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Chair's Column

A Call to Action to Protect our Judiciary

By Robin C. Bogan

As New Jersey family law practitioners, we are strong advocates for our clients and their families. Part of that advocacy must be to ensure that our judiciary is functioning properly and that our clients have reasonable and timely access to courts when needed.

During the COVID-19 pandemic, our court system made incredible strides with technology including implementing remote court appearances, filings through JEDS, and initiatives to protect public health and safety. In the aftermath, the spotlight must brightly shine on the judicial vacancy crisis. Our courts are facing an insurmountable backlog of cases. With limited judges to service the work and 22 more judicial vacancies on the horizon in 2022, the backlog will increase and access to justice will be significantly compromised if this crisis is not immediately addressed. We must act to protect the administration of justice and to promote our third branch of government.

On April 11, 2022, Judge Glenn A. Grant, New Jersey's Administrative Director of the Courts, testified before the Assembly Budget Committee.[1] Judge Grant warned legislators of the impending judicial vacancy crisis.[2] Judge Grant reported that as of May 1, 2022, the courts will have 75 judicial vacancies.[3] While the judiciary has operated previously with 25 to 30 judicial vacancies, the 75 vacancies would be a "historic high" and represents a 16% vacancy rate.[4] The counties that are suffering with the highest judicial vacancies are Bergen with 8, Essex with 12, Hudson with 7, Mercer with 7 and Union with 6.[5]

Judge Grant explained, "We simply cannot expect to confront the aftermath of a hundred-year crisis while facing an unprecedented number of judicial vacancies."[6] Judge Grant also highlighted that family court and landlord/tenant matters were two areas significantly impacted by the pandemic and the judicial shortages.[7] According to Judge Grant's testimony, pending landlord/tenant cases increased more than four times.[8] Domestic

violence pending cases increased from 1,869 in February 2020 to 3,480 in February 2022, representing an increase of more than 85%.[9] Domestic violence cases older than three months have also increased more than 10 times, from 41 in February 2020 to 442 in February 2022.[10] Judge Grant recognized that the longer we wait to address this problem, the worse it will get.[11]

On Feb. 15, 2022, the mandatory retirement of Justice Faustino J. Fernandez-Vina was a stark reminder of this crisis as New Jersey's shortage of judges further impacted the Supreme Court.[12] The other open seat was created when Justice Jaynee LaVecchia retired from the Supreme Court in December 2021. Justice Barry T. Albin will be reaching the mandatory retirement age of 70 on July 7, 2022.[13] Gov. Phil Murphy's decision to replace Justice LaVecchia with Rachel Wainer Apter has been held up for over a year because State Sen. Holly Schepisi (R-Bergen) invoked Senatorial courtesy.[14]

Whenever there is a judicial vacancy, the ripple effect negatively impacts the other sitting judges, lawyers, and litigants. For judges who are currently sitting on the bench, a judicial vacancy causes a shift and reallocation of work so that each judge is taking on more work than one judge may be expected to handle. Burnout is inevitable. Not only are the sitting judges overwhelmed and overworked, but it is even more daunting for them when no help is in sight. This results in judges having limited time with each case due to the sheer volume. Work hours for family part judges in New Jersey are not limited to the 8:30 a.m. – 4:30 p.m. workday, as working evenings, weekends, vacations, and holidays has become routine. The quantity and size of FM motions alone requires judges to expend a considerable amount of time preparing for oral argument. This pace is not sustainable in the long term. Failing to remedy the judicial vacancy crisis may lead to existing judges leaving the bench before their normal retirement age. This outcome would further exacerbate the judicial vacancy problem.

A judicial vacancy crisis also puts family law attorneys in a quandary. It is incredibly difficult to counsel clients if you are unsure when a case will be heard. While the backlog of cases has caused family law practitioners to increasingly use tools such as mediation and arbitration to resolve cases, some matters require judicial intervention. Unfortunately, the backlog has resulted in delayed justice. Applications are not filed in cases where they should because the decision will not be rendered in a reasonable time. For example, a motion to resolve summer parenting time filed in April, which would typically be heard in May or June, may not be heard until August. The backlog also increases the filing of emergent applications for time sensitive matters that normally would not qualify as emergent.[15] Cases that must be tried may require updated expert reports due to the passage of time, which increases experts' fees as well as litigation costs as a whole.[16]

As family lawyers, we are deeply aware that docket numbers represent people, families, and children. We witness the emotional, mental, and financial toll on families forced into a holding pattern, one that can last for several years. Frankly, when access to justice is limited or delayed, a broken judicial system encourages those litigants who are not abiding by court orders or final agreements to continue to do so. It is to their advantage to continue bad behavior as there are no consequences. Delayed access to courts puts people seeking enforcement in a financially precarious position. Even worse, languishing cases involving custody and parenting time put children of those families in limbo until those cases can be properly adjudicated. More difficult cases involving mental health issues, substance use or cases that require monitoring and court oversight become unmanageable. Judges simply do not have time to devote to these cases when faced with their overwhelming caseload. In response to judicial shortages, our court system often prioritizes certain dockets over others or shuts down some dockets completely, causing certain litigants and case types to be unfairly denied access to our court system.[17]

Judicial vacancies are not a new issue, but with 75 vacancies and possibly 22 more, we are on the brink of a crisis of epic proportion. The 25-30 judicial vacancies in 2018 and 2019 hindered the public's access to the courts, created an unmanageable backlog for the judiciary, limited the types of trials that took place, but most importantly, caused significant delay in the administration of justice. If our senators and governor fail to avert this crisis, it will most certainly cause a state of emergency in our judiciary. New Jersey citizens will be denied access to justice and the existing backlog will escalate, resulting in worsening the public's ability to have their disputes adjudicated in a reasonable and timely manner.

Each family law attorney must do their part to defend the judiciary and speak out when its ability to properly function is threatened. As New Jersey State Bar Association Immediate Past President Domenick Carmagnola said recently, "What the governor's office needs to do is

get a little more aligned with what's going on locally. … Try to focus on particular counties and what is holding things up. That will go a long way to potentially loosening this log jam."[18] It is our responsibility to urge our senators, (especially in Bergen, Essex, Hudson, Mercer, and Union counties), to take prompt action to consider all pending judicial nominations and Murphy to timely nominate and re-nominate judicial candidates to maintain and preserve the integrity of New Jersey's judiciary.

The time to act is now. In 15 minutes, here is how you can help to protect our judiciary:

- Make a copy of this article and send it to your senator with a cover letter indicating that the judicial vacancy crisis needs to be addressed immediately. You can find the contact information for the senator in your district at www.njleg.state.nj.us/legislative-roster.
- Contact your senator by calling or writing your own letter/email.
- Contact your County Bar Association leadership and ask them to prepare a resolution to send to Murphy or write individual letters to their senators.
- Reach out to media publications and outlets to alert them to the judicial vacancy crisis.

The judicial vacancy crisis is a serious and long-standing issue that must be remedied. Please do not wait to do your part. Together, we can be the catalyst of change. ■

Endnotes

1. News Release, "Remarks of Glenn A. Grant, Administrative Director of the Courts, to the Assembly Budget Committee," April 11, 2022, njcourts.gov/pressrel/2022/pr041122a.pdf?c=UBm.
2. *Id.*
3. *Id.*
4. *Id.*
5. O'Dea, Colleen, "Courts need judges now, lawmakers warned," April 13, 2022, njspotlightnews.org/2022/04/nj-judge-record-high-judge-vacancies-massive-case-backlog-500-plus-people-detained-more-than-two-years/.
6. News Release, "Remarks of Glenn A. Grant, Administrative Director of the Courts, to the Assembly Budget Committee," April 11, 2022, njcourts.gov/pressrel/2022/pr041122a.pdf?c=UBm.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Racioppi, Dustin, "'Abject crisis' of judicial vacancies hits NJ Supreme Court: How it affects prominent cases," February 22, 2022, northjersey.com/story/news/new-jersey/2022/02/21/nj-supreme-court-retirement-judicial-case-backlog/6830337001; Parmley, Suzette, "N.J. Supreme Court has just 6 justices as politicians stall. What happens when there's a 3-3 tie?", March 7, 2022, nj.com/politics/2022/03/nj-supreme-court-has-just-6-justices-as-politicians-stall-what-happens-when-theres-a-3-3-tie.html.
13. *Id.*
14. *Id.* This is an unwritten rule designed as a check on power, allowing senators to block judicial nominees from their home county.
15. Often, these issues are resolved with a conference call. If both sides permit the court to render a decision on the issue, doing so may avoid delay and save both litigants the expense associated with a full application.
16. If a lawyer does not plan appropriately, the expert report may be outdated or stale.
17. The criminal docket, certain CIC cases, FV and then FD are prioritized. A shutdown of the FM docket may create some short-term relief, but the reduced backlog in the one or two areas that are given attention will soon be overshadowed by the increased backlog in the FM docket. Implementing action plans that enable all dockets to function even on a reduced basis, is a better approach.
18. O'Dea, Colleen, "Courts need judges now, lawmakers warned," April 13, 2022, njspotlightnews.org/2022/04/nj-judge-record-high-judge-vacancies-massive-case-backlog-500-plus-people-detained-more-than-two-years/.

Inside this issue

Executive Editor's Column

Why are There No Concrete Standards for a Judge to Follow When Conducting an Interview of a Child in Contested Child Custody Matters?

By Ron Lieberman

Judges sitting in the Family Part face monumental tasks on a daily basis but none more so than when "confronted with the awesome responsibility of deciding who should have custody of the child."[1] But when our judges seek to determine the preference of the child in appropriate cases through a judicial interview of the child or children,[2] the only guidance provided to a judge for conducting such an interview is to make sure it is "properly conducted" so that the judge can "see and hear the child first-hand…."[3] Other than those few vague, ambiguous words, judges who perform child interviews in contested child custody cases need only ensure the interview is done "with dignity, compassion, and great sensitivity to the extraordinary circumstances that have brought this child before the court."[4] Such lack of guidance does no one any good and should be reviewed by the Family Practice Committee of the New Jersey Supreme Court.

Believe it or not, 35 years ago, Dr. Richard Gardner wrote for this publication and offered information about a child's ability to provide information in child custody litigation.[5] Gardner offered sample questions and inquiries in various areas of child custody disputes.

But little to nothing has changed to offer a more formalized structure of judicial interviews since 1987. Since that time, the only real change in the law regarding judicial interviews was a rule modification in 2002 amending *R.* 5:8-6 to permit a judge the latitude to conduct an interview of a child as part of a custody hearing. The pre-2002 rule required a judge to do so. But to date, how a judge should conduct such an interview is left to almost boundless judicial discretion, other than having the interview conducted in camera and properly preserved, with counsel being provided with the opportunity to submit questions ahead of time, and requiring a judge to place its reasons on the record for not asking any of the questions posed.[6] The question posed implicitly by Gardner all those years ago remains unanswered: should there be model questions for a judge to follow when conducting an interview of a child in a contested child custody matter?

A judge's decision in a child custody matter is reviewed upon an abuse of discretion standard[7] with a judge being provided with "wide latitude" for crafting resolutions.[8] Only when such child custody decisions are "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis"[9] will they be overturned. Despite such latitude, or maybe because of it, the law currently leaves it up to each judge to decide how to conduct a child custody interview. But is that really the best way to interview a child, with such a decision reviewable upon abuse of discretion when there are no definable boundaries on such an exercise of discretion?

Most practitioners would hopefully agree having a child testify in open court as a witness and be asked to declare a parental preference should be a situation as rare as a sighting of Halley's Comet (which passes by Earth once every 75-76 years).[10] But, oftentimes, when a party wants a judge to conduct a judicial interview of a child or children, it is not for benevolent purposes. Instead, that interview is sought because that party believes the child is aligned with them. So, each judge is left up to their individual subjective abilities to determine any useful information from a child, regardless of the fact a child has different communication skills than an adult and does not have the same language skills as an adult.[11] How a judge frames a question is as important as what the child says in response.[12] But what guides how a judge communicates with a child and frames a question? Nothing.

Studies have revealed how questions are posed to children can lead to different results. For example, repeat-

ing the same question but with different phrases can lead a child to provide an answer designed to satisfy the examiner.[13] Perhaps counterintuitively, a judge's direct questions about the legal dispute before that judge can cause a child to provide unreliable answers.[14] Surprisingly, asking a child about their daily activities and their feelings has been shown to lead to more accurate answers than direct questions about the matter at hand.[15]

Some professionals have provided "suggestions for the structure of the meeting and possible questions"[16] between a child and a judge, as follows:

1. "[O]pen-ended questions" with a "circular or narrative method of questioning;"
2. Use "age-appropriate language" to explain "the purpose of the meeting;"
3. Ask "basic information about the child;"
4. Ask "how the child was prepared for the meeting;"
5. Inquire what is the child's "typical day with each parent;"
6. Seek a "sense of the child's view about the separation…and how the current parenting arrangements have been for the child;"
7. Ask about "time with [a] parent if contact is limited;"
8. Ask "about the child's experience of the parental separation;"
9. Follow up on a child's information about parental preference "carefully and in an age-appropriate manner;"
10. Offer "future-oriented questions;" and
11. "[G]ive the child a verbal summary of what the judge has understood."[17]

Those suggestions, if implemented for child custody interviews, would permit the judge, the practitioner, and the litigant to know that judicial discretion has been properly implemented. They would also provide some measure of predictability across the state as to how those interviews will be conducted. What is the harm in having any of those scenarios come to pass? None.

Knowing there would be standardized procedures in place when *R.* 5:8-6 is invoked for a judicial interview of a child would provide litigants with confidence in knowing their child or children are being treated in a manner likely to provide useful information during a judicial interview. Something more is needed to guide judges than merely directing a judge to ensure the interview is "properly conducted" and "with dignity, compassion, and great sensitivity to the extraordinary circumstances that have brought this child before the court." Those vague terms will mean different things to different people, and with so much at stake in carrying out the "awesome responsibility" of deciding where a child should reside, our judges and our clients deserve to know what may be asked of a child.

"The nature of the judicial process requires the power to revise, to limit, and to overrule if justice is to be done."[18] With so much at stake, the time has come for the Family Practice Committee of the New Jersey Supreme Court to review the issue of guidelines for judges to follow when conducting interviews of children in contested child custody matters.

Endnotes

1. *D.A. v. R.C.*, 438 N.J. Super. 431, 458 (App. Div. 2014).
2. *Beck v. Beck*, 86 N.J. 480, 501 (1981).
3. *Mackowski v. Mackowski*, 317 N.J. Super. 8, 14 (App. Div. 1998).
4. D.A., supra, 438 N.J. Super. at 460.
5. Richard A. Gardner, Judges Interviewing Children in Custody/Visitation Litigation, Vol. 7, No. 2, *New Jersey Family Lawyer* (Aug/Sept.1987).
6. R. 5:8-6.
7. *Pascale v. Pascale*, 140 N.J. 583, 611 (1995).
8. Beck, supra, 86 N.J. at 485.
9. *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571 (2002).
10. space.com/19878-halleys-comet.html.
11. *Interviewing Children in Child Custody Cases*, 18 J. Am. Acad. Of Mat. Lawyers 295, 303 (2002).
12. Id. at 305.

13. Barbara Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 Arizona L. Review 630, 657 (2003) citing Michael Siegal, *Knowing Children: Experiments in Conversation and Cognition* 15-38 (1991).
14. Atwood at 657 citing Siegal at 121-33.
15. Atwood at 657 citing Siegal at 121-33; citing also Florence W. Kaslow & Lita Linzer Schwartz, *The Dynamics of Divorce: A Life Cycle Perspective* 162 (1987).
16. Nicholas Bala, Rachel Birnbaum, Francine Cyr & Denise McColley, *Children's Voices in Family Court: Guidelines for Judges Meeting Children*, 47 Family L. Quarterly 379-396 (Fall 2013), citing Rachel Birnbaum, Barbara Jo Fidler & K. Kavassalis, *Child Custody Assessments: A Resource Guide for Legal and Mental Health Professionals* (2008).
17. Bala, Birnbaum, Cyr & McColley, at 388-391.
18. *State v. Witt*, 223 N.J. 409, 440 (2015).

A Day in the Life of a Family Court Judge

By Hon. Thomas Zampino (Ret.)

I was provided with the opportunity to sit as a family court judge in New Jersey Superior Court for two decades and except amongst those practitioners who previously served as family court law clerks, there seems to be some level of misperception about the daily life of a Judge on the bench. As a result, this publication's editor-in-chief, Charles F. Vuotto, Jr., suggested I write an eye-opening, jaw dropping expose of a typical day. This is going to, I am sure, illuminate many of you and may even prove an enriching experience.

The first thing a family court judge does in the morning is wake up. As you lumber out of bed, your mind immediately races to what will be before you that day. You think of the lawyers and litigants who will be entering the courtroom, as you saw the calendar when you left chambers the night before. Some of the appearances you pleasantly await while others cause you to roll your eyes and not want to leave the house. As judges know all too well, the chemistry combination of lawyers in each case really sets the tone for the path it takes, and it can lead to either a rocky or smooth road to resolution.

Once at the courthouse, the calendar populace then begins to fill the hallways with many people spilling their Styrofoam coffee cups on the previously beige rug and posturing for first entry as the sheriff's officer opens the courtroom doors.

You are in your chambers as the staff advises you that there are five individual requests to be heard first. A criminal case, a deposition, a closing, an out-of-state client and a child's concert are all presented reasons. You tell the officer to set up the case with the lawyer-parent first, so that they will not miss their child's concert performance. This will be the easiest decision of the day. As you enter the courtroom, approximately fifty people rise before you. You tell them they can be seated, and you read the list, but only after telling the occupants that they are not to talk in the courtroom and to turn off their cell phones.

The average daily dissolution calendar will consist of ten defaults and settled cases, five settlement conferences and a trial listing. You have told the trial listing not to come until 10 a.m. Though you entered the courtroom at 9 a.m., you find only three defaults ready to proceed. You retreat to chambers for your third cup of coffee and re-enter the courtroom at 9:30 a.m. Now the day can really begin. First, you take all the lawyer-settled cases so those litigants do not have to pay for "waiting time." You handle do the defaults next since most of them are self represented. The defaults divide into two groups. The first group proudly displays their carefully prepared wares and the second group knows not why you are asking for a final judgment of divorce, much less an original and four copies.

Next come the settlement conferences, which you do on the record in open court while your officer administers an oath to the litigants. At this point, many new lawyers swivel their heads in a confused manner while the regulars just explain, "relax, this is how he does it." You give tasks to complete, request submissions and set dates and more dates. You send people outside to talk and you sign scheduling orders. Then, just as you think you are only an hour behind schedule, as it is now 11 a.m., and can begin your trial, things begin to fall from the sky.

Team leaders begin to walk in the door bearing with them orders to show cause and temporary restraining orders for you to address. These drop-ins suddenly consume the balance of your morning in the midst of which you are told one of the Judges went home sick and you now suddenly have eight cases from the non-dissolution calendar to handle because you are the backup judge. You tell the trial to come back at 2 p.m. and you sit on the bench through lunch because you feel a high moral responsibility to do so. While you soon find out, however, that no one in the system ever acknowledges appreciation for your work, you do it anyway because that is your work ethic.

While feeling like you are on the verge of tears, you start the trial at 3 p.m., only because the people have waited all day. You apologize, but by now everyone is tired. Your energy level has been sapped, but you start to take notes on testimony beginning with events that

occurred in 1975. This is called trial strategy. You almost want to scream out loud, but you wear a black robe, you must be superhuman. In fact, you are even going to sit until 5:30 p.m. just to finish one witness's direct examination. The trial will be back tomorrow and when you awake that will be the first thing you remember. Almost like Bill Murray in *Groundhog Day*, you will do it again.

When you leave the Courthouse and the only other car in the garage is another Family Court Judge, you begin to wish for a criminal assignment, but you stay in the Family Part because it is your choice. While it is dark outside when you get home, you feel good inside because you tell yourself that you made a difference in someone's life. You made almost 100 decisions that day for other people, yet now, in your own home, you cannot even decide what toppings for your pizza. Finally, you go to bed only wake up the next morning to do it all over again.

This is a day in the life of a Family Court judge. I hope you enjoyed it because I certainly did for all those years. ■

Judge Zampino served as a Family Court judge for over two decades before becoming Of Counsel with Snyder Sarno D'Aniello Maceri & Da Costa LLC. His practice is limited to the successful mediation and arbitration of matrimonial cases.

Stop the Broadside Attack on the Supreme Court's Certification Program

By John P. Paone Jr.

Years ago, the Supreme Court of New Jersey determined it is in the public's interest to have attorneys certified in various legal disciplines. According to the Court, the certification program is an effort to both protect consumers from false advertising and raise the level of attorney competence in our state. Only after undergoing a vigorous vetting process requiring a clean ethics record, judicial and peer review, requisite years and experience in the field of practice, the acquisition of Continuing Legal Education credits over and above those required to practice law, and passage of a written exam are attorneys certified in New Jersey. Over time, certification has evolved into a kind of gold standard and a resource upon which the public can rely in a world where social media and the internet can transmit all types of misinformation and spurious claims regarding attorney qualifications.

Now, however, an internet advertising practice threatens to undermine the certification program and, in the process, confuse the public. Attorneys who are not certified can purchase from Google the names of certified attorneys as search engine terms. This could result in members of the public attempting to search for Attorney X, who they may have learned is certified and of stellar reputation, and instead finding Attorney Y in their search results. Even though Attorney Y is not certified, Attorney Y still paid money to purchase the name of Attorney X as an internet search term and, as a result, Attorney Y will appear in search results of a potential client looking for Attorney X.

I have little doubt that if certified attorneys were selling their names to non-certified attorneys to divert internet traffic, the Court would easily recognize such action to be deceitful and prejudicial to the administration of justice. Why then should it be acceptable for non-certified practitioners to purchase a certified attorney's name from Google? One would think it self-evident that the purchase of another attorney's name can only serve to achieve a result which is deceitful, improper, and unethical. The State Bar of North Carolina has already banned this practice as dishonest conduct. Incredibly, however, a ruling by our own Advisory Committee on Professional Ethics, Opinion 735, would permit such unscrupulous behavior for attorneys in New Jersey.

To its credit, the Court recently appointed the Honorable Jeffrey R. Jablonski, J.S.C., as a Special Master to review this matter. I would respectfully submit that the Special Master should be tasked to answer the following question: "Why would someone purchase the name of a fellow practitioner in the first place?" The obvious answer to this question leads to the logical conclusion that if the polestar of our legal system is to protect the public then there can be no legitimate justification for such conduct. Attorneys have always been held to a higher standard than that which is condoned in the marketplace. It must be made clear that the tenents of professionalism prohibit attorneys from engaging in this type of internet search manipulation.

Finally, to protect the certification program, the Court must not allow the name and reputation of certified attorneys to be used as fodder for an internet advertisement scheme designed to deceive potential clients. Just as practitioners cannot falsely claim to be certified, they should also be prohibited from purchasing through Google the name of a certified attorney to garner the attention of the unsuspecting public. ■

John P. Paone, Jr. is Certified by the Supreme Court of New Jersey as a Matrimonial Law Attorney, a past Chair of the Supreme Court Board on Attorney Certification, and the Managing Partner of the Law Offices of Paone, Zaleski & Murphy with offices in Woodbridge and Red Bank.

The Ethical Conflict Between Zealous Representation and Fairness to Third Parties

By J. Patrick McShane, III, and Lynda Yamamoto

Family lawyers know their foremost obligation is to their client. Clients expect loyalty, diligence, and competence in their representation by the lawyer whom they select. They have the right to expect no less. However, the Rules of Professional Responsibility provide boundaries beyond which attorneys cannot proceed in the representation of their clients. Zealous representation has limits. The limits are specified in RPC 3.3, "Candor Toward the Tribunal" and RPC 3.4 "Fairness to Opposing Party and Counsel." Even experienced attorneys find themselves at the outer limits of their obligations to diligent and zealous representation of their clients and their obligation of fairness to tribunals or opposing counsel and opposing litigant. This article explores those limits.

Fairness to Opposing Counsel and Tribunal

The two leading cases in this area are *Edgerton v. Edgerton,*[1] and *Brundage v. Estate of Carambio.*[2]

In *Edgerton*, parties were married in 1967, separated in September 1979, and entered a property settlement agreement on Dec. 21, 1979. That property settlement agreement distributed a portion of the wife's inherited properties by way of a partial payment from the wife to the husband of a sum of money. A year later, on Dec. 31, 1980, the legislature adopted the revision to the equitable distribution statute exempting inherited assets from equitable distribution. A divorce complaint was filed in March 1981, the approximate 18th month following the September 1979 separation. On or about July 8, 1981, the Supreme Court decided *Gibbons v. Gibbons,*[3] which retroactively applied the statutory amendment to matters then pending. An "amendatory agreement" was signed by the Edgertons on July 27, 19 days after *Gibbons* was published, ratifying the prior agreement. On that same date, the uncontested divorce hearing occurred, during which the court made findings as to voluntary entry without a determination on the fairness and equity of the agreement.

The husband's counsel was aware of *Gibbons* and the statutory amendment. The wife's counsel was not. The court also was not aware of *Gibbons*. The issue was not raised or disclosed by the husband's counsel. The wife's right to litigate the issue of fairness and equity of the property settlement agreement for non-disclosure of the law and change of law was established by the Appellate Division's opinion. The opinion turned on the application *R.*4:50-1 and the general law of matrimonial agreements that they are only enforceable if "fair and equitable", citing, for example, *Petersen v. Petersen.*[4] In the course of its opinion, however, the court noted the Rules of Professional Conduct as follows:

> "Although the judge was not asked to pass on the fairness of the agreement, it goes without saying that under our Rules of Professional Conduct, attorneys are enjoined to not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. RPC 3.3(a)(3) This rule evinces a strong policy that all relevant legal authority should be brought to the court's attention. Here, for whatever reason, the judgment was actually signed on August 13, 1981, without benefit of the statute being addressed or brought to the attention of the court, and this all occurred after the `July 8, 1981 *Gibbon* decision."[5]

RPC 3.3(a)(3) as cited in that 1985 opinion remains in full force and effect.

RPC 3.3 was implicated in *Brundage*, which postdates a change to RPC 3.3(a)(5). The present version of RPC 3.3(a)(5) is stated as follows:

> "A lawyer shall not knowingly fail to disclose to the tribunal a material fact KNOW-

ING THAT THE OMISSION IS REASONABLY CERTAIN TO MISLEAD THE TRIBUNAL, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law." (Emphasis added)

The prior draft of the capitalized language had been "…with knowledge that the tribunal may tend to be misled by such failure." The "reasonably certain to mislead" language was added in an attempt to direct counsel's exercise of good faith judgment in their representation efforts because there had been a "general reluctance to enforce" the "tend to mislead" standard.[6]

In *Brundage*, the attorney for Ms. Brundage in a palimony case represented the plaintiff in *Levine v. Konvitz*.[7] In *Levine*, the trial court determined that cohabitation was a necessary element of a palimony claim in an unreported, nonbinding opinion. He appealed the *Levine* trial court decision on behalf of his client. In *Brundage*, the trial court determined that cohabitation was not a necessary element of the cohabitation claim and the defendant/husband's estate appealed. In his Civil Appeal Case Information Statement, the attorney for Ms. Brundage failed to disclose the adverse trial court determination in *Levine* and failed to disclose the pendency of the appeal in *Levine*.

Following the Appellate Division's rejection of the defendant's notice of interlocutory appeal, and with the assistance of the trial judge who was still unaware of the contrary unreported trial decision and pending appeal in *Levine*, the parties entered settlement negotiations and reached a settlement for a payment of $175,000 in November with payment to be made by Feb. 1 of the next year. On Feb. 6 of that year, the Appellate Division decided *Levine* in a published opinion that determined that cohabitation was an essential element of a palimony case. Now being aware of the *Levine* decision, the estate sought to renege on the settlement. The ultimate question presented was enforceability of the settlement. In the meantime, *Levine* was overruled by *Devaney v. L'Esperance*[8] in which the Supreme Court agreed with Ms. Brundage's position that cohabitation WAS NOT an essential element of a palimony claim. The Supreme Court stated a court's role as follows in *Brundage*:

> "This appeal requires us to consider not only an attorney's ethical obligations of candor to the tribunal, but the role to be played by our trial courts and appellate courts in matters before them that are touched by an assertion that an attorney for a litigant has violated those rules. This question is complicated because there is a delicate balance to be achieved between an attorney's ethical obligations of candor, and the appropriate mechanism in place for addressing a violation thereof, and a litigant's right to zealous representation by an attorney of his or her choosing."[9]

Stated simply: Should a litigant lose the benefit of her settlement because of her attorney's conduct? The result of *Brundage* was that, although the attorney was criticized for his practice, no ethical violation was found and the settlement was deemed to be enforceable, contrary to *Edgerton*, and without citation to *Edgerton*.

The Supreme Court determined there was no violation of RPC 3.3(a)(1) because that section had previously been interpreted to apply to misstatements of facts or law "directly relevant to the particularly litigation, either a fact in issue or a fact relating to a procedural matter."[10] The Supreme Court also indicated that RPC 3.3(a)(3) was not involved because of the countervailing considerations of *R*.1:36-3 making unreported decisions not binding authority. Therefore, the withholding of the *Levine* unreported trial court decision, even with the appeal pending, was not deemed to be a violation because it was not binding, established law. The heart of the dispute was RPC 3.3(a)(5) which requires disclosure, when failure to do so is "reasonably certain to mislead the tribunal." The Appellate Division found such a duty to have existed. The Supreme Court rejected the Appellate Division's determination, which was in part based upon administration concerns: that is, if similar cases are coming through the system, they should be consistently decided. The Supreme Court adopted an individual case priority over the administrative considerations, based upon the general policy of the law that interlocutory appeals are designed to avoid piecemeal litigation. Thus, while not endorsing the conduct of the attorney and in fact criticizing it, and referring to it as a "sharp practice," it refused to sanction the attorney or the client by overturning the settlement.

It seems clear that the next attorney may be sanctioned. The client may then lose the benefit of their bargain as occurred in *Edgerton*. Although a contrary spin can be placed on it, the most conservative reading of the criticisms of sharp practice is a warning to the next

attorney not to tread so close to the line. Query: Did the fortuitous timing of the reversal of *Levine v. Konvitz* by *Devaney v. L'Esperance* save the attorney in *Brundage*?

Enforcement of Ethical Obligations by Adversaries

Brundage is an example of a matter in which the defendant sought to disqualify the plaintiff's counsel because of the ethical violation, in addition to seeking to overturn the settlement. Violations of *R*.4:14-7 offer other examples of efforts to disqualify opposing counsel. *R*.4:14-7 is the rule providing for notices of depositions with requests for document production. The Comment to *R*.4:14-7(c) is instructive:

"Paragraph(c) was added to the rule to prohibit the apparently proliferating practice of some attorneys, wholly unauthorized, to obtain documentary discovery from non-parties, unilaterally and without notice to other parties, by the simple expedient of issuing a subpoena."

The potential ethical dilemmas have arisen in matrimonial cases in which a subpoena, for example, for medical records or for financial records are issued without notice to the other side. In that situation, at least individual attorneys, if not the firm have been disqualified based upon the authority of *Cavallaro v. Jamco Property Management*.[11] In *Cavallaro,* defense counsel delivered deposition notices to the plaintiff's treating doctors. He included a letter to the doctors that he did NOT provide to the plaintiff's counsel. The letter explained that if the doctors provided the records BEFORE the scheduled date they need not appear. The records were provided. The court held that not only was *R*.4:14-7 intentionally violated, but the attorney's ethical obligations were thereby violated. That justified disqualification. Dismissal of actions can also be considered, but courts avoid that in all but the most severe circumstances. A Family Law attorney violates discovery rules at their own risk of ethical and malpractice claims or counsel fee awards against them or their client.

Welch v. Welch[12] is a case in which fees were awarded against the husband. *Welch* involved a post-judgment custody motion. The husband's counsel issued a subpoena to a police department seeking records on or before a motion return date. The day after the records were supplied to the husband's counsel, she provided them to the wife's counsel and the court. The court described the issue presented as "…the vexing and recurring problem of unauthorized discovery in post-judgment motion practice."[13] Until a plenary hearing is ordered, no discovery is permitted:

Egregious use of subpoena power to obtain information in an impermissible manner has been held to be a violation of the New Jersey Rules of Professional Conduct, in particular, R.P.C. 3.4(c) (fairness to opposing party and counsel) and R.P.C. 4.1 (truthfulness in statements to others). The need for good faith with regard to subpoena power is heightened in matrimonial matters, as the issuance of unauthorized subpoenas, especially in post-judgment family motion practice, presents great potential for abuse. In the instant matter, the subpoena was issued before the motion was even filed and was made returnable on a motion date. Clearly, defendant was aware that there was no plenary hearing pending at which testimony could be offered, as he requested in his motion that the court order a plenary hearing on the custody issue.

Under Rule 5:5-1, discovery in summary actions require leave of the court upon a showing of good cause."[14]

Yet another example of a circumstance in which one side's attorney sought to disqualify the other is *Van Horn v. Van Horn*.[15] In *Van Horn*, within 45 days after the entry of a judgment in a confusing post-judgment procedural history, the husband and his counsel entered a security agreement for payment of the husband's fee, with a mortgage against the husband's interest in the former marital residence. The husband's counsel had prudently insisted that her client, the husband, obtain separate representation when entering the mortgage. The underlying matrimonial case was obviously a high conflict case given the level of fees and the fact that the husband obtained a fee award against the wife, which was credited against the fee due from the husband by his attorney. The wife sought disqualification of the husband's counsel as a consequence of obtaining a security interest before the 45 days of appeal ran. The wife's application was granted by the trial court. While the Appellate Division nullified the mortgage because it was obtained in violation of the court rules permitting only such security interests to be obtained when the litigation has been concluded, it found that disqualification was not the appropriate remedy for the alleged violation of RPC 1.8(a) (obtaining a security interest adverse to the client).

Blatant Wrongdoing

As illustrated by the Supreme Court's disagreement with the Appellate Division in *Brundage*, and the differ-

ing treatment of the mortgage disqualification by the trial court and Appellate Division in *Van Horn*, and the much closer question raised in *Edgerton*, the following is an example of a clearly blatant violation of ethical principles and fundamental fairness.

It should come as no surprise to any attorney who has read the Disciplinary Rules that a misrepresentation made to another member of the bar, the reliance upon which has subjected such member to potential civil liability, can result in an award of damages.[16]

The above quote arose in a malpractice action brought by a wife's attorney against her husband's divorce case counsel in the following context. During the divorce proceedings, the husband's attorney represented to the wife's attorney that he expected the court would not hear the matter the following day, but he would call if it were not adjourned and let the wife's counsel know to come to court. The husband's attorney did not call, the wife's attorney did not go to court, and the husband's attorney represented to the court that the wife's attorney "would not appear." Default judgment was entered against the wife, prompting a malpractice action against her attorney. In a third-party action, the husband's attorney was found liable to his adversary for breach of a good-faith duty owed when making representations upon which the adversary would reasonably rely. The Appellate Division also found the husband's attorney had violated what is now *R.P.C.* 3.3(a)(1), among others, when he knowingly made a false statement of material fact to the court regarding the wife's counsel's failure to appear. Thus, not only can such blatant misrepresentation result in ethical problems, but in a malpractice action as well.

Invasion of Privacy/Investigative Activities

Not only can an attorney be subject to discipline or their client subject to adverse action as a result of the attorney's activities and/or representations, the attorney may also be responsible for activities of investigators.

In *Villanova v. Innovative Investigations, Inc.*,[17] the wife suspected her husband was unfaithful. She hired a private investigator in the course of divorce proceedings. That investigator suggested that the wife install a GPS device in the marital vehicle primarily driven by the husband to track his movements without his knowledge. The plaintiff husband claimed that the investigator's advice resulted in an invasion of his privacy, but the court found that he failed to make out a *prima facie* showing. Addressing the plaintiff's intrusion on seclusion claim, the court found the record was lacking any evidence that established, for the 40 days during which the GPS was in place, that the GPS reports the plaintiff's wife received on the internet disclosed that the plaintiff traveled to private places where he had a legitimate expectation of privacy.

The court noted that the Supreme Court of the United States has held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his [or her] movements from one place to another."[18] Presumably the outcome in *Villanova* would have been quite different if the wife had shared information of her husband's travels to private places, and the investigator's report had contained information that was used by the wife's divorce attorney to the detriment of the husband's employment. The family law practitioner seeking to avoid defending an invasion of privacy action is well advised to consider these issues in cases where the client contemplates hiring an investigator.

Please also note that courts have made a distinction between an investigator hired by a client and an investigator hired by a lawyer. See, e.g., *Torraco v. Torraco*.[19] In that case, the attorney hired the detective thereby making the detective counsel's agent. The documents obtained by the investigator were ordered to be turned over, but not the investigator's report which was deemed to be work product and the investigator was not required to attend a deposition, because to do so could operate as a breach of the work product privilege. However, there is an opposite side of the sword, as in so many situations in the law. That second edge of the sword is that as agent, the investigator's action is the responsibility of the attorney, and any unethical invasions of privacy, computer hackings, wiretaps or other unlawful activities which constitute violations of the criminal law, are also violations of the Rules of Professional Conduct to be visited upon the attorney.

An interesting twist to an invasion of privacy violation presented itself in Advisory Comm. on Prof. Ethics Op. No. 680.[20] In that opinion, the committee described a situation in which the inquiring firm's clients, A and B, invaded the privacy of the opposing counsel's briefcase that had been left behind during a lunch break in the course of a document inspection. The inspection took place at the offices of clients A and B, and all counsel left the premises during the lunch break. Upon her return from lunch, client B informed attorney that some "great stuff" had been copied after opposing counsel's briefcase "fell over" and some documents fell out. The attorney told

client B she did not want to see the documents or discuss them further. At the end of the day, the attorney spoke to client A, who alluded to documents in adversary's briefcase that would be very helpful, but client A would not comment about what B told the attorney.

After the clients' attorney consulted with her senior partner, the law firm sought the advice of the Advisory Committee on the matter. The firm was considering options that involved informing adversary of the breach, withdrawing from the representation, or some combination of the two. The committee commented, if the attorneys had copied the documents, and items of evidence were involved, that action would constitute a clear violation of *R.P.C.* 4.4 (Respect for Rights of Thirds Persons). Attorney review of that evidence, even it was obtained by clients, would constitute "Misconduct" per *R.P.C.* 8.4(a), and if the attorneys allowed the incident to go unreported, it would constitute "conduct that is prejudicial to the administration of justice" under *R.P.C.* 8.4(d). Although the committee hesitated to comment further without a factual understanding of the import of the documents in question, it advised the firm to disclose the incident to the adversary, as is allowable by *R.P.C.* 1.6(c)(4) in order "to comply with other law." While the committee did not take a position as to the withdrawal from representation, it observed that mere withdrawal without disclosure would not reverse the clients' conduct.

The Wiretap Statute

In *White v. White,*[21] Judge Issenman provided a tutorial on the wiretap statute as it related to discovery and privacy issues between spouses. The case arose on a motion to suppress in the context of a bitterly contested custody action. The facts are not complicated. The plaintiff husband continued to live in the marital home after filing for divorce, sleeping in the sunroom of the house. Also located in the sunroom was the family computer, television and stereo controls. Upon discovery of a letter from the husband to his girlfriend that the defendant wife claimed was laying in plain view in the sunroom, the wife hired an investigator to copy, without the use of a password, the husband's files, including certain images, from the hard drive of the family computer. The investigator prepared a report on the findings, which was sent to both the wife and her attorney, along with copies of the relevant files, which contained emails between the husband and his girlfriend.

While being deposed, the husband realized that he had mistakenly believed that his emails could not be opened without his AOL password. The husband had not read in the AOL "Help" screens about an AOL feature that automatically saves emails to the hard drive. The feature is automatically "on" unless it is manually turned "off." As such, the husband's every email was saved to the hard drive in what Judge Issenman termed "post-transmission storage." Further, because the husband was unaware of the file containing his emails, he did not set up a password to protect that file from being viewed by others.

The trial court denied the husband's motion to suppress. In its analysis of the protections intended by the legislature in the Act, the court found that post-transmission storage was not intended to fall under the governance of the Act. Also, on a family computer with files that are not password-protected, the wife's search for files there was not found to be "unauthorized access" as defined by the Act. Continuing to apply the plain meaning of the statutory language the court found that the illegal act of "intercepting" communications was not applicable because the emails and images were simply retrieved from post-transmission storage, not diverted from delivery to the intended recipient. Finally, the court noted that the Act has been interpreted to address only the action of accessing prohibited communication, and not the actions of disclosing or using the information accessed. Thus, held the court, the wife could not be barred from using information gleaned from the files in the custody proceeding. Finding no violation of the wiretap statute, the court proceeded to assess the common law invasion of privacy claim. The court found no such violation because the court found that the husband did not have an objectively reasonable expectation of privacy while in the family home while using the family computer.

In New Jersey, legal recording of a conversation requires that at least one participant in the conversation consent to that recording.[22] In *Cacciarelli v. Boniface,*[23] the court considered for the first time the doctrine of vicarious consent in the context of the wiretap statute. The doctrine had been applied in *State v. Diaz,*[24] a criminal case in which the trial court determined that the audio portion of a recording of a nanny interacting with a baby she was suspected of abusing was prohibited by the Act. The Appellate Division allowed presentation of both audio and video portions of the recording under the theory that the parents who made the recording were permitted to consent to the recording on behalf of their infant. In *Cacciarelli*, the context was a post-judgment

change of custody action in which the father feared that the couple's three young children were being verbally abused in phone conversations with their mother. The court did allow admission of the tapes under the proposition of vicarious consent. It is notable, however, that the court expressed dissatisfaction with the father's delay in making application to the court to restrain the mother from continuing the abusive phone calls. The court found that the father "compounded the problem" when he took no action with the tapes and allowed these conversations to continue for months before bringing the issue to the court's attention. The father's decision to continue recording the calls, rather than alert the court immediately upon realizing that the mother's abusive treatment continued, was at the very least a showing of poor judgment. Although the court does not state so directly, an attorney who was aware of the recording of an objectionable phone call or two would be ethically bound to diligently pursue court action to stop the phone calls, rather than allow them to continue just to bulk up the evidence with a larger number of recordings.

In *D'Onofrio v. D'Onofrio,*[25] a case with similar facts, the Appellate Division approved the trial court's admission of tape recordings made by a custodial father of children whose mother was emotionally abusive on the telephone. In *D'Onofrio*, the mother challenged the trial court's admission of 17 recordings of her conversations with her daughters over a period of eight to 10 months resulting in a limitation on mother's parental rights. The Appellate Division appeared to fully adopt the concept of vicarious consent in the case where the children at risk lacked the legal capacity to consent to the recording of their own conversations. The court cautioned, however, that invocation of the best-interest-of-the-child standard alone will not justify broad-based recordings of conversations with former spouses and children of the marriage under vicarious consent. Instead, a parent presenting tape recordings of allegedly harmful phone calls between the other parent and their children is required to show "a good faith basis that it is objectively reasonable for believing that consent on behalf of the minor to taping is necessary and in the best interest of the child."[26]

Conclusion

Our clients oftentimes pressure us and expect us to be pit bulls. If that is not your style, and it should not be, have the courage, and frankly the common sense, to tell the client to get another lawyer. All of us must be comfortable enough to just say no. We all have our own moral compasses. If it feels wrong, say no. Don't do it. If it isn't something that you would be comfortable having disclosed on a record in open court, don't do it and don't counsel the client to do it. ■

J. Patrick McShane, III, is a shareholder in Forkin, McShane, Manos and Rotz, P.A. Lynda Yamamoto, presented the appellant's argument in Evans v. Emma, 215 N.J. 197 (2013).

Endnotes

1. 203 N.J.Super. 160 (App. Div. 1985).
2. 195 N.J. 575 (2008).
3. 86 N.J. 515 (1981).
4. 85 N.J. 638 (1981).
5. *Edgerton v. Edgerton*, 203 N.J. Super. at 169.
6. *Brundage v. Brundage*, 195 N.J. at 595.
7. 383 N.J. Super. 1 (App. Div. 2006), overruled by *Devaney v. L'Esperance* 195 N.J. 247 (2008).
8. 195 N.J. 247 (2008).
9. *Brundage v. Brundage*, 195 N.J. at 590-591.
10. *Id.* at 592.
11. 334 N.J. Super. 557, 567-568-572 (App. Div. 2000) .
12. 401 N.J. Super. 438 (Ch. Div. 2008).
13. *Id.* at 441.
14. *Id.* at 445. Citation omitted.
15. 415 N.J. Super. 398 (App. Div. 2010).

16. *Malewich v. Zacharias*, 196 N.J. Super. 372, 376 (App. Div. 1984).
17. 420 N.J. Super. 353 (App. Div. 2011) .
18. *Id.* at 364, citing *United States v. Knotts*, 460 U.S. 276, 281 (1983).
19. 236 N.J. Super. 500 (Ch. Div. 1989).
20. 4 N.J.L. 124 (Jan. 24, 1995).
21. 344 N.J. Super. 211 (Ch. Div. 2001).
22. N.J.S.A. 2A:156A-4(a).
23. 325 N.J. Super. 133 (Ch. Div. 1999).
24. 308 N.J. Super. 504 (App. Div. 1998).
25. 344 N.J. Super. 147 (App. Div. 2001).
26. *Id.* at 156.

Legal Weed and Family Law: Post-Legalization Update

By Pamela M. Copeland and Meredith E. Allen

New Jersey legalized cannabis for medical use in 2010 with the Compassionate Use Medical Marijuana Act,[1] making New Jersey one of an ever-increasing number of states plus Washington, D.C., Guam and Puerto Rico who have done so. Implementation of this act was "slow-walked" for several years, but in 2019 the Jake Honig Compassionate Use Medical Cannabis Act went into effect,[2] renaming it and making significant amendments to the 2010 law. Most significant for family law practitioners is that the law now states, "[a] person's status as a registered qualifying patient, a designated or institutional caregiver, or an owner, director, officer, or employee of a medical cannabis cultivator, medical cannabis manufacturer, medical cannabis dispensary, clinical registrant, or licensed testing laboratory, or as a certified medical cannabis handler, shall not constitute the sole grounds for entering an order that restricts or denies custody of, or visitation with, a minor child of the person."

Thanks to this 2019 amendment, we have what are called anti-custody discrimination provisions in our law. In other words, there is no presumption of child endangerment simply because a parent is a medical marijuana patient. It must be proven that the parent's behavior has a substantial adverse effect on the child.[3] It takes more than just a parent's use of medical marijuana to impact their custody and/or parenting time; it is the effects of that use, and thus is one of the factors in that decision, but not the sole determining factor.[4]

Now that New Jersey has joined several other states, Washington, D.C., and the Northern Mariana Islands in making cannabis legal for adult recreational use, what, if any, impact does the new legislation have on family law issues? The answer is both not much and a lot. Not much, because in the 250 or so pages in CREAMMA (Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act), only the following couple of paragraphs in new § 47 pertain specifically to family law:

(b) On and after the effective date of P.L. , c. (C.), marijuana in a quantity of one ounce or less including any adulterants or dilutants, or hashish in a quantity of five grams or less including any adulterants or dilutants, is, for a first offense, subject to a written warning, which also indicates that any subsequent violation is a crime punishable by a term of imprisonment, a fine, or both, and for a second or subsequent offense, is guilty of a crime of the fourth degree;

(i) The odor of marijuana or hashish, or burnt marijuana or hashish, shall not constitute reasonable articulable suspicion to initiate a search of a person to determine a violation of subparagraph (b) of paragraph (12) of this subsection. A person who violates this subparagraph shall not be subject to arrest, detention, or otherwise be taken into custody, unless the person is being arrested, detained, or otherwise taken into custody for also committing another violation of law for which that action is legally permitted or required;

(ii) A person shall not be deprived of any legal or civil right, privilege, benefit, or opportunity provided pursuant to any law solely by reason of committing a violation of subparagraph (b) of paragraph (12) of this subsection, nor shall committing one or more violations modify any legal or civil right, privilege, benefit, or opportunity provided pursuant to any law, including, but not limited to, the granting, renewal, forfeiture, or denial of a license, permit, or certification, qualification for and the receipt, alteration, continuation, or denial of any form of financial assistance, housing assistance, or other social services, rights of or custody by a biological parent, or adoptive or foster parent, or other legal guardian of a child or newborn infant, or pregnant woman, in any action or

proceeding by the Division of Child Protection and Permanency in the Department of Children and Families, or qualification, approval, or disapproval to serve as a foster parent or other legal guardian;

. . .

(b)The presence of cannabinoid metabolites in the bodily fluids of a person engaged in conduct permitted under P.L. , c. (C.):

. . .

(3) with respect to a parent or legal guardian of a child or newborn infant, or a pregnant woman shall not form the sole or primary basis for any action or proceeding by the Division of Child Protection and Permanency, or any successor agencies; provided, however, that nothing in this paragraph shall preclude any action or proceeding by the division based on harm or risk of harm to a child or the use of information on the presence of cannabinoid metabolites in the bodily fluids of any person in any action or proceeding.[5]

In other words, people dealing with the Division of Child Protection and Permanency (DCCP), *should* now have the same legal protections as custody/parenting time litigants who are medical marijuana patients, namely, no presumption of child endangerment simply because that person uses cannabis. It *should* be proven that the person's behavior has a substantial adverse effect on the child. It *should* take more than just that use to impact their custody, because it is the effects of that use that matter, and thus *should* be one of the factors in that decision, but not the sole determining factor.[6]

This *should* have a positive impact on DCPP cases. *Should, should, should* — you're not supposed to "should" on yourself. But the following language is troubling: "nothing in this paragraph shall preclude any action or proceeding by the division based on harm or risk of harm to a child or the use of information on the presence of cannabinoid metabolites in the bodily fluids of any person in any action or proceeding." This has the potential to continue to wreak havoc in the lives of litigants in DCPP cases.

For example, I recently represented a young man whose now ex-wife was charged by DCPP with abusing their son. When he pointed out that she has alcohol issues, she pointed the finger right back at him, claiming he's a pothead. He is in fact a medical marijuana patient, generally uses half his prescription, and is very careful not to use it until their son is in bed, asleep.[7] When asked by DCPP if he would consent to a urine test, he did so readily, knowing he didn't have a problem. Of course he tested positive, the proverbial "hot pee.[8]" Without any further evidence, he was required to attend nightly Narcotics Anonymous meetings for several weeks until the leaders asked what he was doing there, since he did the traditional introduction by stating, "Hi. My name is Tom, and I don't know why I'm here." He was there only because DCPP told him he must attend as a condition of continuing to have sole custody of his son. Those meetings were a burden on him because they were after work several towns away, and he had sole custody. Fortunately, Grandma was able to step in until the NA meeting facilitator gave him a letter stating he didn't have a problem. DCPP released him from his mandatory attendance.

Another issue which arose as a result of this legislation is how a child's marijuana use might affect parental rights to custody of their minor child. As noted above, first violations for possession of marijuana are given a written warning. In the case of a minor, that warning would be given to the minor, and presumably not the parent. If a court later needed to determine fitness of a parent to maintain custody, how much would the parent be imputed to know about the child's prior violations? Would a court evaluating a parent's fitness to maintain custody see and have access to whether the child has already received a written warning? Would the written warning be kept on file and would those records be accessible and by whom? Fortunately, this has been clarified by the legislature, which now requires that the "parent, guardian or other person having legal custody" of a child under age 18 be given notice.[9]

Other issues in CREAMMA require clarification. The statute as it relates to cannabis and DCPP cases does not mention parenting time, only "rights of custody." A logical reading would seem by necessity to encompass parenting time as well, but clarity is recommended. In addition, there is nothing in the statute specifically dealing with non-DCPP cases involving custody/parenting time and a parent's non-medical use of cannabis. We recommend the same be done with respect to non-DCPP custody and/or parenting time cases, namely, by confirming that anti-custody discrimination provisions apply also to those cases.

Perhaps most importantly, we recommend that DCPP

be required to publish their metrics for their use of information regarding cannabinoid metabolites to address what we're calling the "hot pee" issue so the "Tom"s dealing with the DCPP won't be burdened unduly.

CREAMMA states that adult use of cannabis cannot be used as the sole factor to deny a parent custody of their minor child within the DCPP context, with the highly notable exception of that "hot pee" issue. And aye, here's the rub: There's no accurate test like a breathalyzer for booze. The ingredients in cannabis stay in the body for weeks after use, even if there's no further usage. In other words, a person will test positive for cannabis use long after the effects have worn off. Better tests are needed and are in the development process. Meanwhile, we will have to rely on the DREs (Drug Recognition Experts) and WIREs (Workplace Intoxication Recognition Experts), who are being trained now under the new law.

The bottom line is obvious: Nobody wants their child to be cared for by anyone who is impaired, regardless of the substance used, but it is patently unfair to punish a parent by requiring supervised or no parenting time, or attendance at unnecessary NA meetings, simply because they tested positive for legal cannabis use, when not impaired during their parenting time.

The same level of guidance of course applies to the other side of this equation: If a child's other parent is using any substance, legal or otherwise, that impairs their ability to care appropriately for their child, they will require assistance to ensure that their child will be safe and free from any harmful circumstances.

In a termination of parental rights case, the New Jersey Appellate Division recently held that a "parent's status as a recreational marijuana user cannot suffice as the sole or primary reason to terminate that parent's rights under Title 30, unless the Division proves with competent, case-specific evidence that the marijuana usage endangers the child or children."[10] While in this case the Appellate Division affirmed the trial court's decision to terminate both father and mother's parental rights, the Court noted that experts had found that father had a severe addiction, in addition to other factors, including mother's mental health problems. As noted by the Court, "[t]his is not a case involving casual or occasional marijuana usage, but instead one in which the father has been diagnosed with a severe addiction, and the mother likewise has had a long, documented history of substance abuse, coupled with her own persisting mental health issues."[11] The initial trial in this case had been conducted prior to the enactment of New Jersey's recreational marijuana passage. Nevertheless, the Appellate Division noted that historically, New Jersey Courts have not treated a parent's marijuana use (whether illegal or not) "as a categorical basis for stripping [a parent] of his or her parental rights." Thus, marijuana use (whether medical or recreational) in and of itself should not be a basis for stripping a parent of their parental rights (including both custody and, we suggest, parenting time). However, current medical cannabis patients who are facing custody and/or parenting time issues will require guidance as to how best to manage their legal usage with the least amount of impact on their cases. We commend to your attention the guidelines promulgated by Americans for Safe Access which appear in endnote 7. They are thoughtful suggestions, and although written for medical cannabis patients, offer good guidance for all users of legal cannabis.

These guidelines may seem obvious, but those of us who are family law practitioners should never assume that they're obvious to our clients. It is our obligations as family lawyers to advise our clients on what we think is the best course of action (and non-action) which benefits their case, particularly when it involves minor children and custody and/or parenting time issues.

These issues and more will continue to arise in contested family law proceedings. We family lawyers owe it to our clients to understand these issues thoroughly in order to assist them in dealing with those issues with knowledge, sensitivity and clarity. And those of us who are not family lawyers likewise owe it to ourselves, to our clients and to our families and friends to be educated on those issues.[12] ■

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Endnotes

1. N.J.S.A. 24:61-1
2. N.J.S.A. 24:61-6(m)
3. See also N.J.S.A. 9:2-4(c) stating in part, "A parent shall not be deemed unfit unless the parent's conduct has a substantial adverse effect on the child."

4. See N.J.S.A. 9:2-4 listing the various factors the Court must consider when awarding custody. See also *Matflerd v. Matflerd*, 10 N.J. Super. 132 (App. Div. 1950), holding that a parent's misconduct alone should not be the sole determining factor in denying that parent custody, unless such misconduct renders the parent "unfit" or "unsuitable;" *Unger v. Unger*, 274 N.J. Super. 532 (Ch. Div. 1994), holding that smoking cigarettes is a permissible parental habit to consider along with other factors when determining what is in the best interests of children.
5. A21 - CREAMM (Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization) Act, signed by Gov. Murphy February 22, 2021, now 2C:33-15.
6. See endnotes 3 and 4 above.
7. See, e.g., Americans for Safe Access, safeaccessnow.org/ca_child_custody, recommendations promulgated for medical marijuana patients:
    1. When residing in a house with a child, possess or cultivate as little as your condition allows.
    2. Keep all medical marijuana out of plain sight, ideally in clearly labeled medicinal jars and with other prescription medications, in a place that children cannot access.
    3. If you cook with medical marijuana, clearly label any resultant food products as medicinal, and keep them far away from any children's food.
    4. Use discretion when medicating, and do not do so when your child is present. Specifically, think about medicating when you have several hours open before any interaction with the child or after he/she is already in bed.
    5. If your child can understand, specifically explain to her/him that the marijuana is your medicine and that it is not for her/him (much like any other prescription medication). Furthermore, let him/her know that your patient status and medicine is a private matter, just like any other medical condition and that he/she should not volunteer information about it to anyone.
    6. In a dual-patient-parent household, try to work out a routine with your partner where one parent is always unmedicated in case any unexpected issues arise.
    7. Never drive with your children in a car after medicating.
8. Consider keeping notes for yourself regarding the precautions you have taken, so that you are prepared to inform the Family Court judge about them if necessary.
8. A "hot pee" is a urine test that is positive for drugs.
9. A5472 amending 2C:33-15
10. Div. of Child Protection and Permanency, v. D.J. and T.W., Nos. A-1774-19, A-1857-20 (App. Div. 2021)
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12. The authors wish to express their gratitude to Michael A. Hoffman, Chair, Legislation Subcommittee of the NJSBA Cannabis Committee, for his invaluable assistance.

Child Support Woes: Is it Time to Rethink New Jersey's Income Shares Model?

By Jessica R. Sciara and Dina M. Mikulka

This article attempts to provide an overview of how child support is typically calculated and what we can do to bring our approach to child support in line with the changing needs of New Jersey families.

Any practicing family law attorney has likely heard a client's dismay about child support. The parent who receives child support often feels like the obligation is too little, while the noncustodial parent feels they are paying too much. This dissatisfaction could cause further litigation relating to expenses for the child that may or may not be covered under the basic support obligation. The level of dissatisfaction that arises for clients leads to the question of whether New Jersey's current Income Shares Model is fair. This article examines the three main child support models used throughout the U.S. and analyzes which child support model is, on balance, the fairest.

I. Various Models for Calculating Child Support

Currently throughout the United States, there are three models used to calculate child support. The most common is the Income Shares Model, used in 41 states including New Jersey.[1] The second most common is the Percentage of Income Model used in six states, and the third is the Melson Formula, used in three states.[2]

a. Income Shares Model

The Income Shares Model is the most popular model for calculating child support and is used in a majority of states.[3] The basic principal driving the Income Shares Model is that child support should benefit the child as if the family remained intact, which means having the benefit of both parents' respective incomes.[4] The theory behind this model is that child support would be the same proportion of the parent's income the child would receive if the parents lived together in the same household.[5] The income shares model allows for flexibility in shared parenting arrangements.[6]

New Jersey's Appendix IX-A includes the following expenses in the base child support obligation: housing, food, clothing, transportation, unreimbursed health care up to $250 per child annually, entertainment, personal care products and services (hair, shaving, cosmetics), books/magazines, school supplies, cash contributions, personal insurance, and finance charges.[7] However, Appendix IX-A allows credits for recurring payments such as child care, health insurance, predictable recurring unreimbursed health care expenses in excess of $250 per year, and other court approved expenses such as tuition, special needs of gifted or disabled children, and parenting time transportation expenses.[8]

The Income Shares Model fails to consider that each parent pays individual living expenses, instead of joint expenses, as if they continued residing together as an intact family. This flaw in the model is often criticized because custodial parents may need more child support due to the additional expenses they pay, including shelter expenses and other routine expenses to support their children. Likewise, the non-custodial parents view their payment as supplementing the other parent's total living expenses, while the non-custodial parent struggles to meet their own basic expenses.

While the Income Shares Model is not perfect, the consideration of both parents' respective incomes in fashioning support seems generally fair to all involved. The needs of the child supersede, to a limited extent, the needs of the parents, because under the Income Shares Model, child support is for the child, not the custodial parent.[9]

b. Percentage of Income Model

The Percentage of Income Model is the second most used model in the United States and has historically been disfavored when compared to the Income Shares Model.[10] This model considers only the non-custodial parent's income when calculating child support.[11] One of the primary goals for states using the Percentage of Income Model is to create a unified child support calculation for non-custodial parents in similar financial circum-

stances.[12] The Percentage of Income Model is based on the premise that the proportion of income parents devote to their children in intact families is relatively consistent across income levels up to a certain upper income limit as determined by each state and that the custodial parent will contribute at minimum the same percentage of income to support the children.[13] For example, Wisconsin uses a flat rate Percentage of Income Model, and sets forth the percentages of gross income for the obligor as follows: 17% for one child, 25% for two, 29% for three, 31% for four and 34% for five or more children.[14] Similarly, Texas uses a varying Percentage of Income Model and sets forth the percentages as: 20% for one child, 25% for two children and 30% for three children.[15]

The main criticism of the Percentage of Income Model relates to the failure to consider the custodial parent's income. Without taking the custodial parent's income into consideration, there is a question of fairness to both the custodial parent and non-custodial parent. If one parent earns significantly less than the other parent, that lower-earning parent does not get the benefit of a proportional allocation of expenses as under the Income Shares Model.

c. Melson Formula

The Melson Formula is the most complicated and least popular child support model used in only three states: Delaware, Hawaii, and Montana.[16] This child support model incorporates the public policy consideration that each parent should be able to meet their individual needs as well as the child's.[17] Instead of first looking at the respective incomes of the custodial and non-custodial parent, the starting point for this calculation is inputting factors such as a parent's self-support reserve and the number of other dependent children who are not subject to the current child support matter.[18] After considering these factors, the guidelines establish the child's primary support allowance considering other monthly child care expenses, such as health insurance, to arrive at the amount which represents the total need and primary support obligation.[19]

This model also includes a standard of living adjustment, so that if parents improve their income, the child's standard of living will improve in proportion to their own standard of living.[20] This formula is similar to the Income Shares Model except for the added public policy consideration that each parent should be able to meet their own basic needs as well as the child's needs.

The Melson Formula originated in Delaware, and the case *Dalton v. Clanton* explains the formula in detail.[21] Step one is to determine available income of each parent. After determining net income for each parent, a self-support reserve is subtracted from each parent's income.[22] The self-support reserve represents the minimum support necessary for each parent to meet their needs. Step two is to determine the children's primary needs representing the minimum support amount required to maintain a child at subsistence level.[23] Additional expenses may be added to this amount, such as health care or childcare expenses. Third, the standard of living allowance must be determined, which is a percentage of remaining income allocated to support for the child. This standard of living allowance gives the child the benefit of a higher standard of living enjoyed by a parent.[24]

The Delaware Family Court Rules of Civil Procedure set forth additional factors that must be considered when calculating child support. Rule 52(c) provides t he following:

1. Each support obligor's monthly net income
2. The absolute minimum amount of income each support obligor must retain to function at maximum productivity
3. The number of support obligor's dependents in an effort to apportion the amount available for support as equally as possible between or among said dependents according to their respective needs
4. The primary child support needs and the primary support obligation of each obligor
5. The available net income for a standard of living adjustment to be paid by each support obligor after meeting their own primary needs and those of dependents.
6. A consideration of the factors set forth in Del. C. Section 514.[25]

Adjustments can be made to the calculation for parents who equally share custody and expenses for the children.[26]

d. Comparing the Models

There are some commonalities between the three models as well as many differences. Some of the most prevalent commonalities are they each incorporate varying degrees of a self-support reserve for the parents. All three models also allow for the imputation of income for the non-custodial parent if they attempt to avoid their child support obligation via underemployment or unem-

ployment. Each formula also takes into consideration extra expenses for the children, which can vary from state to state.

It is important to note that each state, regardless of the formula, determines whether to calculate child support using gross or net income. The difference between using gross and net incomes can be significant depending on the tax bracket of each parent. States also vary in whether and to what extent they consider the age of the child, childcare expenditures, parenting time costs, and extraordinary medical expenses. Moreover, when calculating what constitutes a shared parenting schedule and resulting adjustment to child support, the states vary widely, ranging from 20% of time with a noncustodial parent to 45% of time with a noncustodial parent.[27]

Income Shares Model v. Percentage of Income Model

The Percentage of Income Model does not easily allow for deviations in the guidelines where one or both parents have extremely high or low incomes. If a state switched from the Income Shares Model to the Percentage of Income Model, many noncustodial parents would see an increase in their child support obligations, particularly if they are high earners.[28]

The Percentage of Income Model is also not flexible in considering a variety of other circumstances, such as a family with higher medical expenses or extraordinary transportation costs.[29] The Income Shares Model, however, allows for these expenses to be considered as a credit to the parent paying the expense, resulting in an adjustment to the child support calculation.[30]

Under the Percentage of Income Model, if parents share equal custody of a child and have similar incomes, then neither parent pays or receives child support.[31] While under the Income Shares Model (and the Melson Formula), the number of overnights that are spent with the noncustodial parent are factored into their child support calculation on a proportional basis.[32] In New Jersey, under the Income Shares Model, an entirely different three-step calculation for true 50-50 shared parenting time is often used, referred to as the Wunsch-Deffler Analysis.[33]

Percentage of Income Model v. Melson Formula

The Melson Formula treats health insurance as a deduction from income and lists health insurance as a primary expense for the child.[34] While under the Percentage of Income Model, parents must share the cost of health insurance equally or based on their respective incomes and this will occur by adjusting the child support obligation upward or downward.[35]

The Percentage of Income Model also does not have a universal or precise calculation for shared parenting time. Most states that use the Percentage of Income Model calculate shared parenting as 30% of the year, or 110 overnights per year.[36] The base child support calculation will then be multiplied by the percent of shared parenting time for both the parents.[37] The two numbers will be subtracted from one another and the parent who owes the difference pays child support.[38] While under the Melson Formula, an obligor receives a shared parenting time adjustment to their child support based on a percentage which corresponds to the designated ranges of the number of overnights with the child.[39]

Income Shares Model v. Melson Formula

A major difference with the Income Shares Model and the Melson Formula is that the child support obligation declines as a percentage of the nonresidential parent's income as the overall income increases.[40] The Income Shares Model also does not take into consideration the same public policy factors that the Melson Formula uses when calculating child support, such as the importance of the self-support reserve.[41]

Overall, the Income Shares Model and the Melson Formula are similar in that they are flexible when considering the number of expenses that can be factored in or credited to each parent. Both models also consider shared parenting arrangements. In general, under both models, the more parenting time the noncustodial parent has, the lower the child support obligation will be.

II. Is the Income Shares Model Fairest for Both Parents?

While most states use the Income Shares Model for calculating child support, custodial parents have a host of complaints for their attorneys once child support is calculated. Much of the criticism stems from the custodial parent feeling as if they pay a much higher amount toward their child's everyday expenses than the noncustodial parent who is not incurring these daily expenses, but rather paying a weekly or monthly support obligation.

a. Custodial Parents can Seek Reimbursement for Recurring Expenses

While under New Jersey's child support model many expenses are included in the base child support calculation, reoccurring expenses can be reimbursed to the custodial parent based on the noncustodial parent's percent of income share.[42] For example, for a custodial parent who earns $50,000 and a noncustodial parent who earns $75,000, the custodial parent would be responsible for 40% of the extracurricular expenses, rather than a 50% split which is sometimes used in Percentage of Income Model states.

The same approach is adopted by New Jersey for medical expenses in excess of $250 paid by the custodial parent per child, per year. Appendix IX-A has a catch-all category as well to include any other court approved expenses, such as tuition, special needs of a gifted or disabled child, and parenting time expenses.[43]

b. Consideration of Both Parents' Incomes Typically Benefits the Custodial Parent.

The Income Shares Model and Melson Formula consider the parents' respective incomes when calculating child support. The goal of the Income Shares Model is to create a support obligation for the child as if the family remained intact.[44]

The custodial parent has the freedom to choose in what ways they wish to use the child support because the base obligation includes a wide range of appropriate uses.[45] Child support can go to food, clothing, housing expenses, and any transportation costs for the child, except for motor vehicle expenses related to a vehicle purchased for and operated primarily by the child, which is in addition to the guidelines-based child support.[46]

For custodial parents who have a lower income, the self-support reserve can be beneficial. The New Jersey guidelines focus on the self-support reserve for those parents who are at or near the poverty level, which is 105% of the U.S. poverty guideline for one person.[47] While this self-support reserve is beneficial for noncustodial parents, having the requirement for custodial parents is beneficial as well because it ensures custodial parents - after their share of child support is calculated - can meet their basic needs to then care for their children. The self-support reserve is calculated at $258 per week.[48] Thus, both parents must have $258 per week left after they have paid their share of child support.[49]

Similarly, the New Jersey child support guidelines have a significant deviation for high income parents. If the parents' combined net income is over $187,200 annually, the guidelines cannot be used to calculate child support.[50] The court must then consider a list of 10 factors under N.J.S.A. 2A:34-23(a) in setting a child support amount. Based on these factors, the court can increase the noncustodial parent's child support obligation. When calculating child support for high income parents, the court will use the guidelines up to $187,200 annually, and then weigh the following factors to consider adjustments:

1. Needs of the child;
2. S tandard of living and economic circumstances of each parent;
3. All sources of income and assets of each parent;
4. Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;
5. Need and capacity of the child for education, including higher education;
6. Age and health of the child and each parent;
7. Income, assets and earning ability of the child;
8. Responsibility of the parents for the court-ordered support of others;
9. Reasonable debts and liabilities of each child and parent; and
10. Any other factors the court may deem relevant.[51]

The courts have rejected a formulaic approach of simply adding onto the guidelines support by the percentage of income over the maximum, in favor of requiring a full statutory analysis.[52]

III. Is there a Fairer Model?

Of the models currently in use, the Income Shares Model provides, on balance, the fairest approach, with some reasonable adjustments to keep pace with the times. When analyzing fairness, the main factors to consider should be: (1) that the child's needs are met; (2) the calculations are reasonably consistent and predictable for a majority of cases; and (3) that both parents are able to meet their respective individual needs considering the support obligation.

The Melson Formula is complex because of the subjective factors the court must consider in each case. While there are many advantages to the Melson Formula, and after a review Delaware has found in most cases, the formula produced fair and consistent results,[53] the

calculation based on those subjective factors can result in unfair outcomes despite the built-in Standard of Living Adjustment. In practice, if a number of factors weigh in favor of the noncustodial parent, the child support obligation may end up being adjusted and become disproportionately lower than the base formula, potentially producing an unfair outcome for custodial parents.

Conversely, the Percentage of Income Model can be too objective and inflexible. The custodial parent's income does not play any role, and often extra reoccurring expenses for the child are ordered to be split 50-50 despite each parent's respective income.[54] This can result in unfair outcomes, especially if a custodial parent's income is very different from the noncustodial parent's income. Similarly, there are almost no consistent factors to consider with respect to any adjustments in the interest of fairness to either parent and the lifestyle of either parent is not a consideration.[55] While this allows for a very consistent child support obligation across many cases, it does not allow for the flexibility that either parent may require in a calculation.[56]

The Income Shares Model, used in New Jersey, is the middle ground among the three models and combines the best attributes of both approaches. While the Income Shares Model is not perfect, it allows for some flexibility in calculating child support while also remaining relatively consistent across many cases. However, the argument that the Income Shares Model in New Jersey includes too many discretionary expenses with basic child support is valid, and could potentially be addressed through a more frequent review of Appendix IX-A instructions.

One area that is ripe for review about whether it should be included in New Jersey's base child support calculation is the category of "entertainment." According to Appendix IX-A, Section 8, many extracurricular activities fall under Section 8, entertainment expenses:

> Entertainment: Fees, memberships and admissions to sports, recreational or social events, lessons or instructions, movie rentals, televisions, mobile devices, sound equipment, pets, hobbies, toys, playground equipment, photographic equipment, film processing, video games, and recreational, exercise or sports equipment.[57]

The language of Appendix IX-A, Section 8 is in need of updating. The cost of smart phones, iPads, laptops, webcams, unlimited data plans, travel or competitive league sports, educational or sports camps unrelated to childcare and intensive tutoring appear not to have been contemplated separately under New Jersey's child support structure. We are all familiar with arguments that such expenses are included with basic child support under Appendix IX-A, thus there is no additional reimbursement due from the noncustodial parent. While Appendix IX-A, Section 9, may permit a custodial parent to be reimbursed for some of these "large or variable expenditures," there is a lack of clarity in the Appendix.[58]

Items previously thought of as "entertainment," including cell phones, laptops, webcams and fast Wi-Fi/internet are now largely necessities, particularly for older children. Many of these expenditures are necessary for children to attend virtual school, complete schoolwork, maintain social contact with friends and remain in contact with parents. New Jersey's child support guidelines already permit courts to consider payment from obligors for predictable and recurring expenses. Now may be the time to address cell phone and internet expenses, especially to the extent that such access is required to complete schoolwork. Likewise, the cost to the noncustodial parent who provides similar items for the children must be considered as well. Specifically, adding these types of expenses to the category of predictable reoccurring expenses may help to render the Income Shares Model fairer to both parents in light of our quickly-evolving world. ■

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Endnotes

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32. Appendix IX-A, Lines 13 and 14.
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36. Brown and Brito, supra 4.
37. *Id.*
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39. See The Honorable Michael K. Newell, Chief Justice, supra 44.
40. See Appendix IX-A, Section 6(h).
41. *Clanton*, 559 A.2d at 1203.
42. Appendix IX-A, Section 9.
43. Line 9(d).
44. Appendix IX-A, Section 1.
45. *Id.* at Line 8.
46. *Id.*
47. Appendix IX-A, Section 20(a).
48. *Id.*
49. *Id.*
50. Appendix IX-A, Section 20(b).
51. N.J.S.A. 2A:34-23(a).
52. *McGinley v. McGinley*, 2011 WL 5266117 (App.Div. 2011).
53. *Clanton* 559 A.2d at 1206.
54. See also Wis. Admin. Code [DCF] § 150.05 providing that each parent's ability to pay should be considered when mandating the payment of health insurance benefits for the child.
55. See Wis. Admin. Code [DCF] § 150.03(11), explaining the court may deviate from the percentage standard upon request by a party, where the standard would be unfair to the child or to any of the parties.
56. *Elrod*, supra at 121.
57. Appendix IX-A, Section 8.
58. Appendix IX-A, Section 9.

When the Elective Share and the Equitable Distribution Statutes Collide – How to Protect a Client from the Black Hole

By Sheryl J. Seiden

The black hole created by the conflict between the Elective Share and Equitable Distribution Statutes is not an issue that lawyers must address unless a client dies prior to or during a divorce proceeding. The Elective Share Statute protects a surviving spouse from being disinherited by their spouse as it provides that the surviving spouse should receive one-third of the decedent's augmented estate. The Equitable Distribution Statute provides for the division of the marital assets at the time of the parties' divorce. The challenge is that the equitable distribution laws cannot be applied after a spouse dies, and, more, the elective share rights do not permit a party who has grounds for a divorce or has initiated divorce proceedings to receive the surviving spouse's one-third share of the augmented estate of the deceased spouse. This leaves the surviving spouse without a remedy under the Equitable Distribution Statute and without a remedy under the elective share rights. This problem creates a "black hole" without a remedy in our laws. Thus, the question becomes: What can a surviving spouse to do to ensure that the surviving spouse obtains a portion of the marital estate?

Equitable Remedies Available

This conflict between the equitable distribution and elective share laws arose in the matter of *Carr v. Carr*,[1] where the husband died during the divorce proceedings prior to the entry of a judgment of divorce. His Will bequeathed all of his assets to his children. In that case, the New Jersey Supreme Court held that the laws of equitable distribution cannot apply after a spouse died. The Court also acknowledged that the elective share rule did not apply after the wife filed for divorce. Recognizing that this left the wife in a "black hole," the Court imposed a constructive trust on the marital assets and remanded the matter to the trial court to determine how to equitably provide the wife with a portion of the marital estate. The result was that the wife then had to litigate the matter against the executor of the deceased husband's estate. While the Court did recognize the need for equitable remedies, it did not determine her share of the marital estate.

In *Carr*, the facts were significant as the parties had been married for seven years and all of the assets were bequeathed to the husband's children, and the wife had a claim for dissipation of marital assets in the case. Those significant facts are not present in every case and lawyers should not assume that these equitable remedies will be available in every case.[2] In order to succeed in the establishment of the constructive trust, the moving party has the burden to establish by clear and convincing evidence (a) the asset has been received or retained through a wrongful act (which can include an innocent mistake) and (b) which unjustly enriches the recipient.[3]

In *Kay v. Kay*,[4] the Court addressed the issue of whether the equitable remedies available in *Carr* were available to the estate of the deceased husband in a divorce action after his death to ensure that his estate would receive an equitable share of the marital assets. Like the facts of *Carr*, the husband had a claim of dissipation of marital assets, and the Court permitted the estate to continue to litigate the dissipation and equitable distribution issues after the death of the husband. In the decision, the Court specifically invited our Legislature to review the "black hole" at issue in this article.[5]

Even when the Court establishes the constructive trust, if the specific allocation of the marital assets between the surviving spouse and the estate cannot be agreed upon, then the issue of specifics of the equitable remedy will be left to the sound discretion of the trial court. Practitioners should not assume that the equitable remedy will yield an equal allocation of the assets in the deceased spouse's estate, as would likely be the case if the assets were equitably distributed.

Efforts of the Family Law Section to Eliminate the "Black hole"

In 2014, the Family Law Executive Committee (FLEC) was asked to review the New Jersey Law Revision Commission's (Commission) Nov. 7, 2011, Final Report, which provided 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 address the "black hole" that exists between these two statutes. The Commission's proposed changes addressed the "black hole" but created an avenue for the bifurcation of equitable distribution issues in matrimonial matter. In 2015, Jeralyn L. Lawrence, then-chair of the Section, an Elective Share Committee (Committee) was established, which the author chaired to address the Commission's Report.[6] The Committee accepted some of the changes proposed by the Commission and proffered additional changes to close the "black hole." These changes were approved by FLEC and then submitted to the New Jersey State Bar Association (NJSBA) for approval.

Unfortunately, the Elder and Disability Law Section did not want to eliminate the "black hole" as its members used this conflict to enable clients to obtain Medicare benefits by permitting the other spouse to retain the marital assets. Specifically, in cases where one party needed to reside in a nursing home, all of the marital assets would be held in the other party's name. Because the parties had been living separate and apart at the time, they could claim that grounds for divorce existed in order to avoid allocating the monied spouse's estate. This shielded the assets from being used to pay for the surviving spouse's care and made that party eligible for Medicare benefits. As a result, the Elder and Disability Law Section did not consent to changes to the Elective Share Statute as it would have eliminated this estate planning tool. This created a conflict within the NJSBA and brought this issue to a standstill.

Conflict Between the Elder Law and Family Law Sections in Addressing this Issue has been Resolved by Case Law

In 2017, the Appellate Division decided *In the Matter of Estate of Arthur Brown Deceased*.[7] This case eliminated the need for the estate planning tool that elder law attorneys employed under *N.J.S.A.* 3B:8-1 to assist their clients with Medicaid Planning. In *Brown*, the New Jersey Division of Medical Assistance and Health Services (DMAHS) filed for a priority lien against the estate of Arthur Brown seeking reimbursement for the $166,981.25 in Medicare aid provided to him during his lifetime. Brown's children then filed suit seeking to dismiss the lien. DMAHS argued that Brown's estate should have received one-third of the assets held by his wife at the time of her death under the Elective Share Statute. Although neither husband nor wife had filed for divorce, the Brown children argued that their father was not entitled to one-third of their mother's estate at the time of her death because the parties had been living separate and apart at the time of her death and that grounds existed for a divorce. The trial court rejected the argument made by the children that their father's entry into a nursing home gave rise to grounds for a divorce after the parties' 59 years of marriage. The Appellate Division affirmed the trial court's enforcement of DMAHS's lien against his estate.

With the change of New Jersey divorce laws from contested to uncontested grounds in 2007, every litigant can argue that grounds for a divorce exist in their marriage. The *Brown* Court, however, prohibits parties from using this statute to shield assets in order to receive government benefits.

Pending Legislation

As a result of the *Brown* decision, the legislation proposed by FLEC was ripe. In April 2021, Robin Bogan, then-Chair of the Section, Ronald Lieberman, the immediate past chair, NJSBA Senior Manager of Government Affairs Lisa Chapland, and the author met with Assemblyman Raj Mukherji to explain the "black hole" that has been created in New Jersey and the Section's proposed means of resolving this conflict. He appreciated and welcomed our suggested revisions and, in response, he accepted FLEC's proposed changes to both the Elective Share and Equitable Distribution Statutes and proposed Assembly Bill 2351 to amend the statutes. This bill is pending before the Legislature and provides the following substantive changes to the following statutes:

> *N.J.S.A.* 2A:34-23(h) (Equitable Distribution Statute)
>
> Add: "If a complaint not dismissed pursuant to R.4:6-2 of the Rules of Court has been filed for an action under paragraph (1) of this section, and either party to the litigation dies prior to the entry of the final judgment, the court's authority to effectuate an equitable distribution of the property shall not abate."

N.J.S.A. 3B:5-3 (Elective Share Statute)

Add: "Surviving spouse, partner in a civil union, or domestic partner shall not include an individual who has filed a complaint not dismissed pursuant to R.4:6-2 of the Rules of Court, or against whom a complaint not dismissed pursuant to R.4:6-2 of the Rules of Court, has been filed for divorce, dissolution of civil union, termination of domestic partnership or divorce from bed and board."

N.J.S.A. 3B:8-1 (Elective Share Statute)

Replace "provided that at the time of death the decedent and the surviving spouse or domestic partner had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as the result of judgment of divorce from bed and board or under circumstances which would have given rise to a cause of action for divorce or nullity of marriage to a decedent prior to his death under the law of this State."

Add: "unless either the decedent or the surviving spouse, partner in a civil union, or domestic partner had filed a complaint not dismissed pursuant to R.4:6-2 of the Rules of Court, for divorce, dissolution of civil union, termination of domestic partnership or divorce from bed and board."

These changes provide that if a complaint for divorce, dissolution of civil union, or divorce from bed and board is filed prior to the death of one of the litigants, then upon the death of a party, the court would still have the authority to effectuate equitable distribution of the marital assets. In addition, these changes would provide that the elective share would not apply if a complaint for divorce, dissolution of civil union, or divorce from bed and board had been filed. In those cases, there would no longer be a right of election for the non-titled spouse. An improperly filed complaint can still be challenged. In sum, the effect of this legislation would be for the filing of a complaint to be what divides the laws of equitable distribution and the elective share.

What to Expect for the Future

Together with the NJSBA, FLEC continues to monitor Bill A2351 and remains hopeful that the amendments to the Elective Share and Equitable Distribution Statutes to eliminate the black hole will pass the Legislature. In the meantime, if you have a client whose spouse dies pending the entry of the judgment of divorce, the only available remedy to address these issues continues to be equitable remedies.

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Endnotes

1. 120 N.J. 336 (1990).
2. *Flanigan v. Munson*, 175 N.J. 597, 611 (2003) (a constructive trust should only be granted "when the equities of a given case clary warrant it.").
3. *Id.*
4. 200 N.J. 551 (2010).
5. "As we commented in *Carr*, our Legislature has occasionally considered bills that have been designed to address some of the concerns that arise when the statutes governing divorce and equitable distribution and the statutes governing the matters pertinent to decedents' estates appear to collide." See *Carr*, supra, 120 N.J. at 350 n.3 (explaining then-recent efforts to create statutory clarity through altering definition of "surviving spouse"). As this appeal highlights a further dimension of the way in which those statutory provisions may conflict, we invite such further consideration of these matters as our Legislature deems appropriate."
6. Members of the current Committee included J. Patrick McShane III, Jane Altman, and Katrina Vitale. In 2019, the Committee included, Christine Fitzgerald as chair, Jane R. Altman, J. Patrick McShane III., Megan S. Murray, Robert Epstein, and Cassie Murphy.
7. 448 N.J. Super. 252 (App. Div. 2017).

A New Protocol to Determine the Competency of a Child Witness

By Christopher Musulin and Matheu D. Nunn

On Feb. 9, 2021, without publicity or fanfare, the Hon. Glenn A. Grant, J.A.D., Acting Director of the Administrative Office of the Courts, issued a Notice to the Bar containing the report and recommendations of the Joint Committee on Assessing the Competency of Child Witnesses (Joint Committee).[1]

The Joint Committee's Dec. 23, 2020, report establishes a new protocol to determine the competency of child witnesses (Report and/or Protocol) under N.J.R.E. 601.[2] The Protocol was created by a nationally recognized expert in conducting child interviews, Thomas D. Lyon, Ph.D., and was subsequently peer-reviewed and validated by three distinguished professional colleagues of Lyon (after Lyon made revisions to address their comments).[3] Although the impetus for the Report was the New Jersey Supreme Court's decision in a criminal law case, *State v. Bueso*,[4] the Protocol recommended has important implications for New Jersey family law practice. Indeed, the Protocol established in the Report provides valuable insight and guidance for both judicial interviews of children and other situations where a child may be called as a witness. When the Report is viewed through its stated goal–to assess competency–and not through the prism of assessing accuracy or reliability of later proffered testimony–we believe the Protocol should be looked to as a best practice employed by judges to establish baseline competency of child witnesses.

Impetus for the Report

In 2016, the Supreme Court decided *State v. Bueso*, a case involving a five-year-old child victim (referred to in the opinion as M.C.) who alleged sexual abuse by a family member who also served as a babysitter.[5] The child initially reported the abuse to her mother.[6] The child's mother contacted the state Department of Child Protection and Permenancy, which in turn contacted the local prosecutor's office.[7] The child subsequently provided a statement to law enforcement, which was videotaped.[8] Prior to trial, the court denied the defendant's motion to dismiss the indictment and also denied defendant's motion to suppress the child's statement to her mother and the videotape of the detective's interview of the child.[9] During a competency hearing, the prosecutor probed whether the child understood the importance of telling the truth:

> [Prosecutor]: Now, if you forgot to do your spelling homework—you didn't do your spelling homework—and you told your teacher you did the spelling homework, would that be a lie?
> [M.C.]: Yes.
> [Prosecutor]: And what would your teacher do if you told her you did your spelling homework—
> [M.C.]: He's going to—
> [Prosecutor]:—but you didn't do your spelling homework?
> [M.C.]: He's going to put me an X in the homework.
> [Prosecutor]: She's going to do what?
> [M.C.]: Put me an X.
> [Prosecutor]: She's going to make you do the next homework?
> [M.C.]: No. She—he's going to put an X.
> [Prosecutor]: Oh. Put an X? So, he—your teacher's a man? Yes? You just have to say out loud—
> [M.C.]: Yes.
> [Prosecutor]:—yes or no. So, your teacher, who's a male, would put an X?
> [M.C.]: Yes.
> [Prosecutor]: Is the X good or bad?
> [M.C.]: Bad.
> [Prosecutor]: What happens if you get a lot of X's?
> [M.C.]: You probably not play with that—be alone.
> [Prosecutor]: You'd be alone?[10]

Then, at trial, the state introduced the subject of tell-

ing the truth in court in its examination of the child:

> [Prosecutor]: Everything you do today in court, you have to tell the truth. Do you understand that?
> [M.C.]: Yes.
> [Prosecutor]: So, is it good to tell the truth?
> [M.C.]: Yes.
> [Prosecutor]: And is it bad to tell a lie?
> [M.C.]: Yes.
> [Prosecutor]: And do you understand bad things happen if you tell a lie in court. Do you understand that?
> [M.C.]: Uh-un. No.
> [Prosecutor]: Do you understand that bad things happen if you tell a lie in school?
> [M.C.]: Yes.
> [Prosecutor]: So, just like if you tell a lie in school, if you tell a lie here in this place, the court, bad things happen. Do you understand that?
> [M.C.]: Yes.
> [Prosecutor]: Okay. So, everything you talk about today has to be the truth. Do you understand that?
> [M.C.]: Uh-huh.

The trial judge then offered defense counsel the opportunity to ask questions. Defense counsel responded, "[n]o objection, Judge." The judge then briefly questioned the child:

> [The Court]: All right. Let me just ask you a question. See that book there?
> [M.C.]: Uh-huh.
> [The Court]: If I told you that that book is round, would that be a truth or a lie?
> [M.C.]: A lie.
> [The Court]: Why?
> [M.C.]: Because it's a rectangle.
> [The Court]: Because it's a rectangle. Okay. So, you know the difference between telling what is and what isn't, right? What really is and what really isn't? Truth or a lie, right? Okay. Thanks.[11]

The court then permitted the child to testify regarding the substance of the criminal charges.[12] The child proceeded to testify and described the abuse; she was partially consistent with her prior video-recorded allegations and statements to her mother.[13] After hearing additional testimony from, among other people, the defendant and an expert on pediatric sexual abuse, the jury convicted the defendant.[14]

On appeal, the Appellate Division reversed, holding that the trial judge was "required to question M.C. personally and directly to ascertain her comprehension of a witness's duty to tell the truth and her conceptual awareness of truth and falsehood and that the judge improperly delegated that responsibility to the prosecutor."[15] The panel also criticized the state's use of leading questions to question the child.[16] On certification to the Supreme Court, the Court held that "the inquiry conducted in this case was well short of ideal."[17] Although the Court ultimately reversed and remanded to the Appellate Division to further address the case, it added:

> A thorough and detailed examination of the child might have established a more compelling record. When M.C. offered her unclear comment about the consequences of a misstatement about spelling homework—indicating that she may not have understood the import of the question—the prosecutor should have shifted to alternative examples of falsehoods that a child might tell in the familiar setting of her school. The trial judge's brief questioning about a hypothetical lie concerning the shape of a book was instructive, but the judge's inquiry would have been more effective had it extended beyond a single topic.[18]

As part of its decision, the Supreme Court also directed that "courts and counsel should develop the record on the question of competency by means of thorough and detailed questioning of the child witness."[19] In a footnote, the Court stated: "[w]e suggest that to assist trial courts and counsel, the Criminal Practice Committee consider developing model questions for use in competency determinations involving child witnesses."[20]

Joint Committee Report

In response to the directive by the Supreme Court, the Joint Committee was established. It is comprised of members of the Supreme Court Criminal Practice, Evidence Rules, and Family Practice committees. The Supreme Court authorized the Joint Committee to

consult with child development and psychology experts. The Joint Committee consulted with Lyon, who is the chair in law and psychology at the University of Southern California (USC), Gould School of Law. He also serves as the Director of the USC Child Interviewing Lab.

After completing his exhaustive investigation and defining revised protocols, his work was peer-reviewed by three additional experts in the field: Gail Goodman, Ph.D., Michael E. Lamb, Ph.D., and Jodi A. Quas, Ph.D.[21] The Joint Committee recommended that the Court adopt the Protocol described by Lyon, as set forth more fully herein, for use when the issue of the competency of a child witness has been raised.[22] The Joint Committee also advised:

The Joint Committee recommends use of the carefully worded oral questions that would be posed to children aged nine and older and use of the picture-based method of questioning younger children and children affected by developmental delays, disabilities, and trauma.

The Joint Committee further recommends that adoption of this [P]rotocol include direction to trial courts to use only the oral questions or the picture-based methods set forth in the protocol to assess the competency of child witnesses.

When the competency of a child witness has been established, the Joint Committee also recommends use of the oath alternative ('Do you promise that you will tell the truth?').[23]

Lyon's Protocol

The Protocol established in the Report creates a distinction between children aged nine and older, and children younger than nine years old.[24] Specifically, for children aged nine and older, questions would be posed *orally* to determine the child's understanding of: (1) the difference between telling the truth and telling a lie; and (2) the negative consequences of telling a lie.[25] Under this approach, the interviewer asks: "If someone says something that didn't really happen, is that the truth or a lie?" The interviewer would then ask: "And if someone says something that really did happen, is that the truth or a lie?" If the child answers "lie" and "truth," then the child has demonstrated an understanding of the distinction.[26] If the child does not answer the question correctly, the interviewer would administer picture-based tests designed for younger children called the "Meaning Task" and "Consequences Task" because these tasks provide a more sensitive test of understanding.[27]

For younger children or those unable to sufficiently respond to the oral questions, a picture-based model is used to assess understanding of: (1) the difference between telling the truth and telling a lie; and (2) the negative consequences of telling a lie.[28] Under the Meaning Task approach, the person assessing competency asks the child a total of four questions about two scenarios set forth in pictures in which one child correctly labels an object and the other child incorrectly labels the object. For each of the two scenarios, the interviewer asks which child told the truth, and which child told a lie.[29] According to the Report:

If a child answers four of four Meaning Task questions correctly, this is strong evidence of understanding (approximately 6% of children responding at chance would answer 4/4 correctly). If a child answers three of four questions correctly, this is weak evidence of understanding (approximately 25% of children responding at chance would answer ¾ correctly). Answering two or fewer questions correctly suggests the child is guessing.[30]

The Meaning Task approach accomplishes seven goals: (1) it accounts for sensitivities associated with young children who are asked to identify truth-telling and lying; (2) it avoids problems encountered in *Bueso* with identification questions; (3) it avoids asking children "what-if" questions that ask them to imagine themselves or the questioner telling a lie; (4) it avoids confusing lies with immoral actions; (5) it avoids "do you know" questions, which can lead to high rates of false negatives; (6) it avoids requiring children to define the words "truth" and "lie;" and (7) it avoids requiring children to explain the difference between the truth and lies.[31]

Under the Consequences Task, the goal is to discern whether the child understands the *negative* consequences of telling a lie.[32] The interviewer asks the child four questions about scenarios in which one child tells a lie and the other child tells the truth. For each scenario, the interviewer asks which child correctly labels an object and which child incorrectly labels the object. For two scenarios, the interviewer asks which child told the truth, and for two scenarios, the interviewer asks which child told a lie. The child can be asked to choose which of two child story characters "is going to get in trouble," a child described as lying or a child described as telling the truth.[33]

Although this is a different approach than the Meaning Task, it shares a similarly important overall goal: to determine whether the child understands the importance of telling the truth and the negative consequences that

can result from a lie. It accomplishes this goal by: (1) recognizing that asking children to identify consequences is most sensitive to early understanding; (2) avoiding asking children "what-if" questions that ask them to imagine themselves or the questioner telling a lie; (3) avoiding asking children if they have ever told a lie; (4) avoiding confusing lies with immoral actions; (5) avoiding "do you know" questions; and (6) avoiding requiring children to believe in specific types of punishment.[34]

This section is not complete without addressing two other broad points discussed in the Report. First, Lyon rightfully cautions in the Report that: "[t]he model questions are designed to test children's ability to articulate their understanding of witnesses' duty to tell the truth, and *not children's honesty or reliability*."[35] In fact, he notes recent research which suggests that children with "an incipient understanding of truth and lies are better able to make false statements . . .[and] it is more difficult for the child who does not know the difference between 'truth' and 'lie' to tell a lie."[36] Second, he concludes that "[q]uestioning in a courtroom rather than in a private room is likely to impair children's performance" because "high arousal" in children reduces their ability "to communicate and impairs their accuracy."[37] To avoid this impairment, Lyon recommends that interviews be conducted in a private room after the interviewer has built a rapport with the child, which may take more than one interview to engender before administering the Protocol.[38]

Comments

The Report has been met with appreciation but also opposition. Most of the opposition stems from concerns about the dichotomy between a child's ability to understand the need to "*tell the truth*" versus the child's *accuracy* or *reliability* during subsequent testimony. While a child certainly may be able to do both, the comments expressed concern that a court may conflate veracity with accuracy and reliability. These concerns appear to be well-founded (and are actually addressed by Lyon in his report, including through revisions he made after receiving comments from Goodman and Quas).[39]

For example, although the New Jersey Office of the Public Defender's Office of Parental Representation (OPR), noted: "[i]n general, the NJOPD/OPR supports model questions for assessment of truth telling competency and agrees that the proposed two-part age specific protocol of both oral and picture-based models, consistent with New Jersey law, may be an effective method to assist the court in assessing child competency[,]" it also concluded that the Protocol has "the potential to result in the Court's adoption and utilization of an assessment model that inadvertently conflates issues of competency and accuracy," leading to determinations on child competency that may be more prejudicial than probative.[40]

In a similar vein, the Office of the Public Defender's Office of Law Guardian (OLG), noted its objection to use of the new Protocol in Children-in-Court (CIC) cases:

> The OLG suggests that the Protocol may undermine a child's statutory right to express his or her views in Titles Nine and Thirty proceedings, and, as written, it is impractical given the nature of child involvement in CIC cases. First, if competency is raised as per the Protocol, a child who testifies multiple times will be presented with the same pictures or questions each time. Second, a child may be discouraged from testifying, or even attending court proceedings, when faced with the competency threshold each time, or after the first time. This may have the unintended consequence of further traumatizing children who have experienced past trauma, through their involvement with our judicial system. Finally, use of the Protocol may lead to a more adversarial proceeding, which is counterproductive to a family-driven court system.
>
> . . .
>
> The OLG urges the Court not to implement the Protocol in CIC cases. A more practical approach in CIC cases, where judges serve as the arbiter of evidentiary decisions and the ultimate factfinder, is to continue to treat child and adult witnesses alike. Upon a commitment to tell the truth, through an oath, affirmation or alternative method, the court should permit children to testify, subject to the court's discretion as to the weight and credibility of the testimony.[41]

The New Jersey State Bar Association (NJSBA) provided similar commentary:

> In summary, the NJSBA urges the Judiciary to consider whether it is better to eliminate the competency test rather than to have a test that is likely to result in unjustified confidence in

> the competence of child witnesses. According to the Joint Report, science supports this inquiry. Eliminating the test also removes the potential for bias to be introduced by the test itself, as noted above. The NJSBA urges that the Judiciary instead allow the fact finder to assess the weight of a child's testimony in total without a bifurcated finding of qualifying and credibility determinations.[42]

The County Prosecutors Association of New Jersey also objected to the use of what it called the "Lyon Protocol" to assess competency under *N.J.R.E.* 601 and asked for the opportunity to "vet" the Protocol before it is adopted as a model procedure or law.[43]

On the other hand, the Supreme Court Committee on Diversity, Inclusion and Community Engagement (DICE) Executive Board supported the new Protocol subject to its comments, most of which are borne out of its mission of diversity, inclusion, and community engagement; for example:

> Children from different cultural and economic backgrounds will be equitably assessed given the use of an interviewer script that accepts as valid a child's "misnaming" of a visual (e.g., naming the mouse depicted as a rat or a peach as an orange). So long as these vocabulary and context variations cannot become the basis to challenge accuracy during testimony, we believe that common concerns about embedded cultural biases, e.g., in the case of vocabulary and terminology in standardized tests, are ameliorated by this assessment standard.[44]

Thus, the DICE expressed its view that, , although children of different backgrounds may meld terms or concepts due to cultural, religious, or other differences (e.g., rat versus mouse), an instance of misidentifying specifics–though understanding the general nature–should *not* lead to a conclusion of incompetency as a witness.

Rules of Evidence - Competency

Issues of witness competency are left for the discretion of trial court judges.[45] *N.J.R.E.* 601 provides that:

> Every person is competent to be a witness unless (a) the court finds that the proposed witness is incapable of expression so as to be understood by the court and any jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness *to tell the truth*, or (c) as otherwise provided by these rules or by law.[46]

Clearly, *N.J.R.E.* 601 does not guide whether the factfinder is bound to accept the accuracy/reliability of a witness's testimonyonly whether the witness, at a threshold level, is capable of understanding the importance of telling the truth (and/or to be understood). The Report and Protocol are also limited to assessing *competency*.

Much of the negative commentary regarding the Report stemmed from this issue (i.e., competency to understand truth versus lie) and whether a judge would improperly conflate competency with *reliability*. To be sure, the commentary on that score is accurate (as recognized byLyon in the Report) and must be considered; but we are confident that in a bench trial, judges will be capable of recognizing this distinction. And, moreover, in a jury trial, the jury determines reliability and accuracy of testimony while the judge would have already determined competency. In other words, the competency/reliability guardrail is built into a jury trial because if the court determines that the child lacks competency, the child will not take the witness stand.[47]

Court Rule 5:8-6 and Title 9:2-4

Rule 5:8-6 gives judges the authority to conduct child interviews as part of a custody trial. It provides as follows:

> …As part of the custody hearing, the court may on its own motion or at the request of a litigant conduct an in camera interview with the child(ren). In the absence of good cause, the decision to conduct an interview shall be made before trial. If the court elects not to conduct an interview, it shall place its reasons on the record. If the court elects to conduct an interview, it shall afford counsel the opportunity to submit questions for the court's use during the interview and shall place on the record its reasons for not asking any question thus submitted. A stenographic or recorded record shall be made of each interview in its entirety. Transcripts thereof shall be provided to counsel

> and the parties upon request and payment for the cost. However, neither parent shall discuss nor reveal the contents of the interview with the children or third parties without permission of the court. Counsel shall have the right to provide the transcript or its contents to any expert retained on the issue of custody…[48]

N.J.S.A. 9:2-4 contains fourteen non-exclusive factors that a court may consider in fashioning a custody or parenting time award. This includes "the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision."[49]

Both the court rule and the statute empower a trial court to interview a child or consider the opinion of a child not only as expressed through a direct interview, but also as recited by an expert or guardian *ad litem*, or if the preference is expressed as an exception to the hearsay rule. These legal standards invite the use of the revised Protocol.

Conclusion

Even the most seasoned custody experts (and attorneys) express trepidation about the challenges of interviewing young children.[50] Prior to *State v. Bueso,* there have been published decisions highlighting the pitfalls and potential abuses associated with child interviews.[51] It is then of no surprise that trial judges routinely express concern about conducting interviews in any type of case. Most are very honest about their lack of sufficient training and background to properly conduct interviews with children. Although the major thrust of the Report is focused on competency *at trial*, we suggest that judges utilize the Protocol before conducting an interview of a child, regardless of the proceeding. We further recommend that a judge build a genuine rapport with a child-interviewee over the course of more than one interview before charting a course into the intended subject matter of the interview (e.g., information for child custody determinations). ■

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Endnotes

1. Judge Glenn A. Grant, Notice to the Bar: Report and Recommendations of the Joint Committee on Assessing the Competency of Child Witnesses–Publication for Comment (Feb. 9, 2021), njcourts.gov/notices/2021/n210210c.pdf. The Notice to the Bar also contains the full report and recommendations of the Joint Committee on Assessing the Competency of Child Witnesses (hereinafter Report).
2. *Id.*
3. Report at 58-77.
4. 225 N.J. 193 (2016).
5. *Id.* at 196-97.
6. *Id.* at 197.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 198.
11. *Id.* at 199.
12. *Id.*
13. *Id.*
14. *Id.* at 199-200.
15. *Id.* at 200-01.
16. *Id.* at 201.
17. *Id.* at 213.
18. *Id.* at 213-14.
19. *Id.* at 214.
20. *Id.* at 214 n.6.
21. Report at 3.
22. *Id.* at 13.
23. *Id.*
24. *See id.* at 20. The Report notes that children as young as the age of four can be presumed competent. *Id.*
25. *Id.* at 9-12, 16-34.
26. *Id.* at 18.
27. *Id.*
28. *Id.* at 11, 17-19.
29. *Id.* at 17-18.
30. *Id.* at 18.
31. *Id.* at 21-25.
32. *Id.* at 18.

33. *Id*.
34. *Id*. at 26-29.
35. *Id*. at 20 (emphasis added).
36. *Id*. at 21.
37. *Id*.
38. *Id*. at 21, 70. *See also* Madelyn Simring Milchman and Charles F. Vuotto, Jr., *Forensic Child Interviewing: Dos and Don'ts*, 32 N.J. Fam. L. 51 (Sept. 2011) (discussing the importance of building a rapport as part of the child interview process).
39. Report at 16, 59, 62, and 69.
40. Letter from Janice T. Anderson, Assistant Public Defender, State of New Jersey Office of the Public Defender, Office of Parental Representation to the Honorable Glenn A. Grant, J.A.D. (March 9, 2021), njcourts.gov/courts/assets/supreme/reports/2021/comments/childwitness001.pdf.
41. Letter from Traci Telemaque, Assistant Public Defender, State of New Jersey Office of the Public Defender, Office of the Law Guardian to the Honorable Glenn A. Grant, J.A.D. (March 15, 2021), njcourts.gov/courts/assets/supreme/reports/2021/comments/childwitness002.pdf.
42. Letter from Kimberly A. Yonta, Esq., President, New Jersey State Bar Association to the Honorable Glenn A. Grant, J.A.D. (March 22, 2021), njcourts.gov/courts/assets/supreme/reports/2021/comments/childwitness003.pdf.
43. Letter from Esther Suarez, President, County Prosecutors Association of New Jersey to the Honorable Glenn A. Grant, J.A.D. (March 26, 2021), njcourts.gov/courts/assets/supreme/reports/2021/comments/childwitness005.pdf
44. Letter from Hany A. Mawla, J.A.D., Chair, Supreme Court Committee on Diversity, Inclusion and Community Engagement to the Honorable Glenn A. Grant, J.A.D. (March 26, 2021), njcourts.gov/courts/assets/supreme/reports/2021/comments/childwitness004.pdf
45. *See State v. Bueso,* 225 N.J. 193, 205 (2016); see also *Ryan v. Renny*, 203 N.J. 37 (2010); State v. G.C., 188 N.J. 118, 120 (2006).
46. *N.J.R.E. 601* (emphasis added).
47. This article does not address other avenues available to get a child witness's statement into a proceeding, which may, nevertheless, hinge on pre-trial determinations, *see* preliminary questions, *N.J.R.E. 104*; competency, *N.J.R.E. 601*; lack of personal knowledge, *N.J.R.E. 602;* undue prejudice, *N.J.R.E. 403*; and, of course, relevance, *N.J.R.E. 401*.
48. NJ Ct. R. 5:8-6.
49. N.J.S.A. 9:2-4.
50. *See generally* Milchman and Vuotto, Jr., *supra* note 38.
51. *See, e.g. State v. Michaels*, 136 N.J. 299 (1994) (discussing the difficulty of child interviews, the problems associated with those interviews including "coercive and unduly suggestive methods," and approaches to avoid tainting a child interview).

Transition to the Family Court

By Hon. Thomas Zampino (Ret.)

In 1989, I was appointed to the state Superior Court bench and served in the Family Part until I retired in 2011. When I came on the court as a trial judge, I had the benefit of 15 years as a family law practitioner. I enjoyed every minute of my career as a family court judge. Chief Justice Robert Wilentz promoted the idea that judges who wanted to remain in the Family Part could stay in family. I was a beneficiary of that policy. My background as a family law practitioner made my transition simpler since I knew the procedural processes, the substance matter and caselaw. I just had to learn and focus on what it meant to be a judge.

From my unofficial perspective, I believe there has been a decline in the number of judges who want to serve their entire career in the Family Part. There are several factors which I believe have led to this situation. Today, I see very few attorneys with similar family law experience being nominated and appointed to the bench. The transition from being an advocate and becoming a neutral arbiter is one of the important aspects of becoming a successful judge. Skill sets beyond such things as the knowledge of the law or case processing are also important. Additionally, demeanor and comportment, respect and courtesy, are essential skills needed for a successful judge.

This switch to becoming a family court judge is further complicated for non-family practitioners assigned to the Family Part because many, if not most, have no experience in the division. It is an extremely difficult transition, akin to learning a new language. Coupled with the fact that the family judges are also the finders of fact, some new judges struggle with making definitive decisions on both motions and trials.

I believe more needs and can be done to ease judges into this new assignment. Listed below are a few ideas on how to assist judges in this transition and hopefully, increase the number of judges willing to spend their career in the assignment.

Suggested improvements:

1. **Action by the Governor and Legislature.** An increase in the number of family practitioners with knowledge and expertise in the matrimonial and non-dissolution case types nominated and appointed to the bench. Attorneys and other interested parties should advocate to the other two branches for more attorneys to be appointed with prior legal experience in family practice.
2. **Training and More Training.** While the Family Part does have more judicial training than any other division, including mentoring programs and the Comprehensive Judicial Orientation Program, the Judiciary also has a judicial commissioner role where retired judges assist judges in their mid-tenure and prior to tenure review. A videotape is made of the judge during court sessions and a conversation with the retired judge is conducted to identify strengths and weaknesses in the judge's performance. I believe this program should be expanded to provide for retired judges who have had a long history in the family division to assist new judges in this transition.
3. **A Statewide Mentorship Program.** My recommendation is for retired Family Part judges serving in a recall capacity to ride the circuit reviewing cases that are in front of the new judge to assist in decision making. The Hon. Robert A. Fall (Ret.) has served successfully in this type of role previously. These mentor judges cannot have any calendar, rather they serve only in a teaching and learning exchange with new judges, who can ask questions to help them make the difficult decisions before them.
4. **Participation of Elder Judges in Judicial College Training.** Some years ago, retired judges lost their role as teachers at the Judicial College. Perhaps that decision could be revisited so that new judges may harness the decades of wisdom and experience from the elders.
5. **A Settlement Bootcamp.** In the Family Part, the vast majority of cases are settled and not tried. With that knowledge, settlement skills should be strongly developed for all Family Part judges. Every judge is different and applies their individual knowledge and expertise to reach the right results for litigants. However, there is a general range of reasonableness

in deciding alimony, for example. Relying upon the retired family judges, the Judiciary should explore CJOP or bootcamp-type training on settlement techniques and other strategies.

The above suggestions are designed to provide greater success in marital dissolution matters, as well as other family case types. Judicial vacancies hovering over 60 for over two years creates impossible challenges for newly assigned judges. There is an unmanageable caseload as soon as the judge walks into a courtroom. This factor alone crushes the enthusiasm of any new judge. It is impossible to sustain any semblance of excellence in such situations. Shouldn't the word transition have real meaning?

When a person transitions from being a lawyer to becoming a judge, the swearing in ceremony does not bestow any magical wisdom for entry into a new high intensity position. In the private world, a new hire would very often shadow the retiring worker to learn the ropes, not be thrust into a full calendar the next week, or even days later.

Beyond the challenges associated with vacancies, I believe that the retired dinosaurs of the Family Part can assist the Judiciary in helping judges to make the successful transition to the division. Collaborating with former colleagues who have spent decades in the trenches, if you will, can hopefully allow judges to be better family judges and even make a commitment to stay in family. Like Chief Justice Wilentz, I firmly believe the family division is the most important division. Perhaps a transition protocol, to be followed by *all* assignment judges, would provide a uniform approach. Our goal should be consistency in decision making and that can only come not by rhetoric, but by the continued support and training we give our new judges. Learning never stops, nor should our teaching.

Judge Zampino served as a Family Court judge for over two decades before becoming Of Counsel with Snyder Sarno D'Aniello Maceri & Da Costa LLC. His practice is limited to the successful mediation and arbitration of matrimonial cases.