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CHAIR'S COLUMN

How Sweet It Is

by Edward J. O'Donnell

Those of you old enough to remember, will recall the words, "How sweet it is!" as a trademark phrase of comedian Jackie Gleason. I was reminded of this phrase several months ago during the Family Law Section Annual Retreat in South Beach, Miami, the home of the *Jackie Gleason Show* and Jackie Gleason Theatre. The phrase is one that is particularly relevant to our section's membership. For us, the phrase resonates.

"How sweet it is!"

It is, truly, a 'sweet' time to be a member of the Family Law Section. The energy, the enthusiasm, the collegiality and camaraderie could not be more apparent. Those of you who went to South Beach, those of you who gathered at our regional meet and greets, and those of you that attended the NJSBA Annual Meeting in Atlantic City and the Mid-Year Meeting in Santa Barbara know exactly what I mean.

We are the envy of every other section of the New Jersey State Bar Association. We set the standard. What other section draws 500 attendees for a Continuing Legal Education program, as does Frank Louis' Annual Family Law Symposium? What other section boasts an Annual Retreat drawing more than 200 attendees? What other section informs its membership by newsletter and educates its members by a first-rate scholarly publication such as the *New Jersey Family Lawyer.* But to say that we merely set the standard minimizes the role we play. In fact, we, the members of the Family Law Section, are some of the leaders of the State Bar Association. From our ranks come officers, trustees and other leaders of the NJSBA. Indeed, we are still reveling in the many successes of the association's immediate past president, a former chair of this section and Tischler Award winner, Lynn Fontaine Newsome.

As a section, however, we did not arrive here overnight. The services we provide to our membership come at a cost. The leaders of our section have, for years, foregone billable hours in order to dedicate time to the needs of our membership. Over the last two years, a considerable amount of time was put into the process of how we govern ourselves. This process of amending our bylaws—an initiative of Past President Ivette Alvarez, and carried forward by the Bylaws Subcommittee chaired by Jane Altman—was extremely time consuming, but the rewards we will reap will

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IMMEDIATE PAST CHAIR'S COLUMN

Closing Remarks

by Lizanne Ceconi

When I was sworn in last May in Atlantic City as chair of the Family Law Section, I implemented a mission statement that we would adopt the CORE Approach. CORE is an acronym that stands for communication, outreach, relationships and education. Through the collaborative efforts of the Family Law Section Executive Committee, I believe we came close to meeting our goals.

Our communication efforts brought for the first time e-newsletters advising the entire Family Law Section about what we do as a section. Charles F. Vuotto Jr.,

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justify our efforts. In making some necessary and overdue changes, we have now ensured that there will be much more diversity on the Executive Committee. Changes in our bylaws also have now assured us that the *New Jersey Family Lawyer* will continue to be relevant to our membership while maintaining its independence.

So what is the platform for the section for the upcoming year? You all recall that last year our now immediate past chair, Lizanne Ceconi, brought us back to basics with her CORE approach, an acronym for communication, outreach, relationships and education. It was a new term of art, but not a new concept. It was a sensational success.

There will be no new acronyms this year. The basics remain the same. We know what our section needs and what serves our membership. But for those of you who need a catchy phrase, I am introducing you to the MORE approach—MORE communication, MORE outreach, MORE relationships and MORE education.

This year, for the third year running, we are continuing the regional meet and greets throughout the state. All have been tremendously successful in establishing a forum with local bar leaders in a social setting. Our e-newsletter, launched by Chuck Vuotto last year, is now being turned out by our own techie guru, Amy Cores. Indeed, our efforts at 'outreach' have yielded great dividends. This year, the Family Law Executive Committee Board will boast a representative from every county in the state.

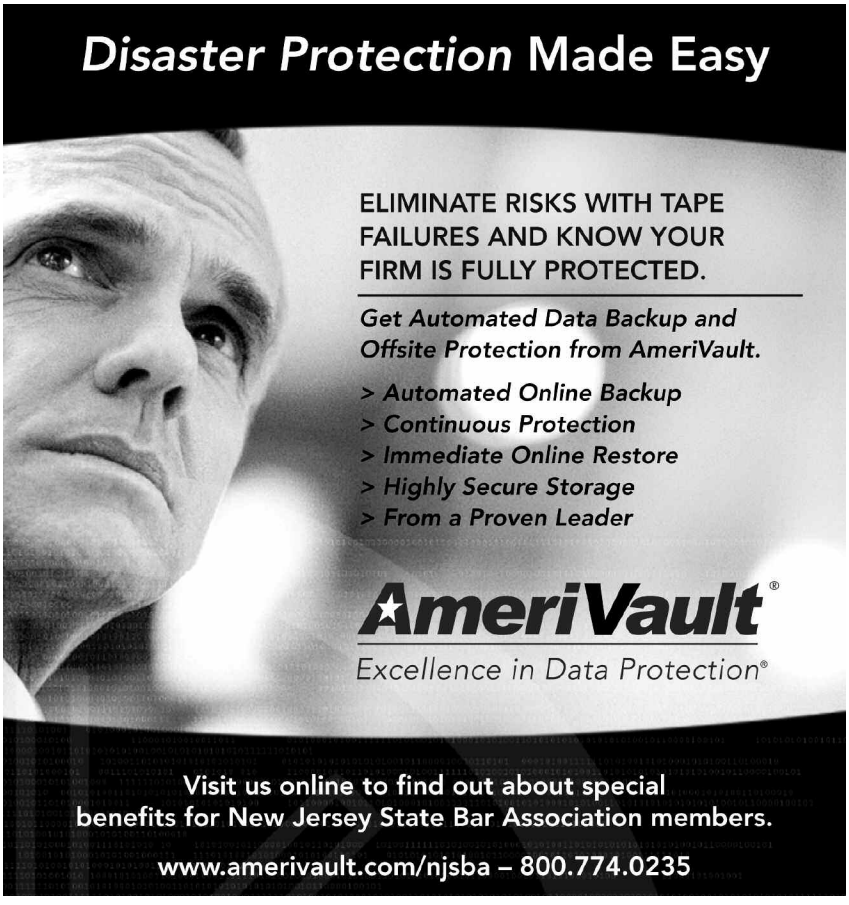
The great work of last year's past young lawyers chairs needs mention. This subcommittee, once fledgling, made a 180-degree turnaround under the leadership of Sonya Zeigler and Alison Leslie. In totally revamping the Young Lawyers Committee, membership was boosted exponentially, largely as a direct result of the regional meet and greets and small informal seminars for young lawyers. This year, the subcommittee kicks into overdrive with Sheryl Seiden and Carrie Schultz at the helm. Their plans for boosting membership and providing educational and social opportunities for young lawyers (and the young at heart) will produce tomorrow's bar leaders and yield tremendous dividends for our section in the years to come.

Our relationship with the bench, the administration, our sponsors and vendors continues to grow. These relationships have in no small way been cultivated by our social events. This year, look forward to joining us at the annual holiday party, and, of course, at our Annual Retreat in Los Cabos, Mexico from March 18 through March 22, 2009. You have all heard, "What happens in Vegas, stays in Vegas." Well, what happens in Cabo, never happened!

Our section's contribution to the education of its membership is apparent. This year at the NJSBA Annual Meeting, we launched a family law track consisting of six substantive programs. Add to this the Family Law Symposium, the Hot Tips Seminar, the programs at the retreats and other CLE programs our members create, moderate and participate. This section is vital to continuing education. As we move into the era of mandatory continuing legal education, we will continue to be at the forefront as the primary provider of continuing education to family law practitioners.

So, the prognosis for the upcoming year is, in one word, 'sweet.' Look forward to a busy, productive, and fun-filled year. ■

(Editor's Note: This column is an excerpt of remarks made by Edward O'Donnell at the NJSBA Annual Meeting in Atlantic City on May 23, 2008.)



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Immediate Past Chair's Column

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who is now the section's chair-elect, did a tremendous amount of work putting the e-newsletter together, and I thank him personally for all his efforts.

We also initiated a listserv through the NJSBA. On a daily basis, family lawyers throughout the state can share ideas, concerns and questions about their family law practices. I would like to thank Amy Sara Cores, one of our young lawyers, for launching this service provided through the NJSBA.

Our outreach endeavors were statewide with meet and greets in north, central and southern New Jersey. I solicited family law members throughout the state to see if there was interest in participating on the Executive Committee. I am particularly proud of the increased participation of our southern colleagues, who have become a significant part of our section. We now have representatives from each county or vicinage in the state. I thank those who continue to make great efforts in attending our meetings and functions from good distances. The involvement and all the new enthusiastic faces really made my year rewarding.

The relationship part of my mission statement is one of the easier goals to attain. Everywhere we go, people marvel at our unity and readiness to step up to the plate for each other and the section. The annual holiday party was a huge success. It gave us the opportunity to socialize with, as well as honor, retired Judge Eugene D. Serpentelli for his years of outstanding commitment and service to the family bar. This year we created the Serpentelli Award to recognize the unique and outstanding relationship that exists between the family bench and bar.

The letter "R" can also stand for retreat, and this past year, over 225 people traveled to South Beach for fun, camaraderie, memories and a little education. We also created the first annual Wally Award, whereby the registrant who demonstrates an outstanding ability to have fun while on retreat receives an award!

Finally, as a section, we are committed to continuing legal education. Our Hot Tips Seminar and Symposium are truly must-attend seminars. Frank A. Louis continues to do a magnificent job in coordinating the Family Law Symposium. It has become a sold-out event. Our co-chairs of the Young Lawyers Subcommittee, Alison Leslie and Sonya Ziegler, instituted for the first time a seminar series offering free seminars and dinner to young lawyers throughout the state. It is one of the best services young lawyers can get for their membership in the Family Law Section. I would like to thank Alison and Sonya for beginning what will hopefully become a tradition of the section.

In addition to our seminars, we worked hard on legislation impacting our practices. While there were no significant family law bills this year, we became pro-active, and have written and introduced legislation that adds irreconcilable differences as a cause of action for dissolution of civil unions and domestic partnerships. We certainly owe a debt of gratitude to one of our freshman Family Law Section Executive Committee members, Debra Guston, for her hard work, insight and commitment. Thanks are also in order for Robert O'Donnell and Amanda Trigg, who co-chaired the Legislation Committee for the section.

This past year, the section also spoke out against the recommendations for public access to court filings. The Family Law Section's position paper was largely adopted by the NJSBA. I am confident that our input will have a meaningful effect on whether neighbors can read other neighbor's divorce papers.

When it comes to legal education, few can compete with the contributions that have been made by my partner, Cary B. Cheifetz. He has devoted a substantial portion of his career to teaching family lawyers and mentoring young family lawyers. On May 14, we honored Cary as the Tischler Award winner before a record-breaking crowd.

The standards to be considered when selecting the Tischler Award recipient focus on public service in the advancement and development of family law, publishing articles, participating in seminars, sitting on committees and participating in groups that advance family law and the positive image of a family lawyer. There is no doubt that Cary embodies all those standards and more. Most importantly, Cary carries with him collegiality and grace in the face of a stressful area of practice. His good humor and style make him a pleasure to have as an adversary, mediator or arbitrator. As his partner, I cannot adequately express what an honor, privilege and experience it has been to work with him for the last nine years. He makes us all proud to be matrimonial lawyers.

In addition to Cary, I also want to thank my partners, Brian M. Schwartz and Sheryl Seiden, for being incredibly supportive of me during my year as section chair. Besides their remarkable contributions to the Family Law Section, *New Jersey Family Lawyer* and the Family Law Section Young Lawyers Subcommittee, and assisting me in my responsibilities to the section, they and all our associates did a tremendous job of picking up the slack and getting me through this year. There simply are insufficient words to express the thanks I extend to my assistant, Flo Fosello. Throughout my tenure as chair, Flo was my go-to person sending emails and notices, putting together binders and making me look somewhat efficient! Never once did she complain about the long hours or volume of work cast upon her.

This past year was very rewarding, but also personally and professionally challenging in matters

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outside my control. The love and support I received and continue to receive from my husband, Ken Grispin, and our daughter, Casey, gave me the strength and energy to fulfill my obligations to the section. As family lawyers, I believe we come to appreciate our families more because of all the strife we see on a daily basis. When it comes to family, I am truly blessed!

My mission statement of the CORE approach kept me on track and focused during the year when it was not always easy. The help from my officers, Edward O'Donnell, Chuck F. Vuotto Jr., Thomas Snyder, and Andrea White O'Brien, made it a fun and rewarding year. Let's keep the momentum going. Please join me in supporting our chair, Ed O'Donnell, this year. I have no doubt that he will continue the traditions of the pre-eminent section of the NJSBA.

There are many others I would like to thank for their encouragement and support of me and my goals over the past year. It is difficult to name all of them, and I have tried to acknowledge my appreciation of their efforts throughout the year. The entire Family Law Section Executive Committee worked together as a cohesive and respectful group to tackle all the issues posed over the year. Each member showed a commitment and responsibility to all that was asked of him or her.

I also cannot tell you how honored I was by the number of notes and letters received in response to many of my columns in this publication. Family lawyers are the most compassionate, earnest and fun-loving lawyers. I am truly humbled to have had the opportunity to be your leader for the past year, and thank all of you for contributing to the success of the Family Law Section. ■

Meet the Officers

Edward J. O'Donnell, (Chair), certified as a matrimonial law attorney by the Supreme Court of New Jersey, is a partner in Donahue, Hagan, Klein, Newsome & O'Donnell, P.C., concentrating his practice in family law with an emphasis in divorce litigation. Mr. O'Donnell is president of the Essex County Bar Association, past chair of the association's Family Law Committee and was the 1998 recipient of the Essex County Bar Association Family Law Achievement Award. Mr. O'Donnell is an also officer of the Family Law Section of the Association of Trial Lawyers of America, as well as the immediate past president of the Northern New Jersey Family Law Inn of Court. He has lectured on family law issues for ICLE, the Association of Trial Lawyers of America, the New York State Bar Association, the Canadian Institute, the New Jersey Family Law Inns of Court, and the Essex and Bergen County Bar Foundations. A published author, he has contributed to *New Jersey Family Law Practice, 11th Ed.,* published by NJICLE, and the Essex County Bar Association publication, *Traps for the Unwary.*

Charles F. Vuotto Jr., (Chair-Elect), is a shareholder with the Woodbridge-based law firm of Wilentz, Goldman & Spitzer. He was admitted to the bar of the state of New Jersey and to the U.S. District Court of the District of New Jersey in 1986. Mr. Vuotto was graduated from Seton Hall University with a bachelor of arts degree in 1983 and from Ohio Northern University, Claude W. Pettit College of Law, with the degree of juris doctor, in 1986. He is certified by the Supreme Court of the state of New Jersey as a matrimonial attorney. Mr. Vuotto is an officer of the NJSBA Family Law Section Executive Committee and co-managing editor of the *New Jersey Family Lawyer*. He is also the co-chair of the Matrimonial Section of ATLA-NJ. Mr. Vuotto frequently lectures to the public, bench, bar, accountants and paralegals on various family law related issues. Has been appointed as a discovery master by the superior court. He is an active panelist of the Union County Early Settlement Program. Mr. Vuotto authored the brief in support of the New Jersey State Bar Association's motion for leave to appear as *amicus curiae* in the case of *Brown v. Brown*, 348 N.J. Super. 466 (App. Div. 2002) and has authored or co-authored numerous articles on the topic of family law.

Thomas J. Snyder, (First Vice Chair), is a partner with the law firm of Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, and devotes his practice exclusively to family law matters. As a member of the NJSBA, he has contributed to the New Jersey State Bar Association *amicus curie* brief submitted in the matter of *Lewis v. Harris*, 185 N.J. 415. As a former legislative chair for the section, he has testified on behalf of the New Jersey State Bar Association before state legislative subcommittees involving open adoption. For his lobbying efforts, he received the New Jersey State Bar Association Annual Distinguished Legislation Award for 2006. He has litigated the following reported cases: *Anyanwu v. Anyanwu*, 339 N.J. Super. 278 (App. Div 2001) and *Steneken v. Steneken*, 367 N.J. Super. 427 (App. Div 2004) trial level, unreported. Mr. Snyder has lectured on family law matters on behalf of the NJSBA, the NJSBF and ICLE. He is a member of the Association of Trial Lawyers of America and a graduate of the National Institute of Trial Advocacy. He graduated from Seton Hall School of Law and served as judicial law clerk for the Honorable Peter B, Cooper, Superior Court of New Jersey, Essex County.

Andrea White O'Brien, (Second Vice Chair), is a partner in the family law department of Lomurro, Davison, Eastman & Munoz, in Freehold. Ms. O'Brien has been certified by the Supreme Court of New Jersey as a matrimonial law attorney, and was a 2006 recipient of the Women of Achievement Award from the Women Lawyers in Monmouth. She is an associate managing editor for the *New Jersey Family Lawyer* and is qualified, pursuant to Rule 1:40, to mediate family law cases. Ms. O'Brien is serving her third term as the co-chair of the Monmouth Bar Family Law Committee, is chair-elect of the NJSBA Certified Attorney Section, and a member of the Association of Trial Lawyers of America-New Jersey Chapter, the Monmouth Bar Association, the Ocean County Bar Association, the Women Lawyers of Monmouth County, and the Jersey Shore Collaborative Law Group. She serves as a panelist in the Monmouth County Early Settlement Program and lectures on family law issues. Ms. O'Brien earned her bachelor of arts degree from Villanova University and her juris doctorate from Brooklyn Law School. She served as a judicial law clerk for the Honorable Clarkson S. Fisher Jr.

Patrick Judge Jr., (Secretary), is a shareholder in the family law department of Archer & Greiner, P.C., in Haddonfield. Mr. Judge is an associate managing editor for the *New Jersey Family Lawyer*. He is a member of the New Jersey Supreme Court Committee on the Unauthorized Practice of Law and the District IV Ethics Committee for Camden and Gloucester counties. In addition, Mr. Judge serves as an early settlement panelist in Burlington, Camden and Gloucester counties and lectures on family law issues. He also serves regularly as a blue ribbon panelist and is the author of several articles that have been published in the *New Jersey Family Lawyer*. Judge earned his bachelor of arts degree from Allentown College of St. Francis de Sales, where he graduated *cum laude*, and his juris doctorate from Widener University School of Law, where he also graduated *cum laude*. He served as judicial law clerk for the Hon. Donald P. Gaydos, in Burlington County, Family Part.

Lizanne J. Ceconi, (Immediate Past-Chair), is a principal and managing partner of Ceconi & Cheifetz, LLC, in Summit. Ms. Ceconi served as chair of the NJSBA Family Law Section in 2007-2008. She is a past president of the Union County Bar Association and has served on the Judicial and Prosecutorial Appointments Committee and the Family Law Committee. Ms. Ceconi served as president of the Northern New Jersey Inns of Court and is presently a master and group leader. On behalf of the NJSBA Family Law Executive Committee, she has been instrumental in planning many of the section's Annual Family Law Retreats, including South Beach, Charleston, Santa Fe, Las Vegas and New Orleans. Ms. Ceconi received her undergraduate degree from Villanova University and her law degree from Seton Hall School of Law. ■

Avoiding a *Harrington* Hearing

by Jane R. Altman

How many times do we leave an adversary's office, a mediator's office, or the courthouse after hours or days of intensive settlement negotiations believing we have finally settled that old case only to learn the next morning that someone has reneged? Your client or his or her spouse has, overnight, reconsidered a basic term, thought of 17 more issues that are essential to his or her approval or simply has buyer's remorse. At the conclusion of the settlement negotiations, your client asked you: "Can I rely on this agreement?" Optimistically, you may have answered: "Sure. It's just a matter of drafting the property settlement agreement." Now you have to call and backpedal due to the 17 new contingencies raised by the spouse.

Can you avoid this all too familiar scenario? There's a very good chance you can, if you make sure the basic terms of the agreement are written or typed and signed or initialed by the parties *before* you leave the settlement conference. Having a memorandum of understanding (MOU) ready to revise on a computer or mark up by hand is usually a good idea. However, even a signed document may not avoid one party's attempt to repudiate the deal. The question addressed here is whether the repudiating party has the right to a hearing to enforce the terms of the agreement (commonly known as a *Harrington* hearing)[1] when there is no dispute that a written agreement was reached.

The first step in this process is to acknowledge that there are certain policy pronouncements from the Supreme Court. There is a strong public policy in the state of New Jersey favoring the stability of settlement agreements, and presuming them to be valid and enforceable.

In *Nolan v. Lee Ho*,[2] the New Jersey Supreme Court stated that "a settlement agreement between parties to a lawsuit is a contract," and emphasized that "settlement of litigation ranks high in our public policy."[3]

In the absence of a showing of fraud, duress or unconscionability, interspousal agreements are not to be lightly disturbed.[4]

In *Peterson v. Peterson*,[5] the New Jersey Supreme Court reaffirmed the longstanding principle regarding the enforcement of settlement agreements, noting that:

> agreements that are essentially consensual and voluntary in character are therefore entitled to considerable weight with respect to their validity and enforceability.[6]

The Appellate Division, in *Schiff v. Schiff*,[7] stated that

> when a contract has been fairly procured and its enforcement will work no injustice or hardship, it is enforced almost as a matter of right. If it has been procured by fraud or falsehood, or its enforcement will be attended with great hardship or manifest injustice, the court will refuse its aid.[8]

The public policy reasons favoring the enforcement of settlement agreements were cogently set forth by the New Jersey Supreme Court as follows:

> Voluntary agreements that address and reconcile conflicting interests of divorcing parties support our strong public policy favoring stability of arrangements in matrimonial matters. The prominence and weight we accord such agreements reflect the importance attached to individual autonomy and freedom, enabling parties to order their personal lives consistently with their post-marital responsibilities. Thus, it "would be shortsighted and unwise for courts to reject out of hand consensual solutions to vexatious personal matrimonial problems that have been advanced by the parties themselves." For these reasons, "fair and definitive arrangements arrived by mutual consent should not be unnecessarily or lightly disturbed." The very consensual and voluntary character of these agreements render them optimum solutions for abating marital discord, resolving matrimonial differences, reaching accommodations between divorced couples, and assuring stability in post-divorce relationship. (Internal citations omitted.)[9]

If you have a signed form of written agreement, whether handwritten or typed, which covers the basic issues in your case, even though it may not be the comprehensive form of marital settlement agreement with all the boilerplate we like to include, you have a very good chance of enforcing that agreement. The reneging party who is seeking to set aside the agreement has the burden of demonstrating extreme circumstances that would justify setting it aside through clear and convincing evidence.[10] This is, as it should be, a difficult burden to meet. A sufficient showing of fraud, duress or unconscionability will be the exception, not the rule, and clearly will be very fact sensitive.

What if the reneging party argues that he or she did not under-

stand when a hastily drawn agreement was signed or initialed? These arguments are unlikely to prevail if he or she was represented by an attorney at the time, and if the written or typed agreement was initialed or signed. After all, if it was not a binding agreement, there would be no reason for the parties to sign it. If the reneging party signed the agreement, or abided by any provision of it, he or she may be precluded from seeking to set aside the agreement by the doctrine of unclean hands.

The law of the state of New Jersey has long held that a court must not give relief to a wrongdoer in the transaction.[11] A court of equity is unlikely to permit the reneging party to set aside an agreement, and therefore benefit from his or her 'wrongdoing' if he or she voluntarily signed the agreement. This is particularly true if he or she subsequently acted in accordance with any part of the agreement, thereby complying with it. But, failure to comply with the agreement does not, by itself, support an argument that there was no binding agreement.

It is not uncommon when settlement negotiations appear to be progressing, but later fall apart, for one of the attorneys to threaten that he or she will seek a *Harrington* hearing to enforce the alleged verbal agreement that was reached. In the *Harrington* case, the parties had reached a verbal agreement on the essential terms of settlement but had not yet memorialized the agreement in a comprehensive marital settlement agreement. After a plenary hearing, the oral agreement was ultimately enforced, despite one party's attempt to repudiate the agreement.

There is arguably no need to waste time, money and resources on a *Harrington* hearing when there is a writing setting forth the basic settlement terms, which has been signed or initialed by the parties. In theory, it should not matter if the terms are scrawled on a series of cocktail napkins, as long as they are readable, they cover the basic issues, and they are acknowledged as accepted by the signatures or initials of the parties. That is why it is always a good idea to memorialize the agreement in some form (such as a MOU) and have the parties sign it before leaving the settlement conference.

When arguing that a *Harrington* hearing is unnecessary, remind the court that not every factual dispute arising in the context of matrimonial proceedings triggers the need for a plenary hearing.[12]

An unreported 2007 Appellate Division decision held that a *Harrington* hearing was not required when one party tried to renege on a negotiated and signed MOU. In *Minervini v. Minervini*,[13] decided on March 20, 2007, the Appellate Division rejected the defendant-appellant husband's attempt to renege on the agreement contained in an MOU. The defendant husband argued that he had not conducted discovery and obtained an expert to properly value his own stock options, and he should not have agreed to the value in the signed memorandum. He sought a *Harrington* hearing, which was denied by the trial court.

The Appellate Division affirmed the trial court decision reviewing the applicable law. Emphasizing that the record revealed no evidence of any unconscionable conduct or material misrepresentation, the appellate court held that the trial judge correctly denied the request for a *Harrington* hearing.

A *Harrington* hearing, as well as the attendant costs, both monetary and emotional, is not an inevitable requirement to enforce a written agreement. Take the extra hour to write out the terms once they are agreed upon, and do not leave without getting both parties to sign and acknowledge their acceptance of the terms. You'll be glad you did. ■

ENDNOTES

1. *Harrington v. Harrington*, 281 N.J. Super. 39 (App. Div. l995), *cert. denied*, 142 N.J. 455 (1995).
2. 120 N.J. 465, 472 (1990).
3. *Id*. at 472.
4. *Edgerton v. Edgerton*, 203 N.J. Super. 160, 171; *Avery v. Avery*, 209 N. J. Super. 155, 162 (App. Div. 1986); *Wertlake v. Wertlake*, 137 N.J. Super. 476 (App. Div. 1975).
5. 85 N.J. 638 (1981).
6. *Id*. at 642.
7. 116 N.J. Super. 546 (App. Div. 1971), *cert. denied*, 60 N.J. 139 (1972).
8. *Id*. at 560.
9. *Konzelman v. Konzelman*, 158 N.J. 185, 193-94 (1999) (citations omitted).
10. *Nolan v. Lee Ho*, 120 N.J. 465 (1990).
11. *Borough of Princeton v. Mercer County*, 169 N.J. 135, 158 (2001; *Bond v. Bond*); 36 N.J. Super. l6 (App. Div. l955).
12. *Harrington* at 47; *Fineberg v. Fineberg*, 309 N.J. Super. 205 (App. Div. 1998).

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David vs. Goliath

Defense Strategies for Litigating the Abuse and Neglect Trial Initiated by the Division of Youth and Family Services

by Allison C. Williams

Any family law attorney who regularly litigates contested custody matters understands that of all family court litigation, nothing engenders in our clients a greater passion for battle more than the possibility that they might lose custody of their child. This premise is all the more resounding in custody litigation initiated by the Division of Youth and Family Services (DYFS). Many family law practitioners have shied away from DYFS litigation due to the unfortunate reality that parents in need of representation may not have the resources to afford private counsel.

Additionally, due to the relative dearth of family law practitioners who understand and are willing to undertake DYFS litigation, these litigants are often left without skilled private counsel to represent them against an adversary (*i.e.*, the government) who has, for all intents and purposes, unlimited resources. This article will provide a procedural overview and practice pointers for defense counsel when defending against a Title 9 complaint filed by the Division of Youth and Family Services, seeking a finding of abuse or neglect against a parent.[1]

INITIATION OF LITIGATION

DYFS litigation is commenced with the filing of a verified complaint and order to show cause.[2] The division will be represented by the Attorney General's Office. The complaint will seek the appointment of a law guardian, an attorney assigned to represent the child, from the Office of the Public Defender. Parents who are unable to afford private counsel are assigned an attorney from the Office of Parental Representation, subject to verification of the parent's financial inability to afford private counsel.

The litigation may be commenced either before or after the child has been temporarily removed from a parent's care and custody.[3] A child can only be removed without a court order where the child faces "an imminent danger to" his or her "life, safety or health."[4] The division is required to make "reasonable efforts" to prevent removal of children from families.[5] The division is also required to make reasonable efforts to reunify children that have been removed, unless the court determines that the alleged acts qualify as an exception to this mandate to attempt reunification.[6]

After removing a child, the division must file a complaint within two days.[7] If the division does not remove the child, but merely asks the child's custodial parent to agree to keep the child away from a person accused of an act of abuse and neglect, including the noncustodial parent, then the division is not obligated to file a complaint within two days. In these circumstances, the parent being investigated would have to file his or her own application to compel production of the child and reinstitution of his or her parental access.

Often the accused parent is denied access to his or her child while DYFS is investigating. The division may ask that one parent sign a case plan, agreeing to keep the child away from the parent under investigation. The parent being investigated naively believes that if he or she just cooperates with DYFS employees, they will go away. This rarely occurs. If a parent is being denied access to his or her child pursuant to a case plan, strongly consider filing an application to force the production of the child. The longer the investigated parent waits, while being kept from his or her child, the longer the division has to make a case against the parent. When parents force the issue, the division usually accelerates its investigation, increasing the likelihood of the division's unauthorized deviations from the investigatory process required by the New Jersey Administrative Code.

The division has far-reaching power to remove a child from his or her parents. Removal can occur with a court order or, in certain limited circumstances, without a court order.[7] An order of temporary removal can only be obtained before a preliminary hearing, if: 1) the parent was informed of the division's intent to apply for an order; 2) the child appears to suffer from the abuse or neglect by his or her parent or guardian so much so that his or her immediate removal is necessary to avoid imminent danger to the child's life, safety or health; *and* 3) there is not enough time to hold a preliminary hearing.[8]

Once your client has been served with a complaint alleging

abuse and/or neglect, a decision must be made whether or not to file a formal answer. A formal answer is not required to be filed.[9] However, if your client presents as truthful and is certain as to the various facts contained in the complaint, you should seriously consider filing a very detailed answer specifically responding to the allegations, so your client takes advantage of every opportunity to persuade the trial court of his or her non-culpability and, most importantly, the needs of the child at issue to have substantial access to and contact with the parent pending resolution of the matter.

Orders to show cause filed in DYFS proceedings seeking interim relief are governed by Rule 4:52-1(a).[10] Thus, in order to obtain an order of removal of the child or restriction of parental access, the division must demonstrate that "immediate and irreparable damage will probably result to the [child] before notice can be served or informally given and a hearing had."[11]

In all practicality, it is exceedingly rare that the court will not find immediate and irreparable harm based upon the allegations contained in the complaint; however, it is possible to prevent the removal of a child when appearing at the first court appearance on the complaint by demonstrating that while the complaint may have, in fact, plead a *prima facie* showing of violation of the Title 9 statute (*i.e.*, an act of abuse and/or neglect), the division failed to demonstrate that the child would be immediately and irreparably harmed by remaining with his or her parents.

As previously noted, division caseworkers are vested with the authority to remove a child without a court order and without the parent's consent in certain limited circumstances.[12] Only upon a showing that "the child is in such condition that his continuance in said place or residence or in the care and custody of the parent or guardian presents an *imminent danger to the child's life, safety or health*, and there is insufficient time to apply for a court order" can the division remove a child.[13] This statutory authority also extends authority to a hospital to keep a child who fits the "imminent danger to life, safety or health" standard.[14]

Far too often, defense counsel attends the first court appearance and simply concedes removal or the restriction of parenting time based upon the allegations in the complaint, preferring to wait until the return date on the order to show cause to obtain more information to oppose the application. It is imperative that counsel never concede removal of the child or restriction of parental access or parenting time pending the return date on the order to show cause, absent extraordinary circumstances, such as the immanency of indictment on criminal charges or the division's pleading of allegations, which, if true, would lead to an application by the division to terminate parental rights. If the child is removed from the parent at the first hearing on the complaint, the judge is more inclined in subsequent hearings to validate his or her prior decision authorizing removal of the child and to keep the child out of the parent's care and custody.

If the child was removed without court order, upon notification of the division's action the parent can file an application for the immediate return of the child.[15] The parent is entitled to a hearing within three court days.[16] At the hearing, the court's paramount concern must be the safety of the child. Nevertheless, the statute mandates that the court return the child "unless it finds that such return presents an imminent risk to the child's life, safety or health."[17] Thus, in presenting testimony at a hearing seeking return of the child, it is paramount that defense counsel focus upon the imminent risk standard. Not all allegations in the complaint may rise to the level of imminent risk; therefore, it is possible that the court may find that the division has plead allegations that could constitute abuse and/or neglect, while finding that there is no imminent risk to the child to prevent return to his or her parent.

The division is required to supply to the court and to counsel all relevant DYFS reports, expert reports or other documents upon which the division intends to rely at trial.[18] These documents must be supplied on the first return date of the order to show cause if then available, or if not available, as soon thereafter as they become available.[19] Often the division will withhold documents from defense counsel that are beneficial to and exculpatory of the parent, under the guise that the documents are not 'relevant' to the division's case. For this reason, it is imperative that defense counsel inspect the division's file, which is expressly authorized by the Rules of Court.[20]

Other than the documents the division gives to defense counsel or defense counsel locates in the division's file upon inspection, further discovery is prohibited by any party, except upon leave of court.[21] This prohibition, though imposed upon all parties, serves a significant disadvantage to the parent. For the most part, the division already has its discovery, which is usually appended to its complaint. Conversely, the parent cannot depose division caseworkers, require the person who made the report to the division submit answers to interrogatories or produce documents, or demand a psychological evaluation of a child making allegations of abuse against his parent without express authorization from the court. Consequently, the division can obtain discovery to put forth its case without the parent's having any say regarding what information, if any, the division is entitled to collect, while the division has every opportunity to—and usually will—oppose any and all requests for discovery made by defense counsel.

At the return date of the order to show cause, if the child is not returned to the primary care of his or her parent, the division must ask the parent to provide names of family members and/or friends who can keep the child pending resolution of the case.[22] If the non-accused parent is available and willing to take the child, the division should place the child with that parent without the need for a lengthy investigation.[23] At the conclusion of the division's case, if the accused parent has been found not to have committed the alleged acts, or has addressed the issues prompting DYFS involvement, the parent is entitled to a hearing to determine whether custody should remain with the non-accused parent or should revert to the exonerated parent.[24]

If the division caseworker likes the parent, often he or she will have already requested this information from the parent, and the division will have begun its approval process of those persons named before the matter is even scheduled in court. Conversely, if the parent is accused of heinous acts, such as sexual abuse, the division caseworkers will often require incessant reminding of their statutory obligation to seek placement of the child with family or friends of the accused parent.

Before placing the child with any proposed caregiver, the division must perform a background check, including a criminal history background check for each resource family parent or applicant, each household member at least 18 years of age, each new household member at least 18 years of age, and each child who reaches 18 years of age post-placement.[25] Additional information is gathered on the proposed applicant, including his or her occupation, income, any history of domestic violence, and a home study to ensure person is fit to take the child.

It behooves defense counsel to speak with the parent prior to the removal hearing to obtain names of potential caretakers for the child, in the event the first hearing is unsuccessful. When asking your client for alternative caregivers, be sure to ask if the parent's family members or friends have ever been convicted of any criminal offenses, which would prohibit them from taking the child.[26]

DYFS hearings and trials are confidential proceedings in which only the division, its agents, the accused parent, any interested parties and all attorneys involved may be present.[27] Conferences are presumptively private; however, this presumption can be overcome.[28] Do not let the division caseworkers or the deputy attorney general convince defense counsel that the courtroom must be closed, and that no one can be admitted. The closing of the court is discretionary, not mandatory.[29] The parent's need for emotional support, particularly at the commencement of DYFS litigation, is certainly reason enough to argue that the court should allow his or her parents, friends or loved ones into the courtroom.

Within 30 days from the return date, the court must conduct at least one case management conference. If, prior to this conference, the court has ordered that the child remain out of the parent's primary care pending resolution of the matter, then defense counsel must begin preparing the parent to oppose the division's complaint.

The first step in preparing a Title 9 case for trial (known as a fact-finding hearing) is to read and dissect the Title 9 statute. Review each allegation to see if it meets the definition of abuse and/or neglect under the Title 9 statute. The law is written so broadly, that even seemingly innocuous acts or omissions may constitute child abuse or neglect under the statute.

N.J.S.A. 9:6-8.9 identifies six characteristics of an 'abused child,' the existence of any of which characteristics shall result in a finding of abuse or neglect against the parent, guardian or person responsible for the child's primary care when the act or omission occurs. These characteristics are broadly based, including both acts and omissions, and exceed that which the average person would likely conceive of as abuse or neglect.

Generally, a parent commits an act of child abuse or neglect by committing any one or more of the following acts or omissions:

1. Physically injures the child, or allows the child to be injured;
2. Creates or allows to be created substantial or ongoing risk of physical injury;
3. Sexually abuses a child, or allows a child to be sexually abused; or
4. Willfully abandons a child.[30]

If a child has been institutionalized inappropriately, or has been willfully isolated from ordinary social contact to the extent that such isolation constitutes emotional or social deprivation, this too may constitute abuse or neglect.

The final definition of child abuse or neglect is essentially a catch-all provision, encompassing any act or omission not covered by the other five definitions in the statute:

> [A] child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, or such other person having his custody and control, to exercise a minimum degree of care (1) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so, or (2) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment or using excessive physical restraint under circumstances which do not

indicate that the child's behavior is harmful to himself, others or property; or *by any other act of a similarly serious nature requiring the aid of the court.*[31]

The Administrative Code delineates a non-exhaustive list of acts that would normally constitute abuse or neglect:

(a) The allegations of the types of injuries or risk or harm that may constitute either abuse or neglect include:
   1. Child death;
   2. Head injuries;
   3. Internal injuries;
   4. Burns;
   5. Poison or noxious substances;
   6. Wounds;
   7. Bone fractures;
   8. Substantial risk of physical injury or environment injurious to health and welfare;
   9. Cuts, bruises, abrasions, welts or oral injuries;
   10. Human bites;
   11. Sprains or dislocations;
   12. Mental or emotional impairment; and
   13. Risk of harm due to substance abuse by the parent/caregiver or the child.

(b) The allegations of the types of injuries or risk or harm that may constitute abuse include:
   1. Torture;
   2. Tying or close confinement;
   3. Sexually transmitted diseases;
   4. Sexual penetration;
   5. Sexual exploitation;
   6. Sexual molestation; and
   7. Substantial risk of sexual injury.

(c) The allegations of the types of injuries or risk or harm that may constitute neglect are:
   1. Inadequate supervision;
   2. Abandonment or desertion;
   3. Inadequate food;
   4. Inadequate shelter;
   5. Inadequate clothing;
   6. Medical neglect;
   7. Failure to thrive;
   8. Environmental neglect;
   9. Malnutrition;
   10. Lock-out;
   11. Medical neglect of a disabled infant; and
   12. Educational neglect.[32]

Because the statutory and administrative definitions of abuse or neglect are so broadly defined, it is conceivable that even the most innocuous conduct could result in a finding of abuse or neglect against the parent, subjecting him or her to inclusion on the Child Abuse Central Registry. To defend against the agency's allegation, it is imperative that defense counsel carefully scrutinize each allegation of the verified complaint, as well as become intimately familiar with the contents of each document appended to the complaint.

Your first area of inquiry must be the 'facts' set forth in the division's complaint. Go through the complaint with your client, line by line. The complaint will almost always contain factual inaccuracies or distortions. Look for discrepancies between the 'facts' set forth in the complaint and the division contact sheets appended to the complaint. Every discrepancy discredits the investigation, and increases the likelihood that the investigator missed a key element in making an administrative finding against your client, resulting in the present litigation.

Holding the Division to Its Duty to Investigate

Your next area of inquiry should be the sufficiency of the initial investigation undertaken by the division. The investigating caseworker is required to interview the alleged child victim in person and individually, and if the child is nonverbal, to observe the child to detect victimization.[33] Additionally, the investigator must interview the child's caregiver and each adult in the home (preferably on the same day as the interview of the alleged child victim); the person who made the allegation (the reporter) and each other person identified in the current report or related information as having knowledge of the incident or as having made an assessment of physical harm, including, but not limited to, the physician, medical examiner, coroner, other professional who treated the alleged child victim's current condition, other than the reporter; the assigned permanency worker (if any), the youth services provider (if any), a private agency caseworker; and any other department representative working with the alleged child victim or his or her family.[34]

Importantly, the division is required to interview the alleged perpetrator, *in person*.[35] Often, when the accused parent retains an attorney, the division caseworkers will refuse to speak with the accused with his or her attorney present and/or will discontinue any efforts to speak with the accused altogether. This violation of agency procedure often accelerates the division's filing of the complaint, prior to its completing its investigation. When cross-examining division caseworkers, defense counsel should confront them with their failure to fully investigate the parent, which merely ensures that the caseworker failed to discover all relevant information about the case, such as other potential perpetrators or the existence of a legitimate defense on the part of the parent.

After completion of its initial investigation, if the caseworker has reason to believe that an act of abuse or neglect may have occurred, the division then proceeds with a formal investigation. In conducting a formal investigation, the investigator must:

1. Assess the strengths and needs of the caregiver;
2. Assess the strengths and needs of the alleged child victim;
3. Interview *at least* two collateral contacts who have knowledge of the incident or circumstances, if the alleged child victim, the alleged child victim's family, or *the alleged*

perpetrator identifies two or more of them;

4. Confirm childcare arrangements reported by the caregiver;
5. Interview a prior permanency worker who is the most knowledgeable about the family, if available, and if a service case is currently closed but had been open within the last two years;
6. Interview school personnel or a childcare provider, if any, with knowledge of the parental care provided to that child;
7. Interview each identified witness who is reported to have knowledge of the alleged abuse or neglect;
8. Interview each community professional who has firsthand knowledge of the alleged abuse or neglect;
9. Interview the following persons:
   i. Each person residing at the address of occurrence, at the time of incident; and
   ii. *Each witness offered by the alleged perpetrator who could provide evidence that he or she did not abuse or neglect the alleged child victim*;
10. Interview each investigative law enforcement officer working on the report if he or she is not involved in cooperative investigation of the report;
11. Interview each of the initial response law enforcement personnel called to the scene of the alleged abuse or neglect;
12. Interview each physician directly involved with the treatment of the reported injury or condition, such as the attending physician, radiologist, surgeon or coroner, if any; and
13. Interview each primary care physician who has seen the alleged child victim within the past six months, if any.[36]

The division caseworker is required to speak with *each* witness offered by your client "who *could* provide evidence that he or she did *not* abuse or neglect the alleged child victim."[37] Many times, this is not done. The caseworker has already made up his or her mind that the accused parent is a bad person and should be punished accordingly. Nevertheless, the statutorily mandated goal of the division during its formal investigation is not to make a case against the parent, but rather, to determine if a child alleged to have been abused or neglected requires protection. On cross-examination, the investigating caseworker should be questioned about each and every person identified by the accused parent to whom he or she did not speak.

Defending Against the Kitchen Sink Complaint

After you have analyzed the sufficiency of the division's investigation, and you have the parent's version of events, you must establish a strategy to defend against the complaint. Generally, there are two types of allegations—one type is an allegation predicated upon a single incident (*i.e.,* a physical assault, a sexual assault, an occasion of leaving a young child unattended overnight without supervision, etc.), while the other is an alleged pattern of abuse or neglect based upon a series of acts of omissions. The multi-act series of allegations presents the greatest difficulty to defend. When the division seeks to lump together a series of allegations to paint a picture of abuse and/or neglect, it is not uncommon that none of the acts viewed in isolation would constitute abuse or neglect. There is some support for the view that a multitude of acts or omissions, which are "synergistically related" can be viewed in totality to depict a pattern of abuse or neglect. The seminal case establishing the synergistically related standard is *Division of Youth and Family Services v. C.M.*[38]

In *C.M.,* the parent was accused of numerous acts that, when viewed in totality, were found to be neglectful. Those acts included removing the child from special education classes without cause, failing to interact with a baby and living in filthy, unsanitary conditions.[39] The court's conclusion, however, was not only that the acts had occurred, but that same had an adverse impact upon the children.[40] Thus, it is not simply the existence of the multiple acts or omissions, but the net effect of these acts, which gives rise to a finding against the parent. When refuting each of the alleged acts, it is important to create a running theme throughout your defense that the acts or omissions, whether viewed in isolation or in totality, did not have an adverse impact upon the children.

One way of creating this theme is to look to collateral events occurring during the same time period in which the alleged acts or omissions occurred and identify how those events impacted the child. For instance, if during the time period when the parent is alleged to have abused or neglected the child, division caseworkers continued to show up unannounced to the parent's home to interview the child and the child begins to act out in school, it may be the anxiety caused by the division's unwanted intrusion into the family's life—and not the alleged abuse or neglect by the parent—that caused the adverse impact (*i.e.,* the acting out at school).

Evidence Issues in Title 9 Proceedings

In the fact-finding hearing, all evidence must be relevant, material and competent.[42] The division may submit into evidence all reports of staff personnel and professional consultants.[43] Conclusions drawn from the facts stated in the reports are treated as *prima facie* evidence, subject to rebuttal.[44] These reports are generally admitted as a business record; therefore, they

meet a noted exception to the hearsay rule.[45] However, the fact the business record itself is admissible does not mean that all content of the record is admissible. First, to meet the business record exception, the document must be prepared on the first-hand knowledge of the DYFS caseworker or consultant, reasonably proximate in time to the facts asserted in the record.[46] Often, DYFS will submit to the court a large stack of division contact sheets, detailing numerous conversations between caseworkers and third parties. The recordation of these conversations is admissible; however, the hearsay contained within the contact sheet still requires a recognizable exception to the hearsay rule to be admitted into evidence. Further, the person testifying to the conversations must be the caseworker who actually had the conversation.

Additionally, the division will often record in its contact sheets the substance of conversations with law enforcement personnel, and will append to its complaint police reports and incident reports. (Police records are *not* kept in the ordinary course of business of the Division of Youth and Family Services.) Therefore, to rely upon police reports and incident reports for any reason other than to prove that the police were contacted, a police officer must testify to the contents of the report in order for it to be admissible in evidence.

Proof of the abuse or neglect of one child of the accused parent is admissible evidence on the issue of the abuse or neglect of any other child of that parent.[47] When defending against allegations made by the division against the parent, it is crucial that this evidence rule be kept in mind. If subsequent allegations surface, no matter how seemingly insignificant the first substantiated finding of abuse or neglect, that prior finding of abuse will be used against the parent.

Another quirk involves injuries found on a child that cannot be directly linked to the parent. Proof of the injuries sustained by the child or of the condition of the child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent are *prima facie* evidence that the child is an abused or neglected child.[48] In these instances the burden shifts to the accused parent to prove his or her non-culpability for the alleged abuse.

Discrediting the State's Mental Health Professional

During the discovery period, the division will almost invariably request and receive a court order for a psychological evaluation of the parent, upon which the division will seek to rely in the fact-finding hearing. Carefully review the psychologist's report. The division often caps the amount of time that the professional may spend with the parent and to prepare his or her report. Cross-examine the professional regarding how long he or she spent administering each and every test, how long he or she spent administering the clinical interview, as well as the time spent to draft the report. Conclusions drawn by a professional after only one session with a parent, with no less than 10-15 minutes spent administering complex, projective tests can easily appear suspect and unsupportable. Also, be sure to determine the date on which the report was drafted and transmitted to the division, juxtaposed to the time the evaluation is administered. It is not uncommon for a professional to be asked by the division to 'expedite' his or her report, *i.e.,* meet with the parent on Monday and prepare a report for the next court date that Wednesday. Conclusions drawn by the professional with little time to collect or reflect upon his or her thoughts are also easily subject to scrutiny.

Make sure to review professional reports for 'copy and paste' language drawn from form reports, such as "A person with this characteristic exhibits signs of ..." It is not uncommon to represent multiple parents who were seen by the same psychologist, all of whose psychological evaluations contain chunks of identical paragraphs!

Also, be wary of hearsay contained within the report. The professional is permitted to testify to hearsay, so long as it is of a type "reasonably relied upon by experts in the field."[49] However, bare conclusions about a parent's propensity to abuse or neglect a child remain inadmissible, as "net opinions."[50] Opinions must be based upon a reasonable degree of psychological certainty. Hence, if a mental health professional renders an opinion and notes that his or her opinion should be discounted if the facts turn out to be different from those upon which he or she relied, the opinion cannot be relied upon by the trial court.[51]

To attack the sufficiency of diagnoses contained in a professional's report, refer to the Diagnostic and Statistical Manual (DSM-IV). Make sure the professional is competent to make a diagnosis (*e.g.*, a psychologist making a psychiatric diagnosis without consultation with a psychiatrist is exceeding the scope of his or her expertise). Also, make sure the diagnoses meet the criteria set forth in the DSM-IV. It is not uncommon for mental health professionals to criticize the DSM-IV when that professional's diagnosis does not fit the criteria, relying instead upon the ICD-10 to support his or her findings. The ICD-10 (International Statistical Classification of Diseases and Related Health Problems, 10th Revision) is a coding of diseases and signs, symptoms, abnormal findings, complaints, social circumstances and external causes of injury or diseases, as classified by the World Health Organization (WHO). The ICD-10 is not a diagnostic manual and should not be used in lieu of the DSM-IV.[52]

Another key area of probing is the relationship between the division and the mental health professional who conducted the evaluation of your client. Generally, courts

are aware of 'the usual suspects,' who routinely perform psychological evaluations for DYFS. However, do not allow the professional's regular appearance in DYFS proceedings to sway defense counsel to consent to his or her qualifications as an expert or accede the validity or sufficiency of his or her psychological evaluation. A professional who derives half of his or her income from the division is vulnerable to appearing as a biased 'hired gun,' who will support whatever conclusion is sought by the division.

A professional's long resume may increase the likelihood that he or she will be qualified as an expert *in something*, but not necessarily in the specialized area pertinent to the division's case. A long resume also provides fertile ground for cross-examination. For instance, if the professional performed an evaluation of the child at issue in the case, spend a good deal of time *voire diring* the professional about his or her experience in diagnosing children. Look for biases in the professional's published articles. Confirm that the professional's license remains in good standing.[53]

Be Wary the Division's Offer to 'Help' the Parent While the Trial is Ongoing

During the trial of a Title 9 case, the division will often seek to have the court order 'services' for the accused parent. Until the court makes a finding that the accused parent did, in fact, commit an act of abuse or neglect, the court cannot order 'services.'[54] Services can, however, be ordered regarding the child. Those services often include counseling, normally a confidential process, which is routinely violated, so that the division can use the child's statements in counseling against the accused parent.

The division will also attempt to convince the parent not to wait to commence services because of the strict time periods contained in the Adoption and Safe Families Act (ASFA).[55] These ASFA time periods require the court to conduct a permanency hearing once the child has been in placement through the division for 15 out of the preceding 22 months. Notably, the court can extend these guidelines upon a showing of good cause.

If the trial is ongoing when this milestone approaches, defense counsel should file an application with the court requesting a finding that a good cause exception to the ASFA guidelines exists. This request should be made in writing, setting forth the reasons for the delay, particularly where the division's case in chief extends over a lengthy time period. Making an oral application may not be enough to preserve the record for appeal.

SETTLEMENT OF TITLE 9 LITIGATION

It is not uncommon for the division to request that the parent 'stipulate' to some allegation in the complaint to avoid a fact-finding hearing. This kind of 'settlement' rarely provides any benefit to the accused parent. If the parent stipulates to an allegation in the complaint, he or she can avoid a trial on the issue; however, the division's form stipulation does not provide that the division withdraws its complaint in all respects regarding the allegations to which the parent stipulates. Accordingly, although the parent stipulates to only some facts in the complaint, the court may accept as true all allegations contained in the complaint. This will substantially extend the services the parent can be ordered to undergo prior to being reunified with his or her child.

If the accused parent is asked to stipulate and is willing to do so, defense counsel should only agree to stipulate if he or she drafts the stipulation, identifying in very exacting language that the parent is agreeing has occurred. Further, defense counsel should include a provision in the stipulation that the division is withdrawing its complaint, except regarding the facts specified in the stipulation, in consideration of and as a condition precedent to the parent's voluntary stipulation. Defense counsel should also attempt in advance to agree upon the services to be provided by the division.

CONCLUSION

In the author's opinion, litigating against the Division of Youth and Family Services can be likened to battling a two-headed dragon while blindfolded with both hands tied behind your back. Employing a few of these practice pointers should help loosen the ropes. ■

ENDNOTES

1. This article does not address litigation commenced by the Division of Youth and Family Services pursuant to Title 30, which applies in guardianship/termination of parental rights cases.
2. R. 5:12-1.
3. N.J.S.A. 9:6-8.28.
4. N.J.S.A. 9:6-8.29.
5. N.J.S.A. 30:4C-15.1.
6. *See*, N.J.S.A. 30:4C-11.3.
7. N.J.S.A. 9:6-8.30.
8. N.J.S.A. 9:6-8.28 and N.J.S.A. 9:6-8.29.
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10. R. 5:12-1(a).
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12. R. 4:52-1(a).
13. N.J.S.A. 9:6-8.29.
14. N.J.S.A. 9:6-8.29(a).
15. *Id*.
16. N.J.S.A. 9:6-8.32.
17. *Id*.
18. *Id*.
19. R.5:12-1(e).
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22. *Id*.; R. 5:12-3.
23. R. 5:12-4(a).
24. *New Jersey Div. of Youth and Family Services v. R.G.*, 397 N.J. Super. 439 (App. Div. 2008).
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27. For a list of disqualifying

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Relocation Revisited

All Those Sad Faces in Far Away Places

by Mark Biel

Let's start with a culture quiz. Some 40 years ago, what group sang: "I'm leaving on a jet plane. Don't know when I'll be back again."? Think you know the answer? Let's try another: "You're so far away, doesn't anyone stay in one place anymore?"[1] While certainly not written in the context of relocation cases, these lyrics poignantly express their underlying anguish.

Over the past 10 years I have been privileged to author several articles on the topic of interstate relocation and removal.[2] While the statutory authority has remained the same, the case law continues to develop. Particularly during the past five years, there have been a number of significant decisions in this difficult and emotionally charged area of the law, which, in my judgment, requires an update of those articles. My intention is to try to provide, for the practitioner, a primer regarding the evolving substantive law in New Jersey, as well as to provide practical thoughts on how to prepare, negotiate and try a removal case.

To introduce you to the type of fact pattern you will encounter as a family lawyer in a relocation case, consider the following:

Case One: The husband and wife are still residing together in New Jersey. The wife is contemplating a divorce. Both parties have full-time jobs and are the parents of three children, ages three, eight and 11. The wife would like to move to San Francisco with the children for a number of reasons, including job enhancement and the fact that her parents live there. She would have no objection to the children spending the bulk of the summer and at least half of the spring and winter recess with their father in New Jersey. What do you advise either client who may consult with you?

Case Two: The parties have been separated for two years, and active divorce proceedings have been ongoing for the past year. Two children are born of the marriage, ages 10 and 12. The parties have a *de facto* joint parenting plan, essentially with the children residing with their mother four nights a week and with their father three nights per week. Each party maintains separate household wardrobes for the children, and all transportation is shared. The father coaches both children in sports and is a scout leader. The mother is a cheerleading advisor/instructor and secretary of the intermediate school Parent/Teacher Association. Both parents assist the children with homework. They alternate taking the children to church on Sunday mornings.

The mother wants to relocate to Louisiana, where she has been offered a job with a $20,000 increase in the marketing department of a casino. She is presently employed in a similar position in an Atlantic City casino. The father has a successful accounting practice in South Jersey and cannot readily relocate. What do you advise either client who may consult with you?

As a family lawyer handling custody matters, you are routinely faced with these issues. America is becoming an increasingly mobile society. Studies show that 75 percent of all custodial parents move within four years after divorce, and of that number 50 percent will move again before the emancipation of the children.[3] In one study, three percent of the custodial parents moved within 12 weeks of the divorce filing; 10 percent moved away within a year; and 17 percent moved within two years.[4]

There is probably nothing more gut wrenching than having to tell your client the children he or she loves can move out of New Jersey with an estranged spouse or ex-spouse, and there is little or nothing the client can do about it. Each attorney must understand and articulate this in a sensitive way to his or her client. If your client has not deeply ingrained him or herself in the day-to-day life of the children, the client will not be able to prevent permanent removal from New Jersey by the other spouse, barring extraordinary circumstances. Anything short of a true joint physical custodial relationship makes resistance to relocation extremely difficult.

NEW JERSEY LAW: THE TREND TOWARD REMOVAL

Any analysis must begin with N.J.S.A 9:2-2, which provides:

> ...(when) such children are natives of this State or have resided five (5) years within its limits, they shall not be removed out of its jurisdiction without their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order.

The heart of the statute is the requirement of establishing "cause" to justify removal of the children from New Jersey to another state. The purpose of that requirement, "is to preserve the rights of the non-custodial parent and child to maintain and develop their familial relationship."[5] In the seminal New Jersey Supreme Court case of *Cooper v. Cooper*, the Court held that in order to establish sufficient cause for removal when such application is challenged, the custodial parent must make a threshold showing that there is a "real advantage" to that parent moving, and that the move is not inimical to the best interest of the children.[6] The purported advantage did not need to be substantial; rather, it needed only to be based "on a sincere and genuine desire of the custodial parent to move and a sensible good faith reason for the move." If the custodial parent made the requisite initial showing, then a court was compelled to consider the "...prospective advantages of the move in terms of its likely capacity for either maintaining or improving the general quality of life of both the custodial parent and the children," the *bona fides* "of the custodial parent's motives in seeking to move" and those of the non-custodial parent in objecting to them,[7] and whether a "realistic and reasonable visitation schedule can be reached if the move allowed."[8]

The *Cooper* standard was subsequently modified in *Holder v. Polanski*,[9] by eliminating the requirement that the custodial parent show a real advantage to the move. Under the *Holder* test:

> A custodial parent may move with the children of the marriage to another state as long as the move does not interfere with the best interests of the children or the visitation rights of the non-custodial parent.[10]

All the custodial parent needed to establish was that he or she had a "good faith reason" for making the move.[11] Thereafter the Court then considered: a) whether the move would be inimical to the best interests of the children, or b) adversely affect the visitation rights of the non-custodial parent. The standard was not whether there would be some effect upon those visitation rights, but whether the move would "substantially change" those rights.

The third level of inquiry under *Holder* was only reached if the court concluded that the move would require substantial changes in the visitation schedule. If this finding was made, proofs concerning the prospective advantages of the move, the integrity of the motives of the party, and the development of a reasonable visitation schedule remained important.[12] The emphasis, however, was not whether the children or the custodial parent would benefit from the move, but whether the children would suffer from it.

Accordingly, under *Holder*, not only was the threshold showing diluted in favor of the parent seeking removal, but the burden of proof and persuasion lay with the party opposing the move.

After *Holder* was decided, trial court decisions provided some glimmer of hope for the parent resisting removal, convincing some family law practitioners that there might be a swinging of the pendulum. The first of these cases was *Zwernemann v. Kenny*,[13] decided shortly after *Holder*. In that case, the court determined that despite the wife's good faith reason for seeking to move to Florida with the parties' nine-year-old son, the fact that the father saw the child approximately seven out of 14 nights and was intricately involved with scouts, sports and other activities, compelled the conclusion that this frequent and rewarding interaction would be thwarted. Accordingly, the trial court found that the father had a "day-to-day hands-on" relationship with his son for which no adequate substitute visitation plan would be feasible.

The second trial court opinion is *McMahon v. McMahon*.[14] In that case, the custodial mother sought to move with her children from New Jersey to Montana. Although the court found no fault with the mother's reason for the move, the visitation schedule presented by the mother simply was not practicable, since the father's ability to take extended time off from his job to be with the children was limited. The court found that the children would be seriously impacted by a separation from him, especially since he and his extended family were extremely involved financially in his children's daily activities.

However, these trial court decisions were followed by a spate of cases that diluted the ability of most noncustodial parents to resist interstate removal.

The first of those cases was *Murnane v. Murnane.*[15] In this case, the wife lived in Pennsylvania and the husband lived in New Jersey. The wife made an application to remove the parties' son, age seven, to Florida. The husband's visitation had consisted of every weekend from Saturday afternoon until Sunday evening, as well as extended time during vacations. The lower court denied removal. The Appellate Division reversed and remanded for additional findings, and for the first time a trial court was instructed to balance whether the father could relocate to Florida against the burden that his wife would have to bear if forced to remain in Pennsylvania.

Then followed *Rampolla v. Rampolla.*[16] When the parties were divorced in 1989, the judgment incorporated a settlement agreement whereby they retained "joint legal custody" of their sons, then ages five and eight. The father had residential custody of the children three out of four weekends, and by the time the plenary hearing on the removal issue occurred, both children also remained overnight with the father each Tuesday and Thursday night. The agreement also provided that it was the intention of

the parties to live in close proximity to each other in order to maximize the contact the children would have with their parents. There was an additional provision providing for the parties to consult with one another should relocation become an issue prior to resorting to post-judgment litigation. The joint parenting plan existed for approximately four years.

Both parties participated actively in the rearing of the children, including coaching; assistance with homework; attendance at sporting activities; and transportation. In an *in camera* interview, the children expressed their unequivocal opposition to the relocation to New York. The application of the mother to relocate was denied. The Appellate Division reversed, indicating consistent with *Murnane, supra*., that the trial judge failed to address an issue crucial to the disposition of the case, namely, whether the defendant father could relocate as a method of insuring the vitality of the shared custody agreement. While the case certainly does not specifically undercut the ability of a parent ingrained in the day-to-day lives of the children to resist removal, it does indicate that where that parent has job flexibility, the parent's residence may very well be dictated by the desires of the removing party.

In *Cerminara v. Cerminara,*[17] the parties litigated, as part of the divorce proceeding, the right of the wife to permanently relocate in Virginia with the two minor children. The relocation was permitted, and the father appealed. In this case, the wife agreed to a generous visitation schedule, and further agreed to share half of the transportation. In analyzing this case under a best interest analysis, the court found that the wife's family in Virginia would be able to provide significant emotional and financial support; that she was offered a job with her father's accounting firm; that she was invited to live in her parents' home until her new home was built; and that she was gifted a lot next to her parents' home with an offer by her parents to finance the construction.

The appellate court concluded that:

> Although Defendant's move to Virginia will affect Plaintiff's visitation rights, there is nothing in the record before us to show that the Plaintiff will not be able to maintain substantial contact with his children. Moreover, the fact that visitation may be made more difficult by such a move, standing alone, is insufficient to deny the Defendant's relocation plan.[18]

Accordingly, in *Cerminara*, there was a reinforcement that while the visitation arrangement may not be able to be replicated by relocation, so long as there is substantial contact, this will apparently suffice.

In 1997, the case of *Horswell v. Horswell*[19] was decided by the Appellate Division. In July 1993, the defendant wife left the marital home and took the parties' two children, then ages one and three, to Arkansas, where her parents and other relatives resided. She then filed a complaint in Arkansas seeking custody of the children and support.

In August 1993, the plaintiff husband filed for divorce in New Jersey, also seeking custody of the children. He obtained an order to show cause, which, among other things, required the defendant to return to New Jersey with the children. The defendant accordingly returned to New Jersey in September 1993, and resumed occupancy of the former marital home at McGuire Air Force Base. However, when the Air Force became aware that the parties were not residing together, it required her to vacate the premises. As a result, the defendant wife applied to the trial court in New Jersey for permission to relocate to Arkansas. A *Holder* hearing was not held until more than a year later. In the interim, a judgment of divorce was entered in May 1995, indicating that custody and visitation issues were bifurcated and would be set down for trial at a future date.

The trial court denied relocation, directing the defendant wife to return to New Jersey with the children or, in the alternative, to transfer legal and physical custody of the children to her husband.

The defendant wife appealed, and in January 1996 the trial court granted a stay pending the outcome of the appeal. The Appellate Division reversed and remanded, concluding that the trial court failed to make necessary findings of fact, and that it misapplied principles set forth in *Holder*. In *Horswell* the Appellate Division concluded:

a. That the desire to live closer to relatives is a sufficient good faith reason to move.[20]
b. While the move to Arkansas had adversely affected the plaintiff's visitation rights, the fact that visitation may be "more difficult," is insufficient to deny the defendant's relocation plan.[21]
c. That the trial court failed to consider whether changes could be made in the plaintiff's visitation schedule, which would enable him to visit the children more frequently, (*i.e.,* whether the plaintiff would be able to fly to Arkansas for more frequent short visits).
d. The trial court should have taken into account that by the time the *Holder* hearing was concluded, the children had already been living in Arkansas for more than a year and a half, during which time they had grown attached to their mother's family and accustomed to their schools and other activities in Arkansas. The Appellate Division also considered the fact that yet another year had elapsed since the conclusion of the *Holder* hearing until the appeal was decided.

The court concluded that:

> A court must consider children's present circumstances, including circumstances which result from *pendente*

lite orders, in ruling upon issues relating to custody, visitation or other matters affecting their welfare.[22]

Thus, we saw the emergence of a clearly enunciated doctrine whereby a court will not simply look at the circumstances at the time of the application, but will consider the situation after the *pendente lite* order has been implemented and the case has reached trial. An appellate court will even look at the circumstances existing at the time of the appeal, which may be months or years later.

THE *BAURES* PARADIGM

On April 23, 2001, Justice Virginia Long, writing for a unanimous Court, crafted *Baures* in an effort to clarify the legal standards that should apply in addressing a removal application. This case provides a blueprint for litigating a removal case, and is presently the most important case addressing the issues.

In 1985, Carita Baures, a native of Wisconsin, married Steven Lewis, a native of Iowa and an officer in the Navy. Their only child, Jeremy, was born in 1990. In 1994, the couple moved to New Jersey. At age four, Jeremy was diagnosed with pervasive development disorder (PDD), a form of autism. The parties had planned to move near Baures' parents in Wisconsin after Lewis was discharged from the Navy, since Baures' parents were retired schoolteachers and offered to help care for Jeremy.

In 1996, Baures filed for divorce. A consent order was entered, providing for custody and visitation and restraining either party from leaving New Jersey with Jeremy. In 1997, Baures' parents came to live in New Jersey to help care for Jeremy. Baures filed an amended complaint for divorce requesting permission to relocate to Wisconsin. The trial court denied the removal request, finding the move would not be in the "best interests" of Jeremy because of the adverse affect the move would have on Lewis' visitation. Baures moved for reconsideration, which was likewise denied by the trial court following a best interests analysis.

Lewis was discharged from the Navy in July 1998, and found full-time employment in New Jersey in the private sector. Because of his discharge, Baures requested and was granted a *Rampolla* hearing on the issue of whether Lewis could relocate to Wisconsin. Upon completion of the hearing, the trial court affirmed the prior denial of Baures' motion to relocate, finding that Baures failed to prove the prospective advantages of the move and provide adequate evidence of the comparability of educational and therapeutic facilities available to Jeremy in Wisconsin. The Appellate Division affirmed the ruling of the trial court, and the Supreme Court granted certification. The Supreme Court reversed and remanded, and took the opportunity to revisit the area of removal due to what it termed "confusion" among the bench, bar and litigants over the legal standards that should be applied.[23]

The Supreme Court began its analysis with a review of social science research indicating that a child's quality of life and style of life are provided by the custodial parent; that the interests of the child are closely interwoven with those of the custodial parent; that in a divorce situation the role of the home parent seems most central; and that in general, what is good for the custodial parent is good for the child.[24]

The Supreme Court also discussed the prior holdings in *Cooper* and *Holder*, indicating that these decisions left a number of open questions, including clarifying the ultimate burden of proof, and the elements of the burden in determining whether the move would be inimical to the interest of the child. The Supreme Court found this to be particularly so when visitation was at the nub of the noncustodial parent's objection.[25]

In attempting to distill a clear paradigm for trying a removal case, the court modified the tripartite analysis of *Holder* and clarified factorially the type of proof that would be required. Accordingly, the moving party initially bears a two-pronged burden of proving: 1) that there is a good faith reason for the move, and 2) that the move will not be inimical to the child's interest. The evidence produced must be *prima facie*, meaning that, if unrebutted, it would sustain a judgment in the proponent's favor. Imposed upon the party seeking to move is the submission of a visitation proposal.

In indicating that the initial burden upon the moving party is not particularly onerous, the Supreme Court makes it clear that if the custodial parent fails to produce evidence on these issues, the noncustodial parent has no duty to go forward, and the trial court should enter a judgment denying removal. However, once the *prima facie* case has been adduced, the burden of going forward devolves upon the noncustodial parent, who must now produce evidence opposing the move as either not in good faith or inimical to the child's interest.[26] After the noncustodial parent has gone forward, the moving party may rest or adduce additional evidence regarding the noncustodial parent's motives, the visitation scheme or any other matter bearing on the application.

The Court offered examples of what might provide a challenge to relocation, including a demonstration that the custodial parent's past actions reveal a desire to stymie the other party's relationship with the child; that the move would take the child away from a large extended family that is a mainstay in the child's life; that educational, vocational or healthcare available in the new location are inadequate for the child's particular needs; or that because of a work schedule, neither relocation (apparently under a *Rampolla* analysis) nor reasonable visitation is possible, and that those

circumstances would cause the child to suffer.

Importantly, *Baures* requires a trial court to examine the following factors relevant to the relocating party's burden of proving good faith and that the move will not be inimical to the child's interest:

1. The reasons given for the move;
2. The reasons given for the opposition;
3. The past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move:
4. Whether the child will receive educational, health and leisure opportunities at least equal to what is available here;
5. Any special needs or talents of the child that require accommodation, and whether such accommodation or its equivalent is available in the new location;
6. Whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child;
7. The likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed;
8. The effect of the move on extended family relationships here and in the new location;
9. If the child is of age, his or her preference;
10. Whether the child is entering his or her senior year in high school, at which point he or she should generally not be moved, without his or her consent, before graduation;
11. Whether the noncustodial parent has the ability to relocate;
12. Any other factor bearing on the child's interest.[27]

The Supreme Court also cited examples of what it termed "powerful visitation related issues" that can defeat a removal application. Among those examples would be a noncustodial parent providing a needed safety net for a child having an emotional disorder, or a noncustodial parent actively involved in coaching and assisting a child who has a particular talent or skill. Yet, the Court further indicated:

> Where visitation is the issue, in order to defeat the custodial parent's proofs, the burden is on the non-custodial parent to produce evidence, not just that the visitation will change but that the change will negatively affect the child.[28]

The Court further indicated:

> ...A mere change, even a reduction, in the non-custodial parent's visitation is not an independent basis on which to deny removal. It is one important consideration relevant to whether a child's interest would be impaired, although not the only one. It is not the alteration in the visitation schedule that is the focus of the inquiry. Indeed, alterations in the visitation scheme when one party moves are inevitable and acceptable.[29]

In stressing the importance of mutual efforts by the parties to develop an alternative visitation scheme that can bridge the physical divide between the noncustodial parent and the child, the Court implicitly reinforced the thinking expressed in previous cases respecting the use of videoconferencing and the Internet when it indicated that innovative technology should be considered where applicable, along with traditional visitation initiatives.[30]

THE *BAURES* EXCEPTIONS

It is important to note two very critical situations where the *Cooper/Holder* analysis as modified by *Baures* does not apply. The first situation is when there has been no determination of custody. Most notably, this will occur when the parties are about to separate or have been separated for a short period of time. The case law, including *Baures,* does not provide a template for the trial of those cases involving a threshold custody determination. In such situations, it is suggested that an initial but final (as opposed to a *pendente lite*) determination must be made pursuant to N.J.S.A. 9:2-4, and it is only after that decision is made that the court can properly address a removal application.

Of course, in those instances a plenary hearing may be able to address both the custody determination and the removal issue, rather than having the issues decided *seriatim*. Keep in mind that in such case the court will first have to address whether it is in the best interest for the relocating parent to assume sole or primary physical custody of the child or children. If, after an analysis of the factors contained in N.J.S.A. 9:2-4, the answer is in the negative, the relocation application will necessarily fail. If the operative legal question is answered in the affirmative, it does not mean that relocation will be granted, but only that the court will then be compelled to complete a *Baures* analysis.

The second type of case where the *Baures* calculus is inapplicable is the case in which the parents share physical custody either *de facto* or *de jure*. In those circumstances, the removal application constitutes a motion for a change in custody, and will be governed initially by a changed circumstances inquiry and ultimately by a best interests analysis. As stated in *Baures*:

> The preliminary question in any case in which a parent seeks to relocate with a child is whether it is a removal case or whether by virtue of the arrangements between the parties, it is actually a motion for a change in custody.[31]

Interestingly, the first case that

dealt with this distinction is the trial court decision of *Voit v. Voit,* where the divorced parents shared "joint legal and physical custody" of their son through a mediated agreement, which was incorporated into a final judgment of divorce.[32] The plaintiff, Dr. Gregory Voit, was to have the child in his care each week from Thursday evening at 6 p.m. through Monday morning at 9 a.m. The defendant, Lisa Voit, was to have their son in her care for the remainder of the week. Trial testimony revealed that the parties deviated from the schedule in order to maximize the child's time with each parent. By the time the parties had filed the final judgment in New Mexico, they had both relocated to New Jersey. Dr. Voit was offered a position at a teaching hospital in Arizona, and sought his ex-wife's approval to move with their son. When the proposal was not accepted, he filed a notice of motion requesting to remove his son to Arizona, and a change in the custody arrangement so that he would have residential custody during the school year. Judge Michael Fisher concluded:

> Under the unique facts of the instant case, where both legal and physical custody is truly shared, the *Cooper/Holder* analysis, with its concomitant burden on the parent resisting the move out of state to come forward with evidence that a proposed alternative visitation schedule would be impossible or unreasonably burdensome is inappropriate. While much of the reasoning of those cases applies, the placing of such a burden of proof on the parent resisting the move would be unfair given the totally shared-parenting arrangement that has to date been engaged successfully by the parties herein.

Given the true shared-parenting plan that existed, the court interpreted the case as being one involving, first and foremost, a request for modification of a joint legal and physical custody agreement.[33] Accordingly, the court framed the issue of whether there should be a change in custody.[34] The court concluded that in order to determine whether good cause exists to permit a removal in a true joint parenting case, the best interests of the child standard must be applied.

In custody modification cases, the burden is on the party seeking modification to show that, due to a substantial change in circumstances from the time that the current custody arrangement was established, the best interest of the child would be better served by a transfer in custody.[35]

Ultimately, the court found that while Dr. Voit's reason for desiring to move met the minimal good faith reason standard of *Holder*, he nonetheless failed to show that it was in his son's best interest to be in Arizona with him as opposed to New Jersey with Lisa Voit.

While *Voit* and *Chen* were precursors to the true shared physical custody arrangement carved out in *Baures*, and in fact were both cited with approval in *Baures*, establishing a more objective framework respecting such an arrangement was left to further case law development. While assuredly falling short of a bright-line test, the recent cases of *Mamolen v. Mamolen* and *O'Connor v. O'Connor* lend guidance and should be reviewed and analyzed by the family law practitioner.[36]

In *Mamolen*, the parties, in partial settlement of their divorce, agreed to an arrangement where the children would spend alternating weekends and one overnight every other week with their father. The plaintiff mother sought to relocate to Maryland one month after the entry of the divorce judgment. After a lengthy trial, the court rejected the relocation application, finding that the parties were in a joint custodial relationship akin to *Voit* and *Chen*.

On appeal, the Appellate Division, while agreeing with the trial court that the true essence of a custodial relationship does not turn on labels utilized by the parties, nonetheless opined that the element of *time* is of critical importance in determining the presence of joint custody. Accordingly, the trial court's decision was reversed and remanded.

Two months later, *O'Connor* was decided. The plaintiff mother appealed a trial court order entered after a plenary hearing in which her application to remove and relocate the parties' child to the state of Indiana was denied. At the conclusion of the hearing, the defendant father was designated the child's primary residential custodian. Initially, Judge Robert Fall characterized the focus of inquiry on whether the physical custody relationship among the parents is one in which one parent is the "primary caretaker" and the other is the "secondary caretaker." If so, the appellate court held, the *Baures* calculus applies.[37] If, however, the parents truly share both legal and physical custody, an application by one parent to remove the residence of the child to an out-of-state location is to be analyzed as an application for a change of custody. The party seeking the change of custody in the joint custodial arrangement must demonstrate that the best interest of the child would be better served by residential custody being primarily vested with the relocating parent.[38]

The court held the time each parent spends with a child must be analyzed in the context of each parent's responsibility for the custodial functions and duties normally imposed on a primary caretaker.[39] In *O'Connor*, the parties' written agreement provided that they were to have joint custody of Ryan, with the plaintiff mother having residential custody. Subsequent to the divorce, both parties continued to reside in Bergen County in relative close proximity. But the parenting arrangements began to change. While initially the defendant father's parenting time with his son

was limited to each week on Saturday overnight to Sunday, the plaintiff's employment responsibilities compelled her to utilize the services of a nanny and her mother to care for Ryan, and began to impose greater responsibilities on the defendant father. Additionally, approximately a year after the final judgment of divorce, the defendant's job responsibilities changed, allowing him more flexible work hours and the ability to expand his parental role in his son's life.

At trial, the evidence established that the parties shared the custodial responsibilities and duties in meeting Ryan's needs, with both parties purchasing clothing for him; attending school-related activities; and attending religious activities, sports activities and medical appointments. The testimony at the trial court revealed that the child himself acknowledged that everything was essentially 50/50. The trial court made the same finding.

In affirming the trial court's decision the appellate court rejected the appellant mother's argument that the case should have been analyzed under the *Baures'* paradigm, finding that there was ample justification for the trial court's conclusion that this was a true shared custody arrangement centering not only upon the division of the child's time with each parent but on the division of key custodial responsibilities.

What is distilled from these cases is that whether a *Baures* analysis is required will turn not solely upon the amount of time a child spends with each parent and not solely upon the custodial responsibilities vested in each parent, but an amalgam of both. Marshaling the specific facts with as much documentation as possible becomes a daunting but necessary process for the family lawyer.

BAD FAITH STRATEGIZING

Trying to manipulate a case into the *Baures* analysis may backfire. In *Shea v. Shea*,[40] the parties entered into a negotiated divorce settlement that established them as joint legal custodians with the defendant mother as the parent of primary residence, and providing substantial parenting time to the plaintiff father. Three months after the settlement the mother filed a removal application seeking to relocate with the minor child to North Carolina. The father asserted that he settled the issue of custody, and waived his right to be the primary custodial parent based upon the specific terms of the settlement that were reached, most importantly, substantial and regular parenting time. He further asserted that the custody negotiations by the mother were "subterfuge." By settling custody, with the mother being the primary custodial parent, the father asserted he would be denied the right to later contest custody during the removal hearing, effectively eliminating the intent of *Baures*.

The defendant denied any manipulative purpose, indicating that her primary reason for relocation was that her mother had recently moved to North Carolina, although the trial judge noted that that move occurred three months prior to the divorce being settled. In a well-reasoned opinion, Judge Millard indicated:

> It seems only fair and equitable, that where a request for removal comes shortly after the settlement of the Final Judgment of Divorce, and the material facts and circumstances forming the good faith reason for the removal request were known at the time of the Final Judgment, a party opposing the removal be entitled to contest custody under the best interest analysis, irrespective of whether the parties had a true shared parenting arrangement. In effect, the party opposing removal is restored to the position he or she held prior to the Final Judgment of Divorce. To rule otherwise could potentially encourage disingenuous settlements, encourage a party to use the *Baures* line of cases as a sword or alternatively litigate custody when not truly necessary.[41]

Nonetheless finding that the defendant mother had established a *prima facie* case for removal entitling her to a plenary hearing, the court found that the plaintiff father had a right at that hearing to establish that the *Baures* removal procedures were manipulated by the defendant by filing her removal action so soon after the entry of the final judgment and, if proven, fundamental fairness would require that the plaintiff be restored to his position at the time the final judgment was entered. Under such circumstances, the court indicated it would utilize a best interest analysis in lieu of the *Baures* criteria.[42]

While only a trial court decision, and not compelled to be followed by another trial judge, it is nonetheless instructive in establishing the *bona fides* of negotiation. As a family lawyer, if a client indicates that as soon as he or she is divorced he or she intends to apply to relocate, *Shea* should assuredly raise a red flag.

INTRASTATE RELOCATION

Does N.J.S.A. 9:2-2 apply when a residential custodial parent seeks to relocate within the state of New Jersey? In concluding that it does not, the Appellate Division, in *Schulze v. Morris,*[43] indicated that such intrastate relocation may nonetheless constitute a substantial change in circumstances, warranting modification of the existing parenting time arrangement.

In *Schulze*, the parties agreed in their final judgment of divorce that the defendant mother would serve as the residential custodian under a joint legal custodial arrangement. The parties agreed to a parenting plan that provided for the plaintiff father to exercise parenting time with his son on alternate weekends, plus one overnight during the week and shared holidays and extended vacation time. At the time of the entry of the judgment, the plaintiff, a trauma surgeon, was

relocating temporarily to Maryland to perform a fellowship, and the parties agreed that during this interim period he was to have parenting time two weekends each month, one weekend in New Jersey and one weekend in Maryland.

When the plaintiff returned to New Jersey, he took a position at a hospital in Brooklyn, New York, and had remarried and established residency in Middlesex County.

The defendant was an elementary school teacher working in Middlesex County, but when she was not offered tenure she sought a position elsewhere and decided to move to Sussex County. The plaintiff sought, by an order to show cause why the defendant should not be restrained from relocating the child from outside the boundaries of Middlesex County, and after conducting an abbreviated hearing the court entered an order directing that a plenary hearing be scheduled with respect to the relocation issue.

Thereafter, the defendant filed a motion for summary judgment, which the trial court granted, effectively dismissing the plaintiff's application that would have required the defendant to remain in Middlesex County. On appeal, the Appellate Division concluded that while the clear purpose of N.J.S.A. 9:2-2 is to preserve the rights of the nonresidential custodial parent and the child to maintain and develop their familial relationships where the custodial parent prepares to remove the child to another jurisdiction, there is no corresponding requirement or burden placed upon that parent who desires to move, with the child, from one location in New Jersey to another.[44]

Simply stated, such an intrastate relocation is not a 'removal' case. While the Appellate Division recognized that such a relocation within the state may have a substantial impact upon the relationship between the child and noncustodial residential parent that may constitute a substantial change of circumstances warranting modification of the parenting time arrangement, that argument was not presented on appeal. Accordingly, while thus not called upon to substantively address the issue, the Appellate Division, in *dicta,* indicated that even in intrastate relocation cases, if it can be demonstrated that the move will be deleterious to the relationship between the child and the nonresidential custodial parent or will be otherwise inimical to the child's best interest, the *Baures* factors should be considered in determining whether modification of the custodial and parenting time arrangement is warranted.

Thus, as an attorney faced with such post-judgment move within the state, while not a removal case, you must be mindful of the right to present an application for a custodial modification, which can nonetheless implicate the *Baures* factors.

INTERNATIONAL RELOCATION

In the recently decided case of *MacKinnon v. MacKinnon*,[45] the New Jersey Supreme Court addressed the issue of whether the standard for removal of minor children of divorce established in *Baures v. Lewis* applies when a custodial parent seeks to relocate a child to a foreign nation. The plaintiff husband filed for divorce in 2004, which was followed by a counterclaim that included a request to remove the parties' daughter to Japan. Pursuant to the divorce judgment entered in 2006, the plaintiff had parenting time with his daughter, Justine, every weekend from Friday through Saturday evening. During the rest of the week, she resided with her mother. At the removal hearing, the defendant mother testified that she had no family and few friends in the United States, and had hoped to return to Okinawa, where she had a strong support network composed of many friends and family, where she had better job opportunities and where she could earn enough money to sustain a comfortable middle-class lifestyle for herself and her daughter. The plaintiff testified that he had no allotted vacation and travel to Japan for extended periods, and prolonged vacation would create substantial financial and familial hardships.

Ultimately, the trial court granted the plaintiff's application for removal, applying the factors established in *Baures*. In an unpublished *per curium* opinion, the Appellate Division affirmed. The Supreme Court granted the defendant's petition for certification. The defendant contended that because the implications of an international removal are so distinguishable from interstate removal, stricter standards than those enumerated in *Baures* are required to safeguard the custodial rights of the non-removing parent. The Court rejected that argument, maintaining the *Baures* test appropriately balances the concerns implicated by either interstate or international removal.[46] The Court indicated that the standard also provides flexibility for courts to decide the appropriateness of foreign travel and that the courts can employ the 12th "catchall factor" to address special concerns of international removal such as Hague Convention membership, cultural and social concerns, flexibility of visitation and enforceability of parental rights.[47]

In affirming the trial court decision, the Court gave due recognition to the defendant's contention that transportation and communication costs increase with distance, and long distances separating the noncustodial parent and the child limit the frequency with which that familial relationship can be nurtured. However, relying on *Baures,* the Court underscored that "the ability to communicate over long distances has been revolutionized during the years since the first removal cases and computers, technology and competitive long distance rates have essentially changed the way people connect with each other when they are apart."[48] The Court concluded that the increased

ease of international travel mitigates concerns about the difficulty of maintaining visitation schedules across oceans.

In further analyzing the *Baures* factors, the Court found no merit in the defendant's contention that Japan's status as a non-Hague Convention country should automatically defeat the plaintiff's request for international removal. Noting that the trial court properly assessed Japan's non-Hague Convention status as a consideration under the *Baures*' framework, the Court gave deference to the finding of the trial court, particularly the finding that the plaintiff appeared to be credible and sincere in her desire to facilitate the defendant's continued parental relationship with his daughter.

In addition to extending the *Baures* principles to international relocation, *McKinnon* is also important for two other reasons. First, it underscores the continuing theme of our courts that some loss of parenting time may be overcome by improved technology and transportation. Second, it underscores the court's intention in the light of *Baures* to accord particular respect to the custodial parents' rights to seek happiness and fulfillment, even if thousands of miles away from the noncustodial parent.

RETAINING JURISDICTION

In settlement discussions, one issue may be retention of jurisdiction. What if the custodial parent, now entrenched in a far-away state, seeks to modify the parenting plan? Suppose the parent does not comply and enforcement proceedings become necessary? Worse yet, suppose the custodial parent seeks to move to a more distant state? Where would these issues be litigated? Can you ever protect your client to insure continuing jurisdiction in the state of New Jersey?

Previous cases such as *Peregoy*[49] and *Hendry*[50] addressed the issues under the Uniform Child Custody Jurisdiction Act (UCCJA). However, that act was repealed and replaced by the New Jersey Uniform Child Custody Jurisdiction and Enforcement Act (NJUCCJEA), effective Dec. 13, 2004.[51] The case that addresses the jurisdictional issue is *Griffith v. Tressel*.[52]

In *Griffith,* the final judgment incorporated an agreement to share legal custody; assign residential custody to the plaintiff mother; permit her to move with the child to Maryland; and designate New Jersey as the "home state" pursuant to the UCCJA prior to its repeal. Four years later the defendant father sought primary residential custody, and the mother cross-moved, asserting that Maryland, where she had now lived for four years, was the most appropriate forum. A plenary hearing was scheduled, and the plaintiff mother filed a notice of appeal.

The court held that the parties' agreement to designate New Jersey as the home state was not determinative, since an agreement between the parties cannot bind the courts of this state to accept subject matter jurisdiction when not permitted by law. In analyzing jurisdiction, the court indicated that the first question to be answered is whether New Jersey has acquired "exclusive, continuing jurisdiction" over custody determinations in the case.[53] When the courts of the state of New Jersey have acquired "exclusive continuing jurisdiction," the second question is whether during the time between the initial order (which in many cases may be the final judgment of divorce) and the filing of the motion for modification, circumstances have changed to divest New Jersey of that jurisdiction. Such exclusive, continuing jurisdiction is retained until a New Jersey court determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state, and that substantial evidence is no longer available in the state concerning the child's care, protection, training or personal relationships.[54]

In *Griffith*, the Appellate Division interpreted the statute to mean that as long as either a "significant connection" or "substantial evidence" is extant in New Jersey, exclusive, continuing jurisdiction is retained.[55]

However, the inquiry does not end there. There is a third level of inquiry that permits New Jersey to decline to exercise jurisdiction at any time, if it determines it is an inconvenient forum and the court of another state is a more appropriate forum.[56] In its analysis, the court is to consider all relevant factors, including: 1) whether domestic violence has occurred and is likely to continue, and which state can best protect the parties and the child; 2) the length of time the child has resided outside of the state; 3) the distance between the court in the state and the court that would assume jurisdiction; 4) the relative financial circumstances of the parties; 5) *any agreement of the parties as to which state should assume jurisdiction* (italicized for emphasis); 6) the nature and location of the evidence required to resolve the pending litigation including the testimony of the child; 7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and 8) the familiarity of the court of each state with the facts and issues of the pending litigation.

In *Griffith*, notwithstanding the agreement of the court finding a significant connection with the state of New Jersey and that the parties had agreed New Jersey would retain jurisdiction, the court nonetheless determined that jurisdiction should vest in the state of Maryland. In weighing the aforementioned statutory factors, the court found they weighed heavily in favor of the finding that Maryland was in a better position to address post-judgment parenting issues. In addressing the parties' agreement, the court indicated:

> To the extent that the parties agreed in 2001 that New Jersey would be the

> home state pursuant to the UCCJA, that agreement does not clearly indicate an intention to conduct post-judgment litigation in New Jersey four years later regardless of changes in the controlling law or familial circumstances.[57]

Accordingly, an attorney is unable to counsel a client that jurisdiction would be retained in the state of New Jersey despite a written agreement to that effect. Suffice it to say, if you represent the relocating party you may wish to urge a provision indicating that future jurisdictional issues would be determined pursuant to the NJUCCJEA or, alternatively, to have the agreement remain silent on the issue. On the other hand, if you represent the parent remaining in New Jersey, in the negotiation process the best you can do is try to craft a provision as follows:

> Each of the parties hereby irrevocably consents to the jurisdiction of the courts of the State of New Jersey concerning any action relating to the child (or children) including by description but not limitation the enforcement or modification of any provision of the agreement entered into by and between the parties relating to the parenting of the child (or children). The parties understand that the issue of relocation could have been litigated in a trial pursuant to N.J.S.A. 9:2-2 and the case precedent thereunder. It is agreed herein that a material part of the consideration of settlement issues in permitting the parent to relocate out of the state with the child (or children) without court determination is the agreement that New Jersey courts would retain jurisdiction in the event of any post-judgment litigation respecting parenting issues including enforcement issues.
>
> The parties have been made aware by their attorneys of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) including the right of the Plaintiff to assert in the future that there is not a significant connection or substantial evidence in the State of New Jersey respecting the children. Each of the parties has likewise been made familiar with the case precedent in New Jersey including *Griffith v. Tressel*. The parties desire that this consent to jurisdiction provision be controlling and determinative in the event of a post-judgment issues respecting parenting, including enforcement, until the respective emancipation of any child referenced in this agreement. The parties further desire that such provision be determinative irrespective of the passage in time, changes in the economic employment and health conditions of either of the parties; changes in the age, level of education or other conditions of the child (or children); as well as any other factors set forth in N.J.S.A. 2A:34-71 with which both the parties are now familiar.

In representing the party remaining in the state of New Jersey, it is important for an attorney to advise his or her client in writing that while such language represents the best effort that can be made to retain New Jersey jurisdiction, a court, while considering the parties' assent, will not be irretrievably bound by the terms and may still consider the underlying policies of the UCCJEA.

AVOIDING THE PLENARY HEARING

While in most instances an application to relocate will require a plenary hearing, it is not inexorably required. Accordingly, there may be factual situations where the issues can be resolved by motion, without the need for a plenary hearing. Instructive is *Barblock v. Barblock*.[58]

In *Barblock*, the mother of two minor children sought to relocate with them to Buffalo, New York. At the time of the proceedings, the children were ages nine and seven. The parties had entered into a property settlement agreement providing for them to share joint legal custody of the children, with the mother designated as the parent of primary residence and the father having parenting time at least every other weekend, from Friday evening through Sunday evening, Tuesday and Thursday evenings and alternating holidays. The record was clear that the parties contemplated, at the time of the divorce, a potential relocation of the mother with the children.

A motion was filed before the family part judge in which a parenting plan was suggested that would permit the children's father to have parenting time one weekend a month; a week in December; alternating holidays; and four weeks in the summer; and the transportation would be shared. The trial judge heard extensive oral argument on the motion, considered written summations of the parties, and ultimately concluded that a plenary hearing was unnecessary because the father had failed to muster adequate reasons to forestall the plaintiff's move to Buffalo.

The Appellate Division affirmed the trial court's decision, rejecting the father's argument that a plenary hearing should have been permitted. Of critical importance in the appellate court's reasoning is that the father did not assert, by way of cross-motion for custody or otherwise, that he was ready, able and willing to take on the role of primary parent if the mother chose to relocate to Buffalo without the children. He simply adopted what the Appellate Division called a "just say no" posture to the motion without coming forward with sufficient competing proofs showing that the move would be harmful to the children.

The practice tip here is that when a client has favorable facts militating in favor of relocation in a post-judgment situation when the client is the parent of primary residence, do not simply assume a plenary hearing is required. File a detailed motion setting forth the client's good faith reasons for the move and articulating why the move would not be inimical to the children's best interest. Include a generous but realistic parenting

plan, and set forth as much detail as possible, including the logistics of transportation. If you find yourself opposing the motion, learn from *Barblock*. In addition to filing an opposing certification, file a cross-motion on behalf of the client, making sure to allege the party's desire and ability to assume primary custody if the other party relocates.

UNDERSTANDING THE COURT RULES

Just because it is a 'removal' case do not lose sight of the fact that first and foremost it is a custody case. As has been indicated in this article, if the removal application is made prior to the custodial status being determined, primary custody will have to first be established as part of the proceedings. If there is a true shared custody arrangement, a relocation will be tantamount to a change in custody, thus also requiring a best interest analysis. There are accordingly three essential rules with which the practitioner needs to be familiar.

Rule 5:8-5, Custody and Parenting Time/Visitation Plans

The rule requires the parties to each submit a custody and parenting time/visitation plan to the court no later than 75 days after the last responsive pleading, which the court shall consider in awarding custody and fixing a parenting time schedule. In fact, Rule 5:8-5(c) indicates that the failure to comply with the provisions of the rule may result in the dismissal of the non-complying party's pleadings, the imposition of other sanctions, or both.

If you represent the potential relocating party, provide a detailed plan, which affords liberal parenting time to the other party. Do not be pennywise and pound foolish. Particularly in a middle-class case, do not try to impose the bulk of the transportation and transportation costs on the other party. If anything, have your client take up the mantle and assume the bulk of those responsibilities. On the other hand, if you represent the party opposing relocation, be imaginative and avoid the pitfall of *Barblock*. Affirmatively assert a plan that would establish your client as the parent of primary residence if the other party seeks to relocate. Then, set forth a fair visitation plan for the relocated parent.

Do not be punitive, as it is also the other party's obligation to propose a plan that is reasonable. However, in the event employment commitments or other factors, which would make it impossible for the parent of alternate residence to assume custody if the other party leaves, do not submit a plan that cannot be justified at trial. To the contrary, explain to the court in the plan why employment responsibilities would curtail your client's ability to have a meaningful relationship with the child if relocation were granted. For example, if those responsibilities prohibit your client from taking time off during winter and spring breaks and during the summer, the court needs to know that any suggestion by the purported relocating party to provide parenting time to your client during those blocks of time would be impractical. You have the right to spell this all out under "any other pertinent information," pursuant to Rule 5:8-5(a).

Rule 5:3-3, Appointment of Experts

This rule permits the court, in its discretion, to appoint mental health professionals to assist the court by performing parenting/custody evaluations. The experts may be selected by mutual agreement of the parties or independently by the court. As an attorney representing one of the parties, a threshold question is whether an expert is required. The answer depends on a multiplicity of factors. For example, if you represent a potential relocating party, and there is one child age two, you may wish to indicate to the court that the child is young, cannot possibly be clinically evaluated or tested by an expert, and there is accordingly no need for an expert. On the other hand, if you represent the party opposing relocation you may argue that an expert is required to evaluate whether your client has psychologically bonded with the child and, if not, whether relocation would accordingly be harmful.[59] There is one thing that is certain, however, if the children are of suitable age to be evaluated the court will usually insist upon an expert being appointed, either by mutual selection or by court selection.

You should also be aware of the fact that Rule 5:3-3(h) does not preclude the retention of private experts, either before or after the appointment of an expert by the court on the same or similar issues. Obviously, a battle of the experts can become extremely costly, and in many cases may be cost prohibitive.[60] However, if finances are no object, it is critical that you include in the initial case management order exactly how you wish to proceed, otherwise you will probably be precluded later. If you wish to hire a private expert to work parallel with the efforts of the court-appointed expert, make sure a provision to that effect is included in the case management order. If the court permits you to engage a private expert as a rebuttal expert after the court-appointed expert has completed his or her report, also make sure this is included in the case management order or you may be precluded from later obtaining a report. Leave sufficient time in the scheduling order to allow the rebuttal expert to properly complete a report but carefully consider whether your client really wishes to expose the child to two separate evaluations. Engage your client in some discussion before a final decision is made.

Finally, understand Rule 5:3-3 so you are in a position to explain the rule to your client and make a reasoned decision not only with respect to selection of experts but to further explain to your client the discovery procedures and use of evidence as set forth in the rule.

Rule 5:8-6, Trial of Custody Issue

In addition to understanding the rule itself, make sure your client has a full understanding that as part of the hearing the children may be subjected to an *in camera* interview by the trial judge. In the absence of good cause, the decision to conduct such an interview is to be made before the trial. In my experience, I have often found that judges do find good cause to wait until the end of the trial testimony to interview the children. However, if the children are interviewed before trial, be aware that counsel has the right to provide the transcript of the interview to any expert, including a private expert, retained with respect to the custodial issues.

Finally, if the court elects to conduct an interview, counsel is to be afforded the opportunity to submit questions for the court's use during the interview, and to the extent that questions are rejected by the court a record of the reasons are to be placed on the record.

If the court determines that an interview is appropriate, instruct your client, both at a conference and in writing, what to tell the child and what not to tell the child. The child should only be told of the procedure for arriving at the courthouse and that the judge intends to ask some questions about his or her family, including mother, father, brothers and sisters, and in some cases third parties. The child should simply be told to tell the truth, no matter what questions are asked. Instruct your client to never tell the child specifically what may be asked or what the child should say. Coaching the child will be easily exposed by any competent jurist, and will impugn the client's credibility.

STAGES IN THE PROCESS

Essentially, there are four separate stages during which the litigant either seeking removal or opposing removal will contact counsel. These stages may be described as follows:

1. **Intact Family.** The parties are residing together but at least one of the parties consults an attorney regarding a right to relocate or, conversely, his or her fears about the other party attempting to relocate.
2. **Pre-Litigation Separated Family.** The parties have been separated for a period of time and have operated under an *ad hoc* set of standards, not court ordered, with respect to the parenting of their child or children. Again, counsel is consulted with respect to removal or how to resist removal.
3. **The Litigation Stage.** The parties are engaged in active litigation and, in almost every instance, have been separated for some period of time. Accordingly, there is usually already a history of a *de facto* parenting plan, but it does not address the issue of removal. Each party has already engaged independent legal counsel. The issue may arise in the active sense, in that removal/relocation has already become part of the panoply of issues to be litigated or mediated. It may also arise in the passive sense, in that removal plays no immediate part in the various issues being litigated, but one or both of the parties seek certain rights through a negotiated property settlement agreement in the event of future efforts by one of the parties to relocate.
4. **Post-Judgment Litigation.** The parties are divorced. Accordingly, the length of time the parties have operated under either a court-ordered or consensually negotiated parenting arrangement is generally of greater duration than with respect to the other stages. Since the factors that will be discussed below have probably manifested themselves more quantitatively and qualitatively than in the other stages, the ability to legally prevail on the issue of removal, one way or the other, generally becomes more ascertainable in this stage.

FACTORS THE COURT WILL CONSIDER

Obviously, which stage the case is in will dictate how important the factors set forth may be. Put another way, the greater duration of time in which the parties have parented their children while living separate and apart, the more relevant these factors become. In analyzing how 'ingrained' each party has become in the lives of their children, factors that the court may consider are:

Time Allocation

a. How many overnights do the children spend with each parent in the course of a month?
b. What is the allocation of midweek time, if any, between the parents, particularly during the school year?
c. How long has the parenting plan been in existence?
d. How did the parenting plan evolve? Was it foisted upon the more docile or submissive parent, or was it the product of a negotiated court order or property settlement agreement.
e. Has the noncustodial parent exercised all available parenting time in the past? If not, how much time was forfeited? Have there been late pickups and/or drop offs resulting in lost time?
f. Conversely, has the primary custodial parent denied parenting time to the other parent in the past? Accordingly, once outside the jurisdiction, will that parent comply with an interstate parenting plan or attempt to manipulate it?

School-Related Issues

a. Do the parties have a relationship with the children's teachers?
b. Who transports the children to and from school?
c. Do the parties attend school functions, including teacher conferences?
d. Do the parties assist their children with homework?
e. Have the parties assisted their children with required special projects?

f. Do the parties review and discuss the children's report cards with the children? With each other?
g. Are the children involved in extracurricular activities with their school? If so, what is the involvement of each party in those activities?
h. Have there been problems when the children have been under the watch of one or both of the parents such as being late for school; excessive absenteeism relating to school; missing extracurricular activities; not getting homework properly completed; or not being ready for school tests?
i. Does the child have learning problems? If so, is the child in a special program or uniquely involved with a teacher who has helped the child progress dramatically? Would this situation be difficult to replicate if relocation was granted.

Health Issues

a. Which parent takes the children to the pediatrician, the dentist, and/or the psychologist?
b. Which parent selects the healthcare providers and/or suggests any of the providers?
c. Which parent provides medical coverage? Is it provided at that parent's own expense or paid for by the employer?
d. Which parent administers prescriptive drugs to the children?
e. Which parent has discovered medical/psychological problems of the child unnoticed or unattended to by the other parent? Did one parent resist taking the child to a psychologist or psychiatrist?
f. Which parent provides life insurance for the benefit of the children?
g. Does the child have medical problems? Is there an adequate opportunity to get treatment in the new area?

Religious Issues

a. Are the parents of the same religious faith?
b. In what religion are the children being raised?
c. What is the importance of organized religion to each parent; do the respective parents attend a church or synagogue?
d. Do either of the parents assist the children with religious instruction, such as CCD or Hebrew school?
e. If the parents are of different faiths, are they nonetheless both committed to raising the children in one religious faith?
f. Has either parent manifested religious intolerance?

Inter-Relationship with Children's Extracurricular Activities

a. Are the children engaged in sports activities? If so, has one of the parents taught the children to play a sport? Is a parent involved in the formal coaching of a sport (Little League, etc.)?
b. Are either of the parents active in sports themselves, including the same sports the children play?
c. Do the children play musical instruments? Which parent has encouraged music?
d. Does one of the parents play a musical instrument and, if so, has that parent instructed the child?
e. Are any of the children interested in art? Does one of the parents assist the child with that activity?
f. Are the children involved in a scouting program? If so, what is the involvement of each parent in that program (den mother or father; scout master, etc.)? Have the children been involved in volunteer or charitable work in the community? If so, to what degree has each parent been involved?
g. What other activities does each parent do with the children, including taking them to cultural activities (museums, plays and concerts); spectator sports activities (professional, college and high school events); and recreational activities (the beach; the boardwalk; the zoo; carnivals and circuses)?

Household Functions

a. Does each parent prepare meals for the child, or does one parent consistently dine out with the child?
b. Do other children (friends) often visit the children at each parents home, or only at one parent's home?
c. What are the accommodations for the children at each home (sleeping arrangements; sharing of beds; sharing of bedrooms)?
d. Does each parent do food shopping, including selecting food for the children? Do the children help each parent with the food shopping?
e. Does each parent purchase clothing for the children, or does one parent rely on the other?
f. Is there a complete wardrobe for each child at each parent's house? Conversely, is there only clothing kept at one house which is transported to the other?
g. Who takes the children for their haircuts (or does one parent give the children haircuts)?
h. Do the children have specific chores to do at each household? If the chores are done properly, is there an allowance or other reward? If they are not done, are there repercussions?
i. What about household rules? Are there specific times set aside for reading? For turning off the TV? For going to bed?

Special Events

a. Which parent plans birthday parties for the children or is it a cooperative effort?
b. Does each party travel with the children? Are the trips child-oriented or adult-oriented?

Inter-Relationship Between Households

a. Do the children have their own set of toys and games at each

household?
b. Does each parent maintain resource tools at their home (computers, reference books, etc.)?
c. At which household (or both) are sports equipment, musical instruments, etc. kept?

Third Parties

a. What is the relationship between the children and each parent's significant other or new spouse (if applicable)? Are there half brothers/sisters or step-brothers/sisters involved on one side of the family? If so, where do they live, and what is their relationship with the children at issue?
b. What is the relationship between the children and the extended family on each side (grandparents, cousins, nieces, nephews, etc.)?
c. What is the relationship between each parent and other family members? (Just because the extended family may live in close geographical proximity doesn't necessarily mean there is a close relationship.)
d. What positive influences (or negative influences) have been brought to the children by other family members?

Personal Habits of the Parents

a. Do either or both of the parents smoke? If so, is it done in the presence of the children?
b. Is either parent an excessive drinker? Have there been incidences of driving while intoxicated? Loss of driving privileges?
c. Have there been incidents of domestic violence, either toward a spouse or child by either of the parents?
d. Has either parent behaved inappropriately with a third party in the presence of a child?
e. Has either party contracted a venereal disease?

OTHER FACTORS

a. What is the health of each parent, both physically and emotionally? Is either parent under the continuous care of a physician or a psychologist/psychiatrist? If so, what is the diagnosis and what is the prognosis?
b. Has either parent been guilty of negligent supervision of the children? Has that supervision resulted in injury to a child? Does each parent insist on seatbelts being worn, without exception?
c. Do one or both parties engage in corporal punishment? Does one party believe that the punishment has been excessive?
d. If there is an existing child support order in place, is the paying parent current? Have there been arrears in the past?

PRACTICAL SUGGESTIONS FOR NEGOTIATING AND TRYING THE CASE

This article has identified many of the factors, which will assist the family lawyer in determining to what degree, if at all, each party is ingrained in the lives of his or her children. Suffice it to say that as the stages change (from intact family to post-divorce litigation), many of the factors become more important, and, in some instances, dispositive of the case. In the end, if the case cannot be amicably settled, the court will ultimately have to make what is an extremely difficult and emotionally charged decision. In great measure, how each practitioner deals with the aforementioned factors and presents them to the court may well determine the outcome of the case.

Relocation cases are extremely fact sensitive. Be prepared to address all of the relevant factors in *Baures*, utilizing all available resources, including demonstrative evidence such as charts reflecting prior parenting arrangements including compliance and/or non-compliance; calendars demonstrating time allocation spent with each parent; calculations showing the ability (or inability) to reasonably replicate an existing parenting plan based upon time spent with each parent; charts showing how the major parental responsibilities have been divided up, *de facto*, between the parties; and utilization of as many visual aids as possible. If you represent the potential relocating parent and cost-containment is not an issue, consider having the new community filmed professionally. Alternatively consider placing photographs into a PowerPoint presentation so that an appropriate large screen projection can be made during the trial. Judges are human, if a judge is going to permit relocation, letting the judge observe where the child is moving can certainly be helpful.

Having said that, I would like to make some practical suggestions to the family lawyers:

1. If your client consults with you in the intact family stage and discusses out-of-state relocation, be aware of the aforementioned factors and others you may think of so that you may be in a position to advise your client on what he or she must substantiate either to be successful in a removal application or successful in opposing such an application.
2. If a client comes to you after the parties are already separated, advise the client on what immediate changes in the parenting of the children he or she must make to be successful in either a removal application or in opposing the removal application. If your client plans to seek immediate removal, and the facts appear not to favor a successful result, the best advice is to tell that client to put his or her plans on hold and to try to make some consensual adjustment, without attorney involvement, that will ultimately buttress the client's position.
3. From the day your client consults with you, instruct that client to keep a detailed diary, not only regarding time allocation but with respect to the

other day-to-day factors enumerated in this article.

4. For purposes of trial, encourage the client to keep as many visual aids as possible. This includes videos of activities with the children, photographs of activities with the children, homework assignments and special projects worked on with the children, etc.
5. If you are in the divorce litigation stage and you represent the client who fears a post-judgment removal application, contemplate the following:
   a. A provision in an agreement that prohibits either spouse from leaving the jurisdiction permanently with the children. While this is undoubtedly unenforceable because the court will still ultimately look to the best interest of the children, it at least is another factor that the court will have to consider. It also might have a chilling effect upon a parent making a post-judgment application. Moreover, if one parent is extremely resistant to such a provision, it may tip their hand and validate your client's fears.
   b. Attempt to craft a provision that sets forth that it is in the best interest of the children for the parties to live within a certain geographical proximity of one another, which can be defined in the agreement. Do not leave the provision solely with this conclusory language. However, set forth the specific factors regarding why the parties believe it is in the best interest of the children.
   c. Attempt to add language indicating that since the parties uniquely believe it is in the best interest of the children for them to remain in close proximity with one another, any party seeking to move beyond that proximity would have the burden of proof in justifying that move, notwithstanding the case law extant in New Jersey.
   d. If a joint parenting plan is being crafted as part of an agreement, set forth language indicating that if either party desires to relocate, neither party wants to be bound by the *Holder/Baures* calculus, indicating further that even if one party is relocating for good faith reasons, the burden of showing that relocation would or would not be adverse to the children's best interests should not lie with one party or the other; to the contrary a custody modification standard, based upon the best interests of the child, should apply under *Voit,* and the burden is to be placed on the party seeking the modification.
6. If you represent a parent in the divorce proceeding who has told you that he or she (as the primary custodial parent) wishes to relocate sometime after the case is over, try to limit the post-judgment litigation. Attempt to include a provision that would permit a primary custodial parent to relocate and provide for a modified visitation schedule in such an event.
7. Remember that resisting removal as a traditional visiting parent is now very difficult in New Jersey, as in most states. If you represent the noncustodial parent in the divorce litigation or post-judgment stages, engage in triage. In other words, instruct your client on the existing state of the law and then make your best deal for the client. Among the concessions to be negotiated are:
   a. Imposing upon the moving party the bulk of transportation.[61]
   b. If the relocation is only several hours away, weekends should still be part of the visitation package, particularly all three- and four-day weekends.
   c. Craft a provision that allows your client, at his or her expense, to come to the custodial parent's locale and visit with the children several times per year, upon reasonable notice.
   d. Try to maximize time for your client during spring and winter break. Make sure you provide that this time will be spent with your client irrespective of whether the client is working or on vacation.
   e. Maximize the summer visitation. Provide that child support ceases during that period of visitation.
   f. Address the issue of summer camp upfront if it is a concern. If a child is of camp age and the custodial parent wants the child to go to summer camp, which will impact your client's visitation, address it up front rather than in post-judgment litigation.
   g. If the driving distance is only a few hours, or if there is sufficient family money so airplane transportation is not cost-prohibited, at least alternate the four-day Thanksgiving recess and perhaps the three-day weekends.
   h. Try to negotiate a reconsideration clause, which provides that when a child attains a certain age, the parents will at least consider a custodial change.
   i. Think about a provision that indicates that if a child reaches the age of 14 years and wants to live with the noncustodial parent, the expression of this intent would automatically result in a custodial change. In arguing for this provision, cite *Kavrakis v. Kavrakis*,[62] indicating that if the child is

of suitable age (defined as age 14) to signify consent to removal, and if the consent was informed and voluntary, the child has the right to remove from New Jersey without a hearing. Also cite *Palermo v. Palermo*,[63] that the opinions or expressed preferences of a child to live with one parent over another may properly be one of the factors a trial judge may consider. That case was cited with approval in *Chen*.[64] Of course, under *Baures*, the preference of the child is now a factor the court is to consider.

j. Negotiate the lines of communication. Make sure there are provisions regarding unfettered telephone access. Provide that the noncustodial parent, at his or her expense, can have a separate telephone line installed in the bedroom of the child.

k. Make sure to maximize daily contact through unlimited computer access, video imaging, and video conferencing as expressed in *Chen* and *Baures*. It is not a substitute for personal parenting time, but it is an important means of communication, nonetheless.

This triage methodology will certainly not be a complete panacea for the loss of day-to-day or week-to-week parenting time. Your job in representing the noncustodial parent is to provide a mechanism for your client to remain a significant influence in the lives of the children. It is suggested that if an attorney representing the custodial parent has a similar obligation. Even if the case is tried, your client should be prepared to testify as to an affirmative desire to maximize time between the children and the nonmoving party.

HEALING THE WOUNDS

Finally, when representing the noncustodial parent, there is another serious obligation foisted upon the family lawyer. An attorney should encourage his or her client to heal the wounds. The advice to your client in this regard may take several forms, including:

1. Do not obsess. Do not spend the rest of your life trying to get even. Do not spend the rest of your life thinking up ways to get the custodial arrangement reversed.
2. Urge your client to engage in some therapy. The loss of interaction with one's child on a week-to-week basis and in some cases not being able to see them for months at a time will be very traumatic for some parents. In these cases, therapeutic intervention is almost mandatory.
3. Encourage your client to be all the parent he or she can be. Encourage the client to take full advantage of every opportunity to remain ingrained in the life of his or her children; to remain a loving and affectionate parent and to be a role model for the children.

Relocation in this country will only increase in ensuing years. It is becoming increasingly unrealistic to expect that any family in contemporary American society, whether intact or divorced, will remain in one geographic location for an extended period of time. The instability and unpredictability of the labor market, the high incidence of remarriage coupled with the high incidence of second divorces, and movement from one state to another by one or both parents now represent the norm. Children are uprooted from their friends, their schools and their neighborhoods, and accordingly, the child's community or network of support at the time of divorce cannot realistically be regarded as a continuing source of his or her stability. We as family law practitioners will be called upon to grapple with these sensitive issues in increasing volume in the years to come. We must be prepared to do so. ■

ENDNOTES

1. Peter, Paul and Mary; Carole King.
2. *New Jersey Family Lawyer*, Volume XVIII, Number 1, January/February 1998; Volume XXI, Number 3, August 2001.
3. Norma Levine Trusch, Relocation of Children After Divorce: The Winds of Change, 18 *Fair-Share* (April 1998) at P.2.
4. Ford, C (1997) Untying the Relocation Knot: Recent Developments and a Model for Change. *Columbia Journal of Gender and Law*, 7, 1-53.
5. *Cooper v Cooper*, 99 N.J. 42, 50 (1984).
6. *Id.* at 56.
7. *Id.* at 57.
8. *Id*. at 56-57.
9. 111 N.J. 344 (1988).
10. *Id*. at 349.
11. *Id*. at 353.
12. *Id*. at 353.
13. 236 N.J. Super. 37 (Ch. Div. 1988), *aff'd* 231 N.J. 1 (App. Div. 1989).
14. 256 N.J. Super. 529 (Ch. Div. 1991).
15. 229 N.J. Super. 531 (App. Div. 1989).
16. 269 N.J. Super. 300 (App. Div. 1993).
17. 286 N.J. Super. 448 (App. Div. 1996); *cert. den*. 144 N.J. 376 (1996).
18. *Id*. at 457.
19. 297 N.J. Super. 94 (App. Div. 1997).
20. Id. at 102 (*citing Holder, supra* at 353).
21. *Id*. at 103 (*Citing Cerminara, supra* at 457).
22. *Id*. at 104.
23. *Baures v. Lewis,* 167 N.J. 91, 97-98 (2001).
24. *Id*. at 106.
25. *Id* . at 114.
26. *Id*. at 119.
27. *Id*. at 116-117.
28. *Id*. at 119.

29. *Id*. at 117.
30. *Id*. at 118.
31. *Id*. at 116.
32. 217 N.J. Super. 103, 106 (Ch. Div. 1998).
33. *Id*. at 121.
34. *Ibid*.
35. 265 N.J. Super 387, 398 (App. Div. 1993); 181 N.J. Super. 130, 136 (App. Div. 1981).
36. 346 N.J. Super 493 (App. Div. 2002); 349 N.J. Super. 381 (App. Div. 2002).
37. *O'Connor, supra*., at 385.
38. *Ibid*.
39. *Ibid*.
40. 384 N.J. Super. 266 (Ch. Div. 2005).
41. *Id*. at 271.
42. *Id*. at 273.
43. 361 N.J. Super 419 (App. Div. 2003).
44. *Id*. at 426.
45. 191 N.J. 240 (2007).
46. *Id*. at 251-252.
47. *Ibid*.
48. *Id*. at 255.
49. 339 N.J. Super. 326 (2003).
50. 358 N.J. Super. 179 (2003).
51. *See* N.J.S.A. 2A:34-53 through 95.
52. 394 N.J. Super. 128 (App. Div. 2007).
53. *Ibid*. at 139.
54. *Ibid* at 140-141.
55. *Ibid* at 145.
56. *Ibid.* at 148.
57. *Ibid*. at 150.
58. 383 N.J. Super. 114 (App. Div. 2006). *See also Pfeiffer v. Ilson*, 318 N.J. Super. 13 (App. Div. 1999).
59. While there are many articles addressing the potential effects of relocation on very young children, attention is particularly directed to Kelly and Lamb, Developmental Issues in Relocation Cases Involving Young Children: When, Whether and How? *Journal of Family Psychology*, 203, Volume 17, Number 12, 193-205.
60. In some cases, expert testimony may be necessary with respect to the *Baures* paradigm; a "best interest" analysis or both. The trial judge is, however, in no manner bound by the findings, opinions or recommendations of an expert, even if court appointed. *See Todd v. Sheridan*, 268 N.J. Super. 387, 400-01 (App. Div. 1993); *Cerminara, supra* at 456.
61. *See Santucci v. Santucci*, 221 N.J. Super. 525, 531 (App. Div. 1987). *See also O'Donnell v. Singleton*, 384 N.J. Super.141 (App. Div. 2006).
62. 196 N.J. Super. 385 (Ch. Div. 1984).
63. 164 N.J. Super. 492, 499 (App. Div. 1978).
64. *Chen, supra*, at 381.

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offenses, *see* 37 N.J.R. 2807(a), specifically N.J.A.C. 10:122C-5.4 (a)(4) and (5).
28. R. 5:12-4(b).
29. N.J.S.A. 9:6-8.43(b).
30. *Id*.
31. *See*, N.J.S.A. 9:6-8.9.
32. N.J.S.A. 9:6-8.9(d).
33. *See*, N.J.A.C. 10:129-2.2.
34. N.J.A.C. 10:129-2.5(b).
35. N.J.A.C. 10:129-2.5(c)(5).
36. N.J.A.C. 10:129-2.5(c)(6).
37. N.J.A.C. 10:129-2.9.
38. 181 N.J. Super. 190 (Juv. & Dom. Rel. Court, Camden County, 1981).
39. *Id*. at 201.
40. *Id*. at 202.
41. N.J.A.C. 10:129-2.9(9).
42. N.J.S.A. 9:6-8.46(b).
43. R. 5:12-4(d).
44. *Id*.
45. *See* 803(c)(6).
46. *See In re Cope*, 106 N.J. Super. 336 (App. Div. 1969).
47. N.J.S.A. 9:6-8.46(a).
48. *In re D.T.*, 229 N.J. Super. 509 (App. Div. 1988).
49. N.J.R.E. 703.
50. *See generally, Matter of Yaccarino*, 117 N.J. 175, 196 *1989) and *Buckelew v. Grossbard*, 87 N.J. 512, 524 (1981).
51. *See Todd v. Sheridan*, 268 N.J. Super. 387 (App. Div. 1993).
52. For more information on evaluating the sufficiency of mental health diagnoses, see Ackerman & Kane, *Psychological Experts in Divorce, Personal Injury and Other Civil Actions*, Fifth Edition, Volumes 1 & 2 (2007).
53. To confirm that the license of any professional required to be licensed in New Jersey remains in good standing, you may perform an applicant search at www.state.nj.us/cgi-bin/consumeraffairs/search/searchentry.pl.
54. N.J.S.A. 9:6-8.51(a)(6).
55. Pub. L. No. 105-09, 111 Stat. 2115 (1997), codified in various sections of 42 U.S.C.

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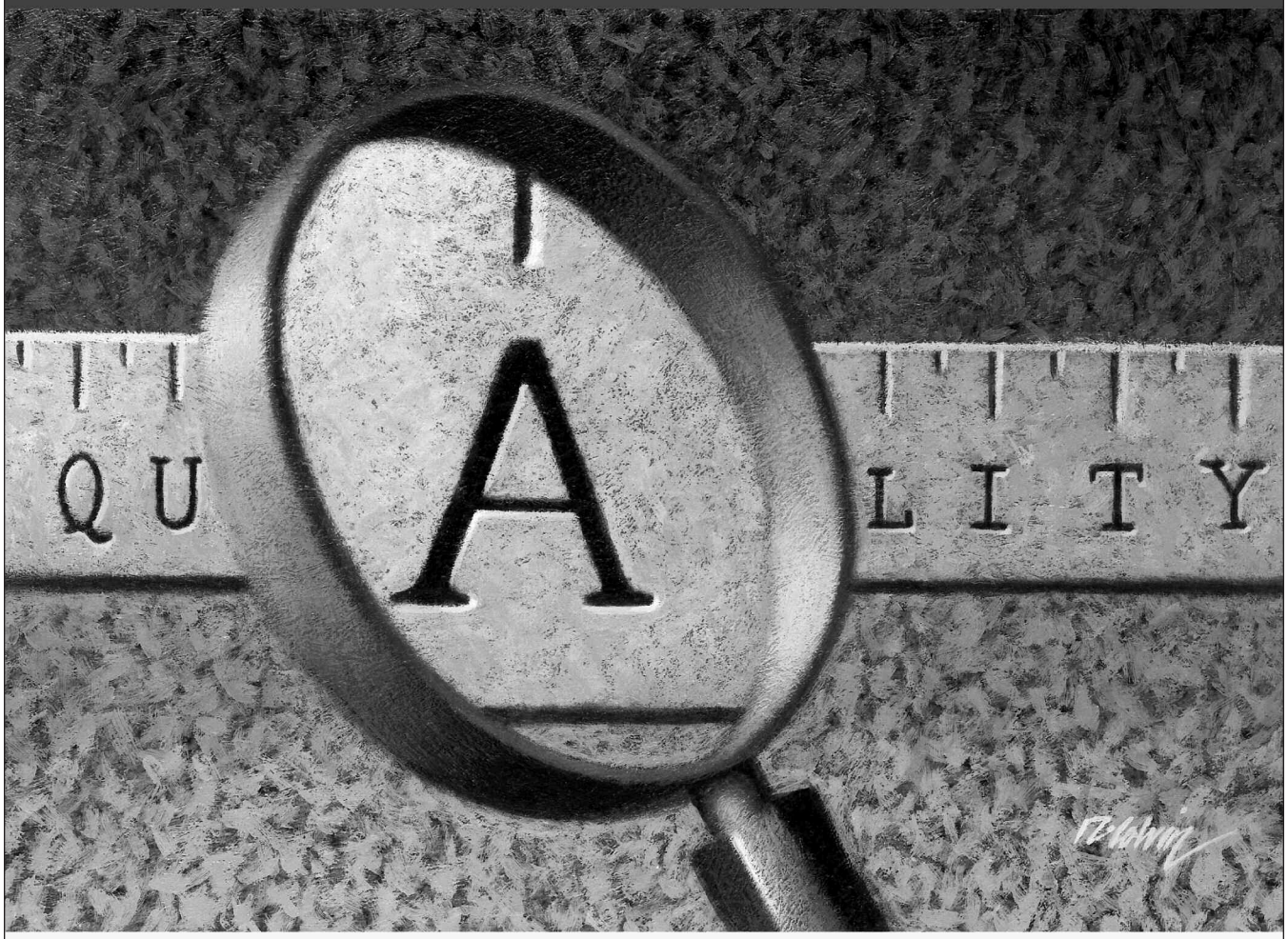

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