New Jersey
Family Lawyer

Vol. 36, No. 5 — April 2016

Chair's Column

Love/Hate Relationship with Unpublished Opinions

by Amanda S. Trigg

Every morning, as sure as the sun comes up, you and I pick up our cell phones and tap on the email icon to bring up the messages of the day. Early every morning, the NJSBA sends us the *Daily Briefing*, which is full of interesting headlines and news about legal events. It can, therefore, be my first decision of the day whether to read it now, or later. That decision invariably rests upon whether I want to know right away whether there are any new court decisions that impact our practice of family law. Some mornings I would rather not immediately scroll down past the news briefs to the decision summaries because I know that lurking under that heading there could be an unpublished family law decision to consider.

Often, those of us who follow such things know when to expect a reported decision from the Appellate Division or the Supreme Court. Those opinions will be diligently printed or archived, read and considered in the context of the cases and clients we currently serve. That is part of the job and does not require any decision making. Instead, the thought process involves deciding how quickly and how carefully I want to immediately read the opinions about family law.

On the one hand, it is important to know what the Appellate Division might have said about a case that is similar to one I handle myself. There might be an interesting tidbit in a new opinion that I might want to use to my client's benefit. On the other hand, I would prefer to avoid using my precious morning minutes to read another opinion that is unrelated to any case I am handling, and that I am unlikely to remember when it comes time to handle a similar matter. Now that unpublished opinions are archived and available digitally, should I read them now, or read them later? The honest truth is that I have a love/hate relationship with unpublished opinions.

Rule 1:36-3 (Unpublished Opinions) clearly restricts the importance of any opinion that is not approved for publication by stating that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." Unfortunately for anyone deciding how to use brain

power before sunrise, the rule goes on to state that even though such opinions are not binding upon any court, we can nonetheless cite them to the court as long as "the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel." Now, the mental gymnastics become a double flip. We must not only analyze the relevance of the opinion but also know whether there are conflicting published opinions. As the saying goes, "ignorance of the law is no excuse," and none of us would want to be the attorney who cites a new unpublished opinion to the court without carefully searching and disclosing the conflicting cases.

By definition, when an opinion does not meet the standards for publication, that means the decision does not satisfy any of the following criteria for a reported opinion, per Rule 1:36-2(d):

> (1) involves a substantial question under the United States or New Jersey Constitution, or
>
> (2) determines a new and important question of law, or
>
> (3) changes, reverses, seriously questions or criticizes the soundness of an established principle of law, or
>
> (4) determines a substantial question on which the only case law in this State antedates September 15, 1948, or
>
> (5) is based upon a matter of practice and procedure not theretofore authoritatively determined, or
>
> (6) is of continuing public interest and importance, or
>
> (7) resolves an apparent conflict of authority, or
>
> (8) although not otherwise meriting publication, constitutes a significant and nonduplicative contribution to legal literature by providing an historical review of the law, or describing legislative history, or containing a collection of cases that should be of substantial aid to the bench and bar.

Question, then, the value of an unpublished opinion. We can certainly learn from the analyses in an unpublished opinion, and perhaps parlay it into a topnotch argument for one of our own clients. That does not automatically translate, however, into smart strategy by citing to that unpublished opinion. Why should any court be interested in an opinion that does not concern a substantial constitutional question, determine new *and* important law, change an established principle of law, update a presumptively outdated body of law, promote the public interest, resolve a conflict of authority or, finally make a "significant and nonduplicative contribution to legal literature"? With all these potential criteria for meriting publication, how can we conscientiously cite to unpublished opinions to advocate for our clients? It seems to be common practice in our area of law, but I question the soundness of the practice. In the interest of full disclosure, I have done it and I expect I will do it again. In other words, this love/hate relationship is unlikely to be resolved any time soon, but in the meantime, let us all remember that we elevate the practice of law by the advocacy paths we choose; we demean ourselves and undermine our client's positions when we choose poorly. ■

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

Fairness and Economic Reality in Business Valuation

by Charles F. Vuotto Jr.

It is widely accepted that fairness is the polestar[1] for those entrusted with the resolution of all issues that arise in a family law matter. That concept is no less applicable in the area of business valuation. This column submits the proposition that one can only achieve fairness in business valuation incident to the dissolution of a marriage or other family-type partnership when conclusions are reached based upon economic reality. That economic reality requires a conclusion of value that is based upon concepts of cash equivalency. Therefore, the valuation expert's opinion and the court's ultimate decision, in order to be fair,[2] must result in a 'value' that is the cash equivalent of what the business owner could receive as of the date of the filing of the complaint for divorce or other agreed upon cut-off date for purposes of equitable distribution. The true issue has been obscured by the debate over the standard of value[3] after the appellate court's decision in *Brown v. Brown,*[4] where the court concluded that the appropriate standard was "fair value"[5] as opposed to "fair market value."[6] Instead, the focus should be on fairness and economic reality.

The inescapable truth is that the value resulting from a strict adherence to a fair value standard in accordance with *Brown v. Brown* does not represent economic reality. Since it does not represent economic reality, it is not fair. Since it is not fair, it should not be the basis for business valuation in the state of New Jersey. Fixing business valuation based upon fairness and economic reality implements the public policy of the statutory scheme of equitable distribution in the state of New Jersey. Clearly, valuing the economic benefits the owner of a personal services business may receive in the future *does not* accurately implement equitable distribution policy as opposed to valuing the asset as though it is being sold (even though it is not actually being sold).

Fair market value appears to be the closest standard of value that is available to determine the cash equivalent that may be obtained by the business owner. However, we should not allow the label to control. In other words, we should not raise form over substance. The ultimate goal in determining the appropriate equitable distribution of a business is to determine the cash equivalent of the business owner's interest as of the valuation date. If this goal can be achieved by applying fair market value, then the standard of value should be fair market value. If some other standard of value can better achieve this goal, then it should be that standard of value.

If a new standard of value needs to be adopted or developed to get to that end result, then that's what should be done. Therefore, if it is necessary to arrive at the cash equivalent by applying a marketability discount,[7] then the marketability discount must be applied. Similarly, if it is necessary to arrive at a true cash equivalent by applying a minority interest discount,[8] that discount should be applied. Conversely, if it is critical to obtaining the cash equivalent by applying a control premium,[9] then that control premium should be applied to increase the value.

The fact that the business may not actually be in the process of being sold, does not change the fact that the ability of the business owner to achieve that cash equivalent would trigger the application of the aforementioned discounts or premiums in order to achieve that cash equivalent. In other words, these discounts and premiums are necessary to translate the value conclusion to a cash equivalent. Although typically applied to real estate, perhaps the more appropriate standard of value to achieve a cash equivalent, rather than fair market value, fair value, or value to the holder, is something akin to value in exchange. Value in exchange is the value of the business or business interest changing hands, in a real or hypothetical sale. Accordingly, discounts, including those for lack of control and lack of marketability, are considered in order to estimate the value of the property in exchange.

The fair market value standard, and to some extent the fair value standard, fall under the value in exchange premise.[10] It may very well be that the value to the holder is greater than the value in exchange or cash equivalent, but it is only the value in exchange or cash equivalent that should be subject to an equitable distribution award.

The additional 'value' (if any) to the holder should be compensated by way of spousal support if compensation is fair and equitable under the applicable law.

Many of us may have attended the 2015 Family Law Symposium and heard our esteemed colleague, Frank A. Louis, espouse his view that basing a business valuation on a hypothetical sale is wrong since it does not represent the reality (in those cases where there is no present or contemplated sale). Interestingly, that argument fails to recognize the inconsistency in valuation approaches between a business and other assets. For example, when valuing the commercial property, the appraiser will utilize average rates of collectability when determining cash flow for purposes of the property valuation. If a commercial property owner getting divorced is able to achieve collection rates in excess of the average rates in the locality, why should the lower collection rates drive the value when the commercial property owner is not going to sell the property? Nevertheless, it is the *average* collection rates that are used rather than the *actual* ones. This is inconsistent with Louis's view that the facts should dictate the valuation approach based on "economic reality."

The first question is why doesn't fair value result in a value conclusion that represents economic reality? The simple fact is that in many situations the business owner will not be able to realize the cash equivalent of the value resulting from a fair value standard of value. This is due to various reasons, including:

1. All related party transactions need to be adjusted to reflect the marketplace.
2. All financing needs to be adjusted to market rates.

The reason is that in a sale a potential investor or pool of investors would not benefit from these types of transactions. The buyers would adjust the subject company's results to reflect economic reality and would, therefore, only determine the value (purchase price) of the company after it has adjusted its financial results to reflect the market.

As Louis noted, our Supreme Court and Appellate Division have repeatedly reaffirmed these fundamental principles, but have never analyzed whether a standard predicated on a sale is the optimum approach to implement this broad policy and fairly divide, in an economically realistic fashion, the fruits of the marital partnership. Where this author differs with Louis's conclusions is that the standard should not be some esoteric value to the holder but rather should be guided by the economic reality of what the business owner can achieve in cash equivalent, perhaps best represented by the value in exchange concept(s). By focusing on what the business owner can achieve by way of cash equivalency, it realistically quantifies what an owner could expect to receive from market participants. It, therefore, permits a fair division of the value of that asset to both the owner and non-business owner. It does not, as Louis warns, relegate the non-owning spouse's interest on a value to some hypothetical third party.

The underlying public policy for equitable distribution is recognition that a marriage is a partnership whose assets should be shared in an equitable fashion. It is statutorily presumed that each party made contributions to the marital enterprise, some of which may be economic in nature and some of which may be noneconomic.[11]

Therefore, with all of the foregoing considered, the appropriate standard that will implement the state's public policy of fairness in rendering equitable distribution based on economic reality should be as follows:

> A non-titled spouse should be entitled to fairly share in the economic value of a business legally or beneficially acquired during the marriage. This value shall be defined as that which the owner could receive at a point in time from market participants (potential willing buyers) after both parties have considered and analyzed all of the relevant facts. This amount would be the cash equivalent subject to equitable distribution at the appropriate termination date.

The goal of this standard is to fairly compensate the non-titled spouse and not put an undue burden on the non-titled spouse. It is intended to reflect economic reality. It is based on the assumption that the cash equivalent of the asset reflects the value of the titled spouse's interest in the business and will require distribution of nothing more than what the owner could expect to receive from market participants.

Therefore, based upon the foregoing, it is clear that those entrusted with the resolution of business valuations incident to the dissolution of marriage or other family-type relationships must be guided by concepts of economic reality and cash equivalency. In so doing, matrimonial disputes will be resolved with adherence to the most important concept (*i.e.*, fairness to all). ■

The author wishes to thank Leslie M. Solomon, CPA, ABV, ASA, of Rotenberg Meril Solomon Bertiger & Gutilla, P.A,. for his invaluable assistance with this column.

Endnotes

1. Reference is made to Justice Pashman's observation in *Kikkert v. Kikkert*, 88 N.J. 4, 10 (1981), that "fairness after all, is the prime concern of equitable distribution."
2. Reference is made to Justice Rivera-Soto's statement in *Steneken v. Steneken*, 183 N.J. 290 (2005), wherein he emphasized that, "we start from the bedrock proposition that all alimony awards and equitable distribution determinations must—both jointly and severally—satisfy basic concepts of fairness." *Id*. at 298.
3. Standard of value sets the criteria upon which valuation analysts rely. An essential step in valuing a business is selecting and then applying the appropriate standard of value. Applying the standard including: fair market value, fair value, intrinsic value, value to the holder, equitable distribution value or some other standard involves an assumption as to who will be the buyer and who will be the seller in the hypothetical or actual sales transaction regarding the assets at issue.
4. *Brown v. Brown*, 348 N.J. Super. (App. Div. 2002). In *Brown*, the Appellate Division adopted fair value, a corporate law principle under N.J.S.A. 14A:11-1 and N.J.S.A. 14A:12-7(1)(c) utilized in shareholder dissenting oppression cases. As recently noted by Frank Louis, in his article entitled "Value to the Holder, Not Fair Market Value, is the correct standard to value a professional practice in New Jersey" (as originally published in the materials made available at the 2015 Family Law Symposium), *Brown* adopted fair value notwithstanding the Supreme Court's admonition, albeit in a footnote, that using corporate statutory remedies may not be applicable in a divorce. *See Balsamides v. Protameen Chemicals*, 160 N.J. 352, 375 (1999), fn. 9.
5. Fair value is defined as a legislatively determined valuation standard applied under N.J.S.A. 14A:11-3(2).
6. Fair market value is defined as the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. (IRS Regulation 20.2031-1).
7. A marketability discount reduces the value of the business by recognizing the time that it would take to effectuate a sale.
8. A minority interest discount recognizes that there is an impact on one's income (and therefore value of one's interest) in a business when that owner does not have a controlling interest.
9. A control premium is the converse of a minority interest, and increases value to the owner due to that person's ability to control the entity.
10. Fishman, Pratt & Morrison, A Consensus View, Q&A Guide to Financial Valuation at 178 (2016).
11. *See* N.J.S.A. 2A:34-23.1.

Executive Editor's Column

Can a Key Person Discount Be Used during the Valuation of a Closely Held Business in a Divorce Case?

by Ronald G. Lieberman

Practitioners know that when they are dealing with the valuation of closely held businesses in a divorce, discounts for lack of control and lack of marketability will generally not apply. Those two discounts have been defined to mean:

> A minority discount adjusts for a lack of control over the business entity on the theory that non-controlling shares of stock are not worth their proportionate share of the firm's value because they lack voting power to control corporate actions...a marketability discount adjusts for a lack of liquidity in one's interest in an entity, on the theory that there is a limited supply of potential buyers for stock in a closely-held corporation.[1]

The Appellate Division has specifically disapproved of such discounts in *Brown v. Brown*.[2] But did the Appellate Division in *Brown* absolutely preclude any form of discount in valuing a closely held corporation in a divorce? That window seemed to be left open in *Steneken v. Steneken*, where the Supreme Court acknowledged that valuing a closely held corporation is fact sensitive and not based on exact science.[3]

Practitioners recently received some guidance on whether a key person discount can be used. In an oppressed shareholder action, over the span of 20 years of litigation, a decision arose that accepted a key person discount (albeit in an unpublished decision).[4] The facts of that case warrant a discussion to show how a key person discount might apply in the divorce setting.

The litigation commenced in Sept. 1995 by Patricia Wisniewski against her brothers, Norbert and Frank Walsh. All three siblings were co-owners of a trucking and freight consolidation company. The 1995 suit was followed in 1996 by a shareholder oppression suit filed by Norbert against Patricia and Frank. In 2000, following a trial, the trial judge found that Norbert was actually the oppressing shareholder and ordered him to sell his one-third interest in the business back to the company or to Frank and Patricia at fair value, to be determined after receipt of the expert's reports.

In 2001, the trial judge fixed the value of Norbert's interest, and then litigation ensued on the question of the value of Norbert's interest. The finding of the trial court of the value was appealed and cross-appealed by Norbert, Patricia, and Frank's estate, since Frank died in 2009.

The buyers of Norbert's interest, Patricia and Frank's estate, raised objections to the valuation, including that there should have been a marketability discount applied to the value of Norbert's interest. The seller, Norbert, alleged that the key man discount used to reduce the value of the company was an error, and there should have been a control premium.

In a 2013 decision,[5] the Appellate Division indicated that a marketability discount was appropriate because Norbert's conduct harmed the other shareholders and caused the forced buy-out. As to the key person discount Norbert believed was error, the trial judge believed the discount should apply, and that Frank was uniquely responsible for the company's success. Interestingly, the Appellate Division noted that Norbert did not challenge either the trial court's conclusion that Frank was a key person or that the expert for Norbert appropriately increased the discount rate in his cash flow to account for the company's dependence on Frank. Instead, Norbert argued on appeal that the trial judge should not have applied a separate key person discount to the valuation. The Appellate Division found no merit in Norbert's argument and concurred that a key person discount was appropriate.

The saga of the *Wisniewski* case raises an issue for this author regarding whether a key person discount in a valuation of a closely held corporation in a divorce should apply. In doing research for this article, the author found two cases, one of which was *Bernier v. Bernier,*[6] a Massachusetts case.

In *Bernier*, a supermarket business was being valued. Both parties agreed the husband's expertise was critical to the success of the supermarket. So, the husband's expert applied a 10 percent key person discount, assuming that after the divorce the supermarkets would be sold to someone who would replace the husband. The wife's expert argued that because no sale was contemplated, no key person discount should be applied. The trial judge adopted the key man discount, but the appellate court reversed, finding the husband testified that he would maintain control of the supermarket after the divorce, and thus no need existed for a key person discount.

The appellate court in *Bernier* was not stating that a key person discount was inappropriate in divorce cases. Instead it held that, because the husband was going to maintain control of the business, such a discount would be inappropriate.

The theory of a key person discount is straightforward, because when a business is highly reliant on one or more key employees, a valuation discount may be appropriate to account for the lost earnings if that key person (or persons) is lost. The Internal Revenue Service defines 'key person' as:

> An individual whose contribution to a business is so significant that there is certainty that future earnings level will be adversely affected by the loss of the individual.[7]

The IRS explains that, in determining whether to apply a key person discount, factors to be considered include: 1) whether the claimed individual is actually responsible for the company's profit levels, and 2) if there is a key person, whether the individual can be adequately replaced.[8]

So, if the business owner provided specialized services, as opposed to the training of staff and the staff's ability to carry out the business, would a key person discount be appropriate? Why not? If a person is so integral to the business, why should the value of a business not reflect that dependence?

This author is aware that the term 'key person' is a term of art that then defines relationships that are critical to the success of a business. Are there certain attributes in a key person? The answer there is yes, there are such attributes, including the alleged key person's relationships with employees, customers and vendors; the professional network of the alleged key person; the experience of the key person; and the managerial abilities of the key person. An attorney alleging that there was a key person involved in the business who will be lost would need to argue whether there can be a potential replacement for this person or whether this person is, in fact, irreplaceable.

Valuators are aware of the existence of a key person discount, so a practitioner is not raising an issue out of whole cloth. The National Association of Certified Valuators and Analysts (NACVA) discussed factors to be considered when using a key person discount, such as when there are efforts of a single individual upon whom the company is dependent for future financial and operational success. Those factors include:

1. The person's duties on a day-to-day basis;
2. That person's reputation within the industry;
3. The depth of overall management in a succession plan;
4. The cost and time required to hire necessary replacement personnel; and
5. The availability of key person life insurance.[9]

Scholars have described the reasons for the key person discount as follows:

> [a key person is] usually the driving force behind the business and the controlling stock holder. The loss of a key man may have a depressing effect upon the value of the closely held stock as future prospects for the corporation are no longer as bright as they once were. This is especially so in those instances where there is a lack of competent personnel available for management success.
>
> When a key man is lost, the valuator ought to consider capitalizing the average reoccurring earnings at a lower rate or depress the gross value of the stock by a percentage discount to reflect this loss.[10]

In other words, "when the successor business is highly dependent upon one person, the likelihood of the business being a continued success in the hands of a willing buyer has significantly decreased."[11]

One influential individual stated that a key person is someone whose unusual skill set can be described as follows:

> The manager must have a special skill coupled with an intensive and thorough knowledge of his subjects. The earnings of the enterprise are the objective reflection of his skills; and he is not likely to be able to create "an organization" which can successfully "carry on" after he is gone. He can sell the business, including the reputation and "plan the business" but he cannot sell himself, the only truly valuable part of the enterprise.[12]

In addition to Massachusetts, Minnesota has allowed a key person discount in a divorce case, *Rogers v. Rogers*.[13] In *Rogers*, the husband owned 85 percent of an engineering firm and the Minnesota Supreme Court mandated that a key person discount apply.[14] The Court required the application of a key person discount because the portion of the company's value that depended on the husband's continued services was not to be considered marital property. As the Court in *Rogers* held:

> Valuation of Appellant's share of [the business] should not be based upon the assumption that Appellant will remain [with the company]. Such an assumption would compel Appellant to continue with [the business], perhaps against his wishes, simply in order to earn enough money to pay the award to the Respondent.
>
> The property acquired during the marriage should be limited to that portion of the value of [the business] that is not dependent upon Appellant's continued services. To capitalize the earnings of [the business] on the assumption that Appellant will continue to contribute his talents and services is, essentially, to capitalize Appellant. An award based on this would, in effect, give Respondent a forced share of Appellant's future work.[15]

In the Court's words, "[r]espondent is entitled to property acquired during the marriage, but she is not entitled to a lien on Appellant himself."[16]

So, the practitioner in our state can review *Rogers* and the rationale behind it, mainly that the business owner is being capitalized post-divorce if there was no key person discount, and thus he or she is giving the non-owning spouse a 'lien' on or 'a forced share' of that business owner's future work. That argument does not seem to have been the subject of any reported decision in New Jersey in the divorce context.

Using the rationale from the *Rogers* Court, a practitioner could argue that the non-owning spouse being bought out of the business is continuing to benefit from the owning spouse's continuing and future involvement in that business and, therefore, would be an inappropriate way to determine value. So, in this author's opinion, using the thoughts underpinning the decision in *Rogers*, a practitioner could argue that a key person discount is appropriate in divorce cases despite *Brown*.

Precedent exists for the practitioner to use in arguing that a court should not allow one spouse to benefit financially from the other spouse after the divorce. In *Kikkert*,[17] the theory was set forth that equitable distribution should apply to "money which in some way was acquired during the marriage," and that the "primary purpose of marital property distribution law is not to compensate for changes in the parties' fortunes after they have separated…." That theory might justify the argument that allowing the non-owning spouse to benefit from the owning spouse's involvement in the business would occur if a key person discount was not used.

Another line of cases addressing the distribution of a professional license provides guidance that courts are not receptive to carrying a party's financial distribution into post-divorce earnings.

> …[A]ny assets resulting from income for professional services would be property acquired after the marriage; the statute [N.J.S.A. 2A:34-23.1] restricts equitable distribution to property acquired during the marriage.[18]

So, a practitioner has ample bases within which to argue that the distribution of a business to the non-owning spouse should be restricted to marital efforts—which is the goal of a key person discount. As with most legal issues without reported decisions, a skilled practitioner with the right set of facts can create law and move our practice area in a particular direction. ■

The author would like to thank Michael A. Saccomanno, CPA/ABV/CFF, CVA, CDFA, partner – FLVS department, Friedman LLP, for his assistance and guidance in writing this column.

Endnotes

1. *Lawson, Mardon Wheaton, Inc. v. Smith*, 160 N.J. 383, 398-99 (1999).
2. 348 N.J. Super. 466, 476-478 (App. Div. 2002).
3. 183 N.J. 290, 297-298 (2005).
4. *Wisniewski v. Walsh*, 215 N.J. Super. Unpub. LEXIS 3001 (App. Div. 2015).
5. *Wisniewski v. Walsh*, 213 N.J. Super. Unpub. LEXIS 724 (App. Div. 2013).
6. 873 N.E. 2d. 216 (Mass. 2007).
7. *Valuation Training for Appeals Officers Course Book*.
8. Section 4.02(b), IRS Revenue Ruling 59-60.
9. Fundamentals, Techniques, and Theory, Valuation Discounts and Premiums, NACVA Chapter 7, p. 47 (2012).
10. Lyons & Wittman, Valuing Closely Held Corporations and Publicly Traded Securities With Limited Marketability: Approaches to Allowable Discounts from Gross Values, 33 *Bus. Law.* 2213, 2220 (1978).
11. Fishman, Jay E., The "Key Man" Concept in Business Valuation Upon Divorce, *Fairshare*, June, 1982, at 3.
12. A. Dewing, *The Financial Policy of Corporations*, 390-91 (Fifth Ed. 1953).
13. 296 N.W. 2d. 849 (Minn. 1980).
14. *Id*. at 852-54.
15. *Id*. at 853.
16. *Ibid*.
17. 88 N.J. 4, 7, 9 (1981)(Pashman, J., concurring).
18. *Mahoney v. Mahoney*, 91 N.J. 488, 497 (1982).

How Deep is the Black Hole, and How Do We Dig Our Clients Out?

by Bea Kandell and Christopher McGann

Black holes were first discovered in 1916 by Karl Schwarzschild. In 1990, in authoring the landmark case of *Carr v. Carr*, Justice Alan Handler recognized that such a phenomenon can exist on earth as well as in outer space.[1] Recognizing the inherent conflict in the equitable distribution and elective share statutes, the *Carr* Court suggested the need for legislative reform by illustrating, in the Court's opinion, prior occasions when the Legislature provided remedial solutions in the matrimonial field.[2]

Under New Jersey law, a spouse is statutorily entitled to equitable distribution "in all actions where a judgment of divorce…is entered."[3] A "disinherited" spouse is also statutorily entitled to an "elective share" of one-third of the decedent spouse's estate *unless,* at the time of the death of the decedent spouse: 1) the decedent and surviving spouse are living separate and apart in separate habitations; or 2) the decedent and surviving spouse have ceased to cohabit as man and wife as a result of a judgment of divorce from bed and board or under circumstances that would give rise to a cause of action for divorce or nullity of the marriage.[4]

What happens, though, when a husband living separate and apart from his wife dies the middle of divorce proceedings, after having removed his wife from his will and with the vast amount of the marital assets titled in his name? Ultimately, the Court concluded that "equitable remedies" should be made available to such a disadvantaged surviving spouse.[5]

In *Carr*, the Supreme Court likened the wife's plight to a "black hole."[6] The wife was not entitled to equitable distribution because a judgment of divorce had not been entered and the husband's death abated the divorce proceedings.[7] The wife was also not entitled to an elective share of the husband's estate because the parties were living separate and apart from one another and divorce proceedings had been instituted.[8] Recognizing the grave inequity that could befall such a disinherited spouse, the Court reviewed the legislative intent of the equitable distribution and elective share statutes in an effort to determine whether the Legislature intended to deny the wife any relief at all.[9]

The Court determined that equitable distribution provides rights to spouses to marital property, which arise from the marital relationship due to the presumed contribution by both parties to the acquisition and preservation of the property.[10] The Court came to a similar conclusion in its review of the probate code, and ultimately held that the Legislature did not intend "to extinguish the property entitlements of a spouse who finds himself or herself beyond the reach of either statute because the marriage has realistically but not legally ended at the time of the other's death."[11]

Although a spouse who finds him or herself in a black hole has no entitlement to statutory relief, the *Carr* Court held that courts should apply equitable remedies (such as a constructive trust) in order to afford the litigants judicial relief.[12] This holding clearly revolved around the need to protect the rights of surviving spouses. The *Carr* Court also clearly hinted at the need for Legislative reform in stating, "in the matrimonial field the Legislature remains free to fashion its own standards for remedial relief… We are aware that the Legislature is conversant with the need to provide remedial solutions in this setting."[13] While the Legislature has not taken such action to date, New Jersey courts have since had to apply the holding in *Carr* to a variety of circumstances—sometimes finding equitable remedies appropriate, other times finding these remedies inappropriate.

Regardless of which party is seeking relief, or in which court, the overarching principle applied by the courts is to reach an outcome that is fair and equitable. Precedent held that, unlike a surviving spouse, the *estate* of a decedent spouse could *not* assert claims against the marital estate.[14] Almost two decades later, that longstanding holding was overturned and, based on the equitable considerations alleged in that case, the *Kay v. Kay* court held that an estate of the decedent spouse *can* pursue

claims to marital property.[15] In *Kay*, the husband's estate alleged that the wife had diverted marital assets to his detriment over time.[16] The estate of the husband sought leave to substitute in for the husband in the divorce action and file amended pleadings alleging the surviving spouse had deceptively titled assets in her name and her daughter's name in order to deprive the decedent husband of his share of that marital property.[17]

While not ruling on the merits, the Appellate Division analogized the claims made by the estate to "dissipation" claims raised by a spouse in the context of a divorce.[18] The court also noted that a "blanket prohibition against equitable claims pressed by the estate would have the inherent potential to disserve public policy by encouraging spouses contemplating divorce to deal unfairly with one another."[19] In doing so, the court stated that, although distinct from the equities implicated when the surviving spouse makes a claim to the decedent's estate, the claims raised by the decedent's estate in *Kay* also sought to prevent unjust enrichment and ensure that the surviving spouse received only the share of marital property to which she was entitled.[20] The court's holding, which was affirmed by the Supreme Court, sought to promote the principles enunciated by the *Carr* Court of "equity and fair dealings" in the context of a divorce.[21] Ultimately, the case was remanded to the trial court to consider the equities arising from the facts alleged and to determine in which division of the superior court the litigation should occur.[22]

As illustrated by the holding in *Kay*, certain events can arise that will permit the estate of a decedent to pursue claims against the surviving spouse in the context of a divorce proceeding. Perhaps the gravest inequity that would result if this were not permitted was evidenced in *Wasserman v. Schwartz*, where the court held the estate of a wife slain by her husband was entitled to equitable distribution of marital assets, including those held in the husband's name.[23] The court in *Wasserman* recognized that if the estate was not permitted to pursue any sort of claim, the husband would benefit and be unjustly enriched as a result of his intentional killing of his wife.[24] In addition to such an egregious inequity, the court also adopted the rationale utilized in the *Carr* decision and noted that public policy dictates a spouse should enjoy the benefit of assets accumulated during the marriage.[25] After having determined that the wife's estate was entitled to the same distribution of assets under the principles governing equitable distribution of a marital estate, the court—despite being in the Law Division—applied the equitable distribution standards outlined by the Court in *Rothman v. Rothman*.[26]

In a recent and similarly egregious fact pattern in the case of *Estate of Beltra v. Beltra*, the Appellate Division affirmed the trial court's decision to substitute the decedent wife's estate into a pending divorce litigation, because the court found the husband had intentionally refused to disclose assets on his case information statement, was held in contempt of court twice for refusing to comply with court orders to release information, and had secreted assets to the detriment of the decedent wife, who was terminally ill during the divorce proceedings.[27] In that case, the wife alleged in her complaint for divorce that the husband had secreted marital assets.[28] The trial court found from the testimony given that the husband paid $50,000 in cash to buy a Dominican Republic condominium.[29] The parties' son testified the husband kept a large amount of cash, and another witness testified the husband was "stopped at the airport with a suitcase full of cash."[30] The estate also asserted the husband intentionally delayed the proceeding because he knew the decedent wife would soon pass away.[31]

After conducting a trial, the court found the husband to be "the least credible of all the witnesses" and determined the "facts were so flagrant" and the husband's "offered explanation [was] so unbelievable" that the trial judge reported the husband's unreported income to regulatory and law enforcement agencies.[32] Given the facts of the case, the court found equitable relief was necessary, as the case presented exceptional circumstances warranting extraordinary relief.[33]

The Appellate Division affirmed the trial court's substitution of the decedent's estate into the matrimonial divorce litigation and its imposition of a constructive trust over the assets held by the husband.[34] The Appellate Division noted the trial court acted appropriately in its "use of tools to prevent [the husband] from being unjustly enriched by his inequitable conduct supporting his diversion of marital assets to which both spouses had a 'cognizable' right."[35]

Although the courts have recognized exceptional circumstances warranting substitution of the estate into a divorce litigation and utilization of equitable remedies such as constructive trusts to ensure there is no unjust enrichment to the surviving spouse, there have also been circumstances where the court has declined to extend the rationale in *Carr*.

In *Estate of Ritterman v. Ritterman*, the probate court did not permit the estate of the decedent husband to file a complaint asserting a claim to equitable distribution of the marital assets and seeking a constructive trust to be placed on the proceeds from the sale of the marital residence.[36] During the pendency of the divorce litigation, the parties were negotiating the husband's purchase of the wife's interest in the marital residence.[37] The wife's counsel sent a proposed order to the husband's counsel providing an executed deed along with buyout terms.[38] However, the proposed order was never executed by the husband's counsel prior to the husband's death.[39] Therefore, the parties continued to jointly own the residence, and it reverted to the wife as a matter of law, upon the husband's death.[40]

The estate for the husband argued the court should utilize its equitable powers and enforce the parties' clear intentions by providing the husband's estate with half of the proceeds from the sale of the residence.[41] The court found there was no meeting of the minds, as counsel was still negotiating the buyout price at the time of the husband's death.[42] Furthermore, there was no unjust enrichment to the surviving spouse, and the instant case presented the direct opposite policy considerations of *Carr*, because the parties were married for approximately 30 years and the estate presented no facts to convince the court why the decedent husband's adult children would have an interest in the home.[43]

In a different case, *In re Estate of Bilse*, the probate court also declined to extend the rationale espoused by the Court in *Carr* by holding that the heirs of the decedent husband were not permitted to pursue his elective share in the absence of any need for support during the period between the wife's death and the husband's death.[44] In that case, there was no pending divorce and the parties were still living together when the wife died.[45] Thereafter, the husband filed suit for his elective share.[46] However, he passed away prior to a determination being made.[47] The court held that the rights of the heirs of a disinherited spouse do not equate with those of a surviving spouse and, therefore, it was not appropriate to utilize any equitable remedies.[48]

The precarious situation outlined in this article in which spouses may find themselves may soon be legislatively abrogated. The New Jersey Law Revision Commission's Nov. 7, 2011, final report proposed changes to N.J.S.A. 2A:34-23(h), N.J.S.A. 3B:8-1 and N.J.S.A. 3B:5-3 to provide that, in situations where one party dies before a judgment of divorce is entered, equitable distribution shall be effectuated *provided that a valid complaint for divorce, dissolution of civil union or termination of domestic partnership is filed prior to the death of a party*.[49] The proposed amendments to these bills were vetted and revised by the Family Law, Real Property and Trusts and Estates Law sections of the NJSBA in order to address the concerns that their sections had with these proposed revisions. The proposed amendments to the statute will then be presented to the Legislative Committee of the NJSBA, and thereafter to the trustees of the association. After this process, it is the hope that the amendments will be considered by the Legislature. It is noteworthy that the proposed amendments being considered define a "valid complaint," as well.[50] Amending the statutes to close the chasm caused when the facts and circumstances converge as they did in *Carr* will prevent litigants from standing on the edge of that black hole, and lawyers and courts from having to dig them out. ■

Bea Kandell is a partner at Skoloff & Wolfe, PC, Livingston. Christopher McGann is an associate.

Endnotes

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2. *Id.* at 348.
3. N.J.S.A. 2A:34-23(h).
4. N.J.S.A. 3B:8-1.
5. *Carr*, *supra* note 1, at 353.
6. *Id.* at 340.
7. *Id.* at 342 (*citing Castonguay v. Castonguay*, 166 N.J. Super. 546 (App. Div. 1979)).
8. *Id.* at 345-46.

9. *Id.* at 346-49.
10. *Id.* at 346-48.
11. *Id.* at 349-50.
12. *Id.* at 350-51.
13. *Id.* at 353.
14. *See* the case of *Kruzdlo v. Kruzdlo*, 251 N.J. Super. 70 (Ch. Div. 1990), decided by Judge Krafte immediately after *Carr v. Carr*, 120 N.J. 336 (1990).
15. *Kay v. Kay*, 405 N.J. Super. 278 (App. Div. 2009), *aff'd*, 200 N.J. 551 (2010).
16. *Kay*, *supra* note 15, at 286.
17. *Id.* at 280.
18. *Id.* at 286.
19. *Id.* at 285.
20. *Id.* at 283-85.
21. *Kay v. Kay*, 200 N.J. 551, 552 (2010).
22. *Kay v. Kay*, 405 N.J. Super. 278, 287 (App. Div. 2009).
23. 364 N.J. Super. 399 (Law Div. 2001).
24. *Id.* at 407.
25. *Id.*
26. *Id.* at 410-11 (*citing Rothman v. Rothman*, 65 N.J. 219 (1974)).
27. No. A-5768-12T2, 2014 WL 8096146, at *1, 4 (App. Div. March 10, 2015).
28. *Id.* at *2.
29. *Id.* at *4.
30. *Id.*
31. *Id.*
32. *Id.* at *1, 4.
33. *Id.* at *2.
34. *Id.* at *5.
35. *Id.*
36. No. C237-07, 2009 WL 857244, at *2-3 (App. Div. April 2, 2009).
37. *Id.* at *1.
38. *Id.*
39. *Id.* at *1-2.
40. *Id.* at *2.
41. *Id.*
42. *Id.* at *3.
43. *Id.* at *5.
44. 329 N.J. Super. 158, 166 (Ch. Div. 1999).
45. *Id.* at 159.
46. *Id.*
47. *Id.* at 160.
48. *Id.* at 168.
49. State of New Jersey, New Jersey Law Revision Commission, Final Report Relating to Equitable Distribution and the Elective Share, Nov. 7, 2011.
50. *Id.*

The Division of Spousal Student Loan Debt in Divorce

by Christopher Rade Musulin

In *Mahoney v. Mahoney*,[1] the New Jersey Supreme Court permitted a non-degreed spouse to recoup money for financial contributions toward the acquisition of an advanced degree by the other spouse. The restitution remedy was termed "reimbursement alimony" by Justice Morris Pashman, writing for a unanimous Court in an opinion also holding that an advanced degree—in this case, an MBA—was not property subject to equitable distribution. The opinion is now frequently cited and routinely applied in New Jersey family part litigation to compensate the non-degreed spouse for monies previously expended throughout the course of the marriage related to the acquisition of a college or advanced degree for the other spouse.

Since *Mahoney* was decided 33 years ago, long before the explosion of costs related to the acquisition of a college or advanced degree, the Supreme Court has not yet specifically addressed responsibility for spousal student loan debt existing at the time of a divorce. Trial courts and attorneys have since struggled with the issue due to the fact that New Jersey case law decided after *Mahoney* offers little direction or analysis. In fact, responsibility for such debt has been the subject of dozens of learned opinions in other jurisdictions across the country, with clear principles emerging to analyze and attribute responsibility for spousal student loan debt. The logic of *Mahoney*, when read in conjunction with these opinions, creates complementary restitutive standards to address both previous expenditures throughout the marriage as well as debt existing as of the date of the filing of the complaint related to the acquisition of a college or advanced degree.

The New Reality of Spousal Student Loan Debt in Divorce

The division of spousal student loan debt in divorce is largely a function of post-*Mahoney* socioeconomic trends. It is well established that people are now marrying later in life, more people are pursuing higher education, and the expense of attending a college or a university has increased dramatically.[2] It is not uncommon for litigants initiating a divorce to confront enormous student loan debt, upwards of $25,000, $50,000 or even $75,000. Next to a mortgage, student loan debt is often the most significant financial obligation incidental to the matrimonial estate.

Mahoney—A Restitutive Remedy for Monies Previously Expended During the Marriage

The *Mahoney* Court was presented with a very narrow issue: whether an MBA degree is considered property and, therefore, subject to equitable distribution in a divorce. For a number of important reasons, the New Jersey Supreme Court declined to treat professional degrees as marital property subject to distribution. However, in attempting to create a remedy for the non-degreed spouse, the Court surveyed decisions from many sister jurisdictions and recognized the existence of certain divorce-related remedies to compensate a spouse who supports another spouse in the acquisition of a learned degree during a marriage.

In fashioning a remedy, Justice Pashman wrote:

> Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy.
>
> In this case, the supporting spouse made financial contributions towards her husband's professional education with the expectation that both parties would enjoy material benefits flowing from the professional license or degree. It is therefore patently unfair that the supporting spouse be denied the mutually anticipated

benefit while the supported spouse keeps not only the degree, but also all of the financial and material rewards flowing from it.[3]

The Court, therefore, specifically held as follows:

> To provide a fair and effective means of compensating a supporting spouse who has suffered a loss or reduction of support, or has incurred a lower standard of living, or has been deprived of a better standard of living in the future, the Court now introduces the concept of reimbursement alimony into divorce proceedings. The concept properly accords with the Court's belief that regardless of the appropriateness of permanent alimony or the presence or absence of marital property to be equitably distributed, there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training. Such reimbursement alimony should cover all financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.[4]

The *Mahoney* Court articulated a restitutive remedy to compensate a non-degreed spouse for *past* expenditures made during the course of the marriage that either directly or indirectly assisted the degreed spouse in achieving his or her diploma. What the *Mahoney* Court did not specifically address (as the issue was not before it) was responsibility for spousal student loan debt existing as of the initiation of the divorce case. As discussed above, this is likely due to the fact that significant student loan debt was not a common circumstance at the time the opinion was authored in 1983.

Legal Principles from Sister Jurisdictions, Which Have Specifically Addressed Spousal Student Loan Debt in Divorce

Many United States jurisdictions apply community property principles to address the division of assets and debts in divorce. Presently, there are 10 community property jurisdictions in America: Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. Despite the difference between community property and equitable distribution concepts, similar principles and trends emerge to address spousal student loan debt.

Dozens of decisions from both community property and equitable distribution jurisdictions can be cited that identify three common principles utilized by the majority of American jurisdictions when addressing the issue.[5]

Use of the Loan Proceeds

Based upon a survey of case law in all United States jurisdictions, the primary inquiry advanced in each reported opinion relates to the *use* of the loan proceeds.[6] In the event the loan proceeds are used strictly for educational purposes such as payment of tuition, the degreed spouse is generally held responsible for the debt. However, in the event the loan proceeds are used for general living expenses such as housing, utilities, childcare, groceries, etc., the debt is almost always divided between the divorcing spouses.

In *Wharton v. Wharton*,[7] the Delaware court determined both parties should be responsible for the wife's student loan debt because the proceeds were used for non-educational purposes, including family living expenses. The same result was reached in *Eldrige v. Eldridge*,[8] where loan proceeds were used for childcare and household expenses.

Contrast these decisions with *Piotti v. Piotti*,[9] where the Pennsylvania Superior Court held the wife responsible for student loan debt utilized exclusively for her educational expenses.[10]

Date of Debt Creation and Length of Marriage[11]

A second principle that emerges from decisional authority surveyed concerns the timing of the debt in relation to the length of the marriage.[12] Specifically, if the debt attendant with the degree is created early in the marriage and the marriage is of a significant length where both spouses enjoy the fruits related to the advanced degree, the decisions surveyed generally require a division of the debt at the time of divorce. However, if the degree and attendant debt is acquired near the end of the marriage, the majority of reported decisions require the degree holder to be responsible for the obligation.

By way of example, the responsibility of the degreed spouse for late marriage spousal student loan debt was established by the Indiana Court of Appeals holding

the husband responsible for his student loans when the parties separated two months before his law school graduation, in *Roberts v. Roberts*.[13] Similarly, in *Spears v. Spears*,[14] the husband was required to assume $233,000 of student loan debt where he received his medical license in 2008 and the wife filed for divorce in 2009.

In *Warren v. Warren*,[15] on the other hand, the North Carolina Court of Appeals upheld a trial court decision classifying the wife's student loan as a marital obligation where the court found the debt was incurred during the marriage and the parties were together long enough to mutually enjoy the benefits of the wife's advanced degree.

In California, the state legislature codified a time-related protocol to address spousal student loan debt. Pursuant to Section 2641 of the California Family Code, a rebuttable presumption exists that a marriage of 10 years in length or longer substantially benefits from the acquisition of a college or advanced degree, rendering the student loan debt subject to community property division.

There is a slight variation on this theme. In the event premarital educational debt is paid off during the marriage, the majority of the jurisdictions surveyed addressed this in a fashion similar to the *Mahoney* Court, and offer some form of a restitutive remedy to the non-degreed spouse.

Ability to Pay[16]

In virtually every decision reviewed, irrespective of whether the state recognizes community property or equitable distribution, the courts almost always consider the ability of the parties to pay the debt when assigning responsibility for the obligation.[17] In several of the opinions this represents the dispositive criteria in addressing spousal student loan debt.

In *Spears v. Spears*,[18] the Arkansas Appellate Court held that no presumption regarding responsibility or spousal student loan debt exists, and the ability of the parties to pay represents the key consideration. The relative economic position of the parties and their ability to pay was likewise critical to the Supreme Court of Alaska in allocating student loan debt in the decision *McDougall v. Lumpkin*.[19] In Indiana, the *Love* Court held the degreed spouse's future earnings potential directly attributable to the degree was dispositive in assigning responsibility for the student loan debt.[20]

Conclusion

Mahoney remains viable law to compensate a non-degreed spouse for expenditures made throughout the course of the marriage. The principles identified above create a complementary restitutive remedy. Use of loan proceeds, the date of debt acquisition and length of marriage, and ability to pay represent useful criteria when determining responsibility for spousal student loan debt existing at the time of divorce complaint filing.

The three-part criteria described above is consistent with the analysis articulated by the Appellate Division in *Monte*,[21] recognized as the leading New Jersey decisional authority apportioning responsibility for debt incurred during the marriage.

In *Monte*, Judge Neil F. Deighan stated a liability will be subject to division where both parties are cognizant of the debt incursion and benefited from the encumbrance.[22] The court also determined the timing of the debt creation is an important factor.[23] If incurred at the break-up of the marriage, implicitly providing no benefit to the joint marital enterprise, it should not be apportioned between the parties.[24] The court further noted that, irrespective of the *bona fides* of the debt as a marital obligation, consistent with *Painter*,[25] it can be disproportionately allocated based upon ability to pay.[26]

Consistent with *Monte*, a party seeking the equitable distribution of spousal student loan debt existing at the time of complaint filing has the evidential burden of establishing traceable debt obligations subject to division. Counsel should be vigilant in fashioning discovery inquiries to specifically address all aspects of spousal student loan debt, including origination documentation, depository and bank statements, as well as the preparation of interrogatories and request for admissions specifically designed to identify and address the use of loan proceeds.

Christopher Rade Musulin is a principal with Musulin Law Firm, LLC, in Mount Holly.

Endnotes

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3. *Mahoney*, *supra*, 91 N.J. at 500.
4. *Id*. at 501.
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7. *Wharton v. Wharton,* 2012 Del. LEXIS 228 (DE 2012) (published in table format at 44 A.3d 923).
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17. *See id*.
18. *Spears v. Spears*, 2013 Ark. App. 535.
19. *McDougall v. Lumpkin*, 2004 Alas. LEXIS 100 (Aug. 4, 2004).
20. *Love v. Love*, 10 N.E.3d 1005 (Ind. App. 2014).
21. *Monte v. Monte*, 212 N.J. Super. 557 (App. Div. 1986).
22. *Id*. at 566-67.
23. *Id*.
24. *Id*.
25. *Painter v. Painter*, 65 N.J. 196 (1974).
26. *Monte, supra*, 212 N.J Super. at 567, *citing id*.

What Happens to Frozen Embryos When the Parents Can't Agree on What Should be Done With Them? An Analysis of the Law in New Jersey and Across the Country

by Rebecca Peskin

Since its American debut in 1981, assisted reproductive technology (ART) has helped thousands of infertile and same-sex couples realize their dream of starting a family. ART refers to "[a]ll treatments or procedures that include the handling of human eggs or embryos to help a woman become pregnant."[1]

In 2013 alone, over 190,000 ART procedures were performed in the United States, an increase of 25 percent from 2004.[2] Many of these procedures were performed at the dozens of ART clinics located in New Jersey.[3]

With the legality of same-sex marriage and the continued improvement in technology, ART is likely to continue to grow in popularity across the country.

This article will focus on the ART procedure of embryo cryopreservation (*i.e.*, freezing) which, like other infertility treatments (surrogacy, sperm donation, etc.) continues to spur debate and foster new law in New Jersey and across the country.

Though frozen embryos[4] have produced healthy children for many couples who may have been unable to have children otherwise, their existence has created a unique family law problem: What happens when the frozen embryos outlast the relationship of the parties who created them and an agreement cannot be reached on what to do with them?

This article will define embryo cryopreservation; analyze the limited law addressing distribution of frozen embryos, including an in-depth look at a New Jersey case; and offer conclusions and recommendations on handling these matters in New Jersey.

What is Embryo Cryopreservation?

An ART treatment involves egg retrieval, which, unlike sperm retrieval, is a painful and invasive procedure, embryo creation, and embryo transfer to a woman's body.[5] If the transfer is successful, pregnancy and birth may result.

As it is often possible to retrieve several eggs at one time, cryopreservation of embryos was introduced as a means of allowing women the opportunity to attempt multiple embryo transfers, while sparing them the time, pain, and expense of repeated egg retrieval procedures.[6]

Frozen embryos can be stored for 10 years or more.[7] It is estimated that hundreds of thousands of frozen embryos are currently in storage throughout the United States.[8]

Treatment of Frozen Embryos Under the Law

Disputes over frozen embryos were catapulted into the public consciousness in April 2015, when the *The New York Times* published an op-ed by "Modern Family" star Sofia Vergara's ex-fiancé, Nick Loeb, regarding his California lawsuit seeking possession of frozen embryos the couple created during their engagement.[9] Loeb's article has been picked up by various media outlets and has prompted public debate over the legal treatment of disputed frozen embryos. To date, courts in only 10 states, including New Jersey, have addressed disputes involving the distribution of frozen embryos.[10]

The factual backgrounds of these 10 cases vary. Most involve married couples who disputed over the frozen embryos as part of their divorce, but one does not. Occasionally it was the man who sought possession of the embryos, but more often it has been the woman. Sometimes the party seeking possession of the frozen embryos sought to have them implanted in herself, and sometimes he or she wanted to donate the embryos to other infertile couples. In many of the cases the parties already had children or were capable of doing so, but for a few, the disputed frozen embryos represented their last chance to have a child genetically related to them.

With all of the factual disparities, it is no wonder

court rulings have also varied. However, the approaches taken by the courts in deciding these disputes can be placed into three categories: the contractual approach, the balancing test and the contemporaneous mutual consent model.[11]

As will be described in further detail below, the approach laid out by the New Jersey Supreme Court is a hybrid of the three approaches taken by other states.

The Contractual Approach

A majority of states have adopted the contractual approach. As its name implies, the contractual approach resolves disputes regarding distribution of frozen embryos by analyzing and enforcing contracts created by the parties, usually at the commencement of the ART procedure.

The first state to utilize the contractual approach was New York, in *Kass v. Kass*.[12] In that case, the wife sued, as part of a divorce, for the right to have the frozen embryos she created with her husband implanted in her over his objection.[13]

The court upheld the informed consent form the parties executed at the hospital where the wife's eggs were retrieved. The form provided, in relevant part, that their frozen embryos would not be released from storage without the written consent of both parties, and that if they could not reach an agreement, the embryos should be used for research.[14]

Accordingly, the court refused to permit implantation, reasoning that "[a]greements between progenitors... regarding the disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them[.]"[15]

The contractual approach was used next in the Washington case of *Litowitz v. Litowitz*.[16] In that case, the wife wished to have the parties' frozen embryos implanted in herself and the husband wished to donate them.[17]

The contract at the center of that dispute provided that the frozen embryos be disposed of when they "have been maintained in cryopreservation for five (5) years after the initial date of cryopreservation[.]"[18]

Relying on *Kass*, the court upheld the terms of the parties' contract and held that the embryos should be disposed of by the clinic because five years had passed since the date of cryopreservation.[19]

Interestingly, neither the husband nor the wife requested the court to order that the embryos be destroyed, though it was undisputed that they had agreed to thaw out and dispose of the embryos after five years of storage at the time they entered into the embryo cryopreservation contract. By utilizing the contractual approach and strictly enforcing the terms of the parties' contract, the Litowitz court did not take either party's change of heart into consideration, thus leaving them with a result that was undesired by both. To remedy this perceived flaw in the contractual approach, other states have departed from strict application of it, as will be described in further detail below.

Courts in Texas (2006) and Oregon (2008) also strictly enforced agreements addressing distribution of frozen embryos.[20]

As recently as June 2015, a court in Illinois applied the contractual approach to a unique set of facts.[21]

Karla Dunston was unmarried when she was diagnosed with an aggressive form of cancer.[22] She then learned her cancer treatment would result in ovarian failure and infertility.[23]

Her boyfriend at the time, Jacob Szarfranski, agreed on March 24, 2010, to immediately help her create embryos to be frozen for later use.[24] Prior to the egg retrieval procedure, the parties signed an informed consent form on March 25, 2010, which stated that no use would be made of the embryos without the consent of both parties.[25]

The parties' each provided genetic materials and several frozen embryos were created.[26]

The parties ended their relationship during Dunston's cancer treatment, and Szarfranski asked that she agree to donate the frozen embryos to science.[27] She refused.[28]

At trial, Szarfranski conceded that the parties entered into an oral agreement on March 24, 2010 to create the frozen embryos.[29] Based on the unique facts of the case, the court determined that Dunston's right to use the embryos was implicit in the oral agreement.[30] The court interpreted the language of the informed consent form to mean the clinic would abide by any agreement reached between the parties.[31] Relying on principles of contract law, the court concluded the oral agreement controlled because it was neither modified nor contradicted by the language of the informed consent form.[32]

The *Dunston* decision is a departure from *Kass* and its progeny because it upheld an oral agreement over a written contract.[33] In distinguishing *Kass*, etc., the *Dunston* court highlighted that the contracts into those cases involved "explicit language regarding the intended disposition of the pre-embryos in the event of a specific event."[34]

In contrast, the court reasoned that the informed

consent form in the instant case did not exhibit a choice by the parties regarding disposition of the embryos, but instead merely prevented the clinic from using the embryos in any manner without both parties' consent.[35] Because the oral agreement exhibited both parties' consent to Dunston's use of the embryos, the court awarded control of them to her.[36]

Given the delicate and extremely personal nature of these disputes, it is easy to see why the contractual approach is favored by the majority of states.

Analysis of the Contractural Approach

Under this approach, the courts are freed from making messy decisions about the rights of parents to decide whether to procreate and can instead utilize familiar principles of contract law. However, an issue with the contractual approach is that it does not allow for the parties to change their minds after the contracts are formed. Instead, as seen in *Litowitz*, courts using the contractual approach will strictly uphold the terms of contracts, even if neither party wishes to enforce those terms.[37]

Considering the sensitive and important decisions being made, it does not seem fair to bind parties to agreements made years earlier and, significantly, while broken marriages or relationships were still intact. The contemporaneous mutual consent approach and the New Jersey hybrid model approaches, which will be discussed in further detail below, address this issue within the contractual approach.

Interestingly, Massachusetts expressly rejected the contractual approach in *A.Z. v. B.Z.*[38] Though the parties to that case signed an informed consent form, the court refused to enforce the agreement as a matter of public policy."

The Balancing Approach

The balancing approach weighs the interest of the party wishing to utilize the frozen embryos against the other party's interest in avoiding unwanted parenthood.

The Tennessee case of *Davis v. Davis* was the first to decide distribution of frozen embryos and to utilize the balancing test.[39] In it, the wife sought to donate the frozen embryos she created with her husband over his objections.[40] When the frozen embryos were created in 1988, the technology was new. The parties did not execute a contract with the clinic, and they testified they did not even contemplate or discuss disposition of their embryos on the event of divorce.[41]

Though the *Davis* court held that "an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies...should be presumed valid and should be enforced as between the progenitors" there was no agreement to uphold.[42] Thus, the court was forced to chart new territory.

After an analysis of constitutional law, the court made the preliminary ruling that "the right of procreation is a vital part of an individual's right to privacy."[43] The court further concluded that "the right of procreational autonomy is composed of two rights or equal significance – the right to procreate and the right to avoid procreation."[44] Balancing the parties' rights against each other, the court concluded the wife's interest in donating the embryos did not outweigh the husband's interest in avoiding involuntary parenthood.[45] However, the court did note that the case would have been "closer" had the wife wished to use the frozen embryos herself, but only if she had no other reasonable means to achieve parenthood.[46] Significantly, the court also stated "[o]rdinarily, the party wishing to avoid procreation should prevail."[47]

The next state to apply the balancing approach was Pennsylvania, in *Reber v. Reiss*.[48] In that case, the party seeking possession of the frozen embryos (the wife) was infertile and had no means other than use of the frozen embryos to become a parent to a child genetically related to her.[49] The parties did not make any agreements regarding distribution of the embryos in the event of divorce.[50]

The court held that "because Wife cannot achieve genetic parenthood otherwise, we conclude that Wife's interest in biological procreation through the use of these pre-embryos outweighs Husband's professed interest against procreation."[51] Accordingly, the wife was granted access to the frozen embryos.[52] Significantly, the court gave weight to the wife's vow not to seek child support from her husband for any child born through use of the embryos.[53]

Though *Dunston* was decided under the contractual approach, in the interest of a complete record, the court did go through a balancing test analysis in its decision. As Dunston, like Reiss, was also infertile, the court also concluded that her right to procreate prevailed.[54]

Analysis of the Balancing Approach

The balancing approach forces courts to decide which party is more entitled to having his or her right to privacy respected. These decisions are difficult. Indeed, because the rights of two individuals must be weighed against one another, the balancing test requires tougher

decision making than the constitutional right to privacy tests, which weigh the rights of individuals against state interests. As such, it is no surprise that the contractual approach is favored by courts. Indeed, had there been a contract in *Davis*, the court's holding suggests it would have used that approach instead of the balancing test.

The Contemporaneous Mutual Consent Approach

As a response to the contractual and balancing test approaches, which the Iowa Supreme Court found did not adequately consider the question of when each party is entitled to a say regarding disposition of the embryos, the contemporaneous mutual consent approach was born in *In Re Marriage of Witten*.[55]

Under that approach, "no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors. If stalemate results, the status quo would be maintained. The practical effect will be that the embryos are stored indefinitely unless both parties can agree to destroy the fertilized eggs."[56]

Analysis of the Contemporaneous Mutual Consent Approach

The contemporaneous mutual consent approach is almost guaranteed to lead to stalemate, but it does give the parties full autonomy over their own reproductive lives. It also spares the court from making tough calls.

However, by forcing the parties to make the decision themselves or suffer the consequences if they cannot, the court is effectively denying them judicial recourse. This is arguably contrary to the purpose of the court system.

The New Jersey Approach

The Supreme Court of New Jersey laid out a hybrid approach to resolving disputes over frozen embryos in *J.B. v. M.B.*[57] In that case, the wife wanted the frozen embryos destroyed and the husband wanted to donate them.[58]

Before undergoing the IVF procedure, the parties signed a consent form with the clinic agreeing that control of the embryos would be relinquished to the clinic in the event of divorce, unless the court specified otherwise.[59]

Reasoning that the informed consent form did not manifest a clear intent by the parties regarding disposition of the embryos in the event of divorce because it carved out an exception permitting the parties to obtain a court order, the court distinguished *Kass* and refused to apply the contractual approach.[60] The court went on to state that "a formal, unambiguous memorialization of the parties' intentions would be required to confirm their determination."[61] The court then applied the balancing test to the husband's claim that destruction of the embryos would infringe on his constitutional right to procreate.[62]

Taking guidance from *Davis*, the court declined to award the embryos to the husband, reasoning he would not be precluded from achieving genetic parenthood if the frozen embryos were destroyed.[63] The court went on to hold that agreements entered into at the time IVF is begun should be enforced, subject to the right of either party to change his or her mind about disposition of the frozen embryos up to the point of use or destruction of the embryos.[64] The court then stated that "if there is disagreement as to disposition...the interests of both parties must be evaluated. Because ordinarily the party choosing not to become a biological parent will prevail, we do not anticipate increased litigation as a result of our decision"[65]

Interestingly, the court reasoned that the right of either party to change his or her mind provided reasonable safeguards against the public policy concerns surrounding enforcement of contracts involving family relationships raised in *A.Z. v. B.Z.* and the notable New Jersey case *In Re Baby M.*[66]

The approach laid out by the New Jersey Supreme Court takes elements from the contractual approach because it will uphold unambiguous formal agreements. However, the Court's acknowledgement of the right of either party to change his or her mind, applies principles of the contemporaneous mutual consent approach.

The difference between the New Jersey approach and the contemporaneous mutual consent approach is that New Jersey courts will apply the balancing test in the event of a disagreement, instead of letting a stalemate arise. In this way, the New Jersey Supreme Court has laid out a hybrid approach to all three methods of deciding disputes over frozen embryos.

Conclusions and Recommendations

If forced to weigh the parties' interests, *dicta* in *J.B. v. M.B.* suggests that a New Jersey court may follow the *Reber* and *Dunston* cases and award the frozen embryos to an infertile party.[67] If such a case arises, it will be interesting to see whether New Jersey courts will force a parent to support a child the court specifically endorsed the creation of over that parent's objections.

Due the sheer number of frozen embryos currently in storage, and the increasing popularity of the procedure,

disputes over frozen embryos are not going away anytime soon. However, until New Jersey courts decide another such case, it remains to be seen exactly how a different set of facts will be interpreted. Notwithstanding, under New Jersey case law, a comprehensive, written, unambiguous contract is imperative.

When making these contracts, the parties should make sure to anticipate and make choices for all possible eventualities, including death and divorce, with the understanding that they may be bound by them in the future. If the forms provided by the clinic do not specifically address such contingencies, they may not be upheld. Therefore, the parties should seek independent counsel to evaluate the forms and prepare an additional agreement if necessary. ■

Rebecca J. Peskin practices with Salvaggio Law Group in Morristown.

Endnotes

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2. Centers for Disease Control and Prevention, 2013 Assisted Reproductive Technology, National Summary Report (Oct. 2015), *available at* cdc.gov/art/pdf/2013-report/art_2013_national_summary_report.pdf.
3. Centers for Disease Control and Prevention, 2013 Assisted Reproductive Technology, Fertility Clinic Success Rates Report (Oct. 2015), *available at* ftp.cdc.gov/pub/Publications/art/ART-2013-Clinic-Report-Full.pdf.
4. Embryo is a scientific term that refers to fertilized eggs at a certain stage of development. Fertilized eggs may be cryopreserved at different stages of development, and thus may be more properly referred to as pre-embryos or zygotes. However, for ease of reference, this article will refer to all cryopreserved fertilized eggs as frozen embryos.
5. Centers for Disease Control and Prevention, *supra* note 1.
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11. *In re Marriage of Witten*, 672 NW 2d 768, 774 (Iowa 2003).
12. 91 N.Y.2d 554 (N.Y. 1998).
13. *Id.* at 557.
14. *Id.* at 559-560.
15. *Id.* at 353.
16. 48 P. 3d 261 (Wash. 2002).
17. *Litowitz v. Litowitz*, 48 P. 3d 261, 264 (Wash. 2002).
18. *Id.* at 271.
19. *Id.*
20. *See Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006); *In Re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008).

21. *Szarfranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015).
22. *Id.* at 1136.
23. *Id.* at 1136-37.
24. *Id.*
25. *Id.* at 1138.
26. *Id.* at 1140.
27. *Id.* at 1141.
28. *Ibid.*
29. *Id.* at 1148.
30. *Id.* at 1149-53.
31. *Id.* at 1153-61.
32. *Id.* at 1155.
33. *Id.* at 1157-61.
34. *Id.* at 1161.
35. *Ibid.*
36. *Ibid.*
37. 48 P. 3d 261, 264 (Wash. 2002).
38. *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).
39. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1991).
40. *Id.* at 590.
41. *Id.* at 592.
42. *Id.* at 597.
43. *Id.* at 600.
44. *Id.* at 601.
45. *Id.* at 604.
46. *Ibid.*
47. *Ibid.*
48. 42 A.3d 1131 (Pa. Super. Ct. 2012).
49. *Id.* at 1133.
50. *Id.* at 1136.
51. *Id.* at 1140-42.
52. *Id.* at 1142.
53. *Id.* at 1141-42.
54. 34 N.E.3d 1132, 1162 (Ill. App. Ct. 2015).
55. 672 N.W.2d 768 (Iowa 2003).
56. *Id.* at 783.
57. 170 N.J. 9.2001).
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59. *Id.* at 14.
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Treatment of Social Security Disability Derivative Child Benefits

by Michael A. Weinberg

This article focuses upon the treatment of Social Security Disability derivative child benefits under the New Jersey Child Support Guidelines, consistent with the approach that these derivative benefits should appropriately be viewed as substitute income to the disabled parent.

Distinguishing Between Supplemental Security Income and Social Security Disability

Supplemental Security Income (SSI) is a means-tested benefit, which means that eligibility for the benefit, or its amount, is determined on the basis of the income or the resources of the party.[1] SSI benefits are not a substitute for lost income due to a disability. Instead, they are designed to supplement the recipient's income to assure that his or her income is maintained at a level viewed by Congress as the minimum necessary for subsistence.[2]

Social Security Disability (SSD) is a non-means-tested benefit program that is financed from payroll deductions. Unlike SSI benefits, SSD payments are designed to replace income lost due to an employee's inability to work because of a disability. As a non-means-tested benefit, SSD payments represent money an employee has earned through employment and also that his or her employer has paid for the benefit of the employee into a common trust fund under the Social Security Act.[3]

An applicant's 'disability' serves as the common qualifying requirement for both SSI and SSD benefits. The United States Social Security Administration defines a disability as follows:

> …the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment(s) that makes you unable to do your past relevant work (see §416.960(b)) or any other substantial gainful work that exists in the national economy.[4]

As a means-tested benefit, SSI benefits are payable only when the disabled person's income and resources are insufficient to provide for his or her basic needs. By comparison, SSD benefits are payable if the individual satisfies the disability requirement and also has sufficient lifetime earnings with contributions into the Social Security Retirement System to be insured for disability.[5] In the event a disabled person is determined to be ineligible for SSD benefits, he or she may be eligible for SSI benefits under the applicable means test.

Availability of a Derivative Benefit to the Child

When a parent is getting SSD, the dependent child of that parent may be able to receive SSD dependent benefits directly from the Social Security Administration based upon the parent's benefits. Within this context, federal law provides that a child of a parent collecting Social Security benefits is entitled to an insurance benefit, provided that the child:

> (i) Has filed application for child's insurance benefits,
> (ii) At the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and
> (iii) Was dependent upon such individual….[6]

With regard to the amount of the Social Security Disability derivative benefit to be received by the child, 42 U.S.C. § 402(d) provides, in part:

> Such child's insurance benefit for each

> month shall, if the individual on the basis of whose wages and self-employment income the child is entitled to such benefit has not died prior to the end of such month, be equal to one-half of the primary insurance amount of such individual for such month. Such child's insurance benefit for each month shall, if such individual has died in or prior to such month, be equal to three-fourths of the primary insurance amount of such individual.

The payment of the Social Security Disability derivative benefit to the dependent child does not affect the amount of the SSD benefit paid to the disabled parent. Moreover, the dependent child does not have to be in the custody of the disabled parent in order to receive the Social Security Disability derivative benefit.[7]

By comparison, if a parent is approved for SSI disability benefits, there is no provision for his or her dependents because SSI is a means-tested benefit. Thus, even though the disability requirements are the same, SSI benefits are based upon the needs of the individual and are only paid to the qualifying person.

Qualification of SSD Benefits and SSI Benefits as Income under the New Jersey Child Support Guidelines

SSD benefits are considered as a substitute for earned income and, therefore, constitute a non-means-tested benefit. As such, SSD benefits are considered to be income under the New Jersey Child Support Guidelines. Indeed, Appendix IX-A to the New Jersey Child Support Guidelines specifically includes "disability grants or payments (including Social Security disability)" as a source of gross income in determining child support.[8]

The New Jersey Child Support Guidelines specify that as a means-tested benefit, SSI is only meant to replace lost earnings of the parent.[9] As such, SSI benefits are not considered as a source of income in determining child support under the New Jersey Child Support Guidelines. Within this context, reference is made to *Burns v. Edwards*,[10] where the impact of a parent's SSI benefits upon child support was specifically addressed. In *Burns*, the issue before the Court was whether SSI benefits received by a disabled parent could be utilized as income when calculating a child support obligation when the benefits were the sole source of support of the parent and income could not otherwise be imputed to the parent.

In reviewing the matter, the Court explained:

> We recognize the basic obligation of parents to support their children is deeply rooted in our jurisprudence, as well as the intent of Congress to require parents to support their children in order to lessen the need for public assistance. However, it is undeniable that American society is also confronted with the problem of disabled parents who are unable to support themselves, much less their children….
>
> A state court confronted with the issue of whether SSI benefits are to be considered as income when calculating a parent's child support obligation faces the dilemma of recognizing the federal mandate of PRWORA to maximize child support establishment and collection based upon consideration of all sources of income, with the clear federal intent of Congress to provide a recipient of SSI benefits a minimum level of income necessary for subsistence.[11]

Based upon its finding that the defendant/husband was totally disabled and surviving solely on SSI benefits, the Court held that the "intent of the child-support framework to ensure that parents support their children has no application to those parents whose sole source of income is SSI, and where such parents have no ability to generate additional income." Thus, the Court concluded that "[t]o require SSI benefits to be diverted under such circumstances for child-support purposes would undercut the purpose of Congress in enacting the SSI program…."[12] Nevertheless, the Court did find that a child support order may be entered against a parent who is an SSI recipient where it is determined the parent is earning, or has the ability to earn, additional income.[13]

Achieving 'Fair and Adequate Child Support Awards'

Appendix IX-A of the New Jersey Child Support Guidelines provides, in part, that the guidelines "were developed to provide the court with economic information to assist in the establishment and modification of fair and adequate child support awards." It further provides that "it is very important that the children of this State not be forced to live in poverty because of family disruption and that they be afforded the same opportunities available to children in intact families with parents of similar financial means as their own parents."[14]

Prior to May 2014, the New Jersey Child Support Guidelines accounted for Social Security Disability derivative child benefits by excluding the benefits from either parent's income and by deducting the benefits from the total basic child support amount before calculating each parent's share of the basic child support amount. Under this approach, no distinction was made regarding which parent was disabled when accounting for Social Security Disability derivative child benefits under the New Jersey Child Support Guidelines.

Although the previous method seemingly worked well when the non-custodial parent was the disabled party, it often yielded an inequitable result where the custodial parent was the disabled party, as reflected below. In an effort to address this possible inequitable result, the then-existing version of Appendix IX-B to the New Jersey Child Support Guidelines contained the following provision:

> There may be circumstances when the CP/PPR is the party who is disabled and the child's share of derivative government benefits such as Social Security Disability greatly reduces child support at a time when the CP/PPR's personal income is also reduced. This creates Line Instructions for the Sole Parenting Worksheet a situation where the government benefits have the overall effect of being treated as a contribution made entirely by the NCP/PAR which may result in an injustice to the child. Under these circumstances, deviation from the guidelines may be required to prevent a financial hardship in the child's primary household due to the substantial reduction, or possible elimination, of child support caused by the application of the deduction allowed for government benefits against the basic child support amount.[15]

Thus, rather than setting forth a consistent, uniformed approach to address Social Security Disability derivative child benefits, the prior version of the New Jersey Child Support Guidelines left the matter within the discretion of the court in situations where the custodial parent was the disabled party "to prevent a financial hardship in the child's primary household."

In order to provide a more consistent, uniformed approach, the New Jersey Child Support Guidelines were amended, effective May 1, 2014, to now include the amount of the Social Security Disability derivative child benefit in the net income of the disabled parent, regardless of whether the disabled parent is the custodial parent or the non-custodial parent. In the event the Social Security Disability derivative child benefit is included in the net income of the disabled, non-custodial parent, the non-custodial parent receives a dollar-for-dollar credit for the amount of the Social Security Disability derivative benefit against the child support obligation, up to the amount of the obligation.

Consistent with the foregoing, Appendix IX-B to the New Jersey Child Support Guidelines now includes a new Line 5, entitled "Government (Non-Means Tested) Benefit for the Child." This section of Appendix IX-B provides that government benefits for a child fall into the following three categories:

a. **Means-tested benefits**—Benefits based on the fact that the child or parent has minimal income and requires government assistance. This includes, but is not limited to, Temporary Assistance to Needy Families (TANF), Deficit Reduction Act (DEFRA), Refugee Assistance, rent subsidies, food stamps (SNAP), and Supplemental Security Income for the Aged, Blind or Disabled (SSI), kinship guardian subsidies. Means-tested benefits for the child are excluded as income (not counted for either parent). Leave blank Line 5.
b. **Derivative benefits**—Benefits based on the contribution (e.g., work history, military service, disability, or retirement) of one of the parties is an essential factor in the child's eligibility for the benefit, without regard to family income. This includes but is not limited to Social Security Disability, Social Security Retirement, Black Lung, and Veteran's Administration benefits.... Enter the weekly amount of the derivative benefit on Line 5 of the parent whose contribution is the source of the benefit (i.e., if the Non-custodial Parent's work history and disability qualify the child for Social Security benefits, the 13 Line Instructions for the Sole Parenting Worksheet benefit for the child will be included on Line 5 Non-custodial Parent). Note, if the benefit is based upon

contribution of the Non- Custodial Parent, he or she will also receive a credit for the benefit on Line 15.

c. **Other benefits**—Benefits that are given without regard to family income or contribution (e.g., work history, military service, disability, or retirement) of either party. This includes, but is not limited to, adoption subsidies and Social Security benefits based on the work history of a non-party relative, such as a step-parent, grandparent, or deceased parent. Enter the weekly amount of this benefit on Line 5 of the parent who actually receives the financial benefit (usually the custodial parent).[16]

The previous Line 12 (Adjustment for Government Benefits) has been deleted from the New Jersey Child Support Guidelines worksheet. Moreover, consistent with the foregoing, Line 15 of Appendix IX-B to the New Jersey Child Support Guidelines, entitled Credit for Derivative Government Benefits for the Child Based on Contribution of the Non-custodial Parent, now provides:

> Enter the weekly amount of the government benefits paid to the custodial parent for the child (if any) that are based on the contribution (work history, military service, disability, or retirement) of the non-custodial parent in the Line 15 NCP column.
>
> NOTE: Benefits amount should match the government benefits for the child on Line 5 NCP column.[17]

As illustrated in the two hypotheticals set forth below, the amended approach set forth in the New Jersey Child Support Guidelines yields a more equitable result when addressing Social Security Disability derivative child benefits:

Hypothetical Number One – Disabled Custodial Parent

Factual Assumptions:

- The custodial parent is the disabled party and has a net income of $500 per week.
- The non-custodial parent has a net income of $1,500 per week.
- The parties' child receives a Social Security Disability derivative benefit of $250 per week.

New Jersey's Previous Approach[18]

Line 5 – Net income of the custodial parent is $500 per week; net income of the non-custodial parent is $1,500 per week. Combined net income is $2,000 per week.
Line 6 – Percentage share of income: custodial parent is 25%, non-custodial parent is 75%.
Line 7 – Basic child support amount from Appendix IX-F is $325 per week.
Line 12 – Adjustment for government benefits is ($250).
Line 13 – Total child support sward is $75 per week (*i.e.,* $325 - $250).
Line 14 – Each parent's share of the support obligation: custodial parent is $19 per week, non-custodial parent is $56 per week.
Line 26 – Child support order: $56 per week.

New Jersey's Current Approach[19]

Line 3 – Net taxable income: custodial parent is $500 per week, non-custodial parent is $1,500 per week.
Line 5 – Government (non-means-tested) benefits for the child: $250 per week.
Line 6 – Net income of the custodial parent is $750 per week (*i.e.*, $500 + $250); net income of the non-custodial parent is $1,500 per week; combined net income is $2,250 per week.
Line 7 – Each parent's share of income: custodial parent is 33%, non-custodial parent is 67%.
Line 8 – Basic child support amount (from Appendix IX-F Schedules) is $360 per week.
Line 13 – Total child support amount is $360 per week.
Line14 – Each parent's share of support obligation: custodial parent is $120 per week, non-custodial parent is $240 per week.
Line 15 – Government benefits for the child based on contribution of NCP: *No adjustment would be reflected since the custodial parent is the disabled party.*
Line 21 – Net child support obligation: custodial parent is $120 per week, non-custodial parent is $240 per week.
Line 27 – Child support order: $240 per week.

The above hypothetical presents the situation of a disabled custodial parent where the parties' child receives a Social Security Disability derivative benefit. Under New Jersey's *previous* method, the New Jersey Child Support Guidelines' obligation of the non-custodial parent is only $56 per week, regardless of the fact that the non-custodial parent is not the disabled party. By comparison, under New Jersey's *current* method, the New Jersey Child Support Guidelines' obligation of the non-custodial parent is $240 per week. Thus, this scenario highlights the significant financial impact upon the household of the disabled parent and the child under New Jersey's *prior* method, under which the non-custodial parent financially benefited from the custodial parent's disability.

Hypothetical Number Two – Disabled Non-custodial Parent

Factual Assumptions:

- The non-custodial parent is the disabled party and has a net income of $500 per week.
- The custodial parent has a net income of $1,500 per week.
- The parties' child receives a Social Security Disability derivative benefit of $250 per week.

New Jersey's Previous Approach[20]

Line 5 – Net income of the custodial parent is $1,500 per week; net income of the non-custodial parent is $500; combined net income is $2,000 per week.
Line 6 – Percentage share of income: custodial parent is 75%, non-custodial parent is 25%.
Line 7 – Basic child support amount from Appendix IX-F is $325 per week.
Line12 – Adjustment for government benefits: ($250).
Line 13 – Total child support award is $75 per week ($325 - $250).
Line 14 – Each parent's share of the support obligation: custodial parent is $56 per week, non-custodial parent is $19 per week.
Line 26 – Child support order: $19 per week.

New Jersey's Current Approach[21]

Line 3 – Net taxable income: custodial parent is $1,500 per week, non-custodial parent is $500 per week.
Line 5 – Government (non-means-tested) benefits for the child: $250 per week.
Line 6 – Net weekly income of the custodial parent is $1,500; net weekly income of the non-custodial parent is $750 (*i.e.*, $500 + $250); combined net income is $2,250 per week.
Line 7 – Each parent's share of income: custodial parent is 67%, non-custodial parent is 33%.
Line 8 – Basic child support amount (from Appendix IX-F Schedules) is $360 per week.
Line 13 – Total child support amount is $360 per week.
Line14 – Each parent's share of support obligation: custodial parent is $240 per week, non-custodial parent is $120 per week.
Line 15 – Government benefits for the child based on contribution of NCP: the non-custodial parents receives a dollar-for-dollar credit of up to $250 per week against the child support obligation.
Line 21 – Net child support obligation: custodial parent is $240 per week, non-custodial parent is $-0- per week (*i.e.*, $120 - $250).
Line 27 – Child support order: $-0- per week.

Hypothetical number two presents a situation where the non-custodial parent is the disabled party and the parties' child receives a Social Security Disability derivative benefit. Under New Jersey's *previous* method to address Social Security Disability derivative child benefits, the child support obligation of the non-custodial parent is $19 per week. By comparison, under New Jersey's current method, the non-custodial parent receives a dollar-for-dollar credit for the amount of the Social Security Disability derivative benefit (*i.e.*, $250) against the child support obligation, up to the amount of the child support obligation. This method yields a child support obligation of the non-custodial parent of $-0-per week, and reflects a far less significant financial impact upon the household of the disabled parent and the child.

Conclusion

Under New Jersey's *previous* method, the Social Security Disability derivative child benefit was credited against the basic child support amount from Appendix IX-F of the New Jersey Child Support Guidelines. While this method provided some relief to the disabled, non-custodial parent, that relief was limited by the fact that

the custodial parent's share of the total child support award was also proportionately reduced. Moreover, if the custodial parent was the disabled party, there was a significant reduction to the non-custodial parent's child support guidelines' obligation under the *prior* method, notwithstanding the fact that the non-custodial parent was not disabled. Thus, under the *prior* method, the non-custodial parent derived a financial benefit to the detriment of the disabled, custodial parent and the child.

In recognition of its stated goal of providing "fair and adequate child support awards," the New Jersey Child Support Guidelines were amended to now include the amount of the Social Security Disability derivative child benefit in the net income of the disabled parent, regardless of whether the disabled parent is the custodial parent or the non-custodial parent. In the event that the Social Security Disability derivative child benefit is included in the net income of the disabled, non-custodial parent, the non-custodial parent receives a dollar-for-dollar credit for the amount of said derivative benefit against that party's child support obligation, up to the amount of the obligation. Since the Social Security Disability derivative child benefits do not result from a disability of the non-custodial parent, there is no credit against the non-custodial parent's share of the total child support obligation under New Jersey's *current* method.

Michael A. Weinberg is a shareholder in Archer & Greiner, P.C.

Endnotes

1. 8 C.F.R. §213a.1.
2. *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981).
3. 42 U.S.C. § 405.
4. 20 C.F.R. § 404.1505.
5. *See* 20 C.F.R. § 404.130 which sets forth four different rules for determining if a person is insured for purposes of establishing a period of disability or becoming entitled to disability insurance benefits.
6. 42 U.S.C. § 402(d).
7. 20 C.F.R. § 404.350, § 404.353 and § 404.366.
8. N.J. Child Support Guidelines, Appendix IX-B, Sources of Income.
9. N.J. Child Support Guidelines, Appendix IX-B, Types of Income Excluded from Gross Income.
10. Burns v. Edwards, 367 N.J. Super. 29 (App. Div. 2004).
11. *Id*. at 40-41.
12. *Id*. at 41.
13. *Id*. at 50; *see also Crespo v. Crespo*, 395 N.J. Super. 190 (App. Div. 2007).
14. New Jersey Child Support Guidelines, Appendix IX-A, paragraph 1.
15. New Jersey Child Support Guidelines, Appendix IX-B, effective Sept. 1, 2013.
16. New Jersey Child Support Guidelines, Appendix IX-B, Line 5.
17. New Jersey Child Support Guidelines, Appendix IX-B, Line 15.
18. Per 2013 New Jersey Child Support Guidelines, effective April 24, 2012.
19. Per 2016 New Jersey Child Support Guidelines, effective Sept. 1, 2015.
20. Per 2013 New Jersey Child Support Guidelines, effective April 24, 2012.
21. Per 2016 New Jersey Child Support Guidelines, effective Sept. 1, 2015.