.S.25:1-5*; and
> (7) All other relevant evidence.
>
> In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. **A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.**[6]
>
> (Emphasis added)

Prior to the enactment of the new law, cohabitation cases were controlled by *Garlinger v. Garlinger*[7] and *Gayet v. Gayet*.[8] The Supreme Court in *Gayet v. Gayet* adopted the economic test delineated in *Garlinger v. Garlinger*, 137 N.J. Super 57 (App. Div. 1975) for determining whether alimony should be terminated based on cohabitation. The principles of *Garlinger supra* call for modification when either a third party contributes to the dependent's spouse's support or a third party resides in the dependent's spouse's home without contributing anything toward the household expenses.[9] In short, this scheme permits modification for changed circumstances resulting from cohabitation only if one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the supporting spouse to relief.[10] The extent of actual economic dependency, not one's conduct as a cohabitant, must determine the duration of support as well as its amount under the law defined in *Gayet*.[11]

The *Garlinger* and *Gayet* standard changed substantially as a result of the new law enacted in September of 2014. The question is now about finding cohabitation under the factors listed. The economic factors are only two of seven factors. Arguably, a court may find cohabitation without any of the economic factors being found to exist. Further, the dependent spouse and their significant other need not reside under the same roof. Based on the new standard for cohabitation, it is suggested that the first two cohabitation factors, which ask a court to look at the extent of intertwining finances between the dependent spouse and cohabitant as well as the extent to which the dependent spouse and cohabitant are sharing responsibility for living expenses should be de-emphasized in the analysis of whether an ex-spouse paying alimony has met a *prima facie* showing of cohabitation.

In the *Landau* matter, the first two cohabitation factors seem to have been elevated in importance. In that case, significant facts appear to have been presented to the trial court suggesting that a *prima facie* case had been made. The paying spouse (plaintiff) filed a certification alleging that the dependent spouse and her alleged cohabitant had traveled together, attended social activities as a couple and posted photos and accounts of their activities on social media sites. He further alleged that the alleged cohabitant engaged in many activities with the parties' children and regularly slept over at defendant's home, as she did at his home. The plaintiff claimed that the alleged cohabitant attended events he used to attend with defendant, including family birthday dinners with her parents. He further claimed that the cohabitant attended the bar mitzvah of one of the parties' sons and was seated next to defendant in "the position of honor" for a parent of the child being bar mitzvahed. At the celebration afterwards, the plaintiff alleged defendant publicly acknowledged the man and their relationship in her speech. He also claimed defendant told him she moved her brokerage accounts to the firm where the alleged cohabitant works and got a "friends and family discount" (although plaintiff later denied this). In fact, plaintiff alleged that the defendant and her boyfriend cohabited in each other's residence approximately 75% of the time examined by a private investigator. One would think that these facts were enough to meet the threshold requirement of a "prima facie showing." It is critical to remember that *prima facie* showing means that plaintiff's "proffered evidence, **if…unrebutted** would …sustain a judgment" in his favor."[12] (Emphasis added)

The defendant opposed plaintiff's action by denying that she was cohabitating and arguing that merely having a boyfriend did not mean she was cohabitating under the statute. She further alleged that she and her cohabitant "had no intertwined finances and did not share living expenses."[13] However, many have wondered, how is it fair to permit the dependent spouse to make that assertion without disclosing reasonable financial documentation to verify it?

The trial court decided that it would not determine whether plaintiff made out *prima facie* case but would allow discovery to move forward on a limited basis to provide plaintiff the opportunity to make his required a *prima facie* showing. In other words, the trial court permitted discover without making a finding that the movant had made a *prima facie* showing of changed circumstances based on cohabitation.

The Appellate Division clarified that the continuing jurisdiction of the family part to modify the alimony fixed in an original judgment of divorce "upon application by either party" is now expressed in N.J.S.A. 2A:34-23, which "provides that such orders 'may be revised and altered by the court from time to time as circumstances may require.'"[14] It is that language, which the Legislature did not alter in the 2014 amendments, which codifies that "alimony and support orders define only the present obligations of the former spouses" and grounds the court's equitable power to review and modify such orders

"on a showing of 'changed circumstances.'"[15] The court clarified that the family part's jurisdiction to modify orders providing for alimony or child support on changed circumstances long predates *Lepis*. *Lepis* was simply the court's opportunity to provide direction for "the standards and procedures" trial courts should employ "for modifying support and maintenance arrangements after a Final Judgment of Divorce."[16] The Appellate Division in *Landau* saw no indication that the Legislature evinced any intention to alter the *Lepis* changed circumstances paradigm when it defined cohabitation and enumerated the factors the court is to consider in determining "whether cohabitation is occurring" in the 2014 amendments to N.J.S.A. 2A:34-23.

The Appellate Division concluded that the plaintiff provided no support for his claim that the legislature in 2014 "signaled a clear departure" from *Lepis* "with respect to analyzing motions to terminate alimony based on cohabitation." However, a practical interpretation must be applied to the statutory factors that a court must consider when determining whether a payor spouse has made out an adequate *prima facie* showing of changed circumstances based on cohabitation. First, it should be noted that the *Landau* Appellate Division acknowledged that the Legislature in N.J.S.A. 2A:34-23(n) essentially adopted the definition of cohabitation as found in *Konzelman v. Konzelman,*[17] which is as follows:

> Cohabitation involves an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage. These can include, but are not limited to, living together, intertwined finances such as joint bank accounts, sharing living expenses and household chores, and recognition of the relationship in the couple's social and family circle.

Here is a central problem; whether analyzing the definition of cohabitation from the definition provided by the Supreme Court in *Konzelman* or the factors added to the statute in 2014, it is clear that the financial factors cannot be adequately presented by the payor spouse since in almost every instance that spouse does not have the information and documentation necessary to make out that case.

It is problematic that the statute provides in one part that when analyzing whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship but that the court may not find an absence of cohabitation solely on the grounds that the couple does not live together on a full-time basis. Further complicating this analysis is the quote from *Quinn v Quinn* stating: "We do not suggest today that a romantic relationship between an alimony recipient and another, characterized by regular meetings, participation in mutually appreciated activities, and some overnight stays in the home of one or other, rises to the level of cohabitation. We agree that this level of control over a former spouse would be unwarranted."[18] The differentiating factors for the most part are financials that are not in the hands of the paying spouse until discovery is completed.

The *Landau* Appellate Division recognized that a *prima facie* showing of cohabitation can be difficult to establish.[19] Nevertheless, the *Landau* court indicated that it was confident that the *Lepis* paradigm requiring the parties seeking modification to establish "[a] prima facie showing of changed circumstances…before a court will order discovery of an ex-spouse's financial status,"[20] continues to strike a fair and workable balance between the parties' competing interest, which was not altered by the 2014 amendments to the alimony statute.[21] However, this author believes that the economic cohabitation factors (factors one and two) should be de-emphasized when a trial court addresses whether a payor spouse has made out a sufficient *prima facie* showing of changed circumstances based on cohabitation.

Endnotes

1. 2019 WL 4308641
2. L. 2014, c. 42, § 1 became effective the day it was enacted, Sept. 10, 2014.
3. 83 N.J. 139,157 (1980)
4. see *Martindell v. Martindell* 21 N.J. 31, 353 (1956)
5. *Lepis* 83 N.J. at 157
6. N.J.S.A 2A:34-23(n)
7. 137 N.J. Super. 56 (App. Div. 1975)
8. 92 N.J. 149 (1983)
9. *Garlinger v. Garlinger*, 137 N.J. at 64.
10. See *Gayet v. Gayet*, 92 N.J. at 104.
11. Id.
12. *Landau v. Landau*, at 2.
13. Id.
14. *Martindell*, 21 N.J. at 352.
15. *Lepis*, 83 N.J. at 146, see also *Quinn v. Quinn* 225 N.J. 34 49 (2016).
16. 83, N.J. at 143.
17. 158 N.J. 185,202 (1999)
18. 225 N.J. at 54
19. *Konzelman v. Konzelman* 158 N.J. at 191-92.
20. 83 N.J. at 157
21. *Landau v. Landau*, at 6.

Executive Editor's Column

A Parent's Objections to a Child's Vaccination Does Not Overrule the Child's Health and Safety

By Ronald Lieberman

Compulsory immunization of children has been a topic of much discussion both in the news and on social media. Until now, however, New Jersey law had not addressed this issue in the context of the court's authority to compel immunization of a child over the objection of a parent. With the recent Appellate Division decision of *New Jersey Division of Child Protection and Permanency v. J.B.*, ___ N.J. Super. ____ (App. Div. 2019)[1] practitioners now have some insight as to what may occur if parents are in conflict with each other over the issue of compelling a child's or children's immunizations.

In *J.B.*, the Appellate Division affirmed a trial court's decision that the New Jersey Division of Child Protection and Permanency properly obtained court approval to vaccinate two minor children in the division's care despite the parents' religious objection. Following a preliminary hearing, the trial judge granted permission to the division to vaccinate the children with age-appropriate immunizations over the objection, on religious grounds, of the children's parents. The division sought to compel age-appropriate immunizations for the children, specifically the measles, mumps and rubella immunizations. The children's law guardian joined in the division's application. A board-certified pediatrician provided expert opinion that all children should receive age-appropriate vaccinations in accordance with the Academy of Pediatrics Committee on Immunization Practices.

Both parents testified that they held religious beliefs against immunizations. Despite their objections, the trial court found that the children's health and life needed to be safeguarded through age-appropriate immunizations. While the appeal of the trial court's decision was pending, the trial court accepted the division's plan of termination of the defendants' parental rights over their objections.

In upholding the trial court's decision, the Appellate Division recognized that parents have a "constitutionally-protected, fundamental interest in raising their biological children, even if those children have been placed in foster care."[2] However, those parental rights are "not absolute."[3] "Balanced against the constitutional protection of family rights is the state's *parens patriae* responsibility to protect the welfare of children."[4]

In affirming the trial court's decision, the Appellate Division held the trial court properly exercised its authority under the child placement bill of rights, N.J.S.A. 9:6B-1 to -6 which permitted the division to "pursue any legal remedies . . . as may be necessary . . . provide medical care treatment for a child when such care and/or treatment is necessary to prevent or remedy serious harm to the child."[5] Moreover, the Appellate Division found that there were certain affirmative responsibilities on foster parents to provide appropriate health care and medical treatment for children living within their residence.[6]

Even though the resource parents had not objected to the immunizations, the children's mother objected citing a statute which provided for exemptions for pupils from mandatory immunizations.[7] One of the parents also objected on grounds of exemption from mandatory immunization for enrollment in a school or a preschool or childcare center.[8]

The Appellate Division found that the parents' objections did not apply because the matter was not concerning the children's attendance at school. The Appellate Division cited numerous articles and studies about how measles are easily transmitted and contagious as well as additional articles mentioning the recent outbreaks of measles in various counties in New Jersey. The Appellate Division cited a portion of the New Jersey Administrative Code that protects children in the care and custody of the division from preventable diseases.[9]

The Appellate Division then cited case law that recognized the necessity of vaccinations and immunizations.[10]

The Appellate Division held that the state could not "needlessly jeopardize the health and safety of children in placement and undermine the discharge of the division's duty to provide care particularly when a known risk of exposure to a disease preventable by a vaccination is present."

In light of *J.B.*, the question now facing practitioners is whether the Appellate Division's reasoning in that case and be relied upon in an application by one parent over the objection(s) of the other parent to compel immunizations of a child in private situations where there is no division involvement?

As there are no New Jersey cases directly on point, a review of a key out-of-state case can provide guidance. In *Winters v. Brown*, a case from Florida, the parents disagreed over whether to immunize their child.[11] The father wanted the child vaccinated, and the mother objected based on her religious beliefs.[12] The trial court compelled the vaccination, basing its decision on the expert testimony of three doctors.[13] Two of the doctors testified that the vaccinations were safe and effective in preventing infections.[14] Those doctors also testified that postponing vaccinations resulted in increased risk of infection to the child and the other children who interact with the unvaccinated child at school and play. The third doctor testified that the vaccinations may cause abnormal neurological development and concluded that it is less risky not to immunize the children.[15] The Florida trial court awarded the father ultimate responsibility for the child's healthcare in siding with the two doctors who testified about the benefits of vaccinations.[16] Because the prevailing party presented competent, substantial expert testimony about the benefits and harms of vaccinations, the Appellate Court in Florida affirmed the trial court's decision even though the other party presented a competent, substantial counter-expert.[17]

There is no analogous case in New Jersey about parental disagreements on vaccinations. Assuming for the moment that one parent objects to vaccinations on religious grounds, the other parent is not going to succeed in overcoming the objection by challenging the sincerity of those religious beliefs because no state is permitted to determine the sincerity of the religious beliefs being held.[18] A party claiming a religious objection does not have to show membership in an organized religion or sect or faith.[19] A state also cannot show preference for one religion over another.[20] Accordingly, it does not appear that one parent can attack the other parent's religious beliefs as being insincere or not deeply held and then expect that such a line of attack would be successful in overcoming a parent's objection to vaccinations. Instead, if one parent seeks vaccination and the other parent objects on religious grounds, it would be up to a court to determine the issue regardless of religion based on the court's *parens patriae* jurisdiction, which power to be the "provider of protection to those unable to care for themselves."[21]

Whether a practitioner is arguing in support of age appropriate immunizations or seeking to prevent such immunization, the court's ultimate decision will likely come down to which side presents competent, medical evidence. Practitioners are also wise to keep in mind that *N.J.S.A.* 9:2-4(c) permits a court to designate one parent as a temporary medical custodian over a child to arrange for immediate, medical care.[22] When parents have joint legal custody they have an obligation to care for the child's best interest, including an obligation to act in a positive and constructive fashion.[23] Judges can take judicial notice under *N.J.R.E.* 201(b) that a fundamental need of a child includes safeguarding his or her physical health. The child's needs are greater than either parent's objections or beliefs. [24]

Thus, in the event of a dispute on the issue of vaccinations of a child or children, with competent medical evidence, a practitioner should be able to prevail in an argument that a conscientious objection to vaccinations should not be superior to the child's fundamental need for protection of his or her health, welfare and safety. The potential severity of the hazards of contracting a disease and the likelihood that not vaccinating the child for that disease could lead to an outbreak should overrule any objection by a parent to the vaccination. The degree of harm imposed on the community by the objection to the vaccination cannot be overlooked or ignored, especially if the diseases are contagious.

As with most family law disputes, a practitioner might be able to avoid this one by placing into settlement agreements a discussion about child immunizations and religious upbringing of the children. Such language might include that the child's health and safety remain the parents' paramount interest and concerns and that nothing either parent will do shall negatively affect the child's health and safety. ■

Endnotes

1. Appellate Docket Number A-3019-18 T3
2. *In re Guardianship J.C.*, 129 N.J. 1,9-10 (1992)
3. *In Re Guardianship H.O.*, 161 N.J. 337, 347 (1999).
4. *N.J. Div. of Child Prot.&Perm. V. R.L.M.* 236 N.J. 123, 152 (2018)
5. N.J.S.A. 9:6-8.86(b)
6. N.J..A.C. 3A:51-7.1(A)
7. N.J.S.A. 26:1A-9.1
8. N.J.A.C. 8:57-4.4(a)
9. N.J.A.C. 3A:51-7.1(a)(2)
10. *Bd. Of Educ. Of Mountain Lakes v. Local 56*, N.J. Super. 245, 258 (App. Div. 1959), aff'd o.b., 31 N.J. 537 1960; *Sadlock v. Bd. Of Educ.*, 137 N.J.L. 85, 87 (Sup. Ct. 1948)
11. 51 So. 3d 656, 657-58 (Fla. Dist. Ct. App. 2011)
12. Id.
13. Id. at 658.
14. Id.
15. Id.
16. Id.
17. Id.
18. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
19. N.J.S.A. 18:14-52
20. *Tudor v. Bd. Of Education of Borough of Rutherford*, 14 N.J. 31 (1953)
21. *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 333 (2006)
22. *N.T. v. D.T.*, 216 N.J. Super. Unpub. Lexis 2456 (Ch. Div. 2016)
23. *Madison v. Davis*, 438 N.J. Super. 20, 46 (Ch. Div. 2014)
24. *Fiore v. Fiore*, 49 N.J. Super. 219, 225 (App. Div. 1958)

College Contributions under *Newburgh*: Does Paying in Proportion to Your Income Equate to an Ability to Pay?

by Lauren A. Miceli

It appears fairly standard practice for parents to obligate themselves through divorce settlement agreements to contribute toward the college expenses of their children, regardless of their future financial circumstances. This is often done with language such as, "the parties will contribute to their children's college expenses in proportion to their incomes" or "the mother shall contribute 45% and the father shall contribute 55%."

This verbiage ignores the fact that no one knows what the circumstances will be when the payment of these expenses comes due. It also ignores that a future obligation, for an absolutely unknown cost, is not an issue ripe for determination in each and every case upon finalization of a divorce. In fact, often parents are agreeing to pay expenses for their elementary school-aged children when they will not know the extent of that obligation for 10 to 15 years. As attorneys, we are contractually obligating our clients to pay expenses they may not have the ability to pay in the future by memorializing such obligations in marital settlement agreements. Said another way, had our clients omitted such an obligation from their divorce settlement agreements, they may be relieved of the obligation to pay in the future if a court truly conducted the necessary analysis. Accordingly, it is this author's opinion that such language should be omitted from settlement agreements where the issue of college cost allocation is not ripe for determination. Moreover, it is also this author's opinion that obligating parents to pay in proportion to their income does not actually or accurately reflect that parent's ability to pay in the future.

In *Newburgh v. Arrigo*, the seminal and most frequently cited case related to the payment of college expenses for children of divorced couples, the court details a 12-factor test "in evaluating the claim for contribution toward the cost of higher education."[1] Often forgotten, however, is that the court in *Newburgh* was addressing a request for college contribution where the parties' agreement was silent on the issue.[2] This makes an important difference because this case does not actually establish a requirement for parents to contribute to the college education costs of their children, but rather, creates a permissive environment wherein one parent may seek contribution from another when the circumstances presented dictate such ability.[3] *Newburgh* did not confer an obligation between parents to pay college expenses, despite how practitioners and courts have since applied its findings.[4] Specifically, the majority decision in *Newburgh* indicated "generally parents are not under a duty to support children after the age of majority. Nonetheless, in *appropriate circumstances*, the privilege of parenthood carries with it the duty to assure a necessary education for children."[5] (emphasis added) What seems to have happened since *Newburgh* is contributing to a child's college expenses has become an obligation imposed upon parents under all circumstances regardless of the parties' financial circumstances and regardless of whether appropriate circumstances for such contributions exist.

Where a party's income is possibly equal to that of a child's yearly tuition cost, we as practitioners now seem to consider that an appropriate circumstance to obligate the parent to contribute. Even the Court in *Newburgh* seemed to recognize this was problematic in finding: "some parents cannot pay, some can pay in part, and still others can pay the entire cost of higher education for their children. In general, financially capable parents should contribute to the higher education of children who are qualified students."[6] The *Newburgh* court drew the distinction between financially capable parents and those who are not. This author would challenge that we, as practitioners, do not draw a sufficient enough distinction when drafting our settlement agreements. Often, we are allowing clients to contractually obligate themselves to pay for college expenses they may not have the finan-

cial capacity to pay in the future. The ability to contribute and the circumstances surrounding said contributions should rather be left to a trier of fact in the future when the actual cost of the child's college education are known and the parties' respective financial circumstances are no longer speculative.

Newburgh requires the assessment of 12 factors when "evaluating the claim for contribution toward the cost of higher education."[7] This article will focus on factors four, six and 10, which respectively read: "(four) the ability of the parent to pay that cost," "(six) the financial resources of both parents" and "(10) the availability of financial aid in the form of college grants and loans."[8] However, it is worth noting each of the other delineated factors relate to the *child's* request for contribution from one of their parents. These factors beg the question, when a request for college contribution is raised, must parents implead the child into the litigation to sufficiently address the child's relationship with the paying parent and the costs they are incurring, to assess that child's goals for the requested education, or even the aptitude of the child prior to their entrance into college? Without information from the child who is actually incurring the expenses, it is potentially impossible for the court to render a thorough decision.

When a divorce settlement agreement is silent, or otherwise contains language that abstractly allocates the payment of college expenses in proportion to the parties' ability to contribute, a request for a parent to pay for college expenses of a child necessarily triggers an analysis under *Newburgh* to determine what costs should be shared, how they will be shared, and if they will be shared.

The first question for a court should be: What types of college expenses are parents requesting be allocated between them? Are those costs simply tuition, room, and board? Or, are parents also seeking the payment of books, registration and academic fees, application fees, SAT/ACT testing fees, college advisors, costs of college visits, transportation to and from college if the children live at school, computer or other necessary and usual equipment needed at college, additional school fees for programs such as semesters abroad, internships, exchange programs and possibly even graduation fees? The list could be endless. So, to what extent can a court obligate parents to contribute to these expenses? Once again, this author would challenge that the contribution toward college costs should be tailored more specifically to the family and that family's financial capabilities.

The second question for a court would then be: What is the actual dollar amount of the identified expenses? The College Board's"Trends in College Pricing 2018" report, discusses the increase seen in college tuition.[9] For an in-state student attending a public four-year college, the average total tuition, fees, room and board charges per year in 2018-2019 were $21,370. For an out-of-state student, the tuition and fees were $37,430. When attending a private, nonprofit four-year college, students are paying an astounding average of $48,510 per year in total tuition, fees with room and board. To summarize those figures:

	In-state, Public College	**Out of State, Public College**	**Private, Nonprofit College**
Per Year	$21,370	$37,430	$48,510
Four Year Total	$85,480	$149,720	$194,040

The total cost, prior to the application of scholarships, grants or loans, is staggering. This is all the more reason why this author believes it impossible for parents to obligate themselves to pay these costs 10 to 15 years in the future when, in fact, the total four-year cost of tuition could be more than the total combined income of the parents paying the expenses at that time. This evidences all the more reason why an issue not ripe for determination should not be addressed in a settlement agreement, and is better left for determination when the parties have all the facts available to them.

The third and last question for a court is: How do the students and their parents expect to pay for the total cost of college? This may require consideration of whether the parents and child expected there to be a proportionate division of costs between them. Federal student aid is the first thing that comes to mind, such as federal subsidized and unsubsidized loans, followed by grants, scholarships, work-study programs, private loans, parent PLUS loans and Perkins Loans. Interestingly, "between 2012-13 and 2017-18, total annual borrowing from the subsidized and unsubsidized Direct Loan programs declined by 22% to $70.0 billion. Total annual borrowing from the Parent PLUS Loan program increased by 22% to $12.8 billion…"[10] From these statistics, it appears parents are attempting to incur the debt in their names more so than in their child's name. But this is debt accumulated. When considering a parent's ability to pay, requiring the incurrence of debt necessarily implies that no ability to

pay exists. The inquiry here remains, however, whether parents can be obligated by a court to go into debt to pay for these expenses if they do not have the financial means to pay out of pocket. This author suggests that courts cannot and should not determine parental responsibility for college expense at the time of divorce where the issue simply is not ripe for resolution. For that reason, settlement agreements should not include an automatic obligation when the issue is not ripe for determination.

A Case Study

A hypothetical scenario illustrative of these issues is as follows: A mother seeks a father's contribution toward child's attendance at the University of Michigan. The child's tuition for 2018-2019 as a nonresident of Michigan is $49,350, according to the university's website. The child would stay in a standard double room available on campus that year for $11,534, and the estimated cost of books and supplies being $1,048. There is also the application fee of $75, the SAT class taken in preparation for the test of approximately $699 and the cost of the SAT for $64. There is also the cost of transportation to and from Michigan and lodging accommodations for college visit days, for a total cost of $800. In all, the child has already accumulated $63,570 in expenses for the first year of college. Each year thereafter, tuition will be $49,350 as a sophomore and jump to $52,814 as a junior and senior. The total cost of tuition alone at the end of four years will be $204,328. In addition, the total cost of room and board will be $46,136 with an additional estimated $4,000 for books over the course of those four years.

The parents are divorced and incorporated into their divorce settlement agreement a provision specifying they would each pay in proportion to their incomes for their children's college education costs. The child is now enrolled and mother is seeking contribution from father. Mother earns $75,000 gross per year and father's income is $95,000 gross per year. The parties have no savings, such as a whole life insurance plan or a 529 account, to utilize for the payment of these expenses. Moreover, neither party has set aside any significant funds for retirement and neither has significant savings available in the event of emergency or decline of health. The parties also share one other child who is currently a junior in high school and looking at available college options.

The parties have regular and ordinary expenses. There is no allegation that either party is living above their means or has an inability to meet their current expenses. Neither party has remarried and besides child support being paid, all other obligations of alimony and equitable distribution have been satisfied since their divorce. Mother has net discretionary funds of approximately $500 available after paying her current expenses each month. Father has approximately $1,000 net available each month after payment of his current expenses. In one year's time, mother has $6,000 of available income and father has $12,000. Therefore, between them, there is $18,000 of available, net dollars to contribute to their children's annual college expenses.

As indicated, the total cost of one year's tuition for this child is $63,570. But how will the court distribute this amount and the amounts which will be incurred every year thereafter? Maybe a portion of the total college costs are offset by the child obtaining federal student loans, but those amounts will not cover the entirety of the cost of undergraduate tuition. Even if the child obtained a $20,000 total financial aid package from the federal government and another $5,000 in scholarships, there would still be $38,570 of expenses that the mother and father would need to provide each year.

If a court just simply obligated the parents to pay in proportion to their incomes, as is required in many divorce settlement agreements, the mother would be responsible for 44% of the expenses (i.e., $16,970.80) and the father would be responsible for 56% of the expenses (i.e., $21,599.20). After paying for the tuition costs with loans first, and then with the parents' available funds left over after their incomes have otherwise been exhausted, there continues to be a significant deficit that would necessarily and only be made up by incurring additional debt in each parent's name.

A Question of Appropriate Circumstances

However, had these parties let the issue of college education expenses abide the event and be determined under the *Newburgh* factors mentioned above at the time of college enrollment, the court would have to find no obligation exists and that they could not satisfy these expenses. These are simply not the appropriate circumstances for such payments. First, there really is no ability of the parents to pay the costs of tuition. Neither of them will have any available funds in the event of an emergency after satisfying their regular and ordinary expenses if they are obligated to pay those remaining funds towards their one child's college education. Second, the parties' financial resources are little to none, given that

the parties have no other savings on which to draw and pay for these expenses. Third, a court would need to consider the availability of financial aid in the form of college grants and loans. However, it is unclear how a court could obligate a parent to go into debt in order to pay for their child's college expenses because it would come into direct conflict with the parent's actual ability to pay college expenses.

So, does obligating litigants to pay in proportion to their income reflect their actual ability to pay for college expenses? This author submits that, we as attorneys, are overextending and over-obligating our clients to pay expenses they may have no financial means to cover in the future. We ought to consider the future implications of including blanket and sweeping obligatory language related to college expenses in settlement agreements.

The above facts are indicative of those typically presented in divorce litigation and post-judgment motions. These hypothetical parties were an ordinary, middle class family, which has now been divided into two households with two sets of expenses. Had these parties remained an intact unit, possibly they could have paid for their child's college education, in whole or in part, or maybe not at all had their financial ability dictated so. But now, they may be forced to incur debt in order to satisfy those expenses in proportion to their incomes. Therefore, these are not the appropriate circumstances under which the *Newburgh* court thought the obligation to contribute to college expenses exists. Had these parents omitted such an obligation from their divorce settlement agreement, wouldn't a court relieve them of the obligation to pay once it conducted the necessary analysis as detailed above? Had such obligatory language been omitted from a client's divorce settlement agreement, they may be relieved of the obligation to pay in the future if a court truly conducted the necessary analysis. Therefore, any language that obligates parents to pay in proportion to their income does not actually or accurately reflect that parent's ability to pay in the future and, in many cases, does more harm than good. ■

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Endnotes

1. 88 N.J. 529, 545 (1982).
2. Other post-*Newburgh* cases also discussed obligating parents to pay college expenses when the settlement agreement lacked a specified provision. *Gac v. Gac*, 186 N.J. 535, 537 (2006); *Gotlib v. Gotlib*, 399 N.J. Super. 295, 300-01, 310, 944 A.2d 654 (App. Div. 2008).
3. 88 N.J. at 543.
4. Therefore, while parents are not generally required to support a child over eighteen, his or her enrollment in a full-time educational program has been held to require continued support. *Khalaf v. Khalaf,* 58 N.J. 63, 71-72 (1971); *Patetta v. Patetta*, 358 N.J. Super. 90, 94 (App. Div. 2003).
5. 88 N.J. at 543.
6. Id. at 544.
7. Id. at 545.
8. Id.
9. trends.collegeboard.org/sites/default/files/2017-trends-in-college-pricing_0.pdf
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ABLE Accounts – What Are They and How Can They Be Utilized in The Practice of Family Law?

by Marisa Lepore Hovanec and Mark Friedman

Introduction

In 2014, federal legislation commonly known as the Achieving a Better Life Experience (ABLE) Act was passed allowing states to create tax-advantaged savings programs for individuals with qualifying disabilities.[1] These savings programs, now known as 529A ABLE accounts (ABLE accounts), operate similar to traditional 529s in that interest and earnings accrue tax-deferred and distributions are tax-free if used for qualified expenses.[2] However, the definition of a "qualified expense" in ABLE accounts is much broader than with a traditional 529 plan. With a traditional 529 plan, qualified expenses (and penalty-free withdrawals) are limited to education expenses. With an ABLE account, qualified expenses include education in addition to a wide range of other expenses deemed "qualified disability expenses" (QDEs).[3] QDEs, as explained in more detail later, include without limitation housing, transportation, employment training and support, assistive technology and related services, personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for ABLE account oversight and monitoring, funeral and burial, and basic living expenses for an individual with qualifying disabilities.[4] Moreover, unlike traditional 529 plans (or almost any other financial instrument outside of a special needs trust), monies held in, and third-party contributions to, an ABLE account, up to a certain limit, will not disqualify the designated beneficiary from receiving means-tested public benefits such as Social Security and Medicaid.[5]

Though New Jersey has recognized the use of ABLE accounts since shortly after the ABLE Act was passed in 2014, these accounts are still used relatively rarely. One reason may be a lack of awareness among New Jersey residents of the existence of ABLE accounts and the benefits they can provide. Another reason is that, although New Jersey has recognized the use of ABLE accounts for several years, it did not have a state-specific ABLE account plan until June 2018. While New Jersey residents could reap the benefits of ABLE accounts prior to June of 2018 by using other states' ABLE plans, this option wasn't fully apparent to the general population.

Here practitioners can get an introduction to the concept of ABLE accounts and explore the ways in which ABLE accounts may be a helpful tool in the practice of family law. In sum, ABLE accounts may, in select divorce cases, be useful alternatives to special or supplemental needs trusts in that they can enable the designated beneficiary to receive financial support in the nature of child support and/or alimony without disqualifying him or her from receiving valuable means-tested benefits, such as Supplemental Security Income (SSI) and Medicaid.

What Is An ABLE Account?

The United States Code generally defines a qualified ABLE program as a program established and maintained by a state or agency or instrumentality thereof, under which a person may make contributions for a taxable year for the benefit of a qualified beneficiary for the purpose of meeting the beneficiary's disability expenses.[6] To be an eligible designated beneficiary to an ABLE account, an individual must:

a) Be eligible for SSI based on disability or blindness that began before age 26;
b) Be entitled to disability insurance benefits (DIB), childhood disability benefits (CDB), or disabled widow's or widower's benefits (DWB) based on disability or blindness that began before age 26; or
c) Certify (or an agent under a power of attorney or, if none, a parent or guardian must certify) that the individual:
    1. Has a medically determinable impairment meeting statutorily specified criteria or is blind, and,
    2. The disability or blindness occurred before age 26.[7]

An ABLE account can only accept monetary/cash contributions, as with a bank account.[8] And, the amount of contributions,except in certain limited circumstances,

such as a rollover from another ABLE account, is limited each year to the federal gift tax exclusion (presently $15,000).[9] In other words, the sum total of all contributions as of 2019 is limited to $15,000 per year. For example, if in 2019 the beneficiary contributes $5,000, and parents contribute $10,000, and then an aunt contributes another $100, the account administrator is required to return the aunt's $100 since the total would exceed $15,000. As a result of the Tax Cuts and Jobs Act of 2017, effective Dec. 22, 2017, rollovers from traditional 529 accounts may also be made without penalty into ABLE accounts if the beneficiary of the traditional 529 is also the designated beneficiary of the ABLE account.[10] However, the amount of the rollover is included in the annual contribution limitation.[11]

Once funded, an ABLE account must be used to pay for the QDEs of the designated beneficiary. Luckily, QDEs are relatively broadly defined. The United States Code defines qualified disability expenses as:

Any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are not approved by the Secretary under regulations and consistent with the purpose of this section.[12]

So long as the contribution limits set forth above are observed and the account balance used only for the QDEs of the designated beneficiary, neither the distributions from the account, nor any earnings experienced by the ABLE account, including interest, dividends and the like, are subject to tax, nor are the distributions or earnings considered income to the designated beneficiary.[13]

Inasmuch as most individuals with disabilities depend on SSI and Medicaid to access disability-related services, establishing an ABLE account benefits those individuals by allowing them to save money for disability-related expenses while maintaining eligibility for means tested benefit programs.[14] This is because money saved in an ABLE account will not affect an individual's eligibility for SSI, so long as they don't exceed the $100,000 savings limit. Then use of an ABLE account will allow the beneficiary to maintain eligibility for Medicaid and other public benefits.[15] By way of contrast, a disabled individual with savings of only $2,001 outside of an ABLE account or special needs trustwould be *completely disqualified* from receiving any SSI benefits whatsoever.[16]

How Are ABLE Accounts Different Than Special Needs Trusts?

Prior to the legislation allowing for ABLE accounts, the only way for a disabled individual to save or receive gifts and income of significance without compromising his or her means-tested benefits was through a trust. More specifically, the disabled individual, or his or her representative(s), would need to set up a special needs trust, a supplemental needs trust, or a pooled trust (SNT) to receive and accumulate assets while still receiving means-tested aid. While the overall need for such trusts is lessened by the passage of the ABLE Act, there are still many instances in which an SNT will be the preferred method of protection. Conversely, ABLE accounts provide certain advantages over SNTs that may make them the better option for some individuals.

The primary advantage to establishing an ABLE account over an SNT is the low cost of plan participation. While establishing an effective SNT typically requires the involvement and expense of a skilled elder law attorney, an ABLE account can be easily established online at little to no cost, without an attorney, sometimes in a matter of minutes.[17] Another significant advantage of ABLE accounts over SNTs is that the investments in ABLE accounts grow tax-free, and are not taxed upon withdrawal if used for QDEs. Yet a third significant advantage is the ability to transfer funds from a 529 account to an ABLE account for the same beneficiary without tax or penalty.[18]

That being said, there are significant disadvantages to ABLE accounts as compared to SNTs. For one thing, an individual who became disabled after reaching the age of 26 will not qualify for an ABLE account.[19] Another obvious disadvantage is the limitation on contributions and balances. As stated, an ABLE account cannot accept annual contributions above the federal gift tax exclusion of $15,000 for 2019. In addition, ABLE account balances above $100,000 are considered resources for SSI purposes, so having more than $100,000 in an ABLE account can disqualify that beneficiary from SSI, SSI-linked Medicaid, and other important benefits.[20] SNTs have no annual contribution limits; you can transfer in trust as much as you want at any time, and there are no limits on how much can be held in trust. For these reasons, an SNT is usually a better fit where a person with disabilities

will receive a significant amount in one lump sum, such as an inheritance or lawsuit recovery.

Finally, any balance remaining in an ABLE account when the beneficiary dies must be used to reimburse Medicaid for medical expenses paid on the beneficiary's behalf.[21] While such requirement would apply to an SNT established by the beneficiary for his or her own benefit, or a first-party SNT (as is often used with lawsuit recoveries), it would not apply to an SNT properly established for the beneficiary by a third-party (as is often used for estate planning).

How Can ABLE Accounts Be Helpful In The Family Law Context?

Child support

The Social Security Administration (SSA) treats child support payments as unearned income to a child who receives SSI benefits. [22]SSI pays a monthly check to disabled beneficiaries, like the Social Security retirement benefit most people receive when they get older. However, income reduces SSI benefits, and child support payments for the disabled child will therefore typically result in a lower monthly check and less money to meet the child's needs. Often, with people having significant disabilities, this is money that is sorely needed. To avoid such an unintended result, careful family law practitioners will often craft an agreement that calls for child support for the disabled child to be paid into an SNT.

That said, there are many cases where the parties' means and the amount of support in contest simply do not justify the high cost of establishing and administering an SNT. For example, when the child support amount is relatively low, parties may choose not to go to the trouble and expense of establishing an SNT, at a cost of thousands of dollars, just to preserve a few dollars in means-tested benefits. Prior to the existence of ABLE accounts, the custodial parent in this situation would be forced to choose between foregoing the payment of child support or receiving a reduced SSI benefit for the child.

Now, with the existence of ABLE accounts, parties in such situations can simply contract to have the non-custodial parent's child support payments paid directly into the ABLE account. As long as these payments do not exceed the annual gift tax exclusion, and the total account balance does not rise beyond $100,000, the payments would not impact the child's means-tested benefits, thereby increasing the overall funds available to the child and their caretaker.

Alimony

In a similar vein, ABLE accounts could be a useful receptacle for alimony payments in certain situations. As noted, only individuals who became disabled before reaching age 26 will qualify for ABLE accounts.[23] Thus, having alimony deposited into an ABLE account will not serve any potential alimony recipient whose disability arose after that age. Nor will it be very useful for anyone whose alimony entitlement greatly exceeds the annual gift tax exemption. However, for that narrow population of individuals who became disabled before reaching age 26 and have an alimony entitlement that is less than the then-existing gift tax exclusion, providing for alimony to be paid into an ABLE account could help to increase the family's total cash-flow by preserving the recipient's entitlement to valuable government benefits.

Equitable distribution

There are also conceivable scenarios whereby ABLE accounts could be utilized for equitable distribution purposes. As stated, an aggregate savings outside of an ABLE account or SNT of only $2,001 will disqualify an otherwise qualifying individual from receiving SSI benefits.[24] Thus, a disabled spouse who is entitled to receive at least this amount in equitable distribution would normally do so to the exclusion of his or her eligibility for SSI. However, a qualifying disabled individual can have up to $100,000 saved in an ABLE account without any impact on his or her means tested benefits whatsoever. In certain situations, it could therefore make sense to have the disabled spouse's share of equitable distribution paid into the ABLE account, so long as it could be paid in one or more annual installments that do not exceed the gift tax exclusion, which is $15,000 as of 2019.

Conclusion

Prior to the establishment of ABLE accounts, the only way to prevent support and equitable distribution from impacting a disabled individual's eligibility for means-tested benefits was through the establishment of a special or supplemental needs trust. However, in some situations the cost and complexity of doing so created a barrier to entry. With the advent of ABLE accounts, those individuals for whom creating a special or supplemental needs trust was either too complex or too expensive no longer have to choose between receiving support and/

or equitable distribution and the maximum means-tested benefit for which he/she would otherwise be eligible. For these reasons, ABLE accounts can be a useful tool in the family law practitioner's toolbox.

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Endnotes

1. Public Law 113–295 The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act) – Enacted December 19, 2014.
2. Id.
3. POMS, SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts (secure.ssa.gov/poms.nsf/lnx/0501130740)
4. Id.
5. Public Law 113–295 The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act) – Enacted December 19, 2014.
6. 26 USC 529A(b)(1).
7. POMS, SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts (secure.ssa.gov/poms.nsf/lnx/0501130740)
8. 26 USC 529A(b)(2).
9. Id.
10. IRS Publication 907 (2018).
11. Id.
12. 26 USC529A(e)(5).
13. POMS, SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts (secure.ssa.gov/poms.nsf/lnx/0501130740)
14. State of New Jersey Department of Human Services, Division of Disability Services, "Achieving a Better Life Experience (ABLE)," available at https://www.state.nj.us/humanservices/dds/hottopics/able/.
15. Id.
16. "OASDI and SSI Program Rates & Limits, 2019 (released October 2018)," available at ssa.gov/policy/docs/quickfacts/prog_highlights/RatesLimits2019.html.
17. The New Jersey ABLE plan application can be found at https://savewithable.com/nj/home/plan-benefits.html.
18. IRS Publication 907 (2018).
19. 26 USC529A(e)(1)(A).
20. 26 USC 529A(b)(2).
21. 26 USC529A(f).
22. POMS, SI 00501.010 Determining Child Status for Supplemental Security Income (SSI) Purposes.
23. 26 USC529A(e)(1)(A).
24. "OASDI and SSI Program Rates & Limits, 2019 (released October 2018)," available at ssa.gov/policy/docs/quickfacts/prog_highlights/RatesLimits2019.html.

Four Strong Arguments in Support of Collaborative Family Law Approach and One OK Argument Against

by Sarah Martine Belfi and Shira Katz Scanlon

Collaborative Practice as an alternative to traditional litigation is relatively new and, thus, scary to many family law practitioners. There are many conceptions and misconceptions of this novel and refreshing way to solve legal problems and settle cases. However, collaborative law is decidedly not the stress free, less work, "kumbaya" way of getting divorced it is often perceived or described to be. This entire legal practice area is governed by self-determination. The process allows clients decide what is important to them, even if what is important to them was not important to the Legislature that drafted our governing statutes or the judges who interpret and apply them. In collaborative law, it is also not up to the attorneys to decide what is important and is not. This dynamic can be tricky and even impossible for some practitioners who have fought for their clients, day in and day out, for years and simply are not familiar with any other way to practice. For some, this change in practice is a breath of fresh air. For others, it is far too difficult to master. For all these reasons, the collaborative law process is hard work, in a much different way than traditionally litigated cases.

Now that the New Jersey Family Collaborative Law Act has been in place for several years, it is worth a look at the collaborative law practice from a practitioners' perspective.[1] The following are four strong arguments in support of the collaborative law approach to resolving legal conflict, and one OK argument against.

Support for Collaborative Practice

Argument 1: Ground Rules.

The Rules of Professional Conduct (RPCs) set a minimum level of professionalism among attorneys. Sometimes, however, the minimum is not enough. It can be excruciating to litigate a case with an attorney who does only enough to live up to the minimum requirements of the RPCs, to say nothing of an adversary who does not even seem to do that. Perhaps this is not unique to family law, but it too often seems that an attorney is taking on their client's fight, and the line of zealous advocacy morphs into an overly personal dispute between attorneys, or the attorney and litigant become indistinguishable entities.

It is important to remember, also, that there are no such rules of engagement for litigants. Sometimes an attorney's own client is the problem, and sometimes the other party, and often both, at least at one point throughout a litigation. Family law attorneys truly do see good people at their worst, as the adage goes. However, good or bad, we almost exclusively see people at a critical, difficult crossroads in their lives and the lives of those closest to them. It is easy to understand why a litigant often ends up personally disliking opposing counsel. As attorneys, to zealously advocate for our clients, we are often tasked with articulating the very underpinnings of the demise of a familial relationship. We are the mouthpiece for ugly allegations, which are sometimes truths.

No RPC can accomplish the milestone step of having all parties agree to ground rules, including not to interrupt one another, not to use inflammatory language, not to be judgmental or accusatory, to listen, to focus on the future rather than the past, and to make "I" statements. Having a litigant commit to this type of desirable behavior allows attorneys to dispense with some of the bomb-planting that can divert from the ultimate goal of resolving conflict and helping clients reach a resolution, whatever that may look like. No one is perfect, so collaborative law practitioners often need to remind parties, and even attorneys, about the ground rules to rein things in. That said, in the collaborative law process these fundamental ground rules are set in stone and enforced throughout the process, even if they are only written on paper.

Argument 2: The Power of Collaboration.

This may seem obvious (much like using the word in the definition of the word), but the value of the simple act of collaboration should not be overlooked and cannot be

overstated when discussing the collaborative law process. This argument refers to not only the collaboration of the parties, but also of the professionals. On many different levels, people working together toward a common goal is what Collaborative Practice is all about.

We have all had those cases where the parties generally get along. They are generally in agreement and the attorneys are simply facilitating the details, documents, and procedure. This is, more or less, the goal of the collaborative law process. Divorce coaches, who are trained mental health professionals as well as being trained in collaborative law techniques, do a lot of the heavy lifting to get the parties where they need to be mentally and emotionally to identify goals and strategies to accomplish goals. This role results in a huge weight being lifted off the attorneys who often find themselves called on to address these emotional issues with our clients, when that is not what we have been trained to do. Financial neutrals guide the parties through budgets and taxes and all things money related. This, too, often falls on the shoulders of the attorney in litigated matrimonial cases, which again, we are not trained to do. Child specialists can also be brought in when needed. Any other need the parties have or anticipate can be addressed, neutrally and individually, with the clients. The attorneys' role in the collaborative law process is often to get out of the way, help bring everything together and, of course, facilitate details, documents, and procedure.

The distribution of multiple non-legal roles to professionals specialized in the respective fields is a true plus to the attorney in the collaborative law process, allowing the attorneys to focus and excel on the work for which we are trained.

Argument 3: Priorities (Children come first, everything else follows)

Family part judges, and even attorneys, regularly caution litigants that settling their disputes among themselves is better than having a stranger in a black robe do so. For most, this admonition rings especially true when it comes to their children. For others, the advice falls on deaf ears. For those clients who are listening and taking this advice, this is where the premium the collaborative law process places on children and self-determination really shines.

Too often, parents' perception of what is in a child's best interest is too heavily skewed by what is in that parent's best interests. The two are not always contradictory, but they are not always complementary, either.

In collaborative law, parties are encouraged, if not required, to consider their goals as well as their 'why' behind those goals. Having a therapist force each party, even where there are no children, to confront their "why" places that party's perspective in a better balance and helps make the process work and work well. Even the party who wants a pound of flesh will often be disarmed when forced to confront their "why" behind what they are seeking.

If for no other reason, most people will not admit out loud to a mental health professional that spite is their motivating force. This brings litigants into the right headspace to be and remain collaborative, even if a gentle reminder may be needed at some point later, and this naturally brings them closer to resolution.

Argument 4: Flexibility and creativity.

In collaborative law, attorneys do not make statements like "I won't recommend that to my client" and "I can't allow my client to do that under any circumstances." During training and practice, we constantly talk about the paradigm shift necessary to engage in this type of practice, as compared to litigation.[2]

It all sounds so incredible, until you have a collaborative law case with -- and this is said completely non-judgmentally – a lunatic of an opposing litigant, who is unhinged and/or unreasonable. Litigation with such a person would certainly be trying, but an attorney might get in front of a judge who would put that person in their place. You would win! Your client would be thrilled! You would be a hero!

But the collaborative law process is not about winning; not for your client, anyway. A win in the collaborative law process is a communal win. Sometimes a good result in collaborative law has nothing to do with what a judge would do or what the law says. Therein lies the elusive paradigm shift. If a client is amenable to a concession that would never be on the table before a judge, the collaborative attorney may not stand in the way of allowing that concession when doing so would hinder the communal win.

Take these authors' word for it, this discipline is not easy, especially when you have been trained to fight zealously for your clients – even the ones who are not always right. This complete change in thought and practice can only come with practice. In the meantime, it will feel

strange and uncomfortable, but upon seeing the results it accomplishes in collaborative divorces, it will get easier.

As attorneys, we still have an obligation in collaborative law to educate and inform the client of law that controls in litigation. However, instead of being the end of the discussion, the law is now more of an opening bid that we acknowledge exists, while no one really expects to dictate the ultimate outcome. In the collaborative law process, we are suddenly freed from the constraint of centuries of jurisprudence that has always been the keystone of traditional litigation. The shift can be uncomfortable, but the law usually competes with self-determination and in collaborative law, the latter always wins.

Collaborative parties are in control of their own outcomes. This framework gives attorneys a chance to brainstorm creative outcomes with other collaborative professionals in the case, implement solutions on a trial basis before committing permanently, and keep trying solutions until something works.

Why Collaborative Practice may not be ideal

Argument 5: All of the Above

Some parties cannot handle being in the driver's seat. Some do not want closure, clarity, results, or what's best for themselves or their children. Some people want blood. Others want a pound of flesh. These people are not well suited for the collaborative law process, and this is not an exhaustive list.

There are very good reasons not to proceed with the collaborative law process in some cases. If one party (or both) exhibits great reservation about committing to the process from the beginning and enters into the process with one toe in the water, or if the parties cannot commit to be respectful throughout the process, the collaborative law process might not be right for them. If a final restraining order is in place, it is not an option at all.

If the parties, or one party, cannot trust that the other party will be forthright, transparent and cooperative toward the common goal of resolving the matter, then collaborative law may not be the right path. If one party will only proceed with the understanding that the other party will give them what they want, this is already a red flag that engaging in the collaborative law process will likely be a complete waste of time.

Parties do not have to be friendly, amicable, or particularly cooperative to be candidates for a successfully resolved collaborative law case. They must, however, commit to the process and trust at the very least that the other person is similarly committed. When this commitment is absent from the start or is lost along the way, the attorneys often have no choice but to take on the role of dragging the parties toward the finish line. Remember, self-determination is *the* most important goal, and so this is less than ideal and can be fatal to the collaborative law process.

Trust is a crucial component, without which the process is likely doomed to fail. It is hard to fathom that many divorcing parties/uncoupling parents/any other players in family law cases can trust one another. However, in most cases the necessary trust can be achieved. When it cannot, neither party can achieve a successful collaborative outcome.

Sometimes, the stars align. You have the right client, who has the right opposing party, who has the right (collaboratively trained) lawyer. You officially have a collaborative law case, and yet you may still find there are drawbacks to having this case be in the process or stay in the process. Some of these drawbacks are real, and some are perceived by the legal community and are not real problems for clients.

Perception problems – i.e. the problems that exist for lawyers as opposed to clients – are the fan favorite arguments against collaborative law that we have all heard time and time again. These arguments are worth examining here.

- **Misconception 1.** It's money out of lawyers' pockets, because we are quickly settling cases, clients are happy and there is no or very little post-Judgment work. This is mostly a myth. While it's true that collaborative law cases tend overwhelmingly to end with happy clients who follow through on agreements, they are not necessarily less expensive in terms of counsel fees incurred. They do not always settle quickly and often involve many time-intensive meetings and lengthy periods of living the interim agreements or data gathering to resolve. Lawyers can absolutely make their living on collaborative law cases.
- **Misconception 2.** The no turning back aspect of signing onto the collaborative law process and getting stuck there without the option for litigation. This is a complete myth. Parties can always terminate a collaborative law process, opt for litigation, and even ultimately settle without a full-blown trial. Remember self-determination? It is very important and the

premium on self-determined outcomes means that parties, by definition, cannot get stuck in a collaborative law process.

The real downsides to collaborative law are much more practical and client-centered. The real downsides are much less focused on gripes attorneys might have with the process itself because we are stuck in our comfortable litigating ways. There is no formal certification process for collaborative practitioners. That means that an attorney can enter into a collaborative law case with an attorney who has been trained in collaborative law, but who has not made the all-important paradigm shift. This attorney who has not fully committed to the principles of collaborative law can, and often will, do things we have been taught to do in litigation and many of us have devoted entire careers to doing: advocacy and argument. In some cases, this will not be a material problem and in other cases it will be fatal to a successful collaboration.

The flip side to this conundrum is more of an internal struggle. Many attorneys believe they cannot sustain an entire practice on this new area; many of us could if we wanted to but choose not to. For those of us who cannot or will not handle exclusively collaborative law matters, it is a major challenge to wear both hats at once. After all, do you know many people who can wear a beret one day and a cowboy hat the next? The contexts are too different, and only the rare person has the aesthetic acumen to wear both types of hats. It is incredibly challenging to litigate and collaborate at the same time.

Building collaborative law processes into a practice, with its challenging alternation between collaboration and litigation skills, can absolutely engender a shift in one's litigation practice. Depending on who you ask, this is far and away one of its biggest benefits. Children come first, clients' needs are addressed, and cases settle, not without effort and not without dedication, but ideally without petty bickering and spite.

In short, collaborative law is not all campfires and kumbaya. However, in the right cases, it can be a refreshing change of pace from the conflict and consternation that so often accompanies traditional litigation.

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Endnotes

1. N.J.S.A. 2A:23D-1, et seq.
2. "A collaborative Professional will respect each client's self-determination, recognizing that ultimately the clients are responsible for making the decisions that resolve their issues." (International Academy of Collaborative Professionals, Standards and Ethics, Section 3.2A (2018), collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf, last visited Dec. 9, 2018.)

Bankruptcy and Divorce: Getting Counsel Fees Added to Probation Arrears

by Samuel J. Berse and Jenny Berse

Editors' note: This is the second article of a three-part series on securing domestic support obligations in bankruptcy and divorce cases. Part 1 ran in the February 2020 edition of New Jersey Family Lawyer.

Continuing the saga from the previous article, *Bankruptcy & Divorce: Exceptions to Dischargeability*, we begin where we left off. Recall in the first article that the creditor-spouse prevailed over the debtor-spouse's insistence that their support obligation was dischargeable in bankruptcy, and the bankruptcy court specifically ordered that:

> This matter having been opened to the Court on Motion of [creditor-spouse] for relief from stay and order that debtor [spouse's name's] domestic support obligations are non-dischargeable, and good cause having been shown,
>
> IT IS HEREBY ORDERED
>
> 1. The automatic stay is vacated to permit movant [creditor spouse's name] and [debtor spouse's name] to resume their divorce proceeding in the state court in [venued County], New Jersey as to the issues of dissolution and debtor's domestic support obligations of [description of the aforesaid obligations], which are hereby ordered to be non-dischargeable, and including [debtor-spouse's] obligation to pay the non-dischargeable [repeat recitation of the aforesaid obligations].
>
> 2. The movant shall serve a copy of this order on the debtor, debtor's attorney, if any, the Office of the U.S. Trustee and any trustee appointed in this case, and any other party who entered an appearance on the motion.

In addition to obtaining that order from the bankruptcy court, we had the additional goal of having the bankruptcy court order that this domestic support obligation would be payable through probation. Unsurprisingly, the bankruptcy judge felt this request was a stretch, even though our argument is partially grounded in federal law. Nevertheless, we persisted through to the family court with the argument we have made, and prevailed on, many times before.

The heart of this article is a discussion of our brief and legal argument on the issue of getting counsel fees and costs added to a party's probation account arrears. The next and last article in this series will include tips and practice points and continue the topic of collections. For now, the focus will be on the legal argument employed to get counsel fees through probation.

To begin, in a rule infrequently cited, "[a]ll orders that include child support shall be paid through immediate income withholding from the obligor's current and future income, unless the parties agree" otherwise. *R.* 5:7-4A(a). The more commonly cited *Rule* 5:7-4(b) provides that "[a]limony, maintenance, or child support payments not presently administered by the Probation Division shall be so made on application of either party to the court unless the other party, on application to the court, shows good cause to the contrary." Additionally, "[i]n awarding child support, payments for health care, child care and other expenses necessary to maintain the child or children shall be designated as part of the child support award unless good cause is shown why such amounts should be separated." *R.* 5:7-4(a).

Our legislature defines child support as:

> the amount required to be paid under a judgment, decree, or order, whether temporary, final or subject to modification, issued by the Superior Court, Chancery Division, Family Part or a court or administrative agency of competent jurisdiction of another state, for the support

and maintenance of a child, or the support and maintenance of a child and the parent with whom the child is living, which provides monetary support, health care coverage, any arrearage or reimbursement, and which may include other related costs and fees, interest and penalties, income withholding, *attorney's fees* and other relief.

[N.J.S.A. 2A:17-56.52 (emphasis added).]

As to the United States Code provisions that permit states to enact income withholding, it may be done:

> in accordance with State law enacted pursuant to . . . [42 U.S.C. § 666(a)(1) and (b)] and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under . . . [42 U.S.C. §§ 651, et seq.] or by an individual obligee, *to enforce the legal obligation of the individual to provide child support or alimony*.
>
> [42 U.S.C. § 659(a) (emphasis added).]

The definitions of "child support" under 42 U.S.C. § 659(h)(2)(F)(i)(2) and "alimony" § 659(h)(2)(F)(3)(A) collectively provide:

> (2) Child support. The term "child support", when used in reference to the legal obligations of an individual to provide such support, means amounts required to be paid under a judgment, decree, or order, whether temporary, final, or subject to modification, issued by a court or an administrative agency of competent jurisdiction, for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing State, or a child and the parent with whom the child is living, which provides for monetary support, health care, arrearages or reimbursement, *and which may include other related costs and fees, interest and penalties, income withholding, attorney's fees, and other relief.*
>
> (3) Alimony.
>
> (A) In general. The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual, and (subject to and in accordance with State law) includes separate maintenance, alimony pendente lite, maintenance, and spousal support, *and includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.*
>
> [(Emphasis added).]

Accordingly, both child support and alimony include attorney's fees, interest, other related costs and fees, and court costs at both the federal level and in New Jersey. See *id.*; N.J.S.A. 2A:17-56.52.

Having established that the federal government permits states to wage-garnish amounts incurred characteristically incidental to the collection of alimony and child support, the argument must be made at the New Jersey State Court level for actual implementation and enforcement. Currently, the cornerstone of the argument relies on non-binding, yet persuasive precedent, which affirmatively answers the basic question: Can the court even do that?

In New Jersey, support in relation to payments through probation has been compared to "the obligation of a spouse and not unlike other categories of necessities which the law compels the husband, the usual repository of family finances, to furnish the wife." See *Cashin v. Cashin*, 186 N.J. Super. 183 (Ch. Div. 1982) (quoting *Weiner v. Weiner*, 119 N.J. Super. 109 (Ch. Div. 1972)). A counsel fee award may be payable through probation when such fees are related to financial matters cognizable in a matrimonial action. *Callaham v. Callaham*, No. A-5757-11, (App. Div. Aug. 21, 2014). In *Callaham*, the defendant specifically argued that "N.J.S.A. 2A:34-23(a), which the court relied upon in adding plaintiff's attorneys fees to defendant, does not provide the trial court with the authority to add the counsel fee award to the child support arrears." Nonetheless, the appellate panel found no reason to disturb the family part's decision to add the plaintiff's attorney fee award to the defendant's child support arrears reasoning that "almost all the attorney's fees incurred by plaintiff related to financial

matters, and an unallocated support order was in effect from the inception of the litigation through the entry of final judgment[.]"

Going back in time, the court in *Cashin v. Cashin* reviewed the question of whether counsel fees awarded to a plaintiff in a judgment of divorce is in the nature of a support obligation and thus subject to wage garnishment. 186 N.J. Super. at 186. Notably, *Cashin* also addressed the issue of what percent of a payor's income can be garnished, but this scenario just focused on whether counsel fees can be included in such a garnishment:

> Inherent in this inquiry is the need to focus on what is support. Fundamentally, it is a payment of money from the obligor spouse to the obligee spouse. It has been held to include a payment in kind made for the benefit of the obligee spouse where mortgage payments made directly to the mortgagee were held to be support. Support is not necessarily linked with the manner of payment or to whom it is tendered, but rather with the necessary nature of the item or services being provided. *Ballard v. Ballard*, 164 N.J. Super. 560, 561 (Ch. Div. 1978).

Do counsel fees come within this definition of support? This question was considered by the court in *Weiner v. Weiner*, . . . and the court responded:

> . . . counsel fees and costs in a divorce action are properly made the obligation of the husband and are not unlike other categories of necessities which the law compels the husband, the usual repository of family finances, to furnish the wife. [119 N.J. Super. 109, 113-14 (Ch. Div. 1972).]
>
> That counsel fees are a support extension is further strengthened when a corollary is drawn to the Federal Bankruptcy Act, 11 U.S.C. § 523(a)(5).

As discussed in *Cashin*, 186 N.J. Super. at 187-88, the appellate panel in *Pelusio v. Pelusio*, 130 N.J. Super. 538, 539 (App. Div. 1974), addressed the question in terms of the Federal Bankruptcy Act, by stating:

> In our view, the counsel fees and costs awarded to plaintiff wife upon the entry of the final judgment of divorce are as much "necessaries" as are alimony, maintenance and support and, as such, fall within the class of indebtedness exempted from release by a discharge in bankruptcy.

Thus, the court in *Cashin* affirmed wage-execution in satisfaction of the counsel fees awarded, and further concluded "[t]he counsel fee awarded to the plaintiff was intended as a contribution toward her support and maintenance, deserving of the maximum protection affordable under the Federal Wage Garnishment Act[.]" 186 N.J. Super. at 188.

It is with this backdrop that co-author Jenny Berse had prevailed in *Kozikowska v. Wykowski*, No. A-3338-14 (App. Div. Feb. 3, 2017), which was then successfully used to support our argument that our clients should be awarded legal fees payable through probation. In *Kozikowska*, the family part awarded the plaintiff a judgment representing palimony payments, child support payments, distribution of assets, and attorney's fees, and ordered the defendant to pay $150 per week toward the judgment through probation. *Id.* The family part reasoned that "pursuant to *Rule* 5:1-2, palimony actions are cognizable in the Family Part, and that "[p]robation is to collect monies that are cognizable in a Family Part action." *Id.* "Further, the judge reasoned that although the supplemental support and attorney's fees are for a palimony action, they are related to a family-type action akin to that which is allowed for domestic partnerships, another, but legally indistinguishable form of familial relationship." *Id.* Ultimately, the appellate panel agreed with the family part and affirmed the award of counsel fees through probation garnishment, finding that its reasoning was "consistent with probation's responsibilities to collect attorney's fees as a component of the support defendant was ordered to pay plaintiff due to their familial relationship akin to a matrimonial or child support matter." *Id.* (citing *Acting Admin. Dir. of the Courts Memorandum*, "Guidance on Child Support Orders Monitored by Probation," (June 22, 2015)).

Ten months after *Kozikowska*, the appellate panel in *Waldbaum v. Waldbaum*, No. A-1838-15 (App. Div. Dec. 27, 2017) also upheld a counsel fee award through probation. In *Waldbaum*, "the trial judge awarded defendant $150,000 in counsel fees. . . . added to plaintiff's arrears with probation[,]" and the panel found the award was not an abuse of discretion.

It is clear there is sufficient precedent to determine that awarded counsel fees should be paid through probation. In fact, we know of no contrary precedent, in other words no instance in which an appellate panel reversed a cognizable fee award in the family law context on the basis of it having been improperly ordered to be paid through probation.

Digressing and recapping for a moment, an argument has been made that courts should follow *In re Gianakas*, 917 F.2d 759, 762-63 (3rd Cir. 1990) and determine whether an obligation is "in the nature of support" and thus non-dischargeable and non-includable in probation arrears, by considering: (1) the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary; (2) the parties' financial circumstances at the time of the settlement to assist in ascertaining the parties' intent; and (3) the function served by the obligation at the time of the divorce or settlement. The fundamental flaw in undertaking such an analysis is that it predates the Bankruptcy Reform Act of 1994 and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

In 1994, domestic support obligation was added as a defined term in order to grant more protection to creditors owed support debts. See *In re Trentadue*, 527 B.R. 328 (Bankr. E.D. Wis. 2015), *aff'd*, 837 F.3d 743 (7th Cir. 2016). Additionally, 11 U.S.C. § 523(a)(15) was added in the 1994 amendments "to expand the § 523(a)(5) exception to discharge for marital debts[.]" *In re Crosswhite*, 148 F.3d 879, 882 (7th Cir. 1998). Also, "Congress, by enacting § 523(a)(15) [in 1994], made it clear that, even if the state courts did not use the traditional devices of alimony and support, the long-term responsibilities of the debtor to those with whom he once had a familial relationship and to those who are dependent upon him because of that familial relationship are economic factors that must be weighed." *Id.* at 888.

In 2005, as stated in the first article in this series, between § 523 (a)(5) and (a)(15), the entire universe of financial obligations is essentially captured as non-dischargeable. We are not suggesting that equitable distribution should be added to an obligor's probation arrears. But, with a debtor-spouse's financial obligation to a creditor-spouse being non-dischargeable regardless of whether it is specifically a domestic support obligation (at least in Chapter 7 bankruptcy), we are suggesting that alimony and child support are broadly defined in 42 U.S.C. § 659, and that any financial obligation comporting with that definition, including counsel fees and costs, can be appropriately added to a payor's probation account arrears.

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A Father's Liability for Retroactive Child Support Upon Delayed Determination of Paternity

by Allison Schrader Dunn

Under what circumstances may a party determined to be a child's father in paternity proceedings be held liable for retroactive child support? Like most family law matters, the particular facts of each case will dictate whether an award of retroactive child support, child support for the period before the adjudication of paternity, is warranted.

The New Jersey Parentage Act permits a child, the biological mother, a legal representative of the child, or any person with an interest recognized as justiciable by the court, to bring or defend an action for the purpose of determining the existence or nonexistence of the parent and child relationship.[1] The act further establishes a 23-year statute of limitations for actions to determine the existence or nonexistence of a parent-child relationship, commencing from the date of the child's birth.[2] Once paternity is established or acknowledged:

a. [t]he obligation of the father may be enforced in the same or other proceedings by the mother, and child, the public agency that has furnished or may furnish the reasonable expenses of pregnancy, postpartum disability, education, support, medical expenses, or burial, or by any other person, including a private agency, to the extent that the mother, child, person or agency has furnished or is furnishing these expenses.

b. [t]he court may order support payments to be made to the mother, the clerk of the court, the appropriate probation department, or a person, corporation, or agency designated to administer them for the benefit of the child, under the supervision of the court.[3]

The language of the act leaves open the possibility that a father could be liable for child support for the period before the adjudication of paternity. The financial impact of such an assessment on a putative father could be significant, especially in a case where the adjudication of paternity occurs many years after the birth of the child.

The case law in New Jersey addressing this specific issue is somewhat limited. The Appellate Division addressed the issue of retroactive child support in the event of a delayed paternity adjudication in *L.V. v. R.S.*[4] In *L.V. v. R.S.*, the plaintiff, a custodial mother, filed an action against the putative father 16 years after the birth of their child seeking an adjudication of paternity as well as child support.[5]

The parties conceived a child in 1981, and the plaintiff contacted the defendant four months later to advise him she was pregnant. She requested financial assistance for medical expenses and the defendant sent her money as requested. The child, Michelle, was born on Jan. 5, 1982 and was given her mother's surname. The birth certificate did not name the defendant as her father. The plaintiff testified during a plenary hearing that she wanted no contact with the defendant and did not want him to play any role in Michelle's life.[6] Subsequent contact between the parties was minimal. The plaintiff testified she was aware of how to proceed to secure child support for Michelle through the court, but she consciously chose not to pursue any formal action against the defendant.[7]

Michelle sought out her father when she was 16 years old, and they began communicating. She requested his address, and shortly thereafter the plaintiff served him with a complaint seeking retroactive and prospective child support.[8] After a plenary hearing, the trial court barred the plaintiff's claim for retroactive and prospective child support on behalf of Michelle on grounds of laches.[9] The trial court based its decision upon its findings that the 16-year hiatus of any contact between Michelle and her father was intentional and purposeful by the plaintiff mother, and that there was no real bond between the defendant and the child.[10]

On appeal, the Appellate Division reversed and remanded the matter to the trial court to determine an appropriate amount of child support that should be paid by the defendant to the plaintiff retroactive to the date of the plaintiff's complaint.[11] The Appellate Division affirmed the trial court's decision denying the plaintiff's request for reimbursement of child support prior to the date of the complaint based upon the equitable doctrine of laches.[12] In doing so, the Appellate Division noted:

> Laches is an equitable doctrine which penalizes knowing inaction by a party with a legal right from enforcing that right after passage of such a period of time that prejudice has resulted to the other parents so that it would be inequitable to enforce the right. The key ingredients are knowledge and delay by one party and change of position by the other.[13]

The Appellate Division further explained:

> The length of delay, reasons for delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs…It is because the central issue is whether it is inequitable to permit the claim to be enforced that generally the change in condition or relationship of the parties coupled with the passage of time becomes the primary determinant…Inequity more often than not, will turn on whether a party has been misled to his harm by the delay.[14]

In denying the plaintiff's claim for reimbursement, the Appellate Division noted "[w]hile laches does not arise from delay alone, the actions and non-actions of the plaintiff are sufficient to justify the bar of laches to deny her any claim for reimbursement."[15] The decision also took into consideration that the record showed the plaintiff was aware of the procedures to obtain child support and to locate the defendant but she chose not to do so in order to inhibit the father-daughter relationship.[16] However, the Appellate Division held that there was no basis to deny Michelle's claim for ongoing support from her father, as there was "no basis to impute to a child the custodial parent's negligence, purposeful delay or obstinacy so as to vitiate the child's independent right of support from a natural parent."[17] The Appellate Division was careful to note: "the application of laches to matters of parent-child relationships have been carefully circumscribed."[18] As such, each case will rest upon a careful factual analysis, and retroactive reimbursement of child support may not be barred in every instance.

For example, in *C.L. v. W.S.*, the plaintiff mother filed a complaint against the putative father that sought a declaration of paternity and child support for the child, who was born with cerebral palsy.[19] The child was born in 1986, and the father gave the plaintiff some money before the child's birth and $15,000 shortly thereafter for child-care expenses. However, he did not make any further payments to the plaintiff and he disappeared less than two years later.[20] The plaintiff filed an action in 1994 against the defendant for a declaration of his paternity and support; however, the action was dismissed due to defective service of process.[21] The plaintiff then waited until 2005 to file another complaint when the child was 19 years old, again seeking a declaration of the defendant's paternity and child support.[22] The complaint did not specifically seek retroactive child support, which became an issue on appeal.[23]

The plaintiff subsequently filed a motion seeking both retroactive and prospective child support. The trial court granted the plaintiff's requests and entered an order establishing paternity and ordering the defendant to pay $222 per week for the child's support plus 66% of her medical expenses. In addition, the court ordered the defendant to pay the plaintiff $3,500 for her counsel fees and $126,984 in retroactive child support at the rate of $222 per week, beginning from 1994 when the plaintiff first petitioned the court.[24]

On appeal, the Appellate Division affirmed the trial court's decision regarding ongoing child support, but it remanded the case for reconsideration of the award of retroactive child support in line with *L.V. v. R.S.,* supra.[25] The Appellate Division noted that the plaintiff did not seek a claim for retroactive child support in her complaint, and therefore questioned whether the defendant was given adequate notice of the "magnitude" of the relief sought.[26]

The court in *In re Rogiers* addressed this issue in the context of estate litigation.[27] In *In re Rogiers*, the child's biological mother sought reimbursement from the father for medical expenses she incurred and services she provided on the child's behalf before the child died. The mother also sought retroactive child support from the father, though she made no claim for child support while the child was alive.[28] The trial court granted the mother's request for reimbursement of some medical expenses, but she denied her claim for retroactive child support from the father.

On appeal, the Appellate Division affirmed the trial court's denial of the mother's request for retroactive child support. The court noted that the trial judge's decision rested in large part upon its conclusion that a child support obligation does not survive the death of a child. The Appellate Division further noted, however, "there may be circumstances when child support may be awarded retroactively based upon equitable principles, even where, as here, no

claim for child support had previously been made."[29] The Appellate Division based its decision upon the fact that the father had contact with the child's mother on multiple occasions during the child's lifetime. This presented Rogiers with opportunities to request child support from the father, but she did not do so. While that was not, by itself, a reason to deny retroactive child support, other factors supported that conclusion. A significant factor was that Rogiers was able to care for the child's needs with trust funds during the child's lifetime to satisfy her financial needs. Based upon these facts, the Appellate Division found no basis to disturb the trial court's decision. [30]

As the applicable statutory and case law make clear, a father could be found liable for child support for the period before paternity is established if the facts of the case warrant such an award. The potential financial impact on a putative father is obvious. A father who may have been excluded from the child's life, either deliberately or by agreement, may suddenly have a significant child support and arrearage obligation.

Furthermore, the plain language of New Jersey's child support statute, N.J.S.A. 2A:17-56.21, mandates that information regarding arrearages be provided to credit reporting agencies.[31] The question of whether arrearages assessed in the first instance against a noncustodial parent should be reported to the credit bureaus was addressed in a reported trial court case, *Cameron v. Cameron*.[32] In *Cameron*, the parties modified their parenting time arrangement post-judgment such that the defendant father went from being the parent of alternate residence to the parent of primary residence.[33] The defendant father filed an application with the court seeking child support from the plaintiff retroactive to the date of filing. Because the motion took several months to be heard, the plaintiff was assessed arrearages in the amount of $1,499 by the time the motion was heard.[34]

Recognizing the injustice that would occur in the event that arrearages were reported against a parent who had not previously violated a court order, the trial court held that the statute does not "require the reporting of technical arrears against a noncustodial parent who has never violated a support order or missed any legally specified payments in the same manner as against an obligor who has failed to make payments or otherwise violated an existing order."[35] While the case law is clear on this issue, in the event that an arrearage is assessed against a client under these circumstances, counsel should ensure that any court order entered specifically provides that the arrears shall not be reported to the credit agencies. Otherwise, the Probation Division may unwittingly do so.

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Endnotes

1. N.J.S.A. 9:17-45(a).
2. N.J.S.A. 9:17-45(b).
3. N.J.S.A. 9:17-55(a) and (b).
4. *L.V. v. R.S.*, 347 N.J. Super. 33 (App. Div. 2002).
5. *Id.* at 35.
6. *Id.* at 36.
7. *Id.* at 37.
8. *Id.* at 38.
9. *Id.* at 38-39.
10. *Id.* at 39.
11. *Id.* at 44.
12. *Id.* at 40-41.
13. *Id.* at 39.
14. *Id.*
15. *Id.* at 40.
16. *Id.*
17. *Id.*
18. *Id.* at 41.
19. *C.L. v. W.S.*, 406 N.J. Super. 484 (App. Div. 2009).
20. *Id.* at 487.
21. *Id.* at 489, n. 2.
22. *Id.* at 487-88.
23. *Id.* at 495-96.
24. *Id.* at 489.
25. *Id.* at 496.
26. *Id.*
27. *In re Rogiers*, 396 N.J. Super. 317 (App. Div. 2007).
28. *Id.* at 320.
29. *Id.* at 327.
30. *Id.*
31. N.J.S.A. 2A:17-56.21.
32. *Cameron v. Cameron*, 440 N.J. Super. 158, 163 (Ch. Div. 2014).
33. *Id.* at 161.
34. *Id.* at 162.
35. *Id.* at 163.

Compulsory Counsel: The Palimony Statute's Unique Requirement

by Alix Claps

It's no surprise to any member of the bar that the wheels of justice grind slowly. So, too, do the gears of legislation, ordinarily. However, the 2010 palimony amendment to the Statute of Frauds, N.J.S.A. 25:1-5(h), was passed and signed so comparatively rapidly, it caused unintended consequences that have yet to be rectified.

When the amendment was initially introduced on Oct. 2, 2008, the full proposed addition to the Statute of Frauds provided that "[a] promise by one party to a non-marital personal relationship to provide support for the other party, either during the course of such relationship or after its termination" would not be binding unless in writing.[1] The Senate Judiciary Committee made several amendments to the bill, including a broadening of the promise of "support" to include promises of other consideration as well as financial support.[2] Additionally, the committee added the requirement that the writing must be made "with the independent advice of counsel for both parties."[3] However there is no published legislative history or any other documentation that provides a rationale as to why or how that provision was added.

This requirement for the independent legal advice is almost unique within the New Jersey Statutes.[4] The only other provision that requires a party to seek independent legal advice is that which permits a lottery or annuity jackpot winner to sign over winnings to another party.[5] Presumably, money to hire a lawyer is not a concern for jackpot winners.

As attorneys, we are more than familiar with a party's right to consult with independent counsel. Undoubtedly it appears in every prenuptial agreement or marital settlement agreement we draft. But although the rights bargained for and given away in those agreements are no less significant than the ones implicated in a palimony agreement, there is no requirement that a party to a divorce or prenuptial agreement consult with an attorney. N.J.S.A. 37:2-33, "Premarital Agreements Formalities; consideration," reads: "A premarital or pre-civil union agreement shall be in writing, with a statement of assets annexed thereto, signed by both parties, and it is enforceable without consideration."[6]

The family bar, in particular, is also familiar with the categories of cases in which litigants are entitled to an attorney at no cost, appointed from the *Madden* list or through the New Jersey Office of the Public Defender.[7] These include hearings where incarceration is a possible outcome,[8] contested adoption cases,[9] and, most recently, enforcement hearings in which a child support obligor runs the risk of having a driver's license suspended.[10] However, the United States Supreme Court has determined that even in a criminal prosecution in which a party is entitled to counsel under the Sixth Amendment, a party had the right to refuse an attorney's help.[11] So, even in these circumstances, counsel is not mandated. But, in stark contrast, in palimony cases, not only are the parties required to obtain independent legal advice, they are required to do so at their own cost, as no *pro bono* attorney is offered to a party entering into a palimony agreement.

Such a situation, in which counsel is mandated but not provided, arguably creates an undue burden on the parties. The basis upon which such a situation arises violates New Jersey's Law Against Discrimination.[12] This subsection of the Statute of Frauds applies only to agreements between unmarried parties. Marital status is a protected class under the New Jersey Law Against Discrimination.[13] The writing requirement alone may not be discriminatory, since the palimony writing requirement is analogous to a requirement that a writing ends a marriage – a written final judgment of divorce is required for legal dissolution.[14] However, no independent counsel requirement exists in a divorce, or in the negotiation and execution of pre- or post-nuptial agreements, nor between unmarried parties entering into a custody/parenting time and child support agreement.

Governor Jon Corzine's statement on signing the palimony bill on Jan. 18, 2010, is very clear in its disapproval of this provision requiring the parties to obtain indepen-

dent legal advice and the commitment made to him by the Legislature to amend this statute:

> I approve Senate Bill No. 2091 (First Reprint) in light of the representation by legislative leadership and the bill sponsors that this law will be improved to recognize agreements or promises in a non-marital relationship as binding when they are mutual, in writing, and notarized as opposed to mandating the involvement or services of an attorney. Legislative leadership and the sponsors share my goal of providing greater clarity in the enforcement of palimony agreements but ensuring that this law does not have an adverse impact on parties who may not be able to afford the services of an attorney. I take this action in light of the time constraints that result at the end of a legislative session, which do not afford time for a Conditional Veto to recommend removal of this provision.

Despite this clear assertion by the governor and the seeming acknowledgment by the Legislature that this problematic provision was in need of correction, it remains on the books today.

To date, this author has been unable to find any cases, reported or unreported, that address the enforceability of the counsel requirement provision. However, as the distance grows from the passing of the palimony amendment, parties are less likely to be able to rely on pre-2010 oral promises which are not subject to the statute. If the Legislature fails to act, it is only a matter of time before the question of compulsory counsel is adjudicated.[15]

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Endnotes

1. Senate Bill No. 2091 Introduced October 2, 2008.
2. Senate Judiciary Committee Statement to Senate Bill No. 2091 with committee amendments Dated February 9, 2009.
3. Ibid.
4. All thanks and courtesies to Ronald G. Lieberman who first raised this question in his Executive Editor's Column, *Maeker v. Ross: Supreme Court Missed a Chance to Find Compulsory Counsel Was Unconstitutional.*
5. N.J.S.A. 5:9-13d(15); N.J.S.A. 5:12-100.1d(16).
6. N.J.S.A. 37:2-33.
7. *Madden v. Twp. of Delran*, 126 N.J. 591 (1992).
8. *Pasqua v. Council,* 186 N.J. 127 (2006).
9. *In re Adoption of J.E.V.*, 226 N.J. 90 (2016).
10. *Kavadas v. Martinez,* No. MER-L-1004-15 (Law Div. Dec. 7, 2018) njcourts.gov/courts/assets/municipal/caselaw/kavadas_v_martinez.pdf?c=wbp.
11. *Adams v. United States ex rel. McCann*; see also *Faretta v. California* 422 U.S. 806 (1975).
12. N.J.S.A. 10:5-3.
13. Ibid.
14. N.J.S.A. 2A:34-18.
15. *Joiner v. Orman* No. FD-07-001086-13 (Law Div. January 1, 2007) 2007 WL 8419367; *Maeker v. Ross*, 219 N.J. 565 (2014).

Strategies Informing Issues Surrounding Cohabitation

by Hon. Marie E. Lihotz (ret.)

Legal articles should not only inform as to what the law is, but also raise questions or arguments to suggest what the law should be. The 2014 amendments to N.J.S.A. 2A:34:23 added subsection (n), designed to provide clarity and certainty to the impact of cohabitation on existing alimony awards. The subsection defines cohabitation and identifies factors signifying the defined relationship. Further, the subsection includes remedies available upon proof of cohabitation. So why is there so much fuss about this legislation governing cohabitation?

Prior law generally treated cohabitation as a change in circumstances, allowing review of economic benefits of the new relationship, to determine the propriety of modifying a prior alimony award. The statutory addition of subsection (n) tackles perceived abuses identified in court decisions when a divorced couple's circumstances involved cohabitation by providing:

> Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household. [1]

Further, the amendment lists factors "a court shall consider" to discern "whether cohabitation is occurring," including:

> (1) intertwined finances such as joint bank accounts and other joint holdings or liabilities;
>
> (2) sharing or joint responsibility for living expenses;
>
> (3) recognition of the relationship in the couple's social and family circle;
>
> (4) living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;
>
> (5) sharing household chores;
>
> (6) whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and
>
> (7) all other relevant evidence.
>
> In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on the grounds that the couple does not live together on a full-time basis.[2]

Each factor does not need to be satisfied. Further, as with other sections of N.J.S.A. 2A:34-23, the weight given to any single factor or combination of factors, rests in the discretion of the trial judge.

The new statutory definition ("cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union . . . .") mirrors the Supreme Court's cohabitation definition in *Konzelman v. Konzelman*.[3] Also, the listed considerations to show cohabitation were extracted from case precedent. *See e.g., Quinn v. Quinn*[4]*; Konzelman*[5] *; Gayet v. Gayet*[6]*; Reese v. Weis*.[7] Consequently, despite the drafters' good intentions, the statutory addition of subsection (n) has not necessarily eliminated the murky issues of what exactly constitutes cohabitation.

The statute mandates cohabitation be shown to achieve the allowed alteration of an existing alimony award. Yet, gathering evidence of cohabitation requires a fact intensive attack on the emotional and financial aspects of the putative relationship to show it rises to the fidelity and commitment associated with marriage.[8]

Importantly, the statute excludes living or dating arrangements not tantamount to marriage. This distinction is highlighted in the Court's opinion in *Quinn*:

> When parties to a matrimonial settlement agreement have agreed to permit termination of alimony on remarriage or cohabitation, they have recognized that each are equivalent events. In each situation the couple has formed an enduring and committed relationship. In each situation, the couple has combined forces to mutually comfort and assist the other. The only distinction between remarriage and cohabitation is a license and the recitation of vows in the presence of others. When the facts support no conclusion other than that the relationship has all the hallmarks of a marriage, the lack of official recognition offers no principled basis to treat cohabitation differently from remarriage as an alimony-terminating event.
>
> We do not today suggest that a romantic relationship between an alimony recipient and another, characterized by regular meetings, participation in mutually appreciated activities, and some overnight stays in the home of one or the other, rises to the level of cohabitation. We agree that this level of control over a former spouse would be unwarranted and might violate the no-obligation clause found in many divorce agreements.[9]

Nothing in subsection (n) destroys these established principles. Moreover, subsection (n) does not apply to a possible economic benefit from sharing a residence with a roommate, relative or friend. It is directed only to marriage-like relationships; other relationships, which may have economic impact are governed by the change of circumstances test in *Lepis v. Lepis*.[10]

The nuanced change made by the statute signals proof of cohabitation is the beginning and end of the discussion to obtain statutorily mandated relief. This differs from the pre-statutory case law, which necessitated evidence of cohabitation, followed by proving (or disproving) the exact financial impact of a cohabiting relationship.[11] Recognizing three of the new statutory factors consider the impact of the couple's finances,[12] the plain language of the overall statute focuses on whether there is cohabitation, not the quantum of the economic benefits to the former spouse or the cohabitant in the relationship.

Make no mistake, the examination of cohabitation allegations invades personal and financial privacy. This is an area many judges find loathsome and lawyers and their clients find disquieting.[13] But the statute's plain language puts everyone on notice of cohabitation's impact on alimony. Moreover, privacy protections are always available as a court can circumscribe the length and nature of discovery and, as necessary, enter a protective order.

Also, subsection (n) obviates the need to prove a single household, taking direct aim at those cases where a couple shared more than friendship, revealed by their involvement in a "mutually supportive, intimate personal relationship," but defeated cohabitation by maintaining two addresses. This addition enhances the weight given overnights, such that evidence of successive, extensive, repeated overnights shared by the couple favors cohabitation, despite the that person each maintains an individual residence.

One issue not clarified is the applicability of the new statutory provisions when parties have a cohabitation clause in a marital settlement agreement, incorporated into the final judgment of divorce, executed prior to the adoption of the statute. Case law requires the language of the agreement must govern the outcome, but what if the language is ambiguous or broad enough to encompass the current law?

Historically, the New Jersey Supreme Court mentioned cohabitation as a changed circumstance allowing modification of an alimony award as early as 1980.[14] A more detailed discussion of cohabitation remedies in *Gayet* followed in 1983. Since then, cohabitation clauses have been inserted in matrimonial settlement agreements, specifically because voluntary agreements knowingly executed are fully enforceable to the extent that they are just and equitable.[15] Several cohabitation cases examine such agreements.[16]

Judge Mary Catherine Cuff's opinion in *Quinn* highlighted a divorcing couple's right of self-determination – upholding governance of their destiny by executing a contract.[17] The Supreme Court emphasized the principle that agreements pre-dating the statute, containing a specific cohabitation clause, remain in full force and effect, unaltered by the addition of subsection (n).

> [W]hen the parties have outlined the circumstances that will terminate the alimony obligation, this Court has held that it will enforce voluntary agreements to terminate alimony upon cohabitation, even if cohabitation does not result in any changed financial circum-

stances. Konzelman, 158 N.J. at 197. Agreements to terminate alimony upon the cohabitation of the recipient spouse are enforceable so long as the relationship constitutes cohabitation and "the cohabitation provision of the [PSA] was voluntary, knowing and consensual." Id. at 203.[18]

Nevertheless, not every agreement mentioning cohabitation, even if executed prior to the statute's effective date, falls outside the statute's scope. *Spangenberg* recited the bill's adopting parameters, stating the new law does not apply to alter an "agreed upon or other specifically bargained for contractual provisions that have been incorporated into . . . any enforceable written agreement between the parties."[19] Contract interpretation is case specific, so the express language of the cohabitation clause might limit rights and remedies by allowing only modification based on changed circumstances or might reference and incorporate pre-statutory law. Alternatively, a clause may not be sufficiently specific, so merely stating alimony may change upon proof of cohabitation seems ripe for review guided by subsection (n).

One significant legal made by the statute regards remedies obtainable upon successfully proving a cohabitation relationship. Prior to the statute's enactment, although termination of alimony was authorized,[20] most times, a cohabitation finding resulted in a modification of an alimony award, bottomed on a lessened-needs analysis.[21] Interestingly, subsection (n) omits reference to modification. The Legislature provided alimony ends completely or is suspended, presumably for the period of cohabitation, once a former spouse commits to involvement in "a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage."

Understanding cohabitation is a frequent basis for movants to seek termination of alimony, what is necessary to invoke this remedy? Many advocate the proofs are limited: prove a serious involvement and alimony ends. Such reasoning emphasizes the relationship status, contending exclusivity and sex equate to "undertak[ing] the duties and privileges . . . commonly associated with marriage" leading to the end of an alimony order. Interestingly, a survey of recent unpublished Appellate Division cases strongly suggests proving cohabitation is not so simplistic.

Since September 2014, two reported cases discuss cohabitation: *Quinn* and most recently, *Landau v. Landau*.[22] *Quinn* is a contract enforcement matter, not a discussion of statutory interpretation and merely mention of the new statute in footnote 3, noting: "because this law was enacted after the PSA was entered, it does not govern this case, and the terms of the PSA apply."[23] Landau, although guided by the amended alimony statute, concerned the movant's burden to obtain pre-hearing discovery when alleging cohabitation in a motion to suspend or terminate alimony.[24] Thus, neither case directly tackled the interpretation of the amended statute.

Several trial courts have considered cohabitation proofs; however, appellate review has not warranted a published an opinion. Unpublished opinions affirm the trial court's exercised discretion in denying cohabitation relief, which may lead to more uncertainty as to what must be presented to constitute cohabitation and end (or suspend) alimony.

Most recently, in *M.M. v. J.Y.*[25] the panel examined the record, which included trial court findings that the former spouse and her romantic partner lived together on "very close to a full-time basis," the couple had a child they both cared for, both the former spouse and her partner were not completely forthright or candid on issues such as the length of time together or even their child's date of birth. Also noted were the trial judge's negative comments regarding the intrusiveness and expense of the cohabitation investigation undertaken by the former husband, who also was found not entirely candid. The appellate panel affirmed the trial judge's findings stating there was no abuse of discretion in concluding the totality of the evidence failed to prove cohabitation under N.J.S.A. 2A:34-23(n). The court declined the invitation to reverse, noting the movant failed to "prove cohabitation to the satisfaction of the court."[26]

The panel's opinion keyed on the cohabiting couple's lack of shared finances. Specifically, the Appellate Division referenced the judge's findings, stating the former spouse and her partner did not "co-mingle[] or intertwine[] financial obligations" or share household chores. Moreover, the partner did not directly contribute to the former spouse or make any promises of support. As to the relationship, the Appellate Division deferred to the trial court's note of the lack of the couple's public expression that they were a couple and credited the partner's testimony that the living arrangement related to his limited income and desire to "spend time" with their child.[27] Perhaps an unsettling comment in the opinion, framed as a holding is: "cohabitation extends beyond simply living together and having a child together. The statute requires analysis of several

factors, including finances, social perception, household chores, and other promises of support."

Another recent case reviewed a marital settlement agreement, allowing alimony modification upon proof of cohabitation.[28] The trial judge denied defendant's motion to compel discovery and suspend alimony payments, concluding defendant "failed to meet his burden to show a prima facie case of cohabitation . . . ." In doing so, the judge was critical of the movant's investigator, who was found to "leap[] to some conclusions without proof," after making "limited" and "overreaching" conclusions after "only thirty-eight surveillance events." Despite the presentation of proofs showing the couple enjoyed 32 of 38 overnights together and admitted they were in a romantic relationship, the Appellate Division deferred to the trial judge's finding: "It simply wasn't enough" for a prima facie showing of cohabitation.[29] Interestingly, the Appellate Division's affirmance also relied on the trial judge's finding: "the present record lacks any evidence that the couple's finances are intertwined or that [the former spouse] is financially dependent upon her significant other."[30]

Another opinion, applying pre-2014 cohabitation case law turned on the number of overnights the former spouse and the partner spent together.[31] The Appellate Division reversed the trial court's rejection of the need for further review, holding a plenary hearing on whether there was cohabitation was necessary to determine whether the former spouse and her paramour stayed overnight only two or three nights per week, as she contended, or four or more overnights each week as movant claimed.[32] The appellate court stated "the frequency of overnight stays, while not completely dispositive, is an important core factor in any cohabitation analysis. Simply stated, people must cohabit to a substantial degree in order for there to be cohabitation."[33]

What can we glean from these and other non-precedential opinions whose holdings do not quite mesh with a commonly held understanding of cohabitation? First, the statute did not end the cohabitation chaos. The emotionally charged issue remains in the forefront of post-marital disputes.

Second, facts matter. As with most family issues, "each case must turn on its own facts," and courts faced with the question of whether a party is engaged in cohabitation "must assess all applicable facts and circumstances, weighing the factors" delineated in N.J.S.A. 2A:34–23(n).[34]

Third, does the statute require the judiciary to draw back the curtain and peer into the personal lives of a former spouse to evaluate whether a new relationship and a couple's conduct amount to cohabitation rather than friendship or dating? Yes. Certainly, it is easier for a judge to assess dollars or quantify the economic impact of a former spouse's new relationship rather than entertain testimony on the intricacies of people's personal lives. Admittedly, relationship review is more complicated and parameters governing the relationship seem elusive.

Fourth, proof a couple shares time in the bedroom only adds evidence to the first prong of the statutory cohabitation definition showing "a mutually supportive, intimate personal relationship." Intimacy alone is insufficient, but at the same time this fact remains crucial when combined with other factors, such as the length of the relationship, the public projection of the relationship, and the depth of involvement in each other's lives and families.

A movant remains disadvantaged to ascertain the explicit nature of a former spouse's apparent new relationship.[35] The former spouse and partner can be opaque in describing their connection, wrapped in denials of cohabitation. Facts showing the relationship may be the only initial evidence a movant can gather. Frankly, evidence of a lengthy, regular, exclusive, intimate, relationship should suffice as prima facie evidence demonstrating the relationship is something other than dating, which in turn should trigger the right to discovery of facts and circumstances identified by the statutory factors to enable movant to flesh out whether cohabitation exists.[36] It would be fundamentally unfair and inequitable to require definitive proof of each statutory factor prior to allowing discovery. After all, a *prima facie* case is a threshold showing; it is not the final proofs.[37] Rather a movant need only offer evidence, along with all reasonable inferences drawn from those facts, sufficient to raise a genuine issue of fact.[38]

It is unfortunate the Appellate Division was not asked to assess the sufficiency of the proffer by the moving party in *Landau*. Instead, the court accepted the trial judge's ambivalent decision stating he could not decide whether the motion proofs sufficiently met the *prima facie* standard.[39]

Fifth, the duties and privileges commonly associated with marriage are not exclusively social. As the unpublished cases reveal, indicia of financial interdependence is weighted heavily to unmask the required relationship. Some showing of shared financial benefits or responsi-

bilities is important because a relationship tantamount to marriage encompasses economic realities. A case that lacks evidence of financial entanglements of some sort fails to establish the second prong of the statutory test requiring the "couple has undertaken duties and privileges that are commonly associated with marriage or civil union." Therefore, establishing some financial component of the new relationship is a necessity to prove markers of a marital-like relationship.

Proof of financial entanglements is justified because the evidence strikes at the underpinning of any alimony award: that is, financial dependence.[40] Early cohabitation cases discuss the financial impact of the relationship noting the connection between emotions and economic sharing. Similarly, the rationale allowing termination of alimony upon remarriage is tied, in part, to a change of financial support and need.[41] So, it is no coincidence that half the factors in subsection (n), assessing the existence of cohabitation, are economically based. This signals the Legislature's message: financial entanglements make a difference.

Further, rationale for the need of some economic proof is found in the monumental discussion on marriage equality found in *Lewis v. Harris*, in which Supreme Court Justice Barry Albin listed "the full benefits and privileges available through marriage[,]" most of which are financial.[42] Simply put, to prove cohabitation, "friends with benefits" means some type of economic benefit to distinguish the relationship from dating.

The uncertainty lies in what quantitative level of benefits is sufficient. If the alleged cohabiting partner buys dinner is that enough? Likely not, as that is closer to dating. If the partner regularly pays for vacations over a significant period of time, will that suffice? Standing alone, no, but depending on other factual support regarding the relationship, maybe. Parting company with the seemingly broad pronouncement in *Mennen*, a couples' decision to have children and live as a family seems to be a strong financial and intimate commitment that involves duties, and privileges associated with marriage. Other facts present in that case may demonstrate otherwise, which suggests this particular holding should be limited.

Assessing a financial element to prove cohabitation leads to this query: If all emotional markers of marriage exist for an extended period, but no financial emoluments are uncovered, would cohabitation be shown? The statute does not elevate a couple's financial entanglement above their relationship markers of a marital-like relationship. Consider that the statute was adopted to ferret out conduct intended solely to avoid alimony termination under N.J.S.A. 2A:34–25. In that light, an alimony recipient was not permitted to engage in a new marital-like relationship, lacking only a legal imprimatur. In short, all facts matter.

Sixth, even though the statute obviates the necessity of proving the exact amount of any economic benefit, as was previously required to demonstrate alimony modification, the unreported cases affirming trial court conclusions that the lack of financial entanglements defeats a cohabiting relationship, strongly suggests a form of *Ozolins*' burden shifting remains viable to defeat claims of cohabitation.

Whether arguing the relationship is or is not cohabitation, the law does not make the statutory factors exclusive, different evidence may be demonstrative of cohabitation or something less than cohabitation. Moreover, each factor need not be present, nor must the evidence showing each factor be accorded the same weight. A fact finder must prudently evaluate all evidence, weighing its totality, in light of all circumstances, not only financial facts.

One last observation. Although there is no case – published or unpublished – directly interpreting the applicable remedies under subsection (n), the statute omits modification, with the exception of preserving marital agreements allowing such relief.[43] Although old habits die hard and many advocate for modification, a few Appellate Division opinions flatly state current remedy choices are confined to suspend or terminate alimony—nothing more.[44]

When evaluating remedies, two significant facts inform whether to suspend or terminate: the length of the relationship and the former spouse's economic dependence. On the one hand when proof is uncovered of a relationship similar to marriage, why shouldn't alimony terminate? After all a remarriage, no matter the duration terminates alimony.[45] Why reward the end of a discovered cohabitation with the continuation of alimony? The counter argument, however, focuses on the reality that alimony obligations are based on need. Reference is made to the dissents by the court on this issue.[46] Most would hesitate to order termination of alimony if the result leaves the former spouse without alternative sources of support.

At this juncture, questions abound on what the statute requires to prove cohabitation in order to achieve the elimination or suspension of alimony. These issues remain open to persuasive advocacy and cry out for a detailed,

reasoned analysis by our courts, giving us a roadmap leading to the effectuation of the Legislature's intent.

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Endnotes

1. N.J.S.A. 2A:34-23(n).
2. N.J.S.A. 2A:34-23(n) (1) to (7).
3. 158 N.J. 185, 202 (1999) ("an intimate relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage").
4. 225 N.J. 34 (2016).
5. 158 N.J. at 202 (defining cohabitation as "serious and lasting.").
6. 92 N.J. 149 (1983).
7. 430 N.J. Super. 552, 570 (App. Div. 2013) ("Cohabitation involves 'an intimate[,]' 'close and enduring' relationship, requiring 'more than a common residence' or mere sexual liaison.").
8. Reiss, 430 N.J. Super. at 557.
9. Quinn, 225 N.J. at 53–54.
10. 83 N.J. 139, 146 (1980).
11. Gayet, 92 N.J. at 154 ("The extent of actual economic dependency, not one's conduct as a cohabitant, must determine the duration of support as well as its amount.").
12. see N.J.S.A. 2A:34-23(n) (1), (2), (6)
13. See Landau v. Landau, __ N.J. Super. __, __ (App. Div. 2019) at *6 (discussing need for prima facie proof of cohabitation to entitle moving party "to know the intimate details of defendant's life and finances and those of her current boyfriend.").
14. Lepis, 83 N.J. at 151 (accepting "the dependent spouse's cohabitation with another" as an event of changed circumstances impacting alimony).
15. Berkowitz v. Berkowitz, 55 N.J. 564, 569 (1970)
16. Compare Quinn, 225 at 48 with Melletz v. Melletz, 271 N.J. Super. 359 (App. Div. 1994).
17. Quinn, 225 N.J. at 48 ("Parties to a divorce action may enter into voluntary agreements governing the amount, terms, and duration of alimony, and such agreements are subject to judicial supervision and enforcement.").
18. Quinn, 225 N.J. at 50.
19. Spangenberg v. Kolakowski, 442 N.J. Super. 529, 538 (App. Div. 2015) (quoting L. 2014, c. 42, § 2.).
20. see Quinn, 225 N.J. at 49
21. Lepis, 83 N.J. at 151.
22. Landau v. Landau, __ N.J. Super __ (App. Div. 2019).
23. Quinn, supra, 225 N.J. at 51 n.3.
24. "The question presented by this appeal . . . is whether the changed circumstances standard of Lepis . . . continues to apply to a motion to suspend or terminate aklimony based on cohabitation following the 2014 amendments to the alimony statute, N.J.S.A. 2A:34-23(n)." Landau, at *1.
25. A-3910-17T3, (App. Div. June 13, 2019)
26. M.M., at *11 (quoting Konzelman, 158 N.J. at 202).
27. Id. at *11.
28. Mennen v. Mennen, No. A-4345-17T1, at *3 (App. Div. Apr. 2, 2019).
29. Ibid.
30. Id. at *5. See also Robitzski v. Robitzski, No. A-2818-14T3, at *5 (App. Div. May 5, 2016) (affirming trial judge's finding movant "failed to meet his burden to show a prima facie case of cohabitation, including any proof of financial interdependency, to justify a change in his alimony obligation).
31. Wachtell v. Wachtell, No. A-3593-13T4 at *4 (App. Div. Apr. 6, 2015).
32. Id. at *5.
33. Ibid.
34. See Jacoby v. Jacoby, 427 N.J. Super. 109, 113 (App. Div. 2012).
35. Landau, at *6 ("There is no question but that a [prima facie shpwing of cohabitatiomn can be difficult to establish . . . .").
36. Cf. Ozolins v. Ozolins, 308 N.J. Super. 243, 245 (App. Div. 1998).

37. "By prima facie is meant evidence that, if unrebutted, would sustain a judgment in the proponent's favor." O'Connor v. O'Connor, 349 N.J. Super. 381, 397 (App. Div. 2002) (quoting Baures v. Lewis, 167 N.J. 91, 118 (2001). See also Polhemus v. Prudential Realty Corp., 74 N.J.L. 570, 582 (1907) ("In a legal sense, then, such prima facie evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact.").
38. See Slohoda v. United Parcel Serv., Inc., 207 N.J. Super. 145, 154-55 (App. Div. 1986)(discussing sufficiency of prima facie evidence and burden shifting when evaluating claims and defenses in Law Against Discrimination, N.J.S.A. 10:5–12a actions).
39. Landau at *3.
40. Quinn, 225 N.J. at 48.
41. N.J.S.A. 2A:34–25.
42. Lewis v. Harris, 188 N.J. 415, 448-50 (2006).
43. See Spangenberg, 442 N.J. Super. 529, 532, 538–39 (App. Div. 2015) (declining to apply the cohabitation criteria of subsection (n) retroactively to parties who had entered into an agreement stating alimony would be subject to review consistent with Gayet and evolving case law).
44. See Robitzski, No. A-2818-14T3 at *5 (App. Div. May 5, 2016) ("We recognize that the new statute eliminates the modification of alimony as a remedial alternative to termination or suspension upon a finding of cohabitation.").
45. See Flaxman v Flaxman, 57 N.J. 458, 463 (1971) (holding that, even where remarriage is annulled, alimony may not be reinstated).
46. See e.g., Quinn, 225 N.J. at 56 (Albin, J. dissenting) ("'The private lives of divorced women are no business of the law' when their personal relationships have not enhanced their economic standing.") (quoting Konzelman, 158 N.J. at 204 (O'Hern, J., dissenting)).