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Chair's Column

Our New Alimony Statute

by Jeralyn L. Lawrence

What a truly amazing and wild ride it has been! As you know, Governor Chris Christie signed the alimony bill into law on Sept. 10, 2014, marking a historic and momentous end to our three-year journey to revise the terms of alimony in the state of New Jersey.

With its enactment, the new alimony statute has given New Jersey national recognition for its fairness and balance, as it affords a measured blend of equity and predictability, while providing structured guidance for both payors and payees. In the unpredictable realm of family law, New Jersey has now achieved an ideal statute that governs alimony on a case-by-case basis, accommodating for changed circumstances in a more productive fashion while resisting the temptation to employ arbitrary, baseless and formulary cookie-cutter guidelines. For family law attorneys, this statute mandates that we use our most creative skillset—our rational, categorical and logical thinking—while also using our number one resource, our brains!

As lawyers, we all shared a similar experience, spending at least three years of our lives training our minds to distill facts and analyze the law, and then to apply the facts to the law. We made a career out of this critical thinking skillset, and we continue to practice these skills every day. Accordingly, it should not be difficult to fulfill the new alimony bill's requirement to approach every case individually, focusing on its own unique circumstantial attributes.

The amendments to the alimony bill were drafted carefully and meaningfully by all interest groups involved, taking into consideration the significant issues in matrimonial cases that we tend to come across, such as loss of employment, cohabitation and retirement. As family lawyers, we represent an equal balance of payors and payees. It is safe to say that at any given time, we can represent both an income-earning spouse and an unrelated, non-income earning spouse. With that responsibility, our positions regarding any change to the statute were always fair, balanced and credible.

Having dedicated the last three years to ensuring the enactment of a fair alimony bill, and spending, collectively, thousands of hours along with my fellow officers distinguishing New Jersey as a state to which others hope to conform, I must applaud all of you who committed a minute, an hour, a day or longer, getting the alimony bill to where it is today. The fact remains that there is no one person to thank, no 'few' people responsible for the preparation, movement, and adoption of this bill. There are many—too many to count—but recognition must be given to those who spearheaded this endeavor and whose involvement undeniably made a difference.

There are those who drafted, redrafted and reworded the language of the bill that attracted attention from all over the state. There are others who dedicated hours and days to attending meetings with numerous legislators, and sacrificed thousands of billable hours to see to it that their voices were collectively heard on an issue that would significantly affect our profession. Still others testified before the Senate Judiciary Committee or the Assembly Judiciary Committee, engaged in settlement negotiations, and met with people in the Governor's Office. Amassing a coalition of 160,000 members, across 24 different organizations, was no small feat. Spreading the word for action on the alimony bill and maintaining an informed and unified coalition was quite a task, and each coalition member should feel the satisfaction of his or her role in its success. Regarding those who had personal relationships with members of the Legislature, and gave us the opportunity to establish our own personal relationships and voice our position, we are overwhelmingly grateful for their help in advancing the alimony bill.

The Family Law Executive Committee's time and widespread focus devoted to the alimony bill ensured it received the attention it needed to make it to the governor's desk. The support from the New Jersey State Bar Association and other local bar committees for this effort has our section's appreciation and gratitude.

Individual recognition must be given to those who gave time and expertise to this important issue, including Senator Nicholas Scutari; Assemblymen Sean Kean, Charles Mainor, John McKeon, and Troy Singleton; and Assemblywoman Pamela Lampitt. I must also recognize the officers of the Family Law Section Executive Committee, Brian Schwartz, Amanda Trigg, Stephanie Hagan, Tim McGoughran, and Michael Weinberg, for leading the charge on what seemed an impossible endeavor. Thank you to our team at the New Jersey State Bar Association, including Paris Eliades, Angela Scheck, Todd Sidor, Kate Coscarelli, Sharon Balsamo, Jena Morrow and William Maer, our lobbyist. I thank them for their contribution in the success of the alimony bill. No conversation, no letter, no telephone call and no meeting on the matter was ever unimportant to any individual involved in this process, and I am overwhelmed by the magnitude of support received throughout our state. We should all be proud of the final product that resulted from our shared efforts. Collectively and collaboratively, we can all take pride in this accomplishment and recognize that without our action the pieces may not have fallen where they did on Sept. 10, 2014.

For you sports enthusiasts, I would equate the process that brought us to Sept., 10, 2014, as much like a season of the NFL. Our drafters of the bill made and strung the football and gave us the uniforms and materials to play at the highly anticipated Sept. 10, 2014, game. Come game day, those who sacrificed billable hours to meet with members of our Legislature guaranteed us some playing time, moving the ball down the field, inch-by-inch, yard-by-yard. Those 'quarterbacks' and 'wide receivers' who testified before the Judiciary Committees and met with members of the Governor's Office, and those who joined the coalition and supported the efforts of the team, helped carry out the calls and eagerly deliver the completion of the long pass plays that amassed significant yardage. Through our team efforts and collaboration, we scored a touchdown on Sept. 10, 2014, and we have great cause to celebrate this compromise.

I thank all of you for your passion and your steadfast commitment to ensure fairness for all of those going through a family law matter. We may not have finalized the bill with the exact outcome we had envisioned; however, neither did the reformers. Assemblyman Singleton reminded all parties about the definition of compromise and, with that being said, we are truly appreciative of the success of this bill.

Substantively, the bill provides for some new terms. Permanent alimony has been replaced with 'open durational alimony.' Durational limits provide guidance to the length of an alimony term. The exceptional circumstances that allow for deviations from the durational guidelines take into consideration facts and circumstances and sacrifices made during the marriage, and still honor the marital partnership and recognize that the lifestyle of

both parties remains the cornerstone of an alimony analysis. The statute also includes comprehensive factors for retirement, both actual and prospective, as well as factors for job loss, both for W-2 employees and business owners. Cohabitation is also addressed, codified the Court's power to end or suspend alimony. The bill was effective immediately upon signing, and is not to be applied retroactively. The sanctity of prior agreements and orders are specifically preserved. It is important you read it. I trust once you do, you will understand why I am so proud of our new law.

Conclusion

My top priority and vision as your chair is to enhance our visibility and influence in the legislative process. We rely upon personal relationships to effectuate change in the halls of the State House. I ask that you each get involved and become the legislative guru our section needs you to become. It is critical that we remain visible, vigilant and vibrant to ensure good laws are passed and bad laws are thwarted. This has been an exciting time to be chair of the section. I thank all of you for your friendship, support and words of wisdom throughout the course of this legislative journey.

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Editor-in-Chief's Column

What is the Solution to the Growing Backlog? Getting to "Yes"

by Charles F. Vuotto Jr.

The amount of statewide judicial vacancies has led to the creation of severe measures in various counties, particularly two of the state's most populous ones—Bergen County and Essex County, with Essex County bearing the heaviest docket.[1] As of Sept. 1, 2014, Bergen County will have nine vacancies.[2] As a result, in a notice to the bar made public Aug. 4, 2014, Bergen County Assignment Judge Peter Doyne announced that as of Sept. 15, 2014, "there shall be no trials conducted in the Civil or Family Divisions which are expected to last longer than two weeks, subject of course, to the discretion of the Presiding Judge and any orders that may have been entered previously."[3] In making this decision, Judge Doyne indicated "I do so reluctantly, but with the understanding that it is my obligation to attempt to ensure this vicinage addresses the matters of as many litigants as we can within a reasonable time period."[4]

While understanding that this 'freeze' was necessary as a matter of last resort, and that Judge Doyne did what he had to in order to keep the docket in Bergen County moving forward, New Jersey State Bar Association President Paris Eliades called it "a form of coercion when you're settling because your day in court has been denied."[5]

NJSBA President Eliades took charge and called upon Governor Chris Christie and legislative leadership to address the ongoing crisis of judicial vacancies. President Eliades sent a letter to Governor Christie, Senate President Stephen M. Sweeney, and Senate Minority Leader Thomas H. Kean Jr., urging action on the vacancies.[6] In his letter, President Eliades indicated:

> New Jersey's judiciary is facing a crisis... With 52 vacancies and another 12 looming, our judges are stretched beyond reason. They are struggling to meet justifiable needs of the citizens of the state who have every right to look to their courts to settle their grievances in the manner contemplated by the constitution and our democracy. As a result of these unprecedented numbers, judges are carrying staggering caseloads and court officials are turning to desperate measures, leading to delays and hardships for people seeking divorces, the resolution of business disputes and many other cases.[7]

President Eliades went on to say, in part, "the solution lies in your capable hands. We urge you to put aside any personal and political differences and focus on the constitutional mandate to fill these trial court vacancies immediately…."[8]

According to the notices to the bar contained in the Aug. 25, 2014, issue of the *New Jersey Law Journal*, the New Jersey Senate, on Aug. 18, 2014, unanimously approved eight new superior court judges for Essex County. Four of those judges have been assigned to the Family Division, as follows: Judge Linda Lordi Cavanaugh, Judge Neil N. Jasey, Judge Marysol Rosero and Judge Marcella Matos Wilson.[9]

A close review of the New Jersey Judiciary Superior Court Caseload Reference Guide from 2009-2013 regarding the family part reveals some interesting figures.[13] There has been a decrease in the overall family part filings from 2012 to 2013 in almost *every* New Jersey county, ranging from a one percent decrease in Passaic County and Sussex County to a 10 percent decrease in Monmouth County and an 11 percent decrease (the most in the state) in Morris County.[14] Gloucester County's family part filings increased from 2012-2013 by one percent.

Yet despite the decrease in filings in Monmouth County, there were 228 backlogged cases in 2012[15] compared with 286 backlogged cases in 2013.[16] In Ocean County the backlogged cases grew from three to five percent, and in Cumberland County the backlogged cases grew from two to four percent.

The increasing amount of judicial vacancies, which both the governor and the Legislature cannot seem to diminish significantly, coupled with the resulting backlog of cases when filings have decreased, reveal a fact we all know to be true—judges are overburdened with cases and the court system may not be situated to handle the problem. Thus, the bench and bar need to collaborate to arrive at modifications to our legal system to rectify these serious and very real ramifications. This author suggests that part of the solution is a combination of the early use of mandatory complementary dispute resolution (CDR) and judicial referral to arbitration, as detailed below.

Author's Suggestions

1. Mandate participation in the CDR process immediately after filing.

On Nov. 22, 2004, New Jersey passed the Uniform Mediation Act (UMA).[17] The purpose of the law was to establish uniform standards and procedures for mediation and mediators. The UMA was passed to protect those who choose to resolve their disputes through mediation.[18] As defined by the UMA, "[m]ediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[19] "A mediator, although neutral, often takes an active role in promoting candid dialogue by identifying issues [and] encouraging parties to accommodate each other['s] interests."[20]

A superior court or municipal court judge may require the parties to attend a mediation session at *any time following the filing of a complaint*.[21] Furthermore, in mediation of economic aspects of family actions, parties are required to provide accurate and complete information to the mediator and to each other, including but not limited to tax returns, case information statements, and appraisal reports. Thus, while the court system is already permitted by rule to mandate the participation in mediation, it does not occur early enough in the process. Why not make participation in mediation an automatic first step after filing a complaint?

Currently, complementary dispute resolution (CDR) is a program judicial systems in New Jersey and around the country are using to attempt to reduce overfilled court dockets, costly trials and the time it takes parties to resolve their disputes.[22] CDR can include mandatory mediation. "Mandatory mediation is a form of alternative dispute resolution that requires participants to go through a mediation process before, or in lieu of, court proceedings. Unlike voluntary mediation, mandatory mediation may sometimes be required by an existing contract or ordered by a judge. Proponents feel that mandatory mediation can help reduce the court case load, allowing parties in a suit time to work out their issues with assistance instead of relying on a judge to settle the issue."[23]

Implementing mandatory mediation in New Jersey family matters prior to court involvement can significantly reduce backlog. Many litigants already include clauses in agreements that require parties to attend mediation prior to filing, should an issue arise. The creation of a formal rule requiring a party to attend mediation prior to filing with the court, with the exception of the initial complaint, is a logical extension of this sound philosophy. Parties should use the services of a mediator as a neutral third party at the commencement of a case in order to assist with the exchange of critical information and documentation, and to resolve all *pendente lite* issues without the need for filing and in an attempt to alleviate backlog in the court dockets. For example, litigants in Tennessee are guided by the Tennessee Statutory Code, which states in part, "…reflect the determination that, in the circumstances present, mediation should be undertaken *prior to Court involvement* (emphasis added).[24]

Further, in Delaware mediation is required in virtually all civil cases (more specifically in custody, visitation, child support and guardianship matters). The court believes all parties should attempt to mediate their differences and reach an agreement.[25]

The benefits of mediation are numerous, including allowing a party to control the outcome, reducing court dockets, and minimizing legal fees. Thus, why not make it a mandatory first step?

2. Permit the Judiciary to inform litigants of the pros and cons of attending arbitration and provide litigants with a list of certified arbitrators.

In the author's article entitled *Equal Protection for Arbitration*,[26] the Supreme Court is quoted in the case of *Fawzy v. Fawzy*,[27] where it emphasized that "our courts have long noted our public policy that encourages the use of arbitration proceedings as an alternative forum."[28] The Supreme Court went on to state that the objective of arbitration is, "[t]he final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between parties. Arbitration

can attain its goal of providing final, speedy and inexpensive settlement of disputes only if judicial interference with the process is minimized; it is, after all, meant to be a substitute for and not a springboard for litigation."[29]

After attending an early settlement panel, litigants are provided with a list of qualified mediators. Why not also provide litigants with a list of appropriately trained arbitrators? Of course, the court should simultaneously be required to inform litigants of the pros and cons of attending arbitration. One problem, however, is that to the best knowledge and belief of this author, arbitration training is only provided by the American Academy of Matrimonial Lawyers (AAML), while New Jersey mediators, after completion of the training requirements provided for in Rule 1:40, *et seq.*, (specifically, Rule 1:40-12), may become "Qualified by the Supreme Court of New Jersey to mediate family law matters."

Rule 4:21A-2 provides for the qualification, selection, assignment and compensation of arbitrators. Rule 4:21A-2(b) provides, in part, that if parties fail to stipulate to arbitrators, the arbitrator shall be designated by the Civil Division manager from the roster of arbitrators maintained by the assignment judge on recommendation of the arbitrator selection committee of the county bar association.[30] "Inclusion on the roster shall be limited to retired judges of any court of this State who are not on recall and attorneys admitted to practice in this State having at least seven years of experience in New Jersey in any of the substantive areas of law subject to arbitration under these rules, and who have completed the training and continuing education required by R. 1:40-12(c)."[31] It is this author's understanding that the training requirements detailed in Rule 1:40-12(c) pertain to arbitration of personal injury protection (PIP) litigation matters. That section of the rule makes no reference to the training provided to family law arbitrators by the AAML or any other group (if one were to exist). This author suggests the Supreme Court amend Rule 1:40-12(c) to acknowledge the training provided to New Jersey family arbitrators by the AAML and provide similar training courses to those provided to mediators, so family law practitioners can obtain the designation of "Qualified by the Supreme Court of New Jersey to Arbitrate Family Law Matters." Further, judges should be required to not only discuss the benefits of mediation, but also the benefits and risks of attending binding arbitration by an appropriately trained arbitrator.

3. Mandate the Judiciary to address CDR at all initial case management conferences.

Mediation, arbitration and collaborative law are all terms and programs that contemporary judicial systems are using to reduce overfilled court dockets, costly trials and the time it takes parties to resolve their disputes.[32] Therefore, judges should be required to address each and every one of these alternatives at an initial case management conference. More often than not, litigants do not understand the options available to them for resolving their issues, and will end up spending thousands of dollars in court while they could have resorted to what is usually a more effective, cost saving and confidential method outside of the court. Thus, it is this author's suggestion that all judges should be required to inform litigants of their right to attend non-binding mediation, binding arbitration, and perhaps other forms of CDR during the first scheduled case management conference. For case management orders submitted by consent, requiring no appearance by the parties, when returning the 'filed' case management order, the court should provide documentation to the litigants regarding their rights to CDR, including arbitration, along with a list of qualified family law arbitrators.

Conclusion

The increasing number of judicial vacancies, and the government's difficulty filling these vacancies, has left New Jersey judges overburdened with cases, which the court system seems ill-equipped to handle. The resulting increase in backlog will only continue to grow unless our system is modified. Without question, part of the solution includes improving bench-bar relations. Attorneys and judges need to work together to develop general and specific approaches to resolve pending matters. Further, judges who wish to remain in the family part should be permitted to do so, and not rotated out. As aptly stated by Jeralyn Lawrence, the current chair of the Family Law Section of the New Jersey State Bar Association in the August 25 *New Jersey Law Journal*, "As family lawyers, our approach should not be to attack and criticize those that are already working too hard, but to remain a unified profession, support one another, learn from one another and find collaborative and collective ways to resolve problems in our profession."[33] Such "collective ways" should include the use of early mandatory mediation, judicial referral to arbitration and addressing all forms of CDR at

the first case management conference. Such tweaks to the system should help reduce the need for court filings; help reduce overfilled court dockets and costly trials; and help reduce the time it takes parties to resolve their disputes.

Finally, perhaps the best support for this author's suggestion to re-direct litigants to the CDR process early in the process is a quote from Lawrence Tribe, Harvard law professor and co-author with Joshua Matz of the book *Uncertain Justice: The Roberts Court and the Constitution*. Tribe, whose students include Chief Justice John Roberts, was recently a guest on the Leonard Lopate Show on WNYC.org, where he stated:

> When anger, resentment, disappointment, shame, and guilt are ingredients in divorce, it's no wonder that the first reaction of the parties involved is going to court to resolve their conflict. In reality, the Supreme Court Justices genuinely believe that litigation is not a great way to solve many problems. They genuinely believe that dispute resolution mechanisms like arbitration are better.[34]
>
> ...Courts can say no a lot more easily than they can push in the direction of yes. The courts are much better invalidating injustices...than in actually making things go forward.[35]

Thus, this author suggests the bench and bar take immediate action, as proposed herein, to help resolve the growing problems in our system. The suggestions proposed herein will help us get to "yes" more easily.

The author would like to give special thanks to Jeremy J. Sturgeon, Esq., associate with Tonneman, Vuotto, Enis & White, LLC, for his assistance with this column.

Endnotes

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2. Bergen Judicial Vacancies and Court Administration—Notice to the Bar, *New Jersey Law Journal*, 2014, http://www.njlawjournal.com/id=1202666253784?
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8. *Id.*
9. 217 *N.J.L.J.* 542 (2014).
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11. Passaic County Civil Division Judge De Luccia Jr. retired in October.
12. Mercer County Civil Division Judge McManimon is set to retire Nov. 16; Michael Booth and Mary Pat Gallagher, Vacancies, Backlogs Growing, but Christie Not Sole Factor, 2014, *New Jersey Law Journal*, http://www.njlawjournal.com/id=1202666896380?
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25. Mediation in the Family Court, Delaware State Courts, http://courts.delaware.gov/help/proceedings/fc_mediation.stm.
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27. 199 N.J. 456 (2009).
28. *Id.* at 468 (*citing Wein v. Morris*, 194 N.J. 364, 375-76, 944 A.2d 642 (2008) (*quoting Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 489, 610 A.2d 364 (1992)).
29. *Id. See also Barcon Assocs. Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 187, 430 A.2d 214 (1981).
30. N.J. Court Rules, R. 4:21A-2(b) (2014).
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33. 217 *N.J.L.J.* 556.
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35. *Id.*

Executive Editor's Column

New Jersey Prevention of Domestic Violence Act Leaves Out Children Who Witness Domestic Violence

by Ronald G. Lieberman

The New Jersey Prevention of Domestic Violence Act[1] is one of the more progressive domestic violence acts in the entire country. The act has a clearly stated public policy of intending "to assure the victims of domestic violence the maximum protection from abuse the law can provide."[2] But, the act is noticeably and regrettably silent when it comes to situations where children witness assault in the context of domestic violence, even if they are not the direct targets of domestic violence. In those situations where children witness an assault, whether it is witnessed visually, auditory, or inferentially, the children perceive the aftermath of domestic violence. The act does not offer relief for these child victims of domestic violence, who may suffer emotional and developmental difficulties as a result of what they witness. The act does not mention counseling for these children or creating a payment source for counseling, and is utterly silent about ordering the supervision or suspension of the batterer's parenting time with these children. These glaring omissions from the act should be rectified by amending legislation from our forward-thinking and attentive legislators. In the meantime, practitioners should be attuned to the children's best interests when a batterer commits assault in the presence of a child or children.

There are 19 specific items of relief a judge can order upon the entry of a final restraining order.[3] Two items of relief mention parenting time,[4] one stating that supervised parenting time could be ordered or that a risk assessment could be ordered with a suspension of parenting time when a parenting time order is already in place, yet no suspension or supervision is urged or mandated when domestic violence occurs in the presence of a child. A third item of relief directs counseling[5] but only for the perpetrator of domestic violence.

There is only one reported case ordering a risk assessment and suspending parenting time for a perpetrator following the entry of a final restraining order.[6] In that case, parenting time was in place before the final restraining order was entered, and the final restraining order did not contain any restrictions on the perpetrator's parenting time. In a subsequent motion filed by both parties to modify parenting time, the judge noted the existence of the final restraining order and directed that a risk assessment of the perpetrator would be ordered.

Why should the situation of a child witness of domestic violence not be a part of the act? Most acts of domestic violence, especially assault, occur in the home, and most victims of domestic violence have children. Presently, a perpetrator of domestic violence in the presence of a child continues to have a presumption of parenting time with the child, who may now have all measures of difficulties relating to the perpetrator or trusting the perpetrator. A practitioner will not be able to cite any items of relief in the act to protect the child witness of domestic violence, so where does that leave the child in such a heartbreaking situation?

There are two bills pending in the 2014 legislative session discussing counseling for child witnesses of domestic violence, although neither bill addresses the glaring omissions presently in the act. A-1310 would require counseling for certain domestic violence offenders, but makes no mention of counseling for the child witnesses of domestic violence or payment of child counseling. A-1975 would create a crime based on domestic violence committed in the presence of a child; however, the bill deals with the criminal aspect of domestic violence.

Our legislators who routinely are attuned to the needs of children should close this gap in the act and create protections for a child witness of domestic

violence. Given that the act is to be liberally construed to achieve its purpose,[7] it is not much of a stretch of logic for the Legislature to permit counseling for a child who witnessed domestic violence, direct that a fund be created to pay for that counseling separate from direct payments by the perpetrator who may then demand input into the counseling, and compel supervised parenting time or even suspended parenting time for a batterer who commits assault in the presence of a child. The burden of proof for removing those restrictions on parenting time should be on the batterer to demonstrate to a judge that open parenting time will not present any harm to the child.

The best interest of the child guides the family part judges when they are dealing with the difficult issues they address in courts on a daily basis. But, when a child is an actual witness to domestic violence the act is silent on protecting that child, leaving a judge without statutory authority to order child counseling or suspension or supervised parenting for the batterer.

It is hoped that in the near future legislation will be passed amending the act to create the items of relief set forth in this column. In situations where a child witnesses assault in a domestic violence case, a practitioner must be ready to address these sensitivities, even if they are not specifically mentioned in the act. A practitioner should seek counseling for a child who witnessed domestic violence, seek funding for it separate from direct payments from the perpetrator who may then seek control over the counseling, and seek supervised or suspended parenting time for a batterer who commits assault witnessed by a child. The child victims of domestic violence deserve nothing less than a practitioner's full attention. ■

Endnotes

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3. N.J.S.A. 2C:25-29B(1)-(19).
4. N.J.S.A. 2C:25-29B(3)-(14).
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Tax Consequences of the Alimony Trust

by Katrina Vitale

In the United States, alimony has evolved over the past century, with recent trends toward scrutiny of its present-day application.[1] Demands for alimony reform are at their height, with New Jersey having enacted its new law concerning the establishment and modification of alimony, effective Sept. 11, 2014. Among other states, Colorado was the most recent to introduce a formula for calculation of alimony, effective Jan. 1, 2014.[2] Several states have bills under legislative review, including Connecticut, Louisiana and New York.[3] This trend clearly signifies now is the time to reassess how alimony is awarded and which tools may be available to serve the interests of parties in the process of separation and divorce.

In those states that recognize alimony, spousal support, and/or separate maintenance rights (collectively referred to as alimony),[4] the laws vary significantly.[5] For example, in Texas, spousal maintenance is reserved for limited circumstances where there is either criminal family violence or an inability to meet "minimum reasonable needs" resulting from a marriage of at least 10 years in length or involving the disability of a dependent spouse or child.[6] In New Jersey, there are no limitations on who may seek an alimony award, but there are some limitations on the duration, in consideration of 14 nonexclusive factors for judicial discretion in making a determination.[7]

The general principle behind an alimony award is that a financially dependent spouse in a marriage of relative length may be entitled to a form of alimony based upon the marital laws of the state.[8] Many states view the right of alimony as being related to the lifestyle enjoyed by the parties during the course of the marriage.[9] The alimony may be payable for a period of years, and in some states it may be permanent. Generally, the obligation of alimony is payable in cash from earnings of the payor that already have been taxed as income to the payor.[10]

Under federal law, there are tax consequences linked to the payment and receipt of alimony. The payee must report the funds as income assuming all attributes of the Internal Revenue Code of 1986, as amended Section 71(b) are met, and the payor can report a tax deduction under Section 215 for payments made.[11]

A financially able payor may want to consider an estate-planning alternative to remove the asset from his or her estate and to avoid income on the growth. If carefully drafted, an alimony trust can be beneficial to the payor as a tax savings. A payee may also favor this method of payment as security for ongoing payments for a variety of reasons, including concerns about the payor's future compliance with the alimony obligation or an unforeseen disability, untimely demise, or other reduction in available funds.

Alimony Trust Described

What is the Alimony Trust?

The alimony trust is a trust that is established for the payment of a support obligation of one spouse or former spouse (payor) to another spouse or former spouse (payee), which may or may not, depending upon its terms, provide a security fund for payment of the obligation beyond the lifetime of the payor. Under the Internal Revenue Code, the term "alimony" does not soundly fit within the concept of the alimony trust. Instead, the alimony trust in some ways conflicts with the federal qualifications for alimony. For one example, the alimony trust may allow for some form of payment beyond the lifetime of the payee and to the estate of the payee, which is inconsistent with the express language of the code.[12]

Alimony trusts are an alternative to alimony paid by a spouse or former spouse, and tax consequences vary to some extent. In the case of alimony, the funds are paid from the income or assets of the obligor spouse. As for alimony, the payor will have first included the funds in his or her gross income and then, upon receipt, the payee must report the funds as income assuming all attributes of Section 71(b) are met. Upon payment, the payor can then deduct the payments on his or her federal return.[13]

In the case of an alimony trust, the funds are paid from a trust that owns the assets after a transfer has been made by the payor. If the payor transfers assets to an alimony trust, the income distributed to the payee is not ordinarily going to be characterized as gross income to the payor, and a deduction by the payor is not allowable.[14] Instead, the income distributed to the payee will be characterized as income to the payee under Section 682(a) of the code, and will specifically not be treated as income to the payor.[15]

How Has the Alimony Trust Been Utilized in the Past?

The alimony trust has been primarily used for purposes of shifting taxable income from the payor to the payee in situations involving higher net worth.[16] Until the Tax Reform Act of 1984, much confusion existed regarding the realization of income by the payee spouse. In addition, it was generally a more viable tool in those cases where assets were available to be transferred irrevocably to the spouse or with remainder interests for their children, and without a right of reversion retained by the payor.

Litigated cases involving alimony trusts have originated with an alimony trust created by the parties, represented by attorneys or otherwise, through an amicable agreement reached by the parties instead of through any court order or adjudication.[17] That is not to say that some state courts could not find authority to direct the creation of such a trust. In fact, circumstances can be hypothesized where a court may want to direct the creation of such a trust. This topic will be reserved for discussion below as future expansion of the alimony trust is discussed.

The majority of reported decisions involving alimony trusts have been centered on the income-reporting aspects. The income-shifting aspect of the alimony trust was upheld as federally constitutional in 1950.[18] Challenge by a payee spouse likewise failed in the *Fairbanks* case. The details of the case were: After the demise of her former husband, who placed assets, including stock, into trust for her pursuant to a divorce settlement, she took distributions from the trust, failing to report the income derived.[19]

The ongoing struggle with construction of the tax effects of the alimony trust was made apparent when the Sixth Circuit held that distributions to a payee former spouse under an alimony trust from the income of tax-exempt bonds were not income to the payee[20] after the Internal Revenue Service issued a recommendation to interpret the Section 71 reference in Section 632(b) as being limited to the determination of the correct taxable year of the beneficiary of a Section 71 trust, and not to the applicability of the source of income rules of subchapter J.[21] Under prior law, a payee spouse was taxed on periodic payments attributable to property transferred in trust or otherwise.[22] No distinction for tax effect was made as far as distribution from principal or from tax-exempt income.[23] The distributions were characterized as income to the payee regardless of the source of the payments.

The Supreme Court once again addressed the tax attributes of an alimony trust in 1962, when it held the transfer of appreciated property to an alimony trust could be a taxable event.[24] A complete transfer in satisfaction of the payor's obligation for support would be deemed taxable.[25] Moreover, if there was a gift of the remainder interest (or reversion) in the payor, the trust would not receive a cost basis in the property.[26] Any distributions from the trust to a former spouse were treated as income to that former spouse under Section 71, regardless of whether or not the distribution came from income or principal. Under circumstances where the divorce was not finalized, the distributions were treated as income to the payee spouse only if disbursed from income of the trust rather than principal.[27]

Congress addressed allocation of tax involved in the alimony trust when it codified Section 682 of the code in 1984.[28] The legislative history makes clear that the intention in establishing the separate provision under the code was to distinguish the tax effect of alimony under Section 71 from the tax effect of payments from the alimony trust. The Internal Revenue Service later discussed the distinction in the regulations, stating code "section 682(a) applies to a trust created before the divorce or separation and not in contemplation of it...."[29] Consequently, Section 682 (a) presupposes there is a termination of the payor spouse's alimony obligation. The IRS has stated this section, if applicable, requires inclusion in taxable income of the payee spouse under an alimony trust amounts paid, credited, or required to be distributed to the spouse only to the extent they are includible in the taxable income of a trust beneficiary under sections 641 through 665 (the subchapter J provisions).[30]

"Before the [1984] changes in [code section] 71, the

entire distribution from a trust was required to be included in the recipient-spouse's income as alimony. Under the post-[1984] rule, the recipient-spouse is entitled to the usual treatment under subchapter J as the beneficiary of a trust."[31] The payee spouse is likewise treated as the beneficiary of a trust, as treated under the subchapter J provisions.[32] The question then becomes, does the trust instrument terminate any alimony obligation and create an alimony estate rather than supplant a preexisting alimony obligation? If so, then the payee will be taxed only to the extent of disbursements from income, rather than principal.

The IRS explains, if the payments are made through a trust in accordance with certain terms in discharge of an alimony obligation under a court order, divorce decree, or a written instrument incident to divorce, then Section 71 applies.[33] Following this rationale, Section 71 will treat all disbursements as alimony requiring inclusion in the payee spouse's income of the full amount of the periodic payments received from the property in trust, whether or not out of trust income.[34] This includes payments from principal, as well as tax-exempt income.[35] What appears to be missing is the link under Section 71 to any trust connection. The regulations discuss the difference between an alimony trust under Section 682 and an alternative trust for alimony under Section 71. A prior version of this section allowed for character as alimony "periodic payments...attributable to property transferred, in trust or otherwise, in discharge of" a legal obligation imposed on the husband and arising out of "the marital or family relationship...."[36] Yet, the code today lacks any such connection. This calls into doubt the interpretation of the IRS under the existing regulations and the reliability of such tax treatment under Section 71.

The application of Section 682 and its distinction from Section 71 remains to be explored. However, it is clear there remain certain estate-planning options available to the divorce and estates practitioners under Section 682 that allow for innovative trust planning with careful drafting.

Applications of the Alimony Trust: Recognizing an Opportunity to Use the Alimony Trust

There are several primary reasons for establishing an alimony trust, which include: shifting of tax consequences between the parties, reducing the size of a payor's estate, creating security for ongoing payments, devising the terms for self-automating termination of alimony, and avoiding the six-year rule and the alimony recapture rule.

The alimony trust allows a payor spouse to shift income to the payee spouse by transferring certain income-producing assets to the trust. By doing so, the payor, who may otherwise be in a higher tax bracket, may take advantage of lowering his or her tax bracket by effectively assigning the asset income to a payee spouse under a Section 682 qualified alimony trust, even if the trust is revocable.

If there is a completed transfer of the income-producing asset to the trust without strings attached, the payor may also accomplish the task of removing the asset from his or her gross estate. While this would appear to be an effective estate-planning tool, it remains uncertain how the disposition of property upon transfer to the trust will be treated. Will it be treated as a gift or a transfer incident to divorce? Will it be coupled with the estate tax? The code and regulations give rise to conflicting interpretation regarding these issues. They are left open for interpretation and creative presentation. However, the client must be forewarned regarding the uncertainty.

Another consideration for invoking Section 682 alimony trust planning is for the benefit of the payee spouse who is concerned about the payor spouse's future compliance with an alimony obligation. The payee spouse may prefer to have the alimony payable with the security of an inalienable asset in accordance with terms of a trust, and thus have an arrangement that will have more teeth than a direct pay arrangement. In the case of an irrevocable alimony trust, there is added security to this method of payment.

Another reason to consider a Section 682 alimony trust is to establish automatic termination of alimony upon certain events, with built-in protections rather than reliance upon terms of a marital settlement agreement. The payor can establish terms for reversion of the remainder of the trust or can identify alternate beneficiaries to meet his or her estate-planning goals without the contingency of the assets automatically reverting back to his or her estate. In some cases, this can avoid probate of an unintended reversionary interest.

Another benefit of the Section 682 alimony trust is that both the six-year rule and the alimony recapture rules do not apply to these alimony trusts. Under Section 1041, property transferred between spouses or incident to divorce is not taxable. However, Congress has said that when alimony is front-loaded in years one and two

post-separation, the excess payments must be recaptured in year three under Section 71(f). The formula for determining alimony recapture is whether the alimony payments in year one exceed the average payments in years two and three by more than $15,000, and whether the alimony payments in year two exceed the payments in year three by more than $15,000. For example, if a payor spouse establishes a three-year trust that generates $25,000 income per year, which is distributed to a former spouse, the former spouse would report all the income without the recapture otherwise imposed upon the payor under Section 71(f).

Finally, an alimony trust can be funded from a loan, thereby allowing the payor to deduct interest payments on the loan. Even though interest on loans is generally non-deductible as a personal expense,[37] when structured into a qualified Section 682 alimony trust, the trustee may take deductions on interest disbursed to the payee spouse under the terms of the trust.[38] This is based on a reading of the regulations that would apply the subchapter J provisions to the Section 682 alimony trust.[39] This could result in tax savings otherwise unavailable to the individual payor.

Planning and Pitfalls

Key Terms of the Alimony Trust

An alimony trust, like any other 'living' or *'inter vivos'*[40] trust, must take into consideration for whose benefit the trust is being established, both during the lifetime of the payor and payee as well as any remainder beneficiaries. Should an alternate beneficiary be established to address certain contingencies, such as death of the payee or a change in events assumed by the purpose for the alimony trust? It is crucial to assess future events that may be predicted in order to address the parties' discernable goals.

The alimony trust must also designate who will serve as the trustee to administer the trust. Should the trustee be an individual in being at the time of the creation of the trust or should it be a corporate trustee? How will any successor trustee be selected? How should designation of a remainder beneficiary be determined? These questions should be explored with the parties while obtaining input from both estate attorneys and family law attorneys, as well as tax and corporate trust professionals.

Will the trust be irrevocable or revocable? One goal that can be met in creating a properly drafted alimony trust is that of removing the assets of the trust from the estate of the payor.[41] The subchapter J provisions must be carefully reviewed to avoid inclusion of assets in the estate of the payor if the intention is for removal based upon estate-planning goals. This will necessarily require the attention of the estate attorney and a tax professional.

Regardless of whether the alimony trust is revocable or irrevocable, the 1984 changes to the code make clear that the income can be shifted to the payee spouse when that spouse is entitled to receive an amount of income from "any trust."[42] Deductions for payments under this section are not allowed for the payor.[43] They will not otherwise be treated as child support despite the language of Section 71(c).

Consequently, the beneficiary, and not the settlor, is taxed on the distributions.[44] This is so even if: 1) the grantor (payor) retains broad powers under the trust, or 2) if the income is made available to discharge the payor's obligation to support the payee.[45] The beneficiary is taxed only on amounts he or she "is entitled to receive," while a grantor might, under other circumstances, be taxed on the income of a revocable trust or a trust wherein the grantor retains power to make distributions of income to other beneficiaries.[46] In such cases, the beneficiary is not in certain terms entitled to receive any disbursements from the trust.[47]

In addition, a post-death receipt of trust funds that can be characterized as alimony arrearages will be reportable as income on the estate return and taxable to the payee's beneficiaries under pass-through distributable net income rules rather than being treated as a beneficiary of the decedent's estate.[48]

Finally, proper terminology must be used to allow for appropriate modification of any revocable alimony trust. In the event the choice is an irrevocable alimony trust, there must be consideration for contingencies that otherwise affect the underlying intent of the trust, such as cohabitation or remarriage of the payee. If the alimony trust is to be revocable, how is it to be modified? What court should have jurisdiction over the review? Should it be the state probate court or the family court? Is the family court equipped to handle the nuances of trust administration and possible reformation or termination issues?

These questions will typically be dependent upon the circumstances of the case, and will need to be fully

explored with the parties while involving other professional input as previously discussed. To be certain, these issues will require attention from the outset of any alimony trust planning.

Common Mistakes in Considering Alimony Trusts

When properly drafted, an alimony trust is an ideal alternative for a dependent spouse who seeks to secure the support of a former spouse. However, an improperly drafted alimony trust runs the risk of inviting future litigation over its terms. Coordination of trust planning and guidelines for funding the trust will avoid disputes at a time when the trust is designed to allow for distributions to a dependent spouse.

One common mistake in drafting the alimony trust is lack of negotiation between the parties regarding inclusion of key terms. Although the prospect of reaching an agreement on the essential terms may appear to be difficult and likely to leave an open term for future determination, the failure to reach a negotiated agreement is certain to invite future litigation. Such future litigation will surely risk costs that far exceed the burden of timely efforts to agree on all essential terms.

Another common issue is the misguided belief that a payor creating an alimony trust will have an available tax deduction. Experienced family law practitioners know that alimony will be taxable to the recipient under Section 61, and the payments will be deductible by the payor spouse under Section 215,[49] if the statutory requirements are met.[51] Consequently, under sections 61(a)(8) and 71(a), alimony and separate maintenance payments are specifically included in gross income. The amount of the alimony or separate maintenance that is included by the recipient as income is allowed as a deduction under Section 215 from the gross income of the payor.

The rules governing the alimony trust alter the tax implications in important ways. Specifically, the payments released under the alimony trust will generally not be treated as alimony at all.[51] Rather, the distributions will be treated as income to the beneficiary (the dependent spouse), while the payments will not be deductible by the payor. The funds paid to the beneficiary from an alimony trust will be taxable to the extent payments are made from trust income.[52] In fact, under certain circumstances disbursements from principal of the alimony trust can also be treated as income to the payee, such as in the case of a payment from both income and principal in carrying out a term for payment "out of trust income if possible and, if not, out of corpus."[53] Section 71 does not generally apply to payments made from a trust under present law. Instead, Section 682 must be carefully considered as it applies to alimony trusts.

Another area for mistakes is overlooking the inclusion of trust assets in the estate of the payor where a complete relinquishment is not otherwise met under the code.[54] The attorney must avoid reversion or retained interests where tax reduction may be a goal of the payor. The principal added to the alimony trust could be treated as a complete relinquishment of interest if properly drafted under the subchapter J provisions, and depending upon the circumstances.[55] On the other hand, where any incidence of ownership is retained by the payor spouse, the tax treatment will be viewed as an asset of the payor's estate until it is transferred to the trust irrevocably, which typically does not arise until after the payor's demise. In that situation, the asset is included in the estate of the payor and all exclusion potential is lost.

In sum, the common areas overlooked in preparing the alimony trust are careful consideration of negotiable terms applicable to the unique facts of each case, neglect of the intricate details of the subchapter J provisions of the code, and failure to carefully consider the loss of a deduction under Section 215 of the code for payment of alimony. All of these mistakes can be avoided with proper trust planning and involvement of the key professionals discussed in the second installment of this article in the *New Jersey Family Lawyer.*

Conclusion

With the establishment of the new alimony statute in New Jersey, alimony trust legislation and its utility is ripe for review. In appropriate circumstances, the alimony trust is a viable tool for both divorce and estate lawyers, and is given more favorable tax treatment today as compared to its pre-1984 tax treatment. The lawyer practicing family law must recognize the opportunity for use of an alimony trust when feasible, to advocate the effective use of the alimony trust upon which state courts may rely, and then work with the estate lawyer to carefully frame out key terms while relying upon input of other qualified professionals, such as tax professionals and corporate trustees, to meet client goals.

If properly used, the alimony trust offers advantages for both parties to a divorce that can serve their estate and tax planning goals. Focused attention to its utility and improvement is essential to the development of alimony trust law.

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Endnotes

1. *See* Laura W. Morgan, Current Trends in Alimony Law: Where are We Now?, *Family Advocate*, American Bar Assoc. Section of Family Law, Winter 2012, vol. 34, No. 3.
2. Colo. Rev. Stat. Ann. § 14-10-114.
3. In Connecticut, six variations of alimony reform bills have been introduced for consideration between Feb. 20, 2014, and April 17, 2014. In Louisiana, nine variations of alimony reform bills have been introduced for consideration between Feb. 24, 2014, and April 1, 2014. In New York, two variations of alimony reform bills have been introduced for consideration between Jan. 28, 2014, and March 10, 2014.
4. *See* Current Trends, *supra*.
5. *Id.*
6. Tex. Fam. Code Ann. § 8.051.
7. N.J. Stat. Ann. § 2A:34-23.
8. *See* Current Trends, *supra*.
9. *See* N.J. Stat. § 2A:34-23; Fla. Stat. § 61.08; 13 Del. C. § 1512; 23 Pa. C.S. § 3701; N.C. Gen. Stat. § 50-16.3A; Conn. Gen. Stat. § 46b-82.
10. In the case of a cash-based individual, the income is taxed upon actual or constructive receipt of cash or its equivalent as compared to the accrual-based individual who is taxed when all events have occurred that fix the right to receive the income and such income can be determined with reasonable accuracy. *See* I.R.C. 446; Treas. Reg. §§ 1.446-1(c)(2)(ii) and 1.451-1(a).
11. These attributes include the following: payments are made in cash or equivalent; payment is made under a divorce decree or written separation instrument; payor and payee are not members of the same household; the instrument does not specify as "not alimony"; there is no liability to make payments for any period after the death of the payee; the payor and payee do not file a joint tax return; payments are made "on behalf of" the payee spouse must be evidenced by a writing; and the payment will be subject to recapture rules. I.R.C. § 71; Treas. Reg. §1.71-1T(b).
12. Unequivocally, there can be no requirement to make any payment for any period after the death of the payee spouse, as such a contingency would remove the payment from qualification as alimony. *See* § I.R.C. 71(b)(1)(D).
13. *See* I.R.C. § 215.
14. *See* § 215(d).
15. *See* § 682(a).
16. *See Fairbanks v. Commissioner*, 343 U.S. 915 (1952); *Laughlin's Estate v. Commissioner*, 167 F.2d 828 (1948); *Johnson v. U.S.*, 70 F. Supp. 517 (W.D. Ky. 1947); *Burton v. Commissioner*, 1 T.C. 1198 (1943); *Fitch v. Commissioner*, 43 B.T.A. 773 (1941).
17. *See id.*
18. *See Mahana v. U.S.*, 340 U.S. 847 (1950).
19. *See Fairbanks v. Commissioner*, 343 U.S. 915; *see also Laughlin's Estate v. Commissioner*, 167 F.2d 828; *Johnson v. U.S.*, 70 F. Supp. 517; *Burton v. Commissioner*, 1 T.C. 1198; *Fitch v. Commissioner*, 43 B.T.A. 773.
20. *Ellis v. United States*, 416 F.2d 894 (6th Cir. 1969).
21. *In Re: Mary C. Ellis v. United States*, 1968 WL 16476 (I.R.S. June 21, 1968).
22. I.R.C., Ch. 736, 68A Stat. 1, 19 (1954).

23. *See* Treas. Reg. § 1.71-1(c)(2) (1957).
24. *United States v. Davis*, 370 U.S. 65 (1962).
25. *See* Rev. Rul. 57-507, 1957-2 C.B. 511.
26. *See Spruance v. Commissioner*, 60 T.C. 141, 155 n.7 (1973).
27. I.R.C., Ch. 736, 68A Stat. 1, 19 (1954).
28. I.R.C. § 682 (CCH 1985).
29. Treas. Reg. § 1.682(a)–1.
30. *Id*.
31. U.S. Tax Rep. P. 6824, Alimony Trusts, 2014 WL 234893.
32. Treas. Reg. §1.682(b)–1.
33. *Id*.
34. *Id*.
35. Alimony Trusts, *supra*.
36. Roland L. Hjorth, Tax Consequences of Post-Dissolution Support Payment Arrangements, 51 *Wash L. Rev.* 233 (1976) (*citing* I.R.C. § 71(d)(1954).
37. *See* I.R.C. § 262(a).
38. *See* I.R.C. § 661(a).
39. *See* Treas. Reg. §1.682(b)–1.
40. An *inter vivos* or living trust is a transfer of property into a trust during an individual's lifetime. *Black's Law Dictionary* 821 (6th ed.1990).
41. *See* I.R.C. §§ 671 to 679.
42. I.R.C. § 682(a). Section 682 reads in terms of the husband being the grantor of such an alimony trust and the wife as being the beneficiary of such a trust. The code and Treasury Regulations make clear that this section is to be gender neutral in application. *See* I.R.C. § 7701(a)(17); Treas. Reg. § 1.682(a)-1.
43. *See* § 215.
44. I.R.C. § 682.
45. *See* Treas. Reg. § 1.682(b)(1).
46. *Id*.
47. *Id*.
48. *See* I.R.C. §§ 71 and 682; *Kitch v. Commissioner*, 103 F.3d 104 (1996), *reh'g denied*.
49. Alimony became deductible in arriving at adjusted gross income in 1976 thereby eliminating the earlier requirement that a taxpayer who seeks a tax benefit for such payment must itemize deductions with a reduced tax benefit. I.R.C. § 74 (1976); I.R.C. § 215.
50. The Tax Reform Act of 1984 introduced four significant changes in consideration of whether a payment can be characterized as alimony: 1) the requirement that payments be allocated as and for support in order to qualify as alimony was eliminated; 2) payments must terminate upon the death of the payee spouse and the divorce or separation instrument expressly provides for such termination; 3) payments that exceed the sum of $10,000 in a given year are deductible only if some payments must be made in at least six post-separation years; 4) if payments are structured to be made in each year within the six-year post-separation period, a reduction in payments of more than $10,000, in comparison to any later year in the period with any earlier year, then the payor of alimony will be deemed to have income in the year in which the reduction occurs.
51. Some states have considered the issue, and after struggling to some extent with the concept, have ultimately concluded that alimony paid under an alimony trust is not to be treated as alimony under the state and federal tax scheme. *See* Kentucky Revised Stat. Ann. § 141.096 (1948) (*repealed* 1954).
52. Treas. Reg. § 1.71-1(c)(2) (1957).
53. *See* Treas. Reg. § 1.682(b)(1).
54. *See* I.R.C. §§ 671 to 679.

55. *See id*. An argument can otherwise be made under Section 1041, specifically that the transfer of property between spouses or to a former spouse "incident to a divorce" should result in no gain or loss recognized. *See* I.R.C. § 1041. "Incident to a divorce" means within one year of cessation of the marriage or related to the cessation of the marriage. However, the alternate argument is that the funding of a trust for the benefit of a former spouse with a contingency that might allow for recovery of said funds by the payor is not a transfer to a spouse at all in the case of a revocable or reversionary trust. Even if irrevocably transferred to the trust by way of complete relinquishment of an interest in the asset(s), such transfer by its true nature is to a trust subject to the terms thereof, rather than an outright transfer to a spouse or former spouse under Section 1041.
Yet, on the other hand, an argument can be made that the transfer should not be treated as a gift, relying on Section 1041. The argument is a transfer need not be completed within one year of the cessation of the marriage to avoid immediate gain if you can nonetheless show that it was "related to the cessation of the marriage." *See* I.R.C. § 1041(a)(2) and (c)(2). As the facts reveal the transfer was made "under the divorce decree of 2008" and within six (6) years, we can rely on Temporary Treasury Regulation Section 1.1041-1T. This regulation provides that the transfer will be deemed related to the cessation of the marriage if it is made pursuant to a divorce or separation instrument, and the transfer occurs not more than six years after the date on which the marriage ceases.

Demystifying Misunderstood Evidentiary Concepts—Part Two

by Curtis J. Romanowski

The goal and focus of this multi-part article is to clarify a limited number of evidentiary issues that routinely come up in family law practice and cause problems. These difficulties arise mostly from either a lack of *message control* or relatively widespread confusion about certain aspects or nuances within the controlling law. The article will also provide advice for applying the rules of evidence in a judicial setting.

Knowledge in the courtroom is the equivalent of *power* — power in the persuasive sense. The system of jurisprudence fairly rests upon the rules of evidence, the primary purpose of which is to ensure that the most reliable evidence is placed before the judge. Without the rules, chaos would prevail in the courtroom. Without knowledgeable practitioners, the ends of justice cannot be met. The author hopes this article will help empower readers in the pursuit of professional excellence.

Objections Where There is No Specific Rule; Eliminating Distractions and Confusion

While Rule 403 is a catch-all rule giving the judge the power to reject evidence that may be technically relevant but is confusing or misleading, Rule 611(a) authorizes the court to exercise discretionary control over the form of the question in order to ascertain the truth, avoid needless consumption of time, and protect witnesses from harassment and undue embarrassment. Unless otherwise noted, the following objections are supported to varying extents by these rules and Rule 401,[1] which defines "relevant evidence," with Rule 402,[2] the corollary of which excludes evidence that is not relevant.

Ambiguous Questions

Milan Kundera, the Czech Republic's most recognized living writer, and author of *The Unbearable Lightness of Being,* once said, "The greater the ambiguity, the greater the pleasure." Not so much here. Questions that are difficult to understand due to their susceptibility to different interpretations are objectionable because their marginal value is outweighed by the likelihood of confusing the witness, the judge and the record.

The response to an ambiguous, vague or indefinite question, which is not objected to, also has the potential to confuse the questioner into thinking there has been a helpful admission when, in fact, there has not. This confusion is particularly dangerous in the context of an oral deposition, where the questioner elicits what was thought to be a highly desirable response to an unintentionally ambiguous question, then relies upon it as an essential article of proof, only to be later surprised to discover at the time of trial the unfortunately latent *disconnect*.

Argumentative Questions

Argumentative questions have two characteristics.[3] Affirmatively, they challenge the witness with respect to an inference from the testimony already in the record. Negatively, they are not intended to elicit new substantive information from the witness. *United States v. Newman*[4] furnishes an illustration. In that case, the question, "Are you telling this jury you don't know what a con man is?," was ruled objectionable. "How can you expect the judge to believe that?" is a classically argumentative way to begin a question. Another way of looking at the argumentative question is the idea that, because they may not be designed to elicit relevant evidence, they are, therefore, objectionable under N.J.R.E. 402.[5]

What is or is not an objectionably argumentative question is a misunderstood evidentiary concept, worthy of critical thought. Challenging the witness with respect to an inference from the testimony already in the record is clearly within the desiderata of essential tactics of cross-examination. It presents the opportunity to assess the credibility of witnesses by testing their *apologetics*.[6]

Argumentative questions, when directed to an adverse witness, frequently are not recognized by *either*

counsel, or even the court. If the same questions were directed to the examiner's friendly witness, they would likely be recognized as leading and not calling for any facts from the witness. Addressed to an adverse witness, however, a question is argumentative if it does not call for new facts, and merely asks the witness to agree or disagree with a conclusion drawn by the examiner from proved or assumed facts.[7]

Although other writers have stated that the examiner should never ask a question where the answer to the question is not already known, this author disagrees. This rule of thumb can be more aptly restated to caution the examiner not to advance challenge questions unless the proper, true response is not already plausibly inferred.[8] If this rule is heeded, any undesired answer will not appear credible. This is accomplished by the line of questioning leading up to the challenge question. The author's personal belief is that with bench trials, lawyers can be far more argumentative in the course of cross-examination, including confronting the witness with good faith, plausible alternate realities that contradict the witness's questionable renditions. Nettlesome questioning, on the other hand, is little more than an abdication of power, as it is reflective of amateurism and a lack of trial skills.

Some may disagree, and no affirmative case law guidance for New Jersey bench trials may exist, but objections to certain argumentative questions should not be sustained. Specifically, when these strategically worded questions are clearly designed to point out problems with a witness's version of the facts, and when the questions are plainly premised upon inferences from the testimony or facts already in the record, the fact that there may be little reasonable expectation that the witness will actually make an overt admission in response—adding new *explicitly* substantive information—should not render the question objectionable. An initial startled reactive silence, for example, can become *Death*, the destroyer of credibility worlds.

As the New Jersey Supreme Court reaffirmed in *Cesare v. Cesare*:[9]

> The scope of appellate review of a trial court's fact-finding function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. *Rova Farms Resort Inc. v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974). Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility." *In re Return of Weapons to J.W.D.*, 149 N.J. 108, 117 (1997). Because a trial court "'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." *Pascale v. Pascale,* 113 *N.J.* 20, 33 (1988) (emphasis added) (quoting *Gallo v. Gallo*, 66 N.J. Super. 1, 5 (App. Div.1961)) (alterations in original).

There can be little question that awkward, bumbling, nervous, stammering and otherwise *shifty* responses to such challenge questions are quite helpful to the trial courts in assessing witness credibility. Even the most experienced judges are no more likely to correctly detect deception than the average adult, absent extensive specialized training combined with native aptitude. The same is true for law enforcement professionals.[10] Of particular interest to the family law attorney is the undisputed fact that "[t]here is no research that shows clinicians are any more skilled at deciphering lies from truth than the lay person."[11]

Argumentative questions may, therefore, be quite proper if directed to an adverse party, as an attempt to secure an admission contrary to the position of the party. Argumentative questions may also be proper if an opinion has already been given by the witness. Then, counsel may properly state different facts than those used by the witness in forming his or her opinion, and inquire if a different conclusion would be more fitting.[12] Allowance of argumentative objections, like all the other objections within the rubric of 'objection as to form,' is within the sound discretion of the trial judge. Take great care, therefore, to avoid asking otherwise thoughtfully crafted challenge questions in a manner that makes them sound purely *rhetorical* or, worse yet, *sarcastic*. Doing so will invariably attract sustained objections to an otherwise proper and skillful examination.

The importance of using challenge questions as yet another "legal engine [ ] invented for the discovery of truth"[13] in bench trials cannot be overemphasized, despite their technically argumentative nature. If a line of strategic questioning upon cross-examination is interrupted with an objection that a question is argu-

mentative, it is important the questioner not oppose the objection in a rambling, ineffectual manner. Speed and simplicity should always be emphasized over the tendency to lose the court's support and interest by trying too hard to explain what one was actually doing. "Your Honor, I am testing the testimony of this witness" is an ideally crisp, effective response.

The author has personally observed more than just a few witnesses so embarrassingly exposed by these sorts of questions that they have, in fact, buckled under interrogation and admitted to their deceit while on the stand. In more than just a very few instances, freshly discredited witnesses have actually volunteered *reasons* for their prior false sworn statements. "He left me no choice," was just one such example.

Asked and Answered Questions

The legitimate rationale behind such an objection is to exclude answers already entered into evidence as either cumulative or a waste of time. This is an irritating objection to make where the questioner is properly using the question to bring the witness back to an earlier line of questioning, to help frame a new question, or to otherwise develop the testimony. In fact, the author has witnessed any number of trial court judges overrule this objection, by claiming there is no such rule.

However, when a questioner repeats a question, simply because he or she was not satisfied with the initial response, the objection should be sustained. Such an asked and answered question is usually also *leading*. Conversely, counsel may wish to repeat a question during the examination of the witness in an effort to either underscore the previous answer for the fact finder or in an effort to receive a completely different answer, and thereby affect the witness's credibility.

Assuming Facts Not in Evidence

In the following example, the question "What did you watch on television last night?" is technically objectionable, since counsel has not established that the witness did, in fact, watch television the night before. In this sense, the question assumes facts not in evidence. One way to avoid this objection is to frame the question as follows: "What, if anything, did you watch on television last night?" In considering this example, the close relationship between the *facts not in evidence* and *leading* objections should be evident. Once an examiner invites a sustained objection to the first version of the question, a similar objection may very well be sustained regarding the second, forcing the use of the cumbersome question, "What, if anything, did you do last night?"

In order to avoid wasting time or confusing the issues, the presentation of testimonial evidence should follow a logical progression, with the establishment of foundational facts serving as support for the introduction of additional evidence. Tedious objections should generally be waived or overruled when the questions deal with preliminary matters, issues of no real consequence, or facts that are not in dispute.

When dealing with preliminary issues, skilled counsel will effectively establish the foundational evidence for subsequent questions, often by leading the witness. For example, a preliminary question might take the form: "Patrolman Happenstance, you are a police officer employed by the Metuchen Police Department and were so employed on September 22nd of this year?"[14] The witness's answer will establish the logical foundation for the next series of questions related to the witness's police activities on Sept. 22.

Sometimes the objection is truly warranted. Be alert for questions that assume the existence of essential facts not previously testified to by any witness. Such questions may begin, "Did you know that..." (*e.g.,* "Did you know that your husband has been recording all of his phone conversations with you for the past several months?"). Though there has been no evidence on the matter, the clear implication of the question is that *counsel knows* the statement to be true and is asking the witness if the witness also *knows*. Such questioning is improper on both direct and cross-examination.[15] The witness is entitled to a fair opportunity to affirm or deny any fact.

In some *legitimate* instances, the presentation of foundational proofs to support a particular line of questioning might have to be deferred. Trial judges have discretion to permit this procedure.[16] Typically, such evidence is conditionally admissible, subject to the proponent's obligation to satisfy the foundational proofs. If the proponent subsequently fails to establish the conditions of admissibility, the objecting attorney can make application to the judge to ignore the conditionally admitted evidence.[17]

Beware of purely *underhanded* tactics, some of which can be insidious. One troubling strategy to be exposed involves repeated reference upon examination to documentary evidence—including audio recordings, emails,

text messages, letter photographs, or even export reports or other correspondence—none of which are in evidence, but which may have been marked for identification and shown to or played for a witness.

For instance, trial counsel shows his client several photographs, purported to be depictions of injuries she incurred on a specific date as the result of domestic violence. He then asks her authentication questions to establish their relevance by placing them in a relevant timeframe.[18] She has no idea of the dates the *selfies* were taken. Rather than offering them into evidence—which should fail, even by New Jersey's very liberal authentication requirements[19]—the examining attorney just continues on with his examination, continuing to reference the unauthenticated exhibits. This questioning may occur over a span of days, during the course of which the attorney may have inappropriately coached his witness regarding the *correct* timeframe or specific date the photos were taken, in order to later move them into evidence.

One practice tip in such an event is to request—at the time the first authentication attempt fizzled out—that the court rule on the admissibility of the exhibits, prior to allowing any further reference to them under the proponent's examination, because further reference would be objectionable as assuming facts not in evidence. This strategy becomes hampered, however, if attempted in front of one of the relatively few trial judges who insist upon saving the entry of exhibits for the end of trial. In that event, counsel should request of the court that the proponent complete all of his or her authentication questions regarding the objectionable exhibits, prior to proceeding further in the examination.

If an examination question has been objected to as assuming facts not in evidence, any number of crisp responses may be offered, as follows:

- This fact will be testified to during the testimony of (insert the name of another witness who will testify later).
- I will elicit that fact from the witness in a separate question.
- That fact has been proved during the testimony of (insert the name of another witness who has already testified).
- That fact has been proved during the earlier testimony of this witness.

Compound Questions[20]

A compound question contains two independent questions within a single sentence, the answer to which may cause confusion for both the witness and the fact finder. Objections to compound questions are best made only when the compound question is likely to mislead the judge to the detriment of objecting counsel's client. Otherwise, the objection merely makes the opponent a better questioner. Where a compound question is propounded to a witness, part of which is admissible and part inadmissible, it is properly excluded as a whole.[21]

It is instructive to discuss the criteria of good argument, inasmuch as the purpose of *all* examination questioning is to advance persuasive argument. There are five criteria of a good argument. A good argument must be structurally well formed and must have premises that are relevant to the truth of the conclusion, premises that are acceptable, and premises that together constitute sufficient grounds for the truth of the conclusion. It must also have premises that anticipate and provide an effective rebuttal to all reasonable challenges to the argument or to the position it supports and to arguments on behalf of viable alternative positions. An argument that meets all of these conditions is a good one, and its conclusion should be accepted. If an argument fails to satisfy these conditions, it is probably flawed.

One who argues for or against a position should use arguments that meet the structural requirements of a well-formed argument, using premises that do not assume the truth of the conclusion, that are compatible with one another, that do not contradict the conclusion, and that are not involved in any faulty deductive inference. One category of logical fallacies involving failed structural criterion is referred to as the *begging the question* fallacy, distinguished from the common misuse of the phrase as a substitute for, "which leads us to the question..." There are four:

- **Arguing in a circle.** This fallacy consists in either explicitly or implicitly asserting, in the premise of an argument, what is asserted in the conclusion of that argument. The implication of this fallacy is the underpinning of why the truly *argumentative* question is objectionable.
- **Question-begging language.** This fallacy consists in discussing an issue by means of language that assumes a position on the very question at issue, in such a way as to direct the listener to that same

conclusion. This explains why *assuming facts not in evidence* is objectionable.

- **Question-begging definition.** This fallacy consists in using a highly questionable definition as a premise, which has the effect of making the claim at issue "true by definition." This fallacy is often present in *ambiguous, vague or indefinite* questions, and in many evasive answers. Verbal clues include a refusal to consider contrary evidence, and the presence of modifying words such as "true," "real," "genuine," etc. For example, "True love never ends in divorce."

Consider this illustrative exchange: Claim: "When little Johnny is with me, he never engages in any bad behaviors." Contradictory observation: "He's three years old and I see him sucking his thumb." Reply: "That's not really bad behavior." The form of this model exchange can often be seen in the course of a cross-examination upon confronting a witness with prior inconsistent statements and other contradictory evidence.

- **Compound, complex, double-barrelled, double-direct or loaded[22] questions.** This fallacy consists in formulating a question in a way that presupposes a definite answer has already been given to an unasked question about an issue that is still open or that treats a series of questions as if it involved only one question. The classic Groucho Marxism, parodied in a Bugs Bunny cartoon, comically illustrates this use of questionable assumptions.

Bugs (as Groucho): "Welcome, welcome to You Beat Your Wife. Say the magic word and win $1,000. What's your name, sir, and what do you do?"

Elmer: "Elmer Fudd. I'm a hunter. I'm hunting a wabbit. A cwazy fwesh wabbit."

Bugs: "Well, Mr. Fudd, for $1,000, would you stop beating your wife?"[23]

Elmer: "Well, yes...I, I mean no! I mean, well, that is I never...

Bugs: Well, while you're making up your mind, I'm going to go slip out of these wet clothes, and into a dry martini, eh?[24]

As another basic example: "Can you take me home and let me stop at the store on the way?," there assuming the same answer to each question. Typically, one of the multiple questions is usually more explicit; the other more implicit. Beyond the basics, however, careful consideration of the compound question, along with its country cousins, the ambiguous question and assuming facts not in evidence, is important enough to be studied.

Consider the following highly sophisticated examples:

In one interesting instance, the New Zealand corporal punishment referendum asked: "Should a smack as part of good parental correction be a criminal offence in New Zealand?" Murray Edridge, of Barnardos, New Zealand, criticized the question as "loaded and ambiguous," and claimed "the question presupposes that smacking is a part of good parental correction."

Madeleine Albright, as U.S. ambassador to the United Nations (U.N.), claims to have answered a loaded question (and later regretted not challenging it instead) on *60 Minutes* on May 12, 1996. Lesley Stahl asked, regarding the effects of U.N. sanctions against Iraq: "We have heard that a half million children have died. I mean, that is more children than died in Hiroshima. And, you know, is the price worth it?" Madeleine Albright: "I think that is a very hard choice, but the price, we think, the price is worth it." She later wrote of this response: "I must have been crazy; I should have answered the question by reframing it and pointing out the inherent flaws in the premise behind it.…As soon as I had spoken, I wished for the power to freeze time and take back those words. My reply had been a terrible mistake, hasty, clumsy, and wrong.…I had fallen into a trap and said something that I simply did not mean. That is no one's fault but my own."[25]

President Bill Clinton, the moderator in a town meeting discussing the topic of race in America, in response to a participant argument that the issue was not affirmative action but "racial preferences," asked the participant a loaded question: "Do you favor the United States Army abolishing the affirmative-action program that produced Colin Powell? Yes or no?"

Unresponsive

The objection of non-responsiveness belongs *only* to questioning counsel. The proper course is for questioning counsel to move to strike the answer as unresponsive and then seek an instruction from the trial judge. The nonexamining lawyer, on the other hand, must rest any motion to strike on a legal ground other than nonresponsiveness.[26] In some situations, where a witness called on direct is persistently unresponsive, the court may allow the direct examiner to lead the witness in order to better control the testimony.[27]

Unresponsive answers may be the result of a wide array of reasons, including confusing questions on the part of the examiner, or witness factors such as reluc-

tance, fear, distraction, fatigue, hostility, stupidity, and the like. Multiple instances of unresponsiveness by a witness who is permitted to testify may be a critically important factor for purposes of summation, and should be pointed out and stressed to the judge in appropriate instances.

Narrative

Opposing counsel may also object to the testimony of a witness as testimony in a narrative form. This objection seeks to prevent the situation where counsel is not provided with notice by the question regarding potential objectionable testimony by a witness. The best tactic for objecting counsel is to state the reasons for the objection; that is, to prevent inadmissible evidence from being heard by the judge, and possibly highlighted by a motion to strike. At the first instance when the witness testifies to inadmissible evidence during the narrative, opposing counsel should move to strike, then ask the judge to consider an overall objection to testimony offered in a narrative form going forward.

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Endnotes

1. "'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of this action."
2. "Except as otherwise provided in these rules or by law, all relevant evidence is admissible."
3. Goff, Argumentative Questions: Counsel, Protect Your Witness!, 49 *Cal. St. B.J.* 140 (1974).
4. 49 F.3d 1, 8 (1st Cir. 1995).
5. *See Hill v. New Jersey Dept. of Corrections Com'r Fauver,* 342 N.J. Super. 273, 303 (App. Div. 2001) ("[W]e conclude that the judge acted appropriately and forcefully in stopping the cross-examination when it became argumentative and gave a strong curative instruction.").
6. The term apologetics etymologically derives from the classical Greek word *apologia*. In the classical Greek legal system, two key technical terms were employed: the prosecution delivered the *kategoria*, and the defendant replied with an *apologia*, or giving an explanation to reply and rebut the charges, as in the case of Socrates's defense.
7. *See Mattfeld v. Nester*, 32 NW2d 291 (Minn.1948).
8. *See* G. Polya, *Mathematics and Plausible Reasoning Vol. II, Patterns of Plausible Inference,* Princeton University Press, 1968.
9. 154 N.J. 394 (1998).
10. Paul Ekman and Maureen O'Sullivan, Who Can Catch a Liar, *American Psychologist*, (APA, Sept. 1991), Vol. 46, No. 9, 913-920.
11. W.G. Austin, Guidelines For Utilizing Collateral Sources of Information in Child Custody Evaluations, 40 *Fam. Ct. Rev.* 177, 180 (2002).
12. Although N.J.R.E. 705 states that "[q]uestions calling for the opinion of an expert witness need not be hypothetical in form unless in the judge's discretion it is so required," that is not to dismiss the vitality of the hypothetical question as a powerful examination tool.
13. All may not agree with Wigmore that cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth," but all will agree with his statement that it has become a "vital feature" of the Anglo-American system. 5 *Wigmore* §1367, p. 29. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to Model Code of Evidence 37 (1942).
14. Readers will kindly note the absence here of the unnecessary and stylistically irritating added question, "Is that correct?"
15. *See generally United States v. Vining,* 224 Fed. Appx. 487, 492, 497; McElhaney, Phantom Impeachment, 77 *A.B.A. J.* 82-83 (Nov. 1991).

16. *See* N.J.R.E. 611(a).
17. *See* N.J.R.E. 104(b).
18. Authentication of a pertinent photograph requires testimony establishing that: 1) the photograph is an accurate reproduction of what it purports to represent; and 2) the reproduction is of the scene at the time of the incident in question, or in the alternative the scene has not changed between the time of the incident in question and the time of the taking of the photographs. *State v. Wilson,* 135 N.J. 4, 15 (1994). *Accord, Saldana v. Michael Weinig, Inc.,* 337 N.J. Super. 35, 46-47 (App. Div. 2001).
19. *See* N.J.R.E. 901. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.
20. Also referred to as complex, double-barrelled, double-direct or loaded questions.
21. *Backes v. Movsovich,* 82 N.J.L. 44, 53 *Vroom* 44, 81 A. 497 (1911).
22. Can also refer to questions assuming facts not in evidence.
23. This type of question also presents what is known as a *false dilemma*.
24. Original quote attributable to Robert Benchley.
25. Madeleine Albright, (2003), *Madam Secretary: A Memoir*, p. 275.
26. *See Sorrells v. State,* 476 S.E.2d 571 (Ga. 1996), providing a nice discussion on the general right to object to unresponsive questions.
27. *See United States v. Hernandez-Albino,* 177 *F.3d* 33 (1st Cir. 1999).

Dissolution of New Jersey Civil Unions by Non-resident Litigants: The Impossible Dream?

by Ronald A. Graziano

Currently, 22 states recognize civil unions, same-sex marriages or domestic partnerships.[1] New Jersey has now indirectly joined that group by abandoning an appeal of a lower court ruling mandating same-sex marriage. At the same time, New Jersey's Civil Union Act has not been declared unconstitutional and still governs the same-sex couples who previously entered into civil unions.[2]

The requirements for a civil union license parallel those for a marriage license.[3] In fact, there are no differences. There is no residency requirement to obtain a marriage license or a civil union license.[4] It is at the point of dissolution, however, that a divergence, perhaps unintended by the Legislature and unforeseen by same-sex couples, sometimes occurs.

A couple that marries in New Jersey but moves to another state need only meet that state's residency requirement to file for divorce. In many states, including New Jersey, that residency requirement is one year.[5] That same one-year residency requirement exists for dissolution of civil unions in New Jersey.[6] Of course, because marriage is recognized in all 50 states the principle of full faith and credit mandates that a marriage in any state can be dissolved in any other state. As a result, heterosexual married couples can divorce in all 50 states.[7] Not so for civil unions.

If a couple enters into a civil union in New Jersey and later moves to a state that does not recognize civil unions, the couple cannot dissolve that civil union in their new state. The only way to dissolve the civil union would be for one partner to move back to New Jersey, or to another state that recognizes civil unions, and establish residency sufficient to meet that state's residency requirements. In this event, one member of the civil union would be forced to leave their employment, leave their home and move to another state for a year, simply for the purpose of obtaining a civil union. This is clearly an impractical solution and, in most situations, a virtually impossible one.

Some couples may lie about their residency in order to dissolve their civil union—an illegal and possibly immoral act that is certainly not the solution intended by the New Jersey Legislature. Another option may be that the couple enters into a written agreement to disentangle the economics of their relationship, and in some circumstances address child-related issues as well. However, the couple would still remain in that civil union forever, never able to form a different civil union or marry if permitted by their home state (while at the same time the home state does not recognize civil unions). Clearly, the New Jersey Legislature did not intend for civil unions to be, for all practical purposes, perpetual. In effect, requiring a couple to remain economically and sociologically entangled beyond the time they desire is at the very least bad policy, and may be actionably discriminatory as well.

The issue of dissolving a New Jersey civil union is not a purely academic exercise. Under current law, "… partners in a civil union are deprived of significant federal benefits such as: family and medical leave; Medicare; immigration matters; military and veteran's affairs; filing a joint federal tax return; and participation in a Survivor Benefit Plan."[8] Absent a civil union dissolution and a subsequent same-sex marriage, that deprivation will persist.

As the situation currently stands, a couple in a civil union is barred from entering into a same-sex marriage until they dissolve their civil union. That seems to be the case in New Jersey, and is specifically so in other states.[9] One might argue that the solution is for New Jersey to automatically convert civil unions into same-sex marriages. Of course, the current state authorities have not indicated any willingness to do so and, perhaps more importantly, such a 'conversion' without a couple's consent raises issues of constitutionality and autocracy.[10]

The most logical and practical solution is legislative. A simple amendment to the civil union statute eliminating any residency requirement for the dissolution of civil unions initially formed in New Jersey is all that is need-

ed. This is comparable to one seeking a divorce based on a cause of action for adultery, as an individual seeking a divorce on the basis of adultery need not meet the one-year residency requirement.[11] Of course, both parties would be required to certify under oath that they consent to dissolution in New Jersey and that their current home state does not recognize civil unions. This would avoid any complications arising out of conflicts with federal law, which now bars recognition across state lines of same-sex marriages. Furthermore, requiring this type of certification would eliminate fraud, abuse or other exploitation of the statute.

Some states have enacted legislation employing a similar approach.[12] However, those states sometimes include provisions into the remedial legislation that are both unfair and unnecessary. For example, Vermont mandates that a property settlement agreement be in place before the residency requirement waiver is permitted.[13] This additional requirement, however, deprives a same-sex couple of the ability to litigate, or at least contest in some fashion, economic issues arising out of their union. The author believes New Jersey should not follow this approach, but instead should simply waive the classic residency requirement in situations where a dissolution of the civil union for a particular couple would otherwise be near impossible, absent unnecessary hardship.

N.J.S.A. 2A:34-10 could be amended by adding a third paragraph as follows:

> 3. Except that the one year bona fide resident requirement shall be waived in dissolution of civil union actions for civil unions formed in New Jersey if the partners to that civil union:
>
> **(a)** Reside in a state that does not recognize civil unions; and
>
> **(b)** Consent, in writing, under oath, to jurisdiction in New Jersey of the dissolution proceeding. ■

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Endnotes

1. California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, Wisconsin, and the District of Columbia. Masuma Ahuja and Emily Chow, Same-sex Marriage Status in the U.S., *Washington Post*, http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/ (last updated Jan. 6, 2014). It should be noted that Utah, as of early 2014, is somewhat unique in its recognition of same-sex marriages. The United States Supreme Court has upheld a federal appeals court decision temporarily staying a United States District Court decision declaring Utah's ban on same-sex marriage unconstitutional, but the United States Department of Justice has nonetheless announced it will recognize same-sex marriages conducted in Utah. Editorial Board, Utah's Same-sex Newlyweds Should Keep Their Status, *Washington Post*, (Jan. 8, 2014). Additionally, Oklahoma's same-sex marriage ban was deemed unconstitutional by a federal judge in Jan. 2014, and the decision is currently stayed pending appeal. Juliet Eilperin, Federal Judge Rules Oklahoma's Same-sex Marriage Ban Unconstitutional, *Washington Post*, (Jan. 14, 2014).
2. *Garden State Equal. v. Dow*, __ A.3d __, M-208 Sept. Term 2013, 2013 WL 5687193 at *5 (N.J. Oct. 18, 2013).
3. "The Civil Union Act, while it may not see much use in the coming months, remains available for people who choose to use it. Even more important, though, the statute was presumptively valid 'so long as' it provided full and equal rights and benefits to same-sex couples. Based on recent events, the Civil Union Act no longer achieves that purpose." *Garden State Equal. v. Dow*, __ A.3d __, M-208 Sept. Term 2013, 2013 WL 5687193 at *5 (N.J. Oct. 18, 2013) (*citing Lewis v. Harris*, 188 N.J. 415, 423 (2006)).
4. N.J.S.A. 37:1-28.
5. N.J.S.A. 2A:34-10.
6. N.J.S.A. 2A:34-10.

7. The principal of comity is embodied in part by the full faith and credit clause and "puts the constitution behind a judgment instead of the too fluid, ill-defined concept of 'comity.'" *Williams v. State of N.C.*, 325 U.S. 226, 228 (1945). Comity provides that a state should give respect and deference to the legislative enactments and public policy pronouncements of other jurisdictions. It is applied voluntarily and when used by the court it leads to recognition and enforcement of the laws of the foreign state to the extent that they do not conflict with local laws or violate the public policy of the local state. *See Sajjad v. Cheema*, 428 N.J. Super. 160, 180, (App. Div. 2012), *citing In re Fischer's Will*, 119 N.J. Eq. 217, 223 (Preog. Ct. 1935). A jurisdiction that does not recognize same-sex marriage is not bound by the principle of comity in actions for divorce between same-sex couples because of the conflicting local policy and legal considerations of the non-recognizing state.
8. *Garden State Equal. v. Dow*, __ A.3d __, M-208 Sept. Term 2013, 2013 WL 5687193 at *6 (N.J. Oct. 18, 2013).
9. Colorado's new civil union law (Colo. Rev. Stat. Ann. § 14-15-101–19) enacted May 1, 2013, "prohibits anyone who is married or in a civil union in another state from entering a civil union in Colorado with someone other than their legally recognized spouse." Associated Press, First Gay Divorce Finalized in Colorado, http://www.usatoday.com/story/news/nation/2013/07/30/first-gay-divorce-colorado/2600037/ July 30, 2013.
10. New Jersey's Civil Union Act creates an anomaly that, although not the subject of this article, is none the less interesting: Does the statute violate the equal protection rights of heterosexual couples since it specifically limits its applicability to same-sex couples?
11. "[E]xcept that no action for absolute divorce or dissolution of a civil union shall be commenced for any cause other than adultery, unless one of those parties has been for the 1 year next preceding the commencement of the action a bona fide resident of this State." N.J.S.A. 2A:34-10.
12. Vermont amended the residency requirements in 2012 for same-sex couples who were unable to obtain divorces in other states as a result of the foreign jurisdiction not recognizing the Vermont sanctioned marriage or union. Vermont Drops Residency Requirement for Dissolving Vermont Civil Unions/Marriages, *Vermont Freedom to Marry*, (April 27, 2012), www.vtfreetomarry.org/2012/04/vermont-drops-residency-requirements-for-dissolving-vermont-civil-unionsmarriages.html. The amended statute now permits divorces to be filed in Vermont provided that: "(1) the marriage was established in Vermont, (2) neither party's state of legal residence recognizes the couple's Vermont marriage for purposes of divorce, (3) there are no minor children who were born or adopted during the marriage, (4) the parties file a stipulation together with a complaint that resolves all issues in the divorce action." Vt. Stat. Ann. tit. 15, § 592, *as enacted by* Vt. H. 758 (2011-2012 Legislative Session).
    Prior to the amended Vermont residency statute, couples who were in foreign jurisdictions which did not recognize the union or marriage entered into in Vermont were left in situations where the obligations of the parties were unenforceable. *Austin v. Austin*, 75 Va. Cir. 240 (2008) (holding that the union created in Vermont was void in Virginia and no rights created by the union were enforceable by any court within the commonwealth). New York, based on principals of comity, permits its courts to have subject matter jurisdiction over an action for equitable and declaratory relief for dissolution of a civil union validly entered into outside of New York. *Dickerson v. Thompson*, 73 A.D.3d 52, 53, 897 N.Y.S.2d 298, 299 (2010). However, the appellate court noted explicitly that although the trial courts in New York have subject matter jurisdiction over these cases, "questions as to whether and to what extent relief may ultimately be afforded to the parties have no bearing on whether [the trial court] has subject matter jurisdiction." *Dickerson v. Thompson*, 73 A.D.3d 52, 56, 897 N.Y.S.2d 298, 302 (2010). The opposite outcome occurred in *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 670 (Tex. App. 2010), review granted (Aug. 23, 2013), where the Court of Appeals of Texas held that the Texas courts lack subject-matter jurisdiction for a divorce proceeding that is brought by a party to a same-sex marriage entered into in another state because same-sex marriage is proscribed in the Texas constitution.
13. 15 V.S.A. § 592(b)(4)(C)(v).

I Won a Palimony Judgment, But I Can't Collect

by Angelo Sarno and Jill Turkish

Times are changing. People are marrying later in life. Most families today are two-income households. People are more career driven. Premarital agreements are being used more than ever. With the recent statute changes, the same concepts behind premarital agreements and then some are now being applied to non-married cohabitants in martial-type relationships with a promise to care and support the other. As a result, cohabitation agreements have gained increasing popularity as more unmarried individuals seek support from former partners.

The idea that unmarried couples could owe one another some type of support upon dissolution of their relationship was first examined in the case of *Marvin v. Marvin*.[1] In *Marvin*, the parties had lived together for *seven* years, without ever getting married.[2] When their relationship ended, Michelle Marvin alleged that during their relationship Lee Marvin had orally agreed to provide her with financial support for the duration of her life.[3] The court decided the oral agreement between the parties could be enforced based on a contract theory.[4] The court logically held that, as in any contract, unmarried adults are free to structure their finances and property as they choose, so long as their agreement is voluntary and not based on the performance of meretricious services.[5] The court, however, made clear that its decision did not attempt to denigrate the institution of marriage or give cohabiting partners the same rights as married spouses.[6]

The first case in New Jersey recognizing palimony agreements was *Kozlowski v. Kozlowski*.[7] There, the court relied on *Marvin* and held that "agreements made by adult non-marital partners which are not explicitly and inseparably founded on sexual service are enforceable."[8] The court noted that most palimony agreements are made orally to accommodate for the fact that promises to provide support generally arise through spoken agreements and conduct.[9] Furthermore, if a contract is found to have been formed, the court may award a lump sum payment calculated by the amount of the promised support and the recipient's life expectancy.[10] This formula requires a calculation of the support level required by the person seeking palimony. In *Kozlowski*, Irma Kozlowski received a one-time lump sum judgment in an amount predicated upon the present value of the reasonable future support Thaddeus Kozlowski promised to provide her with, and it was computed by reference to Irma Kozlowski's life expectancy.[11] New Jersey took it one step further in *Devaney v. L'Esperance*,[12] which held that cohabitation is not a necessary element of a claim for palimony, but there must be some "marital-type relationship" to support the cause of action.

Fast forward from the 1970s. In 2009, the New Jersey Legislature amended the statute of frauds to provide that in order to be enforceable, palimony agreements must be in writing and made with the advice of counsel for both parties.[13] In the recent case of *Maeker v. Ross*, the Supreme Court concluded that Beverly Maeker's claim for palimony was not barred because the Legislature, in passing the 2010 amendment to the statute of frauds, did not intend to retroactively void oral palimony agreements that predated its enactment.[14] The Supreme Court reasoned that, for retroactivity purposes, the appellate court erred in focusing on the date the cause of action accrued rather than the date the oral contract was formed.[15]

While palimony and alimony awards or judgments may appear to have a similar result, there are major differences in the implications for each. The only real thing they have in common is the word "alimony." They are very different things in reality. In bankruptcy proceedings, for example, the discharge of palimony agreements is treated differently than the discharge of alimony.[16] Domestic support obligations are non-dischargeable in bankruptcy proceedings.[17] Pursuant to 11 U.S.C. § 523(a)(5), a debt cannot be discharged in bankruptcy if it is one owed for a "domestic support obligation."[18] The Legislature has made clear this includes debts owed:

> To a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or

> support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record or property settlement agreement, but not to the extent that (A) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.[19]

In other words, if a debtor files for bankruptcy, some debts may be forgiven, but those obligations that provide support to a former spouse or child must still be paid by the debtor.

Bankruptcy court is *not* a court of equity like family lawyers are accustom to. Many courts have said it is often difficult to determine which obligations constitute alimony, support or maintenance.[20] While courts have made clear that federal bankruptcy law governs which support obligations are in the nature of alimony, state law can also be considered for guidance.[21] The ultimate test is whether the obligation is for the purpose of providing maintenance for or support of a spouse or child.[22] So does a palimony award fit this test? One could clearly argue it does.

Federal courts previously have looked to the parties' intent in determining whether the obligation is alimony or support.[23] Intent can be determined by an examination of: 1) the language of the agreement and its meaning under the circumstances, in conjunction with any necessary extrinsic evidence, 2) the parties' financial situation at the time the agreement was made, and 3) the purpose of the obligation at the time of the settlement.[24] The parties' label of a provision within a support agreement is not dispositive of whether or not the obligation created is in the nature of alimony or support.[25] Similarly, the fact that a support obligation is payable to a third party is also not dispositive of the issue of dischargeability.[26] Debts assumed as part of an equitable distribution scheme are not usually considered alimony or support, and thus in certain circumstances may be dischargeable in bankruptcy.

Despite how creative family lawyers can be, since bankruptcy court is a court of law, the answer is that unlike alimony, palimony agreements are dischargeable in bankruptcy proceedings.[27] In *In re Doyle*, for instance, the parties lived together for five years in a home owned by the plaintiff.[28] Kathleen Niermeyer alleged that during the relationship the pair acted as a married couple.[29] James Doyle convinced the plaintiff to take out a $50,000 second mortgage on her home for use in his business, which he promised to pay.[30] Upon dissolution of the relationship, Niermeyer sued Doyle for support.[31] The court entered a stipulated judgment of the parties, providing that Doyle would be responsible for paying the second mortgage each month.[32] Thereafter, Doyle filed for bankruptcy and sought discharge of the stipulated judgment.[33]

In a thorough decision, the bankruptcy court examined both the federal bankruptcy law and state common law in deciding the judgment should be discharged.[34] The federal bankruptcy law, 11 U.S.C. § 523(a)(15), specifies that a duty is not dischargeable if it is one owed to a "spouse, former spouse, or child of the debtor." Accordingly, the court stated that Niermeyer is not included as a creditor owed under the federal statute, as she is neither the spouse nor child of Doyle.[35] The court declined to broaden its interpretation of the federal law because those cases that had expanded its scope did so only in situations involving "family duties."[36] In addition, the court examined state common law in support for its holding.[37] Relying on *Marvin*, the court stated any support owed as a result of a non-marital relationship is based on "contractual obligations and not from an inherent right to such obligation."[38]

The difference in treatment between palimony and alimony agreements in bankruptcy proceedings stems from the nature of each support obligation. Alimony arises based on a familial relationship, while palimony arises, in contrast, from a contractual duty. Alimony arises from the legal duty of a husband to support a wife.[39] The Legislature clearly intended for those with a familial relationship to the debtor to benefit from the exception, not those with whom the debtor has entered into contracts. Although discharge of debts in bankruptcy proceedings allows the debtor to start anew, those who may be dependent on the debtor, however, such as a spouse or child, should not suffer because of the debtor's bankruptcy.[40] While those receiving palimony may argue otherwise, the duty created by a contract, which includes a palimony agreement, is different than that created by marriage. There is no duty to provide support in a non-marital relationship outside the voluntary entrance into a contractual agreement.

While most individuals attempt to equate palimony agreements to alimony, and thereby prevent their judg-

ments from being discharged in bankruptcy proceedings, the Legislature has made clear that the two are very different for purposes of bankruptcy. The bankruptcy law says that support is non-dischargeable if it is owed to a spouse, former spouse or child.[41] Those parties attempting to liken palimony to alimony in bankruptcy proceedings cannot succeed because they are plainly not a spouse, former spouse or child. The federal statute further supports the contention that alimony is based on a familial relationship, unlike palimony.

Furthermore, the marital relationship has traditionally been a protected institution, while non-marital relationships receive no such security. Courts that have provided palimony to non-marital partners have made it clear their decisions are not meant to trivialize the institution of marriage.[42] Nor is it the intent of courts to provide rights typically preserved for married couples to those that are unmarried.[43] Clearly, the New Jersey Legislature's amendment to the statute of frauds requiring palimony agreements to be in writing further supports the contention that palimony agreements are based solely on contractual obligations, not on any other legal obligation to provide support.[44]

Thus, when evaluating these surviving claims, the first question to ask is whether there is a viable claim. Part of that answer must consider what assets exist to satisfy any adjudicated award. Winning the case only to collect a paper judgment that is subject to discharge is not an ending anyone wants to hear about.

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Endnotes

1 *Marvin v. Marvin*, 18 Cal. 3d 660, (Cal. 1976).
2. *Id.* at 665.
3. *Id.* at 666.
4. *Id.* at 665.
5. *Id.*
6. *Id.* at 684.
7. *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979).
8. *Id.* at 385.
9. *Id.* at 384, *citing Martin v. Campanaro*, 156 *F.* 2d 127, 129 (2 Cir.), *cert. den.* 329 U.S. 759, 67 S. Ct. 112, 91 L. Ed. 2d 654 (1946).
10. *Id.* at 388.
11. *Id.*
12. *Devaney v. L'Esperance*, 195 N.J. 247, 248-49 (2008).
13. N.J. Stat. Ann. § 25:1-5(h).
14. *Maeker v. Ross*, 2014 N.J. LEXIS 910 (N.J. Sept. 25, 2014).
15. *Id.* at 30-31.
16. *In re Doyle*, 70 B.R. 106, 109 (B.A.P. 9th Cir.).
17. 11 U.S.C. § 523(a)(5).
18. *Id.*
19. *Doyle,* 70 B.R. at 107.
20. *Stein v. Fellerman*, 144 N.J. Super. 444, 449 (App. Div. 1976).
21. *Loyko v. Loyko,* 200 N.J. Super. 152, 156 (App. Div. 1985).
22. *In re Romeo*, 16 B.R. 531, 535 (Bankr. D.N.J.).
23. *Id.* at 536.
24. *In re Gianakas*, 917 F.2d 759, 762-63 (3d Cir. 1990).
25. *Id.* at 763; *Loyko*, 200 N.J. Super. at 156.
26. *Loyko*, 200 N.J. Super. at 156.
27. *Doyle*, 70 B.R. at 109.
28. *Id.* at 107.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 109.
35. *Id.* at 108.
36. *Id.* at 109.
37. *Id.* at 107.
38. *Id.* at 108.
39. *Id.* at 109.
40. *Id.* (*citing In re Balthazor*, 36 B.R. 656, 658 (Bankr. E.D. Wis. 1984)).
41. 11 U.S.C. § 523(a)(5).
42. *Marvin,* 18 Cal. 3d. at 684.
43. *Doyle*, 70 B.R. at 108.
44. N.J. Stat. Ann. § 25:1-5(h).

Forensic Substance Use Evaluation in Family Courts

by William Frankenstein, James Langenbucher and Judith Hartz

Abuse of alcohol, illicit drugs, and pharmaceuticals is a chronic and pervasive problem in society. About one in 12 American adults has a diagnosable alcohol problem,[1] the most common substance use issue, and many of these adults are involved in matters before the family court. This substance abuse issue has direct relevance to a cardinal principle of family law—serving the best interests of dependent children—because 8.3 million American children, or one in 10, live with at least one addicted parent, according to a 2009 National Survey on Drug Use and Health (NSDUH). As divorce rates increase, the multifaceted problems faced by these children come under the jurisdiction of family courts, including weighing the effects of parents' substance use and misuse on their children's welfare.

Allegations of parental substance abuse often emerge in custody and parenting time disputes, during both the divorce process and in post-judgment litigation. These allegations present vexing problems in settling cases. When substance use data provided by alleging and subject spouses are consistent, courts may act without external guidance on parenting issues because the diagnostic and prognostic picture of the subject spouse is not disputed and suggests relatively straightforward solutions. But agreement is not always possible, nor, in contested cases, is it possible to find the desired convergence of sources of both 'soft' data (subjective impressions, a suspected slur in a voice heard over the telephone, unverified observations, etc.) and 'hard' data (verified significant intoxication, test results, treatment and legal records, etc.).

Actions where substance abuse is alleged or found in parents or guardians are not restricted to child protection matters where statutory definitions of abuse and neglect, or findings by the Department of Child Protection and Permanency (DCPP), form the basis for the court's involvement. Rather, allegations of substance use and abuse (as well as reports of other psychiatric problems that are frequently combined with substance use) can be brought by one parent against another parent directly to the family courts. In the latter cases, the best interests implications of such allegations in custody and parenting time disputes and post-judgment matters must be addressed by a court. Accordingly, courts and counsel routinely find themselves troubled by ambiguous cases where the dataset upon which decisions would be founded is equivocal and even includes instances of substantive factual disagreement, where one spouse firmly alleges substance abuse by the other and feels compelled to prevent risk to the children when in the other's care, while the accused spouse denies the allegations or their relevance on his or her ability to parent. These scenarios present the most difficult problems for courts and counsel who must test and balance a child's best interests considerations against child and parenting rights. It has become increasingly common for best interests and custody evaluations to also address substance abuse allegations of parents in evaluating appropriate custody and parenting time arrangements for children.

This article will analyze the court's authority to order forensic substance use evaluations in matrimonial matters, as well as discuss the appropriate use of a forensic substance use evaluation (FSUE) in matrimonial law. Basic information and practical guidance is supplied to family courts and attorneys in how the FSUE can help them navigate the uncertainties in their legal stewardship.

The Courts' Authority to Order Forensic Substance Use Evaluations in Matrimonial Matters

Laws governing parental rights have always favored the integrity and autonomy of the intact natural family. The right to raise one's children free from state interference is deeply embedded in U.S. history and culture. It has been identified as a fundamental liberty protected by the due process clause of the 14th Amendment,[2] characterized in *Meyer v. Nebraska* "as essential to the orderly pursuit of happiness by free men."[3] New Jersey has recognized deeply embedded parental rights in its

jurisprudence,[4] rights that survive even after the nuclear family dissolves as a result of a divorce.[5]

The constitutional imperative of preserving *familial* integrity, however, is not absolute.[6] A court has the responsibility to protect children, as it is vested with *parens patriae* authority (parent of the country),[7] originating in English common law as a duty of the Crown and its officers to protect infants and those of legal disability.[8] The doctrine—that when presented with a conflict between parents' rights and children's welfare, children's welfare reigns supreme[9]—is often cited as the fundamental principle guiding the courts in promoting a child's welfare and best interests. It is by this authority that, when the safety and wellbeing of children in divorce matters are called into question, family part judges may be compelled to circumvent parental autonomy and insert the court's authority into the family structure in ways that may affect the rest of a child's life.

New Jersey jurisprudence has previously established that a trial court possesses the inherent power to appoint an independent expert as an aid to ascertaining the truth.[10] This inherent authority of the court to appoint such experts has long been regarded as a matter within its discretionary power, and such appointments have been routinely made in custody and other family actions before there was express rule authorization.[11] This judicial prerogative was codified in Rule 5:3-3, granting the court wide discretion in dealing with custody issues and significantly expanding its authority to order the appointment of independent experts to render guidance on allegations of substance abuse. Case law also mandates that parties in a custody dispute "be afforded every reasonable opportunity to introduce experts whose evaluation of the family situation may assist the Judge in determining the best interests of the children."[12] In making determinations regarding custody, courts "rely heavily on the expertise of psychologists and other mental health professionals."[13]

Medical and mental health professionals provide an important service to children and the courts when they develop competent, objective, impartial information in assessing the best interests of the child. The use of an evaluation is often invaluable because judges are unable to investigate the allegations themselves, and do not have the appropriate background or training to fully analyze and evaluate the impact of a parent's substance abuse on the children. The FSUE is a tool often used by the court to further its investigation of allegations of alcohol and other drug abuse in custody matters, often, but not only, as part of a broader custody and best interest evaluation.

When is the Use of a FSUE Appropriate?

Divorce inevitably requires a restructuring of parental rights and responsibilities in relation to children. If the parents agree to a restructuring arrangement, there is no dispute for the court to decide and no need for expert guidance. However, if the parents are unable to reach an agreement, the court must help to determine the relative allocation of decision-making authority and physical contact each parent will have with the child, applying the best interests standard. In making a custody determination, there are a number of mandatory factors the Legislature has directed the court to consider.[14]

Arguably, the most relevant factor in a situation where FSUE is applied is parental fitness, although other custody factors are also potentially or likely affected (*e.g.*, the parents' ability to agree, communicate and cooperate; interaction and relationship of the child with his or her parents and siblings; history of domestic violence; safety of the child and the safety of either parent from physical abuse by the other parent; needs of the child; and stability of the home environment offered). Fitness itself is a prime factor, as New Jersey jurisprudence provides that "a parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child."[15] In 1981's *Beck v. Beck*, the New Jersey Supreme Court discussed the term "fit" and set a standard—that parents at the minimum be "*physically and psychologically capable of fulfilling the role of the parent*"[16]—for future judges to follow.

In *Unger v. Unger*, the Court addressed a custody dispute where a parent contended the other's chain-smoking had a deleterious impact on the children's health and undermined her parenting fitness.[17] The father alleged the children were constantly inhaling second-hand smoke, which resulted in them having respiratory complaints. The Court held that any action by the mother that affected the health and safety of the children should definitely be a factor that courts consider when determining child custody in the future. During the litigation, the Court relied on the testimony of a court-appointed psychologist to render a custody evaluation, a partisan custody expert employed by the father, as well as a medical doctor employed by the father to provide an opinion

on the medical impact of second-hand smoke on the children. After a plenary hearing, with testimony from a physician, the Court held that a parent who smoked cigarettes in the home caused a negative health impact on the children warranting a temporary change in custody.[18]

In many cases of substance abuse, where abuse of alcohol, illicit drugs, or pharmaceuticals are implicated, the impact on children is often more indirect, covert or difficult to quantify. The authors are aware of very few New Jersey divorce cases that directly discuss how allegations of substance abuse bear on parental fitness. But, there are some cases in New Jersey and in other jurisdictions that recognize the relationship between alcoholism and other drug abuse and children's best interests.

In *Rizzo v. Rizzo*,[19] the court agreed that a custodial parent's alcohol and drug use, and resulting comportment and physical condition, were relevant to the issue of custody, but only if the substance use could be shown to affect the parent's mental or physical health and relationship with the children.[20] In *Marriage of Oertel*, an appellate court reversed the order of a lower court and switched physical custody of a child from the father to the mother, finding the trial judge had failed to apply best interests standards and failed to perceive the obvious hazard to the child's emotional and physical health posed by the father's continued alcohol use.

The key questions in these cases is whether, when, and under what conditions the use of a particular substance such as alcohol, illicit drugs, or prescription drugs affects a parent's fitness to care for a child. Judges recognize that mental health professionals who specialize in addiction issues are best equipped to address those issues, which explains why the court has inherent and statutory authority to appoint such experts in custody cases.[21] Therefore, when allegations of fitness-relevant parental substance use are raised in family court, a FSUE is often required in addition to a typical best interest evaluation, to assist the court in the inquiry into a parent's fitness.

Who Should Conduct a Forensic Substance Use Evaluation?

Compared to *clinical* substance use assessment, *forensic* substance use evaluation requires a mental health expert with broad background and expertise in addictions science, including thorough knowledge of clinical risk factors, course, phenomenology, impact of addiction on marital and family functioning, treatment, relapse risk and associated or comorbid psychiatric illnesses, and the technical information pertaining to substance psychopharmacology and substance use testing. This work requires high levels of skill in diagnostics and forensic practice, and considerable experience working at the interface of family law and mental health. These practitioners will typically have doctoral credentials, such as a Ph.D., an M.D., or an Ed.D., and will most often be either psychologists or psychiatrists, often with specialized addictions qualifications.

When is a FSUE Indicated in a Family Court Matter?

The three most common scenarios for FSUE are: 1) in any stage of the divorcing process where one spouse expresses concern about risks to a child's physical or developmental safety caused by the substance use of the other; 2) in the active litigation or post-litigation/post-separation phase where the children's or someone else's statements to a parent suggest that the other parent's substance use causes a safety concern or impairs the quality of parenting time; or 3) in the post-litigation phase where a former spouse with an acknowledged clinical history of substance use now claims stable abstinence and recovery as a basis for his or her application to either remove limits or constraints on parenting or to expand or broaden parenting time.

To help the court resolve issues such as these, a FSUE may be ordered when one of these three conditions are met: 1) the hard data on substance use and consequences in a family court matter is so equivocal that it cannot be reconciled by anyone other than an expert; 2) when a spouse (or in rare instances, another informant, such as another family member or child protective services) raises a reasonable suspicion that substance use has relevance to the litigation (typically on matters of child custody or visitation); and 3) important and irreconcilable differences in the claims of the litigants exist that, if not resolved, may have unacceptable implications of risk for parenting.

What Should the Order Directing a FSUE Say?

Mental health experts prefer the term FSUE instead of 'forensic alcohol' or 'forensic drug evaluation' because the latter titles unnecessarily and incorrectly limit the scope of evaluation. An adequate assessment must ascertain history, patterning and consequences of all abusable

substances, including pharmaceuticals, all of which carry a risk profile for parenting matters both individually and together and in terms of so-called comorbid psychopathologies (depression, anxiety, traumatic stress, etc.) that are often *as* or even *more* relevant to parenting fitness than the substance use disorders with which they are associated.

An important aspect that relates to the crafting of usable, relevant, and applied evaluation concerns the scope of the evaluation. A categorical, yes or no formulation of the evaluative process—does he or she or does he or she not have a substance use disorder or pose a relapse risk—is of little use unless those findings are applied to an analysis of case-specific parenting risks. Therefore, when calling for a FSUE, it is important the evaluation be tailored to incorporate some assessment of the relevant family court matters, meaning the extent or type of parenting time, a need for supervision or monitoring, the status of co-parenting or parent-child relationships, or 'what to do if' types of questions to be answered. Evaluators routinely request that consent or court orders for a FSUE ask specifically for them to perform a "forensic substance use evaluation related to a family court matter," and prefer that the orders be as specific as possible in articulating the family law issues that may be decided based on the evaluative results.

The preferred form of request for a FSUE is by court or consent order. While a party can retain such an expert, and retention can be useful and may be the only avenue to secure expert opinion, the perception of partisan bias can undermine the usefulness of the evaluation. This limitation can have the net result of augmenting polarization and hostilities and distancing stakeholders from a view of the FSUE as fundamentally constructive and helpful. The order should stipulate the subject person of the evaluation, who is retaining the expert, the scope of the evaluation, and that full cooperation is expected of both litigants.

In addition, the order for a FSUE should indicate who bears responsibility for retention and fees, whether or under what circumstances litigants may possess a copy, prohibitions against redistribution, and how the report is to be disseminated. Usually, direct release to counsel of the report requires the court to issue a protective order as a means to protect against misuse of the product. Legal and mental health professionals involved in such matters are reminded that drug and alcohol treatment records are afforded an even higher level of protection against inadvertent or unauthorized disclosure than general medical records, and most mental health practitioners are bound by their professional ethical precepts to guard against misuse of their forensic product.

Last but not least, the order should include a provision that indicates the substance use evaluation findings and conclusions in the report should be crafted to best inform and contextualize the parenting matters in the litigation. When only gross descriptive information, without elaboration, is provided to the court, meaning results discuss whether the subject does or does not have a diagnosable substance use disorder, there is an increased likelihood the resulting settlement or judicial remedy will be mismatched to the situation.

What Should the FSUE Process Incorporate and How are Results Disseminated?

Once a FSUE is ordered or agreed to, the evaluator should provide some form of engagement letter that reviews protocol, retention and office policies, confidentiality practices, disposition of the evaluation report on its completion, and anything else required to ensure that litigant-parents have as much relevant information at hand as possible to give informed consent for participation. Then, a credible FSUE should first identify and collate the universe of concerns as expressed or documented by the alleging spouse, through interview and review of relevant data as represented in pleadings. Typically these data recount and highlight specific episodes where alleged substance abuse by the subject spouse posed risk or resulted in negative consequences, and convey the historical characteristics of the alleged substance use from the complaining spouse's perspective.

In the FSUE itself, data are collected in many ways, to satisfy a requirement basic to all forms of empirical discovery, namely *convergent validation*. The core of the evaluation involves interviews of the subject and alleging parents, neither of whom is impartial and who together may offer starkly different, often irreconcilable, accounts of the subject parent's substance use and of the period of marital decline generally. The addition of multiple objective converging sources is necessary in order to clarify facts and sources of inconsistency. Doing so will render a plausible, falsifiable, fact-tested *synthesis* or reconciliation of the available data, recognizing that at least some data are irreconcilable and that that part of the marital story

is, ultimately, unknowable to the court. These methodologies, at minimum, include:

- Examination of the subject spouse to thoroughly survey the subject's genetic and family history, early personal history relevant to the later development of substance use or comorbid conditions, including early conduct problems and difficulties in school, relationship and social history, educational and employment history, medical history, substance use and psychiatric history, current psychiatric and substance use status, and likely trajectory of life.
- Subjects of searching forensic examinations of this sort are aware of the seriousness of the litigation the examination is meant to inform, and it is unlikely that they volunteer much information bearing on substance use or comorbid psychiatric issues they feel could cast them in a negative light or create prejudice against them in legal matters. They, in other words, engage in varying degrees of 'denial' or 'minimization' in interview. Therefore, an important component of the FSUE is the conduct of in-person or telephone interviews with *collateral coinformants*, lay or professional persons with frequent up-close contact with the subject, willing to provide objective information about the subject's past and present conduct, including verification or challenge of specific information provided by the subject in interview. In most cases, the alleging spouse is one of the most important collateral coinformants. Multiple coinformants, nominated by both litigants, should be interviewed in order to enhance convergence of the dataset.
- Drug-testing—by urine, saliva, blood, hair or other biospecimen—is another important source of convergent validation. Examiners should take whatever care is possible to guard against the subject's opportunity to invalidate the test by use of a masking agent or other means, and proper clinical technique should be used to collect and handle the specimen. But in most cases, the examiner will not employ *forensic drug testing standards*; therefore, while negative drug test results are highly suggestive they are not dispositive, and *positive* test results, which may be dispositive, should always be viewed as suggestive only, requiring replication under forensic chain-of-custody and analytic conditions.
- Metabolic testing is another important source of convergent data, using both direct and indirect evidence of recent use, particularly of alcohol. In terms of direct evidence, beverage alcohol (ethanol) is converted in the body to acetate acid and excreted quickly, within a few hours, making detection of drinking difficult in this way. In terms of indirect evidence, some alcohol leaves 'metabolic fingerprints' many weeks, even months, after use. For example, alcohol affects blood chemistry, especially the levels of enzymes concentrated in the liver, in such a way as to suggest a pattern of heavy drinking. Nevertheless, metabolic indices are neither *sensitive* nor *specific*, meaning that subjects with actual substance use disorder may not show elevations, and that elevations may also be caused by conditions other than substance abuse.[22]
- Also necessary is the administration of both *generic and case-specific psychometric testing* using the premier measures in their specialty areas, the 'gold standard' to which other instruments are compared. This enables the evaluator to *quantify,* as well as describe in more detail, the severity of problems described in interview, permits insight into the response biases and reliability of the subject as informant, and sharpens insights and generates hypotheses regarding subject needs for treatment and further specialized or targeted assessment.
- An important component of the complete FSUE is an *accurate diagnosis*, rendered in the most current applicable nomenclature. In the United States, for most purposes, as of May 2013 that is the language of the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5), which replaced the DSM-IV categories of substance abuse (mild/prodromal) and substance dependence (severe/addicted) with a single 'substance use disorder' category (alcohol use disorder, cannabis use disorder, opioid use disorder, etc.), diagnosed according to a unitary set of 11 symptoms:
  - **(1)** Recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home
  - **(2)** Recurrent substance use in situations in which it is physically hazardous
  - **(3)** Continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by it

(4) Drug tolerance
(5) Withdrawal or withdrawal relief
(6) Substance is often taken in larger amounts or over a longer period than intended
(7) Persistent desire or unsuccessful efforts to cut down or control substance use
(8) A great deal of time spent in activities necessary to obtain, use, or recover from use
(9) Important activities given up or reduced because of substance use
(10) Continued use despite knowledge of a persistent or recurrent physical or psychological problem caused or exacerbated by it
(11) Craving or a strong desire or urge to use

DSM-5 requires either tolerance or withdrawal for the course specifier of "with physiological dependence" to be entered, and cases with two to three symptoms will be coded "mild," four or five symptoms will be coded "moderate," and six and above will be coded "severe." Accurate coding of severity protects the relevance of the evaluation results for the court, counsel and litigants who otherwise might have too much information yet too little guidance for application. Some cases with mild forms of substance use disorder are neither rare nor particularly alarming. Many such persons have full volitional control over their use and are at low risk for substance-related parenting failures, although some mildly increased measure of personal and child risk is implicit.

Other domains do not have criterion-level standing in DSM-5 and so are not strictly of diagnostic relevance, but they are necessary to formulate and understand most cases that require a FSUE.

- The literature has long stressed the strong associations between substance use disorders and a broad array of other psychiatric illnesses or *co-morbidities* (mood disorders, anxiety disorders, traumatic stress disorders, dissociative disorders, and personality disorders). These combine with degree of criterion-related severity and with degree of changes in the structural and neurochemical environment of the brain (also called neuroadaptation) that co-determine many important areas of case functioning, including relapse liability, parenting safety and other. When subject spouses are heavy drug users, or when they are abstinent but still manifesting the kinds of personality changes that are an outcome of long-term use, assessment of comorbid psychiatric illnesses is fraught with difficulty, but must be a part of a thorough FSUE.
- Another area of non-criterion assessment involves positioning the subject spouse on the construct of *stage of change*, from the so-called *transtheoretical model* of Prochaska and DiClemente (1983).[23] Stage of change recognizes that alcohol and drug users are at different stages in terms of changing or even contemplating changing their behavior, and recognizes that behavior change progresses through fairly recognizable, common stages, articulation of which may help the court understand the subject spouse's behavior and intentions in a dynamic way.
- Other areas of inquiry that *are* of criterion relevance to DSM-5 but that are of special significance for understanding and prognosticating the forensic case, include neuroadaptation. Addiction results in gradual changes in an interrelated system of brain structures that regulate pleasure, satiety, hunger, and other drive states, as well as areas that control attention and higher cognitive processes.
- The other process worthy of additional remark, another feature of neuroadaptation, is *withdrawal.* Both the physical aspects of drug withdrawal that can include a wide array of aversive phenomena, as well as the psychological experience of drug craving, a difficult to resist urge to use, are a powerful motivational drive that is most efficiently relieved by additional use of the drug or a cross-tolerant one. Withdrawal or fear of withdrawal is therefore one of the most important engines driving ongoing use and must be thoroughly evaluated in a FSUE. Withdrawal symptoms are substance-specific, and the practitioner should be familiar with the withdrawal profiles of common drugs of abuse
- *Non-criterion assessment* is also necessary. This form of assessment incorporates case characteristics that are not featured in diagnostic models, but nonetheless are valid severity markers, are of strong prognostic significance, co-determine outcomes, and influence interests of child safety. Non-criterion domains include:
  (1) Psychological and behavioral complications of substance use, such as agitation, irritability, dysphoria, hazardousness;

(2) family complications, in addition to the acute marital problems driving the divorce, such as family-centered sources of stress versus support, chronic-stable marital dysfunction, psychiatric and medical problems in collaterals;
(3) medical complications in the user, such as physical and neurological consequences of substance use;
(4) close family members with stress-related physical and/or psychiatric co-morbidities;
(5) social pathology, such as alienation, rootlessness and losses, and social funneling;
(6) educational and vocational problems, including under-recognized disabilities, such as adult ADHD, underachievement for other reasons, current job or school jeopardy, and need for remedial services;
(7) legal problems, such as charges pending or civil actions; and
(8) financial problems, such as severity of debt and need for relief.

Review any documentary or other media materials submitted, including protected health and treatment records, as well as objective records such as certified criminal background checks and driving abstracts for any states in which the individual is licensed. The discovery materials incorporated into evaluation are a rich source of data. The procedural history of a case and the evolution of the substance use allegation can be tracked through chronological review of pleadings and orders. Objective records can be used to ascertain medical history, substance-specific details, such as obtained blood-alcohol levels, prescriptions written and filled, legal problems where substance use was featured, and objective negative consequences associated with substance use.

Reference to the clinical and scientific literature is essential, as the extent of science devoted to describing and explaining the phenomenology of addiction is vast. Compared with the literature on forensic family court evaluation for custody and best interests, which is much more theoretically based and less amenable to empirical study, addiction science provides a much better underpinning for the assessment, diagnostic, treatment, and monitoring domains of the FSUE.

Once all data are collected, a comprehensive report is prepared, which details the nature of the referral, the background of the case, the protocol and methods; itemizes all data reviewed; summarizes the database collected; and integrates the data using a "structured professional judgment" approach into the most valid account possible of the subject's substance use and comorbid psychopathology, if any, in language that supports the crafting of specific conclusions and recommendations. The findings, conclusions, and recommendations address historic and present substance use; co-morbid psychiatric diagnostics when relevant; prognosis for relapse risk; whether there exists a need for further assessment, updating or use monitoring; treatment and self-help needs; and parenting and co-parenting implications.

When Does Substance Use Create Risk for a Child?

Risk to children from parent substance use falls generally into two categories. The first category is physical and psychological safety concerns, and the second category is developmental concerns. Both categories can have as great or greater effect on children during or after divorce as during the time when the family was intact. Physical and psychological safety is typically a contemporaneous concern, whereas developmental concerns speak to child and adolescent lifespan development more broadly, and may not be observable for many years.

Practical experience shows that a FSUE is most often applied as a risk assessment in cases where physical and psychological safety concerns have some imminence in the mind of the alleging spouse. When evaluation of the subject parent's substance use is framed as a risk assessment in this way, it is conceptualized as a response to expressed safety concerns that emerge most vividly in anticipation of the physical separation of parents: apprehension that the subject parent will, for example, drive while intoxicated with the children as passengers; fail to provide proper vigilance and supervision, allowing children unsupervised exposure to dangerous or inappropriate situations, or to otherwise engage in loose or absent parental oversight. As the alleging parent is no longer in a position to directly monitor the other's status and behavior, the separation fosters in the alleging spouse a sense that absent their presence, safety can no longer be guaranteed, potentially triggering in them tension, guilt and worry; tendencies toward controlling behavior; or over-solicitation of information from the children.

It is much more rare that a FSUE is applied when expressed concerns are the children's general develop-

ment and welfare projected out over the early lifespan. While there is a rich scientific literature that addresses the generally negative *sequellae* of growing up in families marked by parent substance-involvement, these broader and more diffuse concerns meld with the wide-ranging fields of inquiry characteristic of custody and best interest evaluation. When an alleging parent raises concerns about their partner's substance use as a fitness factor, a FSUE can be performed and reported in parallel with the custody evaluation, or integrated into the broader best interest and custody evaluation with less redundancy and expense. Whether an integrated or parallel report is produced, the evaluator may choose to opine on the general social, personality and behavioral characteristics observed in offspring of substance-involved parents while concurrently addressing risk.

Determining the extent of risk associated with the subject parent's substance use requires analysis of both case-specific and substance-specific variables. Substance-specific variables include the substances used, pattern of use, typical and peak doses, range and types of consequences experienced, degree of physiological dependence, tolerance, withdrawal liability, liability to physical hazard (*e.g.*, driving while intoxicated) and psychological hazard (*e.g.*, substance use hallucinosis), risk for fatal overdose, compulsion to use, history of quit attempts and relapse, treatment and self-help use, and other psychological dimensions of addiction liability. Case-specific variables include child age and developmental level, number of children, special developmental considerations, co-parenting quality, parental psychiatric comorbidity, and the range of psychosocial and economic variables, at minimum.

Is Diagnosis Sufficient?

Simple rendering of the subject partner's diagnostic status for addictive disorder alone tells little about actual risk. As an example, contrast the following two subject parents, each having overnight parenting time with their reasonably well-adjusted 12-year-old child, and each meriting a DSM-V diagnosis of alcohol use disorder, but each of whom vary markedly in parenting risk:

- Subject Parent A has a drinking pattern of steady, unvarying and predictable daily drinking characterized by routinized consumption of six 12-ounce, 3.2 percent alcohol beers, starting at 6 p.m. and ending at 9 p.m., which results in nod off and then going to bed without incident.
- Subject Parent B is a physically and nutritionally unhealthy person, who consumes a fifth of liquor, binge-like and unpredictably once or twice weekly, superimposed over more modest daily drinking, and whose behavior becomes floridly impaired, incoherent and terrifying before falling to the floor and passing out. The parent then vows, the morning after, to get sober, only to stimulate through that choice the onset of an alcohol withdrawal hallucinosis or *delirium tremens*, posing sharply elevated risk in parenting from the resultant gross aberration in reality testing.

So, in contrasting subject parents A and B above, while both merit nearly identical alcohol use disorder diagnoses, the risk to children attendant on B's behavior is far greater than for A, particularly given the age and adjustment of the child. Imagine the same comparison for a child of three. Risk would elevate with both parents, but perhaps even more so for A, because inadequate supervision of a three-year-old is more risk-relevant than for a well-adjusted 12-year-old, whereas risk with B remains high across the board. This example illustrates that risk calculation incorporates assessment not just of diagnosis, but of a range of influential variables that aggravate or mitigate risk. It is critical that the FSUE capture the relevant direct and ancillary substance-specific and case-specific variables so better risk calculations are made.

It is implicit that risk profiles vary by substance. For example, abused stimulants such as cocaine or amphetamines convey very high risk for gross impairment in basic role functioning, as they can, with overdose, produce a psychiatric syndrome akin to an energized, paranoid psychotic state with grossly impaired reality testing. Contrast that with marijuana use, which, while potentially impairing judgment, memory, balance and some other mostly cognitive functions, does not typically carry liability for a dangerous overdose, intoxication or withdrawal syndrome. As such, marijuana use is less likely to produce florid symptomatology, except in an already otherwise vulnerable individual with relevant and significant co-morbidity. Similarly, different subject spouses, both diagnosed with an opioid use disorder, may manifest very different risk profiles if one developed an *iatrogenic* drug dependence as the result of adherence to a pain management regimen following back surgery, while the other developed dependence as an intravenous user of street drugs.

These examples are offered to underscore that child and adolescent risk calculations must include accurate diagnosis, but a competent practitioner then interprets those diagnostic findings in the context of a host of other substance-specific and case-specific variables, such as use pattern and chronicity; quantity, frequency and usual and peak doses used; presence of co-morbid psychopathology; family ethnicity and larger genetic and cultural context of the alleged substance use problem, age, number and maturity of the children; characteristics of the relational history and dynamics between children and both parents; treatment and self-help history; presence of social and instrumental supports; attitudes about recreational substance use; and others. The most sophisticated and accurate risk calculations attempt to modulate the perception of risk by organizing these ancillary data on a case-by-case basis, fostering a more accurate calculation of the threshold for harm to children.

How Does a FSUE Assist Courts, Attorneys and Litigants to Move and Resolve Cases?

A FSUE provides an independent, integrated rendering of multiple, convergent sources of subjective and objective data that is otherwise unavailable, bringing a much higher level of objectivity to the determination of a subject parent's clinical status and parenting risk, and illuminating other ancillary or broad family systems issues. Absent this synthesis, courts are left to adjudicate and attorneys to argue or settle based on subjective, distorted, incomplete or biased information. Substance use has been and remains a polarizing issue in this country. Witness the 'War on Drugs' and contemporary debates over medical and recreational marijuana use, and nearly 100 years ago, the amending of the Constitution, first in 1920 with the instatement of Prohibition, and again, in 1933 with its repeal. Considering this, and the prevalence of substance use and misuse in the population, combined with whatever personal or family experience with addiction legal professionals may bring to court, reliance on inadequate assessment allows morality, bias and veiled prejudice to subtly inform legal decision-making about substance illness.

Establishing Plausible Diagnoses

The cornerstone of the FSUE is the diagnostic assessment. The FSUE provides a narrative for understanding the subject parent's vulnerability to addiction, the origins of the problems and the psychological and other variables that maintain it, and a historical rendering and present status of an addictive disorder and its comorbidities. From this analysis, relapse probabilities are assessed, calculated, and a most likely 'relapse signature' is articulated. The presence of comorbid conditions such as meaningful psychopathology or physical pain bears on liability to relapse, so diagnostic identification of comorbidity, when possible, directs suggested treatments to map more precisely onto the needs of an individual client, and more completely addresses parenting impacts. For nearly 40 years, research in descriptive psychopathology has suggested a nexus of strong genetic and family-modeling factors that link together substance abuse, impulsivity, stimulus hunger, so-called 'primitive' character structure, and both bipolar and unipolar mood disorder into unified syndromes. Anxiety disorders, post-traumatic stress disorder, pain syndromes and other acute illnesses are often comorbid with substance abuse. Inattention to these likely comorbidities limits the ability to predict relapse and may increase risk for relapse itself.

Suggesting Treatment, Self-Help and Other Remedies to Restore Functional Parenting and Co-Parenting

It is fairly well accepted that children of divorce are best served by meaningful relationships with two parents who ideally can be cordial when together, can exchange information, make consensual decisions, and insulate children from their relational conflict. The capacity for divorced parents to meet this standard of collaboration presumes some degree of basic psychological health, even when a FSUE finds fitness relevant pathology in a case, the goal of the evaluation is to identify treatment, self-help and ancillary remedies for the identified substance use disorder and the co-morbidities to increase the likelihood the subject spouse may return to health and full fitness. With health and fitness restored, the subject parent can work legally or through various alternative dispute resolution strategies toward any removal of the constraints imposed on their parenting.

When a clinical problem is identified, a FSUE carefully matches clinical need to appropriate courses of treatment and self-help that can direct the subject spouse, and the family as a whole, toward eventual normalization of parenting roles. Evaluators may make current or prospective treatment recommendations for

the alleging parent and/or the children because the scope of evaluation as ordered asks for the relevance to be drawn to family court matters. Such recommendations may encompass the full complement of targeted therapies, such as clinical address of alienation and estrangement dynamics; reunification therapy; child therapy and court-imposed interventions including co-parenting therapy and the use of parenting coordinators.

Suggesting Further Assessment and Monitoring

Even the most skillful assessment is rarely able to settle all matters related to risk in a family court case, and recommendations are often made for further assessment and monitoring. While legal norms prefer a conclusion to finality, the natural course of substance use disorders does not support such a strategy. Recommendations in a FSUE are, at best, probabilistic. Tracking developments in a case through scheduled or on-demand follow-ups and updating are helpful in supporting clinical or legal case management over time. Consequently, a FSUE addresses and identifies the needs for, and the parameters and scheduling of, updates, setting forth the parameters for on-demand, immediate updating in the event slips or relapses are suspected. The FSUE also identifies targets and provides rationale for future assessment, including psychiatric, medical, psychological and neurological.

One area where a FSUE provides guidance on the necessity of further or ongoing assessment concerns the monitoring of alcohol or other drug use by the subject parent once the evaluation is completed, and after the case is settled or tried. In many cases, testing for recent alcohol or drug use during the course of evaluation is of limited utility, particularly if the sampling method chosen affords only a brief retrospective detection window. For litigants who anticipate being the subject of a FSUE, the time period prior to commencement of the evaluation may be weeks or months, as the legal process unfolds. Many individuals, anticipating they will be drug tested, are able to abstain or dramatically reduce use while the evaluation takes place, or will invest in masking agents or other attempts to evade detection. Consequently, while a positive urine test result can be dispositive in a case, a negative urine result may mean the person simply has not used in the prior few days or has successfully masked use.

For most abused drugs, urine testing, the most commonly used testing method, provides a retrospective window of approximately three days. For marijuana, for reasons specific to its metabolism, the retrospective detection window may be longer—up to three weeks in the case of regular users. Whereas for alcohol, blood-alcohol level (BAL) is detectable only when it is positive, and so the retrospective window may be only hours, although newer technologies hold greater forensic promise for retrospective assessment. Sampling hair or nails can provide a longer retrospective window, sometimes up to three months, so it is a better test methodology for sampling for past drug use in the run-up to evaluation. Sweat can be sampled through use of adhesive patches, although this is not a retrospective sampling strategy, instead measuring substance use while the patch is affixed to the body.

Uncovering covert alcohol use has been particularly vexing since testing for it historically relied on direct blood alcohol level testing, which has a detection window measured in hours, and is relatively easy for a drinker to evade detection. In recent years, new metabolic markers of recent alcohol consumption have emerged, and while not yet viewed as forensically dispositive as they are highly sensitive and prone to produce false positives, they are still used to good effect for relapse monitoring. Testing levels of ethyl glucuronide (EtG) and ethyl sulfate (EtS) in urine, as well as other testing methods in development are useful, but they require very specific instructions on how to avoid inadvertent positive bias caused by cosmetics and household products containing alcohol (*e.g.*, hand sanitizer), and it must be understood that as stand-alone measures they are insufficient to establish specific parameters of consumption. Nevertheless, a positive finding is suggestive and should trigger an on-demand update of the evaluative protocol.[24]

For most cases covered in this analysis, the importance of alcohol and drug monitoring rises after the FSUE is completed. It is in this aftermath, where, absent a substance use monitoring plan, the subject parent may be inclined to resume use and the alleging parent to ratchet up their vigilance. While the subject parent may experience the requirement of ongoing substance use monitoring as punitive or harassing, they should be reminded the purpose of external monitoring is to make objective recordings, and the protocol has as much opportunity to support a claim of ongoing abstinence or restricted use as it does to uncover otherwise covert use. In addition, incorporation of substance monitoring may relieve pres-

sure on families in the post-divorce period, especially if children would otherwise be enlisted by the divorced partners to 'tattle' or 'cover up' information about covert substance use. The authors generally suggest a substance use monitoring program for up to a year's time,[25] using different sampling methods to defeat use of adulterants or masks, and using agreed-upon procedures to follow in the event of a positive finding.

Suggesting Approaches to the Family Court Matters

As courts are tasked with determining the necessary child protections to offset risk, judges, attorneys, and litigants are dependent on the FSUE to translate the diagnostic, prognostic and advisory data into meaningful suggestions to lower risk, when feasible, by addressing parenting time, constraints or impositions on parenting time, and risk prevention or harm reduction strategies. In more collaborative types of cases, counsel and litigants are more prone to work together post-evaluation, and collaborative relapse plans can be developed to foster proactivity and collaboration in the event of relapse, an event the data typically anticipate, and which, if mismanaged, can set a case back significantly. Proactive relapse plans provide levels of graded risk alerts and matched assessment steps and parenting plan actions based on observable and inferred events.

Remaining Available to Consult to Courts, Counsel and Litigants after the Report is Delivered

While the FSUE has considerable influence as a settlement tool or as a support to adjudication, the review of the report by legal professionals may lead to questions or requests for guidance or clarification. Practitioners should afford legal professionals an opportunity for formal or informal consultation on the condition that the consultation does not disqualify their use as experts and does not spoil the perception of independence and integrity of the product for the purposes of deposition or trial. These consultation conferences may include legal professionals seeking guidance on assessment and monitoring protocols for the post-litigation phase; for input regarding plans for case management in the event of relapse, depending on whether that relapse was disclosed by the subject parent or was inadvertently discovered; and for guidance on drug testing models and protocols, parenting plan considerations, timing questions, and other uncertainties that may arise, in an effort to implement recommendations being made.

Special Circumstances

For practitioners who perform FSUE services for family court cases, there are a few special circumstances that regularly arise and are covered briefly.

Substance Use by Recreational, 'Social' or Non-problem Users

The diagnostic criteria for substance use disorder that most bear on a non-problem use question are whether the substance use results in failure to fulfill major role obligations, such as parenting; whether use occurs in physically hazardous situations such as driving; or whether the substance use is continued despite material problems caused or exacerbated by continued use. The most relevant assessment aspects would be to: 1) determine what substances are being used in a reportedly non-problem manner, to what extent and with what frequency they are used; 2) establish the extent and degree of intoxication achieved in accordance with the intoxication profile of the substance; 3) take note of the marital history, with particular interest in a history of consensual substance use by the previously harmonious spouses, or tolerance of that use by the alleging parent; 4) determine whether there were other potentiating medical/psychiatric conditions or prescription regimens that may interact with substance use and aggravate its effects; and 5) analyze the broader family context for relevance.

In the event an evaluator finds insufficient evidence for a diagnosable substance use disorder, and the subject parent can be viewed only as someone who periodically achieves intoxication through volitional not compulsive substance use, but is otherwise free of negative consequences to use, emphasis is placed on practical clinical case management advice. These situations can often be dealt with as a target for co-parenting therapy or work with a divorce coach where a consensual resolution can be crafted. If substance use is not a problem, but co-parenting harmony is disrupted, an evaluator would advocate for abstinence or use limits before and during parenting time.

Continued use, despite problems caused by the use, is diagnostically relevant. If co-parenting is significantly aggravated by the subject parent's insistence that the alleging parent is over-reacting, and arguing that there is no risk and is unwilling to cease use when parenting, they may satisfy the diagnostic criterion of "continued use, despite social/interpersonal problems made worse by use." If, in their resistance, they drive with the child

while even mildly intoxicated, they could satisfy the criterion of "use in physically hazardous situations." So it is conceivable that through reactive resistance to the alleging parent's concerns alone, they could meet the threshold condition of satisfying two criteria for substance use disorder, thus triggering a DSM-5 diagnosis that could trigger justifiable parenting constraints.

Alternatively, FSUE in this context may identify conditions under which substance use claimed to be a non-problem by the subject parent conveys more risk than is advisable. In such cases, even when the subject spouse has demonstrated full volitional control over use, an evaluator may recommend strict abstinence over conditional abstinence before and during parenting time. There are many examples of these conditions in practice, such as:

(1) A subject parent's preferred choice of substance, in and of itself, is concerning and no argument can be made to support that a category of non-problem use of the substance is possible (*e.g.*, methamphetamine, cocaine, heroin);

(2) A subject parent has a comorbid medical or psychiatric disorder for which they take prescribed medications where substance use is contraindicated;

(3) A subject parent smokes marijuana recreationally and non-problematically in a manner they inaccurately believe is sufficiently covert and undetectable to their children, and so inadvertently model drug use for the children.

While many other similar scenarios exist, the general principal should be that if the substance use exists, even if it is truly not a problem, the subject spouse should adopt an abstinence model or scripted use model before and during parenting time. Failure of the subject parent to agree with this practical remedy, in itself, will raise questions in the mind of the alleging parent, and potentially stimulate further co-parenting problems.

Alcohol Consumption in a Parent Previously Diagnosed with an Alcohol Use Disorder

Similar to the cases above is the situation in which a person carrying a historical alcohol use disorder returns to a level of use that, by all measures, appears now to be a non-problem. The data bear out that a proportion of individuals previously diagnosed as alcohol abusers or alcohol dependent may return to a drinking pattern best characterized as recreational. Generally, intoxicant use peaks from late adolescence to early adulthood, when a quarter or more of the general population meets criteria for at least some level of mild substance use disorder. A minority of those follow an escalating problem trajectory, while a majority 'age-out' of their substance use problem, adapting to a lower level of social use or preferring to abstain altogether. There exists patterns that flex and change over time, with users migrating from nonuse to problem use, to frank dependence, to a non-problem use, back to frank dependence, across the adult lifespan.

When, during the course of divorce, one parent complains of ongoing *use* (*not* abuse) of alcohol by the other parent who *formerly* (but *not* currently) had a diagnosable problem, and may even have sought treatment for it, the court is presented with a difficult case. Attempting to untangle the complexities of that case, with appeal to the best scientific literature and while preserving the autonomy and peace of mind of all litigants, is nearly impossible without a skillfully drawn FSUE that can scale risk, posit likely alternative trajectories for the current use, and construct monitoring and safety barriers in the event use escalates.

Non-Medical Use of Pharmaceuticals

The non-medical use of pharmaceuticals[26] is defined here as medication use by a parent who does not possess a prescription, but obtains a drug illicitly ('borrowing' from friends or family, through black market sourcing, online, from doctors via bogus complaints, or other means). These cases may or may not have diagnostic and parenting implications, although any such drug diversion is illegal and potentially dangerous.

A characteristic case concerns the use of stimulant medication by parents whose work demands sustained, highly focused attention to otherwise tedious stimuli. For example, traders who must execute large money trades with split-second timing, requiring vigilant focus uninterrupted for many hours, sometimes surreptitiously obtain stimulant medications used in childhood attention deficit disorder and employ them essentially for performance enhancement. Another common case concerns non-medical use of pharmaceuticals for informal symptom relief. Pharmaceuticals sought for this range from sedative-tranquilizers used for insomnia or anxiety relief, to narcotics and opiates for pain complaints, to stimulants for difficulty with sleep-wake cycles and others.

Cultural and subcultural mores and norms, especially among litigants from backgrounds that are more permissive of pharmaceutical use guided by common sense and outside of professional sanctions, vary widely case by case, and must be accounted for in a competent FSUE.

Some pharmaceuticals are secured solely for their intoxicant properties to produce a 'high.' These may include stimulants, sedative-hypnotics, tranquilizers, and anesthetic medications such as Ketamine, cathinones (*i.e.*, bath salts), and other 'club drugs.' In any of the cases identified in which pharmaceuticals are used non-medically, the authors apply the same FSUE protocol as typically employed. While illegal and inadvisable, non-medical use of pharmaceuticals in itself may not signal a diagnosable substance use disorder. A person who, a few times a year during particularly gritty work phases, obtains a Xanax for home use from a friend, or a trader, who on rare occasion, has taken their child's Adderall before work after a bad night's sleep, is very different from an individual who solicits multiple doctors and emergency departments with bogus pain complaints to obtain opiates for their euphoric effect, and pays only cash and does not use their health insurance.

An evaluator should ask for the subject parent to authorize their primary care physician to obtain and forward a copy of their client's centralized pharmacy database record for controlled psychoactive substances, which has existed in the state of New Jersey for about two years.[27] This data help objectify the level of pharmaceutical obtainment by the subject parent, and can make covert efforts by the subject parent to overdose themselves more visible and available for evaluation. When symptom relief or performance enhancement appears as the primary motivation for the non-medical use of a pharmaceutical, it is recommend the person seek a licit prescription for the medication, which, if taken in accordance with instructions, will rarely convey serious parenting risk. When the motivation is to produce intoxication, it is much more likely that the non-medical use of pharmaceuticals will be viewed as diagnosable and parenting-relevant.

Complaints Made Against the Parent of Primary Residence

Usually, when allegations are made that a subject parent abuses substances to a parenting fitness level extent, it is the parent of primary residence who makes those allegations. There are, however, cases in which the non-residential parent alleges the primary residential custodial parent has a relevant substance use disorder. Particular to these cases is a focus on *maternal substance use,* which is pertinent because women appear to have greater vulnerability to non-problem use becoming problematic via a 'delayed, compressed course' of substance use, and because mothers may have more barriers to treatment. These are difficult cases, insofar as the potential for temporary custody changes, back and forth, may undermine the already shaken foundational stability for children.

These are often credible reports raised late in the litigation, when the alleging parent realizes that once physically separated from the substance user they will no longer be able to adequately insulate or protect their children from possible harm. Unfortunately these allegations may be unfounded, exaggerated, even mounting to an undisguised attempt to gain leverage. Regardless, the court is obligated to investigate, lest a minor child be placed in harm's way.

Conclusion

Family courts have responsibility to protect children and rule on best interests matters when parent substance use and abuse is alleged to be an issue, but are often stymied when gray area cases come before them. Cases for which the data and observables do not line up clearly place courts in the complex position of ruling on matters absent a coherent sense of the subject parent's actual substance use and abuse, and the risk imposed to children by that parent when they are anticipating or recovering from intoxication, or are intoxicated when parenting. A FSUE represents a detailed, intensive, multifactorial effort to impose structured professional judgment on parenting plan matters based on a database comprised of objective and subjective reports, clinical observation, review of biological markers and measures, psychometric testing, review of discovery materials with a particular emphasis on objective records suggestive of problem use, and observation. The FSUE examines this database, references it against contemporary diagnostic systems, and incorporates knowledge gained from addiction science, and applies the results to the complex problems of custody and parenting time, co-parenting, and short and longer term risk to children.

As there is not a lot written yet in the professional literature that links addiction assessment and science to family court matters, this article strives to improve the legal dialogue on these matters by beginning to educate on the standards and practices of forensic substance use assessment.

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25. A meta-analysis of more than 500 alcoholism treatment outcome studies by Miller and Hester (1980) found that more than 75 percent of treated patients relapsed within the first year. Hunt and colleagues (1971) found that 65-75 percent of treated alcoholics, heroin addicts and smokers relapse within the first year of treatment, most typically within the first 90 days. These findings are characteristic. It is a rare alcohol- or drug-troubled individual who recovers after their first or even second treatment attempt. Severely substance-dependent patients who do achieve sustained sobriety do so after five or six treatment attempts of various types. *See* W. Miller and R. Hester, (1980). Treating the problem drinker: Modern approaches. In: *The addictive behaviors: Treatment of alcoholism, drug abuse, smoking and obesity*. New York: Pergamon Press, and, W. Hunt, L. Barnett, L. Branch, (1971). Relapse rates in addiction programs, *Journal of Clinical Psychology* 27, 455-456.
26. Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality, (April 11, 2013), *The NSDUH Report: Nonmedical Use of Prescription-Type Drugs, by County Type*. Rockville, MD.
27. The New Jersey Prescription Monitoring Program (NJPMP) enables provision of accurate information on patients' controlled dangerous substance (CDS) prescription history from a database pharmacies update at least twice monthly. The NJPMP collects and makes available information on drugs dispensed by pharmacies in New Jersey or by out-of-state pharmacies dispensing into New Jersey. The program enables: 1) prescribers to review their own prescribing records to determine whether their identity has been misused to create false prescriptions; 2) stakeholders with an interest in an effective tool for identifying those who fraudulently obtain prescription drugs or are otherwise involved in the criminal diversion of prescription medication; 3) potential for detection of individuals who may be "doctor shopping"; 4) the potential detection of 'pill mills,' a prescriber who regularly colludes in the prescribing and dispensing of controlled substances outside the scope of the prevailing standards of medical practice; and 5) generation of reports on abnormal patterns of prescribing and dispensing related to specific patients, intending to help identify possible abusers of CDS. The website for the NJPMP is http://www.njconsumeraffairs.gov/pmp/.