New Jersey Family Lawyer

Volume 26 • Number 1
September 2005

CHAIR'S COLUMN

Ready, Set, Go!

by Bonnie C. Frost

As I assume the position of chair of the New Jersey State Bar Association's Family Law Section, I look forward to a productive and active year. In preparing to write this column, I looked over the welcome columns of prior new chairs. All had thanked prior chairs and their leadership in getting the section to where it is today—the largest section of the New Jersey State Bar. All thanked their partners, mentors and other section officers. I am no different. My hat is off to all of you who have held this position before me. I am already in awe of the amount of work involved.

I have come to this place as a result of my relationships with other family lawyers and family part judges. I remember the first time I met Pat Barbarito, a former chair of the section and the winner of the prestigious Tischler Award in 2004, and my partner. We met one day in October 1985, at the Morris County Courthouse, during a judicial swearing-in. Pat, herself a young lawyer at the time, urged me to apply for a job at the firm where I have now been firmly entrenched for over 20 years. Initially I dismissed that offer because I did not want to be a family lawyer; rather, I wanted to practice law in a field where thinking about the law could "make a difference." I also felt that, because I had come from the field of adult education for under-educated adults and for adults new to this country, it was time to leave that *social work* stage of my life. However, I knew, deep down, that if I were to become a family lawyer I would be happy, since it would be a continuation of my life of helping others during difficult transitions in their lives.

After ultimately accepting the offer, I was trained by Peter Harris, who patiently taught me how to become the family lawyer I am today. As unbelievable as it may seem to those who know him, Peter was a great teacher. I also frequently attended Institute for Continuing Legal Education (ICLE) seminars, which stimulated my interest in learning more about family law. Through Pat and Peter, I learned that family law was multi-faceted and demanding, not only in the day-to-day practice of meeting clients and motion practice, but in *thinking* about the issues. In one job interview during my clerkship, an attorney told me that he liked practicing family law because it was "easy," and because he did not have to think. How wrong he was! The case law in our area has grown exponentially as more attorneys are forced to grapple with serious and substantial issues, as well as issues of fairness and justice.

The first motion I argued was before Judge Daniel Coburn, where I saw my client taken away in handcuffs. Obviously, that was not one of my most persuasive arguments. My first trial was before Judge David Cramp, who found that neither party was credible. That finding was eye opening for me—I had thought everyone told the truth, especially my own clients!

While in those first years of practice, Pat and Peter taught me about the day-to-day practice. I learned practical tips from seminars, from my interactions with other family lawyers at those seminars, and from other lawyers and judges in the courtroom. But, the day-to-day practice of law is difficult and stressful, not only because the clients we see are not at their best, but because of a court system that all too often places time goals on lawyers and clients ahead of the interests of the litigants. The family bar, a congenial group, has always provided support for one another during difficult times, and continues to do so today.

In order to become more involved in our practice, I became part of the Family Law Section Executive Committee, which brings me to writing this column. A few years ago, initiated by Lynn Newsome, then-chair of this

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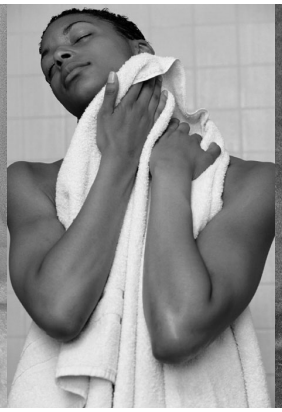

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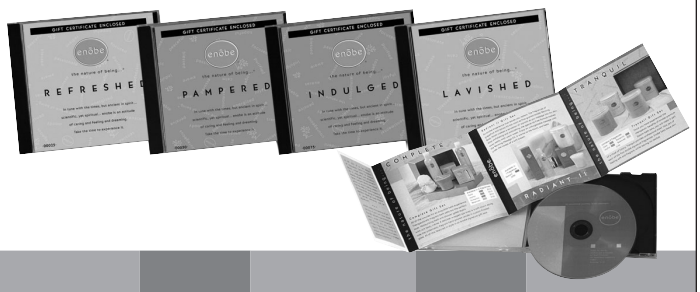

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New Jersey Family Lawyer

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section, we started a young lawyers sub-committee of the executive committee. It was our intent that we *older* lawyers had to think about stepping aside to allow new blood with new ideas and more energy into the organization, with the hope of ensuring the future success of our section. In addition, it was hoped that this opportunity would provide young lawyers with the chance to mingle with other young lawyers and form relationships that would last their entire careers. In the past two years, this young lawyers group has become very active with meet and greets around the state, and has organized entertaining and educational seminars at the Family Law Retreat. All young lawyers with less than 10 years experience are encouraged to join this sub-committee by contacting me directly.

The Family Law Section is also part of a larger organization, the New Jersey State Bar Association. There are many benefits to joining the state bar, and I encourage you to do so. First, everyone has access to free legal research via New Jersey CiteLine℠ with Lexis-Nexis. It includes all of the published cases, statutes and court rules. This is an invaluable free service for young and experienced lawyers alike.

Next, as a member of the New Jersey State Bar Association, your dues permit you to enroll in ICLE seminars at a reduced rate. I can still recall the first ICLE seminar I attended, which was designed for first-year lawyers and taught by Ed Snyder and Lee Hymerling. Some of the things they said in that seminar remain with me today, and are snippets of wisdom I repeat to other young lawyers. It was then that I realized ICLE seminars were things I must attend if I wanted to improve my lawyering ability.

We also produce the *New Jersey Family Lawyer*, which is a periodical published eight times each year and sent to all members of the section and all family part judges. The articles included in this publication have been cited by judges in this and other states to under-gird their decisions. The thoughtful reasoning of lawyers and experts in our state about family law issues has influenced many others nationwide. The *New Jersey Family Lawyer* is always interested in receiving articles for publication. When you are writing a brief on a novel issue, think about turning it into an article for the *New Jersey Family Lawyer*.

Working on your behalf, the Family Law Section Executive Committee is very active. We provide the New Jersey State Bar Association with our positions on pending legislation, court directives and policies. We include presiding judges, Appellate Division judges and family law judges in our meetings so they can hear our views and can, in turn, provide us with theirs. Also, members of our committee are regularly called upon to testify in Trenton on legislation that can impact families throughout the state. We take pride in making a difference.

The Family Law Section has also participated in writing and arguing before the Supreme Court as *amicus* for the NJSBA on the cases of *Weishaus v. Weishaus*[1] and *Mani v. Mani*.[2]

In January of each year, Frank Louis plans a stimulating seminar titled the Family Law Symposium. Its purpose is to encourage lawyers to re-energize themselves and think outside the box about facts they are presented with in their cases. It is very easy to get into a grind with the two-week motion cycle practice and, thus, easy to ignore cre-

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FROM THE EDITOR-IN-CHIEF *EMERITUS*

A New Beginning for the AOC

by Lee M. Hymerling

Appearing in this issue of the *New Jersey Family Lawyer* is an extensive interview with the new acting administrative director of the courts, Appellate Division Judge Philip Carchman. The interview marks the continuation of a tradition of this publication's editors discussing issues of importance to the family bar with leaders, future and present, of our Judiciary. Last year we published an interview with four assignment judges: Eugene Serpentelli of Ocean County; Linda Feinberg of Mercer County; Valerie Armstrong of Atlantic County; and Graham Ross of Somerset County. Previously we had published an interview with Chief Justice Deborah Poritz, who at the time was our state's attorney general.

The interview with Judge Carchman represents a probing look at the functioning of the seemingly monolithic, but actually very human, Administrative Office of the Courts (AOC).

Judge Carchman comes to his latest judicial assignment with a vast wealth of experience in every part of our judicial system, from past service in municipal courts to service in the Law Division, the General Equity Division, the Family Division; as an assignment judge and, most recently, as a long-serving Appellate Division judge. Along the way, Judge Carchman has been able to see our state's judiciary from every possible perspective, including service by designation on the Supreme Court.

Judge Carchman's credentials in the family part are particularly distinguished, having served as the presiding family part judge in Mercer County and having written a number of extremely important family law decisions in the Appellate Division.

The AOC is often misunderstood. What the interview makes clear is that the bar's perspective of the AOC as a sprawling, impersonal and bureaucratic agency is misguided.

Too often, too many view the AOC as little more than an agency that collects statistics designed to monitor, grade and torment the bench and bar. Too often, too many have viewed its past directors with fear and, in some instances, distain. Those judgments have not been fair.

Those of us who have had an opportunity to work with past directors, and more frequently with assistant AOC directors assigned to the Family Division, have had the occasion to meet distinguished lawyers and administrators who have not only been dedicated public servants but also have each left their special mark on how family law is administered in New Jersey. From Steve Yoslov to Alice Stockton to Jeff Kuhn to, most recently, current Assistant Director Harry Cassidy, they and others who have served in the position have done extraordinarily well, often with far too little by way of resources, and rarely with the positive recognition they deserve.

Judge Carchman is an ideal fit for his current position. He recognizes our section's traditional partnership with the Judiciary, which has lead chief justices for more than 25 years to appoint section leaders to positions of responsibility on innumerable Supreme Court committees that have shaped our rules and influenced our substantive law. Our section, better than any other, has understood that it is preferable to share our talents working within the judicial structure rather than oppose reform for opposition's sake. Chief Justice Robert Wilentz established the partnership, and Chief Justice Poritz has ably enhanced the tradition established by her predecessor.

These are not easy times for either the family bench or the family bar. The bench is beset with long dockets and inadequate resources. The family bar is confronted with best practices with which many disagree and deadlines which too often challenge not only the quality of our work but also the quality of our professional lives.

The dialogue that Judge Carchman welcomed with your editors bodes well for the future. It is important for the bar to better understand the work of the AOC, and for the AOC and its leader to better understand the challenges we confront.

The job of every jurist is to judge wisely without bias or favoritism. The job of the Administrative Office of the Courts and its director is to provide coordination and leadership, resources and understanding.

Let there be no doubt, Judge Carchman understands the important role played by the family part and how important the role of the AOC is to the efficient administration of family justice in New Jersey. Let there also be no doubt that Judge Carchman knows and respects the importance of our section's partnership with New Jersey's judicial system. We thank the chief justice for her selection of Judge Carchman, and we wish Judge Carchman well in this new and most challenging assignment. ■

Meet the Officers

BONNIE C. FROST
(CHAIR)

Bonnie C. Frost, certified as a matrimonial law attorney by the Supreme Court of New Jersey, is a managing partner of Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, P.C., in Denville, where she concentrates her practice in family law and matrimonial appeals. Ms. Frost is treasurer of the New Jersey Chapter of the American Academy of Matrimonial Lawyers; senior editor of the *New Jersey Family Lawyer;* a member of the Supreme Court Family Practice Committee; secretary of the District X Ethics Committee for Morris and Sussex counties; and a member of the American Bar Association, the Morris County Bar Association Family Law Committee and the Morris County Bar Foundation. Ms. Frost has lectured for ICLE and the Morris County Bar Association.

IVETTE R. ALVAREZ
(CHAIR-ELECT)

Ivette R. Alvarez, is counsel at Einhorn, Harris, Ascher, Barbarito, Frost & Ironson. Ms. Alvarez is a member of the New Jersey State, Garden State and Essex County bar associations; the vice-president for the Hispanic Bar Association of New Jersey; and a trustee at large for the New Jersey State Bar Association. She is a past chair of the District V-C Fee Arbitration Committee, and served on several Supreme Court committees, including the Family Law Practice Committee, the Skills and Methods *Ad Hoc* Committee, the Family Division Practice Sub-Committee on Child Support and the Custody and Parenting Time Subcommittee. Ms. Alvarez serves on the Executive Committee and Finance Committee of Legal Services of New Jersey, and has also been a board member and community advisor for the Resource Center for Women.

THOMAS J. HURLEY
(FIRST VICE-CHAIR)

Thomas J. Hurley is a solo practitioner in Burlington County. He is certified as a matrimonial attorney and a member of the American Academy of Matrimonial Attorneys. Mr. Hurley is a frequent lecturer for ICLE, and an annual contributor to the *New Jersey Family Lawyer.* He served on the District IV Ethics Committee, and has served on the Family Law Executive Committee since 1993. Mr. Hurley presently serves on the board of the Cedar Run Wildlife Refuge and Unicorn Handicapped Riding Association.

LIZANNE J. CECONI
(SECOND VICE-CHAIR)

Lizanne J. Ceconi is a principal and managing partner of Ceconi & Cheifetz, LLC in Summit. The firm specializes in matrimonial law and appears in courts throughout the state of New Jersey. Ms. Ceconi is a past president of the Union County Bar Association and currently serves 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 the last four Annual Family Law Retreats to 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.

EDWARD J. O'DONNELL
(SECRETARY)

Edward J. O'Donnell is certified as a matrimonial law attorney by the Supreme Court of New Jersey, and is a partner in Donahue, Hagan, Klein, Newsome & O'Donnell, P.C., concentrating his practice in family law with an emphasis in divorce litigation. A trustee of the Essex County Bar Association, he is a 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 officer of the Family Law Section of the Association of Trial Lawyers of America. 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.*

MADELINE MARZANO-LESNEVICH (IMMEDIATE PAST CHAIR)

Madeline Marzano-Lesnevich is a partner in Lesnevich & Marzano-Lesnevich in Hackensack, where she heads the firm's family law department. She is a matrimonial law attorney certified by the Supreme Court of New Jersey, and is a fellow of the American Academy of Matrimonial Lawyers. She practices exclusively in family law. Ms. Marzano-Lesnevich is a member of the Supreme Court Family Practice Committee; a member of the board of directors of the NJSBA Certified Trial Attorneys Section; a former member of the board of directors of the Women in the Profession Section; a member of the Family Law Committee of the Bergen County Bar Association; a member of the American Bar Association's Litigation and Family Law sections; and a member of American Trial Lawyers Association's Family Law Section. Ms. Marzano-Lesnevich serves as a mentor to the National American Academy of Matrimonial Lawyers' Institute for Family Law Associates and is the editor-in-chief of the New Jersey chapter's newsletter. Formerly, she served as a contributing editor to the *ABA Family Law Litigation News Letter.* She is also a former recipient of the New Jersey State Bar Association's Distinguished Legislative Award, and has lectured for ICLE, the Association of Trial Lawyers of America, the American Academy of Matrimonial Lawyers (New Jersey Chapter) and the Administrative Office of the Courts Judicial College. Ms. Marzano-Lesnevich was named a New Jersey Super Lawyer by *New Jersey Monthly Magazine,* May 2005. ■

Chair's Column

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ative arguments on issues. Every year, the symposium brings that intellectual stimulus to family lawyers. When you attend the seminar, you realize, if you had not already, that the practice of family law is not easy!

While the members of the Family Law Executive Committee take their membership in this committee seriously, we also enjoy each other's company. Every year, we sponsor a holiday party in December; we honor one of the members of the bar who has dedicated his or her career to furthering our profession at the annual Tischler Award dinner in May; and, we sponsor a Family Law Retreat. In the past, the Family Law Section has traveled to Santa Fe, Las Vegas and New Orleans. In 2006, we will be going to Washington D.C., from March 29 through April 1. Last year, we sold out the retreat and had to close registration. I urge all of you who are interested in attending to register early to assure yourself a spot. We are planning exciting activities in a dynamic city with innumerable things to see and do for families and singles alike. Save the dates!

In addition, the NJSBA Mid-Year Meeting will take place in Aruba in November 2005. Tom Hurley, our second vice-chair, has volunteered to organize an exciting seminar on behalf of the Family Law Section.

In closing, I thank Madeline Marzano-Lesnevich, who was the paragon of organization as chair last year, for providing me with a superb role model for getting through the year with grace. Her shoes will be hard to fill. I thank John DeBartolo, another past chair, for providing part of the outline for this column. I also wish to thank all of you who are supporting me in this endeavor—my family, my partners and other members of my firm who have already been called upon to help. The fun is just beginning, and I am looking forward to a great year! Please join me. ■

Benefit of the Bargain?

by Jerome J. Turnbach

Over the course of the last 20 years, there has been a clear move by the New Jersey Supreme Court to liberalize the process for obtaining court orders permitting relocation by custodial parents under N.J.S.A. 9:2-2. Such a liberalization has been viewed as an equalizing measure, because in the most common situation the "mother still receives custody of the children and the father is awarded visitation rights. Implicit in that arrangement is the right of the father to move elsewhere for virtually any reason."[1] Conversely, the mother, by operation of N.J.S.A. 9:2-2, lacks that freedom of movement. After a background discussion on the development of the New Jersey Supreme Court's relocation jurisprudence, this article will argue that the liberalization has undermined the right of non-custodial parents to get the benefit of the bargain struck in settling their custody case. The author then proposes one possible solution to the problem.

Few issues raise the emotions of family court litigants like an application to move a child to another state, perhaps far from his or her non-custodial parent. As this law first developed, permission to relocate was withheld in the absence of proof by the custodial parent that they would realize a "real advantage" by the proposed move[2]. This made it difficult for the custodial parent to relocate, since evidence of such real advantages naturally resided outside of the jurisdiction of New Jersey, and forward-looking statements of hope for a better life elsewhere were too speculative to amount to good cause for relocation.

In 1988, the Supreme Court signaled a shift in policy favoring custodial parents seeking to relocate. In *Holder v. Polanski,*[3] the Court opined:

> [a]s men and women approach parity, the question arises when a custodial parent wants to move from one state to another, *why not*?[4]

In seeking a way, then, to permit more custodial parents to relocate, the Court cast aside the real advantages test of *Cooper,* and held that "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 noncustodial parent*."[5]

The Supreme Court's seeming intent was that "[s]hort of an adverse effect on the noncustodial parent's visitation rights or other aspects of a child's best interests, the custodial parent should enjoy the same freedom of movement as the noncustodial parent."[6] In practice, however, the *Holder* decision did not result in as great a liberalization of movement as the Court has hoped. Thus, in 2001, the Supreme Court once again advanced the cause of custodial parents in the case of *Baures v. Lewis*.[7] The Court characterizes the issue again in terms of the problem as it was defined in *D'Onofrio v. D'Onofrio*,[8] that is:

> [n]oncustodial parents may relocate to pursue other interests regardless of the strength of the bond they have developed with their children. Custodial parents may do so only with the consent of the former spouse. Otherwise, a court application is required.
>
> Inevitably, upon objection by a noncustodial parent, there is a clash between the custodial parent's interest in self-determination and the noncustodial parent's interest in the companionship of the child.[9]

In restating the standard for removal, the Supreme Court has now determined that in assessing removal applications, the courts should "*accord [ ] particular respect* to the custodial parent's right to seek happiness and fulfillment."[10]

In announcing the holding in *Baures*, Justice Virginia Long acknowledged a "growing trend in the law easing restrictions on the custodial parent's right to relocate with the children and recognizing the identity of the interest of the custodial parent and child."[11] The fundamental shift from *Cooper* to *Holder* was to disregard the real advantages test in favor of a look at the motives of the parties, including both the custodial parent's reason for seeking the move and the noncustodial parent's reason for opposing the move. Having found that "the real advantages test was too great a burden,"[12] the *Baures* Court approved of the *Holder* Court's reliance on motive, rather than demonstrated advantage. Now, where the custodial parent evidences a good faith reason for seeking to move, the inquiry then turns solely to whether the move will be inimical to the best interests of the children. The question, after motive, then becomes whether the inevitable change in visitation will be adverse to the best interests of the child,[13] colored by the Court's holding that a mere change, or even a lessening of visitation, is not

deemed an adverse effect.[14] Thus, with genuine motive, and a reasonable parenting plan, the relocation is permitted. *Baures* goes on to enumerate factors for the Court's consideration—all of which are derived from the basic tenants set forth above.

Without question, then, the Court has liberalized the standard to permit more custodial parents to move. Lost, however, in the *Cooper/Holder/Baures* calculus is any consideration for the non-custodial parent's often bargained-for parenting rights. That is, what is a non-custodial parent really getting when they bargain to be the non-custodial parent with a particular parenting plan?

While the court rules, statutes and case law of the family part differ markedly in their substantive applications than they do in their sister civil and criminal parts, most marital dissolution actions end by way of a negotiated settlement arrived at by the same negotiation techniques used in those other courts. That negotiation has at its core give-and-take between father and mother, each considering his or her own rights and interests. In other words, each strikes a bargain acceptable to him or her, and expects that, by living up to the obligations in the agreement, each will receive the benefit of the bargain.

After this point, similarities between negotiated deals in the family part and the other legal venues diverge. While a party may bargain for a particular alimony obligation, or a child support obligation (including, perhaps, contribution toward college expenses, extracurricular activities, medical expenses, or even base child support), each can only get the benefit of that bargain for as long as the circumstances upon which the deal was struck remain materially unchanged.

While the potential for modification surprises some litigants, it is well settled that the unique subject matter in family cases requires flexibility to maintain fairness. The requirement of actual material or substantial change has given negotiated settlements in the divorce context enough stability to encourage their use in resolution of dissolution actions. There remains, however, one class of litigants who lack this crucial protection: the non-custodial parent opting to settle a custody claim by waiving his or her right to a best interest custody determination. Under the current state of our law, the non-custodial parent can be immediately deprived of the benefit of the parenting-time bargain by a custodial parent's *Baures*[15] removal application. Missing in the evolution of our state's removal jurisprudence is a crucial element of stability in the face of consistent circumstances—stability that would permit a practitioner within a reasonable degree of certainty to counsel a non-custodial parent that one may take from the settlement a reasonable expectation that they will receive the benefit of the bargain as it relates to custody.

Alimony and other support obligations are routinely settled without the need for judicial determination because litigants know two things: that unless circumstances change, they will receive the benefit of their bargain; and, if circumstances do change, the modification will take into account factors impacting them as well as factors impacting their spouse.[16] In other words, the court, in modifying a final judgment, will do so with an eye toward maintaining fairness and equity in the face of the changed circumstances.

For the non-custodial parent, however, our law provides no similar protections. Often, a parent will forego a custody determination in exchange for an enhanced parenting schedule—perhaps one additional mid-week overnight every week—added to the usual alternate weekend liberal and reasonable schedule. Such a parent may say that the one mid-week opportunity to assist with homework, participate in school-night bedtime rituals, and impart to his or her children a work ethic, is sufficient compensation to forego seeking primary residential or shared physical custody. Perhaps, to that parent, such opportunities have value because on weekends, where sports and recreation generally take center stage for children, opportunities to teach children the importance of academic discipline are diminished. For that parent, foregoing the best interest determination is done in exchange for a clear bargained-for benefit. Our trial courts, however, are ill-suited to protect the benefit of such a bargain in light of the prevailing *Baures* removal scheme. That is, a removal application under *Baures*' openly permissive relocation paradigm, brought within weeks or months of the entry of a final judgment, can instantly deprive a non-custodial parent of the benefit of his or her bargain (and thus eviscerate the value of the best interest analysis wavier he or she gave as part of the negotiated settlement).[17]

Frankly, *Baures* provides none of the safeguards available to other litigants in order to protect his or her bargained-for rights akin to the balance usually struck when support is modified. A non-custodial parent enters the relocation litigation at a disadvantage. Unlike support hearings, where the double-edged inquiry of need and ability to pay results in an even-handed consideration of both parties' circumstances, the *Baures* analysis does not start with the bargained-for deal and assess change, but rather ignores to a great extent the bargained-for custody arrangement at the outset, and adjusts parenting time anew without heed to the prior parenting arrangement (unless there is a true shared parenting arrangement).

Instead, the standard set forth in *Baures* should be modified to allow those defending a removal application the same opportunity as all other post-judgment modification

applications: the requirement that the custodial parent show a substantial change in circumstances before depriving the non-custodial parent of the benefit of the bargain. (As it is, good faith motive in *Baures* could be reinterpreted to be a proxy for changed circumstances). This likely would not materially alter the result in most *Baures* removal cases, but would remove the incentive from primary custodial parents to agree to parenting arrangements knowing circumstances are such that they will be seeking removal long before the non-custodial parent can settle into their bargained-for parenting role.

To explain further, a custodial parent wishing to relocate would first have to show that his or her circumstances had substantially changed. In accordance with this, facts known or knowable to the custodial parent at the time of the negotiation of a settlement agreement and entry of final judgment could not later serve as the basis for this change in circumstances. This would offer the non-custodial parent, who presumably has waived an opportunity for a best interest custody evaluation in favor of an otherwise bargained-for parenting schedule, an opportunity to fairly defend against the relocation application.

There would then be two possible types of *Baures* cases: 1) those cases where a substantial change in circumstances relative to the relocating parent's situation had occurred, in which case, the *Baures* formula should be applied; 2) those cases where, if there were no finding of substantial change in circumstances, a fair analysis of any such relocation application based upon a best interests custody determination. That is, give that parent a best interest analysis of the removal question (in the same fashion that *Baures* already contemplates for parents with true shared physical custody), rather than the simple motive and parenting time schedule analysis, which occurs otherwise.

Of course, questions could be raised regarding the feasibility of showing a change in circumstances in light of the public policy in favor of stability in custodial arrangements, but the author believes that courts would look to the custodial parent's interests and circumstances to consider whether such change occurred—just as with a post-judgment alimony applications—and such a change would conceivably be unlike the type of change needed to modify an order of primary residential custody. The author suggests that this formula strikes a balance between the parties' interests and preserves a crucial component to reaching a negotiated settlement—litigants having a reasonable expectation that they will get the benefit of their bargain. The author further suggests that regardless of the manner in which it is addressed, it is more important that the problem identified be addressed. ■

ENDNOTES

1. *Holder v. Polanski*, 111 N.J. 344, 349 (1988) *citing D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 207 (Ch. Div.) *aff'd o.b.,* 144 N.J. Super. 352 (App. Div. 1976).
2. *Cooper v. Cooper*, 99 N.J. 42, 56 (1984).
3. 111 N.J. 344 (1988).
4. *Holder* at 349. [Emphasis added].
5. *Id.* at 349. [Emphasis added].
6. Id. at 352, *citing Wilkie v. Culp*, 196 N.J. Super. 487, 496 (App. Div. 1984).
7. 167 N.J. 91 (2001).
8. 144 N.J. Super. 200, (Ch. Div. 1976), *aff'd o.b.,* 144 N.J. Super. 352, (App. Div. 1976).
9. *Baures v. Lewis*, 167 N.J. 91, 96-7 (2001).
10. *Id.* at 97 [Emphasis added].
11. *Id.* at 109.
12. *Id.* at 113.
13. In introducing its reasoning, the Supreme Court set forth a list of accepted postulates which inextricably link the welfare of the child with that of the custodial parent. This link, in practice, limits the arguments available to the non-custodial parent vis-à-vis impact on the child's best interests. It is clear the inquiry into inimicality is not a best interest analysis at all, but something materially less broad in scope. It is here, in practice, where attorney and non-custodial parent feel the pressure of the liberalization.
14. *Baures* at 113.
15. *Id.* at 91.
16. *Lepis v. Lepis,* 83 N.J. 139 (1980).
17. Without modification, this system encourages disingenuous settlements, and may well foster unnecessary custody litigation. In addition, one could envision the malpractice claim against a lawyer who counsels settlement on favorable shared parenting terms in a close custody case only to see a party's ex-spouse remove the children from New Jersey within months of the final judgment.

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A (Very) Candid Conversation With the Honorable Philip S. Carchman

*(**Editor's Note:** The board of the New Jersey Family Lawyer wishes to thank Judge Carchman for his participation in this interview, conducted by Lee Hymerling, editor-in-chief emeritus and Mark Sobel, editor-in-chief.)*

HYMERLING: Judge, how has the transition been from occupying virtually every position in the Judiciary in each one of the four divisions, both as the equivalent as presiding judge or assignment judge, to being a foot solider in the Judiciary, to now being the chief administrator? How has that transition been?

CARCHMAN: The transition has been dramatic and the differences are equally as dramatic. Well, first coming from the Appellate Division where a phone call was an event, to a circumstance where the phones never stop ringing or the emails never stop dinging, as you are going to hear in a moment, it has been dramatic. But, as with every other experience that I have had in the Judiciary, while I have been associated with the Judiciary in various forms and in various positions for the past 20-plus years, when you think you know about an organization, you very quickly find when you take a position such as this, that you know very little about it, and what has happened in the last five and a half months since I've had this position, the learning curve has been steep and dramatic. This is an organization with more than 9,000 employees, a budget in excess of half a billion dollars and, when I talk about the 9,000 employees, I am not including the judges in that picture. Not only do we operate here in Trenton, we operate in every county in the state—15 vicinages.

The one thing that I have learned, although I sort of knew this intuitively, but never fully appreciated, is how professional the staff is and how professional the people here are at the AOC and in the vicinages. I have worked closely over the years with many of the judges, so I am familiar with their skills and their talents, but I have never fully appreciated what is behind the product that the public sees by way of the Judiciary.

SOBEL: Given what you've said, what would you say starting out are your biggest challenges in terms of what you envision happening with the office?

CARCHMAN: Well the biggest challenges internally is really the day-to-day operation of this very big business, number one, and coordinating the literally scores and scores of programs, operations, divisions, that we have operating on a daily basis. If you view the Administrative Office of the Courts as something beyond simply a service organization for judges, you realize that we're involved in every conceivable issue. Internally, we have real estate issues, we have EEO issues, personnel and human resource issues. We have brick and mortar issues that we deal with all the time, and then you add to that legislative issues, inter-government relations, and I haven't even touched on a judge yet; I haven't touched on a case. We have education and training involving judges, we have programmatic issues, we have relationships with the federal government; we collect more than $1 billion in child support and that, in and of itself, is a massive undertaking. Of our 9,000-plus employees, every single one is wired electronically with each other. We have an IT operation that is extraordinary in terms of what it does in allowing people to communicate with and deal with each other. And now I start with the judicial operations and the trial court services, and we have 400-plus superior court judges and seven Supreme Court justices, more than 350 municipal court judges and close to 500 municipal courts, and on and on and on it goes, and it's just coordinating the efforts in these various areas that is the challenge.

HYMERLING: Are there particular challenges in administering the family part that are unique to family part?

CARCHMAN: (Laughs) I've always viewed the family part as unique. Let me just preface the answer by saying something that I said yesterday in a speech that I made, and I have said continuously over the past five months since I've been here: I am always asked about my experience as a judge and, as you've correctly pointed out, I guess it's the rare privilege or opportunity I have served in every judicial position in the state of New Jersey. I have sat on every case type that exists in the state of New Jersey, from the municipal courts all the way through, and a few stints by assignment in the Supreme Court. The assignment that I always refer to in various speeches is my three years, nine months, one day in the family part. It is probably the part of my judicial career that I reflect on the most, that I think about most often. In terms of this particular responsibility that I now have, a good deal of time and effort is devoted to the family part and issues arising in and out of the family part.

Now, I know that much of the focus of the bar is on dissolution cases, however, as you know (depending on who you ask) there are 11, 12 or 13 case types in the family part. Everyone has a slightly different count, but one of the front burner issues right now is children-in-court. We are working with the Division of Youth and Family Services and the Department of Human Services on a child welfare reform plan that involves the Court in a most basic way and that is right now one of the major challenges that we are addressing. I don't think a day goes by—I shouldn't limit it to a day, probably an hour goes by—that there's not some family part issue that has to be addressed. Certainly not all in the dissolution area, but up and down the line.

SOBEL: One of the areas specifically in the family part certainly has gotten a life of its own or evolved into that, is the thinking among the people down in the trenches that best practices has taken over family part, and that it has become, for lack of a better term, a numbers game—clearing the calendar, moving the numbers, things of that nature. The thought is, at least now, that somebody like yourself who is the administrative director, who actually was doing family work for a number of years as a judge, can bring some sensitivity to that. What would you say to the people who are going to be reading this in terms of the implications regarding best practices and family court work?

CARCHMAN: The way you phrased the question, it's almost a loaded question. Let me first correct something that's implicit in the question because it does represent something of a change of focus, and that is the concern about numbers and clearing the calendar. Clearing the calendar is less of an issue than it was in years past. Right now, just to put it in context, there is a much greater emphasis on dealing with backlog and best practices, in many ways, addresses and attacks the issue of backlog. In the broadest sense, and this doesn't specifically apply to family part, the most recurrent complaint that I receive from litigants and from the bar, as well to a lesser degree because I think they understand, but certainly litigants, is, "why does it take so long for my case to be heard?"

We, as lawyers, operate in a time frame where we think in terms of discovery periods and we think in terms of six months and a year. As active practitioners, we think they're relatively short time spans within which to operate. But, for a litigant who's going through a divorce or going through a custody dispute or whatever, if you say to them, "This isn't going to be resolved for six months to a year," they look at you as if you're crazy, and they say, "But what do I do in the meantime, and I have all these stresses," and so forth. So, much of the best practice effort, and I think this is well understood, was not only to develop some sense of uniformity throughout all of the vicinages, but really also to deal with the issue of moving cases in an orderly, effective and efficient way to effect a relatively, and again we're lawyers talking, but a relatively quick resolution of the case so that those horror stories about the four- and five-year-old custody case—and if you think about the life of a child and you take four or five years, you're talking about fractions that are meaningful one-third of a child's life—to move those cases and get those cases resolved.

Yes, best practices puts stresses on the bar. I am very much aware of it. I was on the receiving end as a practitioner where judges used to say you're going to finish discovery by a certain date. By the same token, I think the bar has to appreciate that the pressures on the court and the pressures that best practices develop are really in everyone's interest.

HYMERLING: Best practices happened after the Report of the Special Committee on Matrimonial Litigation that I co-chaired and Mark served on, and there were certainly themes. One theme that was perceived from the public hearings and that the public expressed was that divorce lasted too long and cost too much, and that certainly is a best practice theme. Another theme, however, was the theme of differentiated case management and tracking the cases, recognizing that different cases concerned a different level retention and more time to mature. Are you at all concerned that within the context of best practices and the year's goal in dissolution, and I don't want to talk about just dissolution but, are you at all concerned that there's maybe too much emphasis on completing a case within the year either, recognizing that more difficult cases which may take longer to resolve?

CARCHMAN: Case types?

HYMERLING: Case types. But are you at all concerned that there may be too much emphasis on the year even in the more difficult cases, which may take longer to resolve?

CARCHMAN: I think that the year is a reasonable number and certainly there are going to be instances where you have the extraordinary case that requires some consideration. My real concern—and now I remove myself from my life as an attorney and put myself on the other side—so many times before best practices, when I sat in the family part, and I would see lawyers come in on a case and I well recognized that this was a case that could have been resolved in a much shorter time span than the attorneys were allowing it to be resolved. And I'm not casting aspersions on attorneys, and I think the bar understands where I'm coming from in that regard. You know, we recognize attorneys are busy. They have more than one case. Hopefully they have more than one case at a time, but the judge has to deal with the case in front of him or in front of her. And often the judge recognizes, and I think best practices implicitly recognizes, there are cases that can be moved a lot faster than other cases. Let me give you an example. I think of a case—it was actually a post-

judgment motion—where there was discovery sought that would have extended that case *ad nauseum* well beyond any reasonable period of time and, if all of that discovery had been allowed, you probably would have had a case that could and should have been disposed of a matter of months—it would have taken a matter of years.

Now, that was pre-best practices. With best practices, the case actually was resolved a little bit quicker than that, but the hammer would have fallen that much earlier. And I've seen that and I remember seeing that in litigated cases, where you get these—I mean both of you are familiar with it—these absurd discovery requests that go well beyond anything that is necessary in the case and attorneys have to be careful and there are other forces out there driving the practice of law but, by the same token, there has to be a point at which the court steps in and says, "Enough! It's going to stop!" And the year goal serves that purpose. Again, I would be silly if I were to say that there aren't cases that you just can't finish in a year, and the best would be the one-year goal I don't want to say has flexibility, but everyone recognizes that to be the case. But, by the same token, you've both been involved in cases where you're creeping up to that one year, and all of a sudden the attorney pops up with the new expert, the new report, changing direction, not in mid-stream, but the end of the game, and that's what makes judges age very quickly. And it also makes adversaries age very quickly.

SOBEL: What would you say to people, I will say somewhat on the extreme, with the whole best practices type of system who say: "I and my adversary have this private case. It's a case. We agree it's going to take a significant amount of time. The litigants agree it's going to take a significant amount of time. Why does the court care then if we take longer than a year, or 18 months or two years for that matter?"

CARCHMAN: Because the private agreement of the lawyers and even the concurrence of the clients who may be relying on the lawyers' advice as to how long it may take, may not well serve the real interest of justice in that particular case. Again, I'm now saying it for the third time, there are cases by their very nature are going to take more than a year, but we run a system here in New Jersey unlike many other jurisdictions, where the court calendars are, as a policy matter, determined by the court, determined by the judge. We have lawyers who will agree that they are not going to dispose of this case for three or four or five years. We are not going to tolerate that. We are not going to allow it to happen. In those extraordinary situations where time becomes impractical, where the goal becomes impractical, the judges deal with those cases, but it can't be up to the lawyers. There are other jurisdictions where you don't even file until everyone is ready and, of course, I have spoken to both litigants and lawyers in those states who talk about the six-year divorce proceeding or the seven-year divorce proceeding. As a policy matter in New Jersey, that doesn't serve anyone's interest, so we are going to maintain that control, notwithstanding the private agreement.

The premise of your question, Mark, was that we have this private case. I think the word "private" doesn't apply when there is a proceeding that has been filed in court. That now makes it a public case. And I'm not talking about publicizing. The parties have been unable to resolve their differences. They can take 10 years to do that before they file. Once they have decided that they're going to submit themselves to the jurisdiction of a court, they are going to be involved with the Rules of Court. They have lost, for lack of a better way of putting it, that ability to privately control the course of the proceedings. And we have rules. We have rules to operate a court system and to manage a court system in an appropriate way. This is the policy. Best practices has now been encompassed as part of that rule structure. So again, I have to extract the word "private," because that's no longer in the equation.

HYMERLING: Another issue very much related, and I dare say one of the greatest frustrations for litigants now, is that best intentions notwithstanding, too often or very often, there are no continuous trials and, notwithstanding that you have a year goal for completion. Once the trial has commenced, you may telescope the year, but more seriously, there may be significant gaps with more than a week or two or even a month necessarily between trial days. Do you believe that it is practical to believe, to think that in most multi-judge vicinages, continuous trials—meaning at least a half a trial day on non-motion days—is something that can be accomplished?

CARCHMAN: You know, the issue of continuous trial dates has been around since I think 1948, January 1, 1948, when the new court system went into effect, and at that time there wasn't a separate family part *per se* but its evolved. Certainly the goal is to have continuous trial days. I know in some instances that is achieved. [In] some vicinages, they've been very successful — other vicinages, less so. I think that's something we internally have to deal with. Again, [this is] another issue the family part is going to raise here. I would like to see that implemented state wide, and have it enforced and have judges do it.

Having said that, I well recognize that the family part, unlike the other parts and divisions—you know when you're talking about 11, 12 or 13 case types and the judge is on emergent duty that particular week and the lawyers are all ready and the litigants are ready, and in walks that tough domestic violence case, things come to a halt. Although we now assign judges to do children-in-court cases, I remember sitting and being on emergent duty and sitting in the middle of a dissolution trial and in comes a DYFS complaint for removal of a child in a neglect and

abuse case, and that becomes a values decision as to which case takes precedence, and frankly it's an easy call. And the lawyers get upset, the litigants get upset and frankly the judge gets upset because the rhythm of the particular case is disrupted. I don't think it serves anyone's interest to have these bifurcated trial dates. You know, as lawyers, that if you're working on something and you get interrupted because something else interferes and a month later you go back to working on it, you have to re-educate yourself on the entire matter. Now you can bill for it, but the judges can't. What it means for a judge is you start the trial, you spend one day or two days at trial, you have all of this stuff in between that has to be attended to, has to be completed, and you pick up the trial two weeks later or three weeks later and you have to start going through your notes and start re-educating yourself about the case, and you pick up and try to get the theme.

I would try as best I could to get two or three trial dates in a week in a particular case. I'm thinking of one custody case that I had that ran 15 days and we were trying that over five weeks, doing two or three days at a clip, and at the end of that case my office was a shambles. It was just filled with mountains of paper on other cases piled up.

The workload in the family part for judges is extraordinary, but the problem that you raise is not only a problem for the bar, but it's equally a problem for the bench and it's a problem that we really have to focus on.

HYMERLING: Well it certainly is a problem for the bar. It's very difficult for the public to understand, but it is ultimately a case management issue—recognizing Your Honor is totally correct. The family court judge, much less so than anyone else, any other judge in the system, can control his or her day-to-day docket because you don't know what's going to walk in the door.

CARCHMAN: *Cannot* control.

HYMERLING: Cannot control your day-to-day docket because of emergent matters and because, in my view, there is a legitimate prioritization of case type, meaning if there is a family-in-crisis issue, if there is a domestic violence issue.

CARCHMAN: If you check the rules, they are all prioritized, and you realize that the case that you are trying at a particular time came at the top and, as you go through the case types, you really can't argue that any of those prioritized cases are less important than your case, and yet, you're sitting there, the litigants are sitting there, they are in court, they are paying you for your time, they are going through their own emotional time and stresses, and they can't understand why their case is not being heard at that particular moment. But, having said all of that, the problem that you identify is really a problem that we have to deal with systemically, internally. That's our issue and…

SOBEL: Following up what you just said, Judge, on a slightly different subject, which is I get the sense that we, as family practitioners have, maybe as parochial as that is, but I think we enforced over the years of talking to lots of judges within the system is that being a family court judge at the trial level may be the hardest or certainly one of the hardest types of assignments a judge can have in terms of both the difficulty of the work, the time commitment, the variety of expertise needed, etcetera. Given that kind of thought process, we get comments from our readership that either judges don't want to be there or that as soon as they gather the experience that is helpful in resolving matters, they're assigned to different positions. As the administrative director of the courts, and certainly as a family court judge previously, can you comment on your philosophy regarding [this issue]?

CARCHMAN: Well, before I tell you my philosophy, I think what you had said was much more accurate years ago than it is today, and I'm going to tell you why. First of all, let's start by my saying that your premise is absolutely correct. I'm never going to say it's the hardest assignment because we have lots of other judges who will read this and call me if I say that. It is certainly one of the hardest assignments—that's self-protective. I think the common understanding, and I think some of this is dated, and is now more that judges did not want to be there. The good judges who were there were rotated out as soon as they developed an expertise. Judges didn't stay for an appreciable length of time. What I am finding now, because I work with and observe the chief justice, when she goes through the assignment order and makes the assignments, she finds that there is a much higher complement of judges who want to be in the family part and want to stay in the family part who do not want to be rotated out, and we are seeing more and more of that. So, that first premise again, I think is somewhat dated. There are some judges who, for whatever reason, find it very uncomfortable to be in the family part. It maybe is the stress of the workload the nature of the workload. By the same token, there are judges who have the same opinion about criminal [part], same opinion about civil [part], and I'm thinking of two or three instances where judges ask to come out of civil and go to family because they didn't like the nature of the work in civil, they didn't like the rhythm of the work in civil. They wanted to be in family.

I alluded earlier that I always refer to the family part when I've discussed my experience. When I go to various judges' meetings and conferences, I seem to gravitate, and actually the bar associations as well, gravitate toward the family part because it seems they have the most fun of the groups and parts. So, I think some of the old school understandings are really misunderstandings as to what's happening.

Yes, there are judges who are very fine judges in family who, after they spend a rotation in family for three years or so, they move on, but they are going to be fine judges in

civil and after three years in civil, they're going to move to criminal, and they may find their way back to family. The chief justice still has a rotation policy in place. It serves the Judiciary very well. It makes our judges better judges. I happen to think that a service in the family part enhances a judge's ability to make decisions without a jury, to make quick decisions based on information forthcoming. Many of our chancery, our general equity judges really learn that decision-making process in the family part. You are seeing more assignment and appellate judges now who have had family part experience. You have a Supreme Court justice who spent a good part of her career in the family part, so I think really the bar might want to take a step back and take a look at the spectrum of the judges and the length of time of service of the judges and compare it with what existed years ago and I think you'll see a difference.

HYMERLING: Changing the focus just for a moment, do you see any tension that you can talk about between the Judiciary and the Department of Human Services as child support-related issues are handled by the two branches of government?

CARCHMAN: We are in a partnership with DFD. We work with Human Services and DFD to effectuate a child support program to ensure that the most money that can be collected is collected. This year we will exceed $1 billion. We have now centralized the child support collection process here in Trenton. We have opened up, with DFD, the call center. Now three vicinages have all calls come to an 800 number dealing with child support issues handled centrally in a call center in Hamilton Township. It has been extraordinarily successful because 70 percent of the calls that are being received are disposed of right then and there on the spot, presumably to the customer's, if you will, satisfaction.

HYMERLING: You see, that's the frustration of many support recipients because getting answers to specific questions was very hard to achieve.

CARCHMAN: That was a major issue and concern. People were being put on hold. People were receiving messages that they would get a call back and they didn't get a call back. Much of that has now been eliminated. The call center is operating very efficiently, very effectively. As I say, 70 percent of those calls are being resolved and the other 30 percent are being referred back with a promise that is being fulfilled. You will receive a call back within X period of time, usually 48 hours or so, and now many of the folks working in child support have the time to really devote to addressing other collection and enforcement issues.

HYMERLING: Is there funding for that to be implemented statewide?

CARCHMAN: We certainly have these programs which we are piloting now. It is my hope that this will be expanded and we will pick up a couple of new vicinages soon and certainly the objective is to have it statewide. Funding is an issue that we talk about as much as the family part.

SOBEL: Given that, and just to follow up on that, one of the other things that is being discussed a lot, and I think it dovetails with best practices a little bit, is economic mediation and the program and either expansion or refinement of the program of economic mediation. What role, if any, do you have or do you envision in terms of your role as administrative director as it relates to a program of that nature?

CARCHMAN: That's something that we would look at very carefully, [and] examine carefully, look to expand if necessary or if successful, and really hear from you, the users, if you will, as to the successes. Mediation has been around for a long time, and now it's recognized as a valuable tool to resolve issues, so wherever we can apply it in an effective way to achieve just results, we will foster that.

HYMERLING: One of the great success stories of the Judiciary in the area of cooperation between the bench and bar has been the matrimonial Early Settlement Program, which does not exist anywhere else in the country, or at least not when I looked several years ago or when I lectured for the ABA in other parts of the country a number of years ago. Do you believe on a systemic level there is a full appreciation of the contribution that the bar makes in staffing without cost to the MESP?

CARCHMAN: Well, if you are asking if the Judiciary appreciates it, the answer is absolutely, yes. We recognize that in many areas we are in, I used the word "partnership" with DFD, with the bar. We are in partnership in so many other areas. That program would not exist without the bar, and it is a perfect example of common interests being fulfilled through cooperative efforts. I know the various presiding judges and assignment judges, and especially assignment judges, appreciate the bar's contributions. I mentioned Appellate Division judges who had family part experience. Look at the assignment judge appointments of people who have had family part experience. I'm off your question for a moment, but when the issues arise in the Judicial Council, which is the governing organization in the Judiciary, exclusive of the Supreme Court and the chief justice, and family part issues come up—the presentations are made to people who are knowledgeable about this because they have been there.

Look at Judge [Linda R.] Feinberg, you look at Judge [Graham T.] Ross, you look at Judge [Eugene D.] Serpentelli, you look at Judge [Valerie H.] Armstrong—the four people you interviewed before. All of them have experience and I am sitting there and I was there. So, I do not want to say it is a more receptive ear, but it is an ear that is tuned in to the language that's being used, but back to your question. All of these programs are fully appreciated, but don't exist

without the bar, and as we seek to innovate and try new things, we always reach out to the bar for input—to get some thought.

Best practices was not done in a vacuum. Think of that. The whole best practices process involved input from the bar. So, yes we appreciate it and I'm going to take this opportunity, since I did the same thing with best practices, let me just say something, in closing [about] best practices. Best practices represents a change. It is a change in the way we do business. I recently gave a speech to all of the judges and I said when we reflect on change, we have to think back to 1948, the Constitution of 1947 came in. A new Judiciary was created. The then-chief justice, the first chief justice in the modern system, Arthur Vanderbilt, came in and effectuated dramatic change and had the bar in an uproar.

One of the first things he did was create a rule structure, the first really significant rules of court, which at the time, was probably an inch thick, and included in the rules of court was this new concept. It had been used in equity cases to a limited degree. It was called discovery. Lawyers for the first time were going to find out what the allegations meant. They were going to find out the names of witnesses, they were going to put some flesh on the nature of the allegations, they were going to be able to find out the defenses, they were going to find out the facts on which the defenses were based. This was a change that was so dramatic, the bar was in an uproar. In addition to that, we had the first rules of court. They had to pay attention to how the procedures were going to be followed.

Then you had *Winberry v. Salisbury*, [5 N.J. 240 (1950)] so these changes had the force of law, and if you think back—now we're 50+ years later, [about] discovery, you think, "Discovery, that's my lifeline. I don't operate without discovery."

So we talk about best practices in the year 2005. We are only a year or two into best practices. We are all young, but think of the next generation of lawyers following you—they will only know best practices. You are not going to see the same reaction that you see from the bar. All of us, as lawyers, have been trained in a certain way. We react in a certain way and when change comes, we are always wary of it, and I'm speaking now as one of you, as a lawyer. Best practices represents a change.

SOBEL: Given what you've said, can you provide us with some of your thoughts in terms of what other types of changes and thoughts you might have in terms of now in your role as administrative director of the courts?

CARCHMAN: Right now, I'm still in my learning curve. I will tell you that much of my time right now has been spent dealing internally with some structural changes in terms of how we operate this organization. There are some dramatic changes that will affect other parts that are not going to affect the family part as of yet, but one of the areas, less so in dissolution, but one of the areas I alluded to early on; *i.e.*, children in court. The entire structure of that operation and how those cases proceed forward and how we deal with the litigants there is really undergoing dramatic change. All, again, part of this Child Welfare Reform Plan, but we expect to see—[and] we've seen some of it—we expect to see a dramatic rise in the number of cases. How it will affect you as attorneys doing primarily dissolution work is [that] you are going to see many more cases and what we have said is, we have to have more resources in the family part to deal with what we know will be in the influx of cases because we recognize there are other case types—your cases being one of them.

So, I think you're going to see changes in that particular area specifically. There is always stuff percolating throughout the Judiciary. The folks here are very innovative. They are always coming up with new ideas, better mousetraps, new ways to do things, and not a day goes by when someone doesn't come up with a suggestion that we start referring around and think about. But what comes to mind immediately, in terms of the family part, is [the Child Welfare Reform Plan].

SOBEL: Following up what you said, Judge, what role do you see going forward, given the various case types in terms of what I'm going to utilize as perhaps non-judicial involvement or people who are not judges—hearing officers or other types of things of that nature—in terms of going forward to deal with what you're saying, may be an increased caseload or...

CARCHMAN: Well, we now have child support hearing officers. We have domestic violence hearing officers. Are you asking specifically in terms of dissolution cases?

SOBEL: No, absolutely not.

CARCHMAN: The use of hearing officers has become more prevalent actually since I've been out of the family part. The use of domestic violence hearing officers was in the discussion stage when I was serving as an assignment judge and it came to fruition when I was in the Appellate Division. Child support officers are firmly in place in the Judiciary and play a very important role. Right now, I don't see any immediate change in the use of hearing officers. I think hearing officers serve an important function in some areas; I'm not sure that the use of hearing officers would be the be all and end all.

SOBEL: You're aware, are you not, that certainly practitioners have concerns about not getting access to a judge?

CARCHMAN: Oh, absolutely. Absolutely. And I don't think in the dissolution area, you are going to see any dramatic change in the way we do business other than the fact that things are done a little faster in front of the judges now, hopefully. But the concern about not having access to a judge has also been a bar issue. It was an issue when I was a member of the bar, when I was

practicing law, I should say.

HYMERLING: You refer to resources. Do you see over the next five to seven years a significant political likelihood...

CARCHMAN: I'm not going to be here.

HYMERLING: We hope you are here for a very long time. Do you see in the next five to seven years a significant political likelihood that there will be afforded to the Judiciary an opportunity to increase bench strength overall?

CARCHMAN: You know, five to seven years is almost a generation in terms of judicial life, but we have found, and now I have to speak from almost hearsay because, again, I have been here such a limited period of time, but what I have seen is that both the Executive Branch and the Legislature is responsive to our needs, recognizing that there are budget issues out there and the budget issue is obviously a very critical issue right now. Where we need increased judge strength, the governor had responded, the Legislature has responded. Where we will be in five to seven years? I don't know.

One of the areas that we really have not talked about a lot is the area of technology. Technology is so dramatically changing the practice of law, less so I think in the family part, but if you go into special civil part, where we're doing electronic filing, now we will have electronic filing in all 15 vicinages. I was visiting Camden yesterday and they are about to start next week and it will take a minute and a half to prepare and file a complaint.

Could electronic filing be applied to dissolution cases? It's something that we will look at. But, as technology changes, as the Web becomes the primary instrument of communication with people, how this impacts on judges, how it impacts on the Judiciary is something we continually discuss and explore. We have a strategic plan now, or technology's strategic plan, which is changing in some ways the face of the Judiciary, but, by the same token, where we are five or seven years from now, who would have imagined five or seven years ago where we would be today.

HYMERLING: Do you see the system as having specific roles sensitive to the family part beyond best practices, or areas that the system has interest in seeing changed?

CARCHMAN: You say, "beyond best practices," best practices represents probably the most dramatic change and we're still absorbing its impact and that's going to take three or four or five years. [As for] goals for the family part or for dissolution, we want to have the most effective, efficient, timely resolution of cases that we can to achieve a just result. That's our goal. That's our mission statement. It's a little bit broader than that when we talk about what we do, but the question is either a very difficult question or a very easy question, one or the other.

HYMERLING: It was meant both simultaneously.

CARCHMAN: If you're asking if we see any dramatic changes, the answer is probably not at this point. As I say, we are still absorbing what changes have recently been made. Do we want to make things better? Absolutely.

SOBEL: There is some, I guess, scuttlebutt amongst [those in] the trenches that there is either a friendly or less than friendly competition among the various vicinages as to how they are doing with their respective calendars upon which they—I'll use the term, I don't think it's used outside—are graded in terms of two stars, three stars, one star or whatever.

CARCHMAN: Well, you picked that up from the Diamond reports. They are not graded. One of the strengths of this Judiciary is that there is governance, by the participants, and that means the judges who sit on cases. Now let's talk about the family part. We have the Conference of Presiding Judges in the family part. They meet every month. The policies that are in place in the family part in good measure percolate from that conference. They are on the line all the time. They are seeing the concerns that you have that you express. New ideas. I mean that's the hatchery, if you will....

SOBEL: Sorry to interrupt you, just so we can know. Do you participate in that?

CARCHMAN: I have attended some of their meetings, but I am not a regular participant in that group. I do not know if they want me there all the time. It's a dynamic group. These are smart people. You know them all. You've dealt with them all. They are constantly looking and changing and modifying and tweaking and challenging us. "Take a look at this policy. We ought to be thinking about doing this." I don't know if you have seen any of the minutes or materials that come out of it.

SOBEL: Actually, one or both of us had the opportunity to sit with the presiding judges in our roles as either chair of the [Family Law] Section at times and...

CARCHMAN: Okay, so you've seen the conference in operation. That then moves through various levels, and there are other committees and so forth, rising to the level of the Judicial Council with the assignment judges plus the chairs of these various conferences and these issues are debated and so forth. The point being, in reference to your question, there is constantly review and, if you will, introspection within the Judiciary as to whether best practices are being implemented, we send out visitation teams. I don't remember if that was discussed in the interview you had with the four assignment judges.

HYMERLING: Actually it was, and we participated in that.

CARCHMAN: Visitation teams go out and they look and sit down. It's not an "I-Spy" operation. It's really to sit down and work through these things. How are the standards being implemented, is it happening and whatever? You do not get graded on it, but you discuss it. "Is this something that's working? Is it not working?" We look at backlog because backlog is...it's simply a number; it's a tool. It tells us that something is or is not happening. We are not counting beans,

but by the same token, if there's a high backlog and cases are not being disposed of in a timely manner, it is certainly a legitimate inquiry to say, "What's happening folks? What's going on? Where's the problem?" And it may be simply that the two or three judges, for example, sitting on dissolution cases have confronted the perfect storm: those three monster cases and everything has stopped and we have to deal with it. Well, the Diamond system that you referred to says we're going to make an inquiry. You have to come back and tell us what's happening. I think that's pretty good management. I'm surprised that the vicinages view it as grading *per se*.

SOBEL: You've heard that?

CARCHMAN: No, I haven't heard it. That's interesting. I haven't heard it from the presiding judges and I haven't heard it from the assignment judges.

SOBEL: As practitioners, I can tell you, we've heard it.

CARCHMAN: I'm sure. It's easy chatter. By the same token, I think those folks who are involved in the governance process understand it as an important introspective look. Both of you are involved with big law firms. You go through exactly the same process—every single day, every single week, every single month and certainly at the end of the year. If one of the associates were to come up to you and say, "Umm, we're being graded!" You'd say, "Darn right you are, folks." How do you grade? You grade on productivity. How many hours you've billed, so forth and so on. These are measures. It may not measure the quality of someone's work because they may be billing lots of hours and they are turning out junk (not in either of your respective law firms, of course), but you look for measures. We look for measures and our backlog numbers and our other numbers are simply measures. Life is grading. You start grading when you are in third grade?

HYMERLING: Judge, a couple of, and I'm just going to throw concepts at you. A couple of the things that people have been concerned about over recent years and not necessarily right now, is the problem of reserved decisions. Could you explain how the system deals with reserved decisions and whether you think progress is being made?

CARCHMAN: Reserved decisions. All right. Now you get the historian in me again. Let's go back to 1948. Everyone is up in arms about discovery. The lawyers are reacting to this dramatic change. The judges now, they are not happy either. Why? For the first time, they have to file timesheets.

SOBEL: I didn't know that.

CARCHMAN: What do they do every day? So in 1948, the new constitution is in effect. The chief justice is there and the Administrative Office of the Courts consisted of 21 people.

SOBEL: Compared to now?

CARCHMAN: Well, we are a statewide Judiciary. It wasn't at the time. Today 9,000 staff in a unified system. This office is less than that, and one of the things that he [Justice Vanderbilt] instituted was [that] judges had to report their time. Now, when I came on the bench, it was every 15 minutes, you had to account [for your time] and you filed a timesheet every week, and it was entered on the computer; it was tracked. That changed somewhat when Judge [James J.] Ciancia came here. He actually revised that practice so you don't have to do that.

What was instituted as well, and this was, again, revolutionary, you had to report reserved decisions, and these appeared on this weekly timesheet. That was in 1948. In 2005, to this day, there has been no break, that same reporting requirement is in effect. What happens? At the Judicial Council meeting attended by the chief justice, myself, all of the assignment judges, now the chair of each conference of presiding judges, and at its predecessor meeting, assignment judges meeting with the chief justice, each assignment judge must review with all of the other judges every reserved decision in the state if it's more than 60 days old, with an intended date of completion. That practice has continued since 1948. It has never varied.

HYMERLING: Do you have confidence that the reports are accurate, meaning that the reserved opinions are reported?

CARCHMAN: We can test their accuracy because now we have an automated case management system. We have all kinds of linked systems so we can always test accuracy. There is also a case, *In re Alvino*, [100 N.J. 92 (1985)] which is an ethics opinion by the Supreme Court, where a judge was disciplined for failure to report a reserved decision.

SOBEL: What is your sense of how we are doing in terms of that?

CARCHMAN: I think we are doing very well. Now, you have to understand the definition of reserved decisions. If there is still an open piece of a case, it's not yet reserved. I think there is such a stress on it that we are doing fairly well. I just read the recent article in *The New York Times* about the federal judge who had more than 250 reserved decisions, many over years old. That will never be tolerated in this Judiciary.

SOBEL: Do you have a sense that as a family part, civil part, Law Division, whatever it might be, that there are one or several particular areas that it's more either likely or you're following it more closely or it needs to be followed more closely?

CARCHMAN: No, they are all followed exactly the same. In civil and family you probably see the greatest number, but you're not talking about huge numbers. We have more than 400 judges sitting in the state. The Appellate Division is not in that play, but the presiding judge pays attention.

SOBEL: How would that translate, if at all, to, especially in family part, which is a lot of motion practice?

CARCHMAN: If motions are reserved, they are supposed to be reported.

SOBEL: Are they treated differently on the report?

CARCHMAN: No, they are all part

of...

SOBEL: It would be a reserved decision?

CARCHMAN: A reserved decision.

HYMERLING: Another issue that lawyers and judges confront is the practice of either having tentative decisions or dispositions and not having tentative dispositions and that's largely to date then left as a matter of discretion by the Court. In South Jersey, the situation is mixed. In Burlington County, there are tentative dispositions on virtually everything; some other counties there are not. Do you have a personal view whether that is something that an attempt should be made to encourage more judges to do so?

CARCHMAN: Right now, I think it's properly a matter of personal preference, and I say that now I'll put on my former family part judge hat, sitting on motions, I rarely gave tentative decisions. Now if oral argument was waived, it was of no moment. If oral argument took place, occasionally something would come up during the course of the argument that would alter my decision. That's probably not a good reason for not having tentative decisions, but as a matter of personal preference, I didn't. I've heard actually mixed reactions from the bar. Some members of the bar are very enthusiastic about tentative decisions. There are other members of the bar who, when they see the tentative decision, challenge it immediately. So tentative decisions gain the judge nothing in those cases. I am not sure there is uniformity among the bar in terms of tentative decisions.

SOBEL: I also think it depends upon the type of motion that is filed. I think you'll get certainly a variation of opinions whether we're talking about discovery motions or substantive motions and things of that...

CARCHMAN: Yes.

HYMERLING: My view is that even if the decision is adverse to you, it's a very desirable tool because it focuses the arguing and draws your attention to the judge's concern. I have never had, that I can recall, a judge who was totally close-minded as the result of a tentative decision given and what I find is that the quality of the oral argument dealing with what is really an issue as opposed to the extraneous matter is really a great benefit.

CARCHMAN: I'm not sure. I think if you ask the bar and put it that way, they would agree with you. I'm not sure whether in practice that actually happens, especially as you folks know if your client's sitting in the back of the room and possession of that piano is the most important thing, notwithstanding that custody is an issue.

HYMERLING: Another problem, which I thought was a solved problem but it may not be, is the problem of administrative adjournments of motions, meaning the list is too full or other reasons. One of the problems that that creates is it really denies any kind of flow to a case or allows problems that the client perceives to be not emergent, as a judge would perceive them to be emergent, but still emergent, and you can't argue with the computer that says you are adjourned.

CARCHMAN: Well now we'll flip the discussion a little bit. You are absolutely right. And it's one of the reasons why best practices has to succeed. The judge says, "This is not emergent." The litigant says, "I care a lot about this now and I want it resolved now." And I come back full circle to the complaint that we get necessitating that best practices should work. It's tough to answer and say that practice shouldn't happen. I've been confronted with motion lists as a family part judge and in the family part we were hearing motions every week. It's like the wave coming in and it goes out, but it keeps coming in.

There are going to be some motion days when you are just so overwhelmed that you just can't give that motion the attention that you have. If you are doing three days of continuous trials, when you do your motions it's usually between 5 and 11 at night. You two are not the filers of surrebuttal affidavits, but you start to get that stuff, you put the motion off. So there are going to be those moments when you say, "I'm sorry, it has to go off." It should not be the practice.

SOBEL: I think what he was commenting on judge, is not that a judge is making a critical determination on a particular case because of a fact or the caseload, but that it's almost like a test. We've got so many slots, so many tables, the reservations are full, you'll have to call us next week.

CARCHMAN: I'm not sure that we're saying different things. The question is how big the restaurant is.

SOBEL: I guess so.

CARCHMAN: And some judges have a capacity for absorbing more people in their restaurant and others less so. Again, that would be a practice I would like to find out how prevalent that is.

HYMERLING: It's not nearly as great as it was, but it still occurs and it can be extremely frustrating for the litigants.

CARCHMAN: By the way, I occasionally would do that, but as a general rule I would call the lawyers.

SOBEL: One of the things...

CARCHMAN: Of course, they always agreed.

SOBEL: One of the things in terms of your role as administrative director of the courts, at least as I've seen it, and I think Lee will agree, is that it tends to happen where there are fewer judges in that particular vicinage and therefore the pressure is on them. I think it tends not to happen where there are a lot more judges.

CARCHMAN: Well, sure, and you get those cases where the motions come in every single week on the case. I had instances—I don't even know if you were around Mercer when I had one particular case—where I said to the lawyers, "No more motions. You have to clear the filing of a motion with me." Now I could see you both having that same conversation with someone sitting behind this desk and saying, "You know there's a judge out there who

won't let us file motions until the motion is cleared," but these were motions about whether the box over the thermostat should be removed and whether he was allowed to close the blinds, and so forth.

HYMERLING: That goes to the basic thing that in family more so than in anywhere else, one can't lose one's sense of common sense or humanity when you go on the bench. There's no question that we see excesses and those excesses have to be addressed in an appropriate way, in a case sensitive way. And sometimes I have seen in cases where there is pre-screening of motions and it's not illegitimate—in an extraordinary situation, not in the normal situation, but still I think it's appropriate.

CARCHMAN: But I guarantee you there's a member of the family bar who's saying, "You know, there's a judge down in Mercer who will not let me file motions," and he's going to get two or three comrades and say, "My God, he won't," and that story is going to get on telephone wires and it's going to be Carchman doesn't allow you to file motions unless you get it cleared.

SOBEL: Okay. If there is a particular judge who has expressed a desire to stay in family part, is that given weight when you and the chief justice review the assignments going forward?

CARCHMAN: If a judge asked to stay in family?

SOBEL: Yes.

CARCHMAN: The judge's request always is considered.

SOBEL: How about if it's the other way around?

CARCHMAN: A judge asking to be out of family?

SOBEL: Yes.

CARCHMAN: Forget at reappointment. At any time. Judges who ask to go out of family and go into a different division are given consideration. Just as a practical matter, when I was the assignment judge I met with every...well [Judge] Ross said this in his interview. I sat down with every judge before the assignment recommendations, and that's how it's done, were made. And I said, "This is where you are. This is how long you've been. What would you like to do?" And the judge would say, "I want to stay in family; I'd like to come out of family," and so forth, and I'd say, "But you've only been in family for six months," and we would talk about it. Ultimately it comes into our system here and it goes to the chief for her decision and then you start to get a whole host of other considerations—the needs of the Judiciary, the needs of the vicinage, staffing, do we have enough judges sitting in family? Can we accommodate the request?

SOBEL: That would be a factor that would be considered?

CARCHMAN: Oh, absolutely.

SOBEL: What, if anything, do you miss about not being a judge anymore?

CARCHMAN: I am still a judge! I've just taken a slight detour on my way to the bench. I do miss the give and take of the courtroom, different levels, different things. I used to enjoy motions. I enjoyed oral arguments. The lawyers may not have enjoyed it, but I was enjoying myself. You know, working through the puzzle, to come up with hopefully the right answer. In the Appellate Division, getting some opinions to write that were interesting opinions and sometimes cutting the edge off the existing law and doing that, but, this is a new challenge, and this is challenging.

HYMERLING: Is there any message that you would like to convey to our readers about the AOC and about how the AOC interacts with the public, the bench and the bar?

CARCHMAN: The AOC is the administrative arm of the Judiciary. The Judiciary is made up of multiple components. We view our relationship with the bar, with the bench, I've used the term "partnership," [but] it is not a pure 50/50 partnership and I recognize that, but there is cooperation by all components for the common interest. We are all serving a justice. We are fortunate in this state to have the finest state Judiciary in the United States.

You cited an example. Early settlement programs in matrimonial matters. It may appear to some to be a small thing. Now you say there's none other in the country. With a simple concept, New Jersey was the leader. New Jersey is on the cutting edge of almost every innovative project. We look elsewhere and we capture things from other jurisdictions that I will tell you in my experience as a judge, my limited experience here, when I go out to other jurisdictions, when I go out and speak about the Judiciary in New Jersey, when I go to conferences on judicial ethics, which I was involved with a couple years ago, everyone says, "What does New Jersey do? What's New Jersey's position on this?" The emails come in: "What's New Jersey's position? What is New Jersey doing with the judges? What kind of innovative procedures do we have?"

We are now about to participate in the Child Welfare Program out in the Midwest in the fall. We are so far ahead of the curve on this stuff that it's remarkable. We are the leaders in the country. That is a function of the way the bar and the bench interact. The way the chief justice, the Supreme Court, the AOC, to a person, respects the relative roles or the roles of the other participants. The State Bar, Ed McCreedy, Harold Rubenstein and I are on the phone or talking or corresponding with each other. We have our Supreme Court committees. They are made up of judges and lawyers and lay people—all bringing something different to the table. That's what makes us very strong.

HYMERLING: On behalf of the family lawyers and on behalf of the two of us, I want to thank you for not only a significant interview, but one which evidences the willingness of the bench and the system to share its views with the Bar and we are very grateful for the time you spent.

SOBEL: Thank you. ■

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