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CHAIR'S COLUMN

A New Year, A New Focus

by Charles F. Vuotto Jr.

I am honored to serve as the 40th chair of the Family Law Section, one of the preeminent sections of the New Jersey State Bar Association and the third largest of the 36 sections of the state bar. I am humbled to follow a long line of distinguished family law practitioners who have served in this capacity. I hope that I will honor them and the members of the section with my service in the year to come.

I can safely say that I would not likely have received this honor if not for a handful of very special people. First, I want to thank Judge Gene Iadanza for swearing me in on May 14, 2009. Judge Iadanza sits on the section's executive committee, attends most, if not all annual retreats and truly cares about the litigants as well as the family bench and bar. Next, I wish to sincerely thank my mentors and past chairs: Frank Louis, John Paone, David Wildstein, James Yudes, Lee Hymerling, John DeBartolo, Lizanne Ceconi, Cary Cheifetz and Pat Barbarito. One cannot navigate the often foggy landscape of bar involvement without a guiding light. I am very fortunate to have many lights to help me find my way through sometimes difficult circumstances, and I thank them for their wise assistance during my journey.

I cannot fail to acknowledge my new (or not so new) partners, Noel Tonneman and Steve Enis. The three of us took a leap of faith together this year and formed our own firm in Matawan. I figured I wouldn't have enough to do between my duties as chair of the section, co-managing editor of the *New Jersey Family Lawyer*, writing, speaking, and occasionally practicing law now and again. It has been an intense, but exhilarating ride, so far. I could not be in better company. We thank all of you who wished us well as we began this journey. This transition has given me a new vision of what I had envisioned as the practice of family law. We are beginning to realize that the practice is, in many respects, different for lawyers in a large versus small firm.

I wish to thank and honor my mother. She has always been the person I turn to as a sounding board, to vent, or just seek comfort in difficult times. I truly appreciate all that she has done and continues to do for me. I cannot say without great sadness that my father could not be here for these events. He passed away 13 years ago. I would not be a lawyer but for him. I also wish to acknowledge my brothers, Anthony and Francis, and express my appreciation for the support they have given me over the years.

Some may say that I am somewhat organized. However, the appearance of organization and preparation would not be possible without my assistants, Kathy Purazzo and Monica Pfeiffer, as well as my associate, Lisa Steirman Harvey, Esq. They have been with me as I trudged up the ladder of the section. I truly do not know what I would do without them. They are my right and left hands. They make me look good when I would not. They have my back in every way.

I wish to acknowledge my son, Nick. Many of you know him. He has accompanied me on most of the section retreats in prior years. He has grown up among us and, to some degree, as a result of us. Some may remember him educating us about the stars on the train on our way back from a ghost town in Santa Fe, New Mexico, playing pool at a hacienda in Puerto Rico, racing Hummers on the Baja Dessert or whale watching in Cabo. Some of us know that Frank and Nurit Louis' son, Evan, taught Nicky about the birds and bees at the Clam Bake in Charleston, South Carolina. Nick was the ripe age of seven at that time. I'm eternally grateful to Evan for that. Nicky is my pride and joy, and no one or nothing could ever make me more proud.

Last, but by no means least is my wife, Rosemary (or

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Cookie to me and many others). She doesn't like me introducing her as "Cookie." Of course, that's a problem for me since I'm so bad with names. I'll often have to pause to remember to say "Rosemary." But in all seriousness, she is my partner, she is my confidant, she is my rock. There is no storm I cannot weather with her by my side. Without her, my new firm would be in upheaval and perhaps floundering. I love you, Cookie.

PRIMARY THEME

As have prior chairs, I take this post with the primary goal to maintain our section's status as one of the best in the New Jersey State Bar Association. Since its inception in 1965, the Family Law Section has grown from an enrollment of 31 to 1,069 members. Ours is the third largest section of the State Bar Association. In many ways, we have become the archetype shaping other sections. The Annual Family Law Symposium, organized tirelessly by Frank Louis, is the most prestigious family law seminar in the state, and draws record crowds of about 500 participants. This past year, the registrants totaled 138 for the Friday night program and 590 for the Saturday program! This was the highest Saturday registration in the history of the symposium. The annual retreat, holiday party, Tischler Award Dinner and many other section events are anxiously anticipated and much enjoyed. Thanks to the Herculean efforts of our immediate past chair, Ed O'Donnell, Cabo was a blast!

Although there are several goals that I would like to achieve in the upcoming year, I would like my theme to be a re-dedication to the children impacted by divorce. Children are the true victims of divorce. For many years the prevailing view has been that divorce was not only traumatic for children but contributed to negative life outcomes for the majority of those whose parents divorced. According to the book *For Better or for Worse: Divorce Reconsidered*, by Hetherington and Kelly (2002), a new picture emerged. While a recent study attempted to suggest otherwise, even that study concludes that 25 percent of the children from divorce did end up with serious psychological, social or academic problems. Not everyone agreed with these conclusions. While some practitioners may believe the percentage is low, the fact is that most children going through divorce are negatively impacted now, and to different degrees in the future.

Although there are several goals that I would like to achieve in the upcoming year, I would like my theme to be a re-dedication to the children impacted by divorce.

I do not believe that we have as a Section focused on this issue in a way that may make a meaningful difference. As such, I have created a committee on children's rights, which will be co-chaired by Amy Wechsler and Mary Coogan. This committee should seek to explore ways to lessen the negative impact of divorce and family violence on children.

Certain problems in our system need to be addressed, such as the impact of the policy of public access to documents; the infrequency of appointments of guardians or attorneys for children to protect their interests; and the need to educate parties about the dangers of using children to gain financial advantage or exact revenge against the other party. Perhaps changes in the Rules of Court regarding the appointment of experts need to be reexamined.

Admittedly, this is easier said than done. However, we cannot and must not shy away from such a noble task, no matter how daunting.

MISSION STATEMENT

It should be the goal of every new leader to add something to the organization they head. For me, in addition to the committee on children's rights, I would like to propose a new and revised mission statement for the section, as follows:

The mission of the NJSBA Family Law Section is to serve as the statewide leader in the field of Family Law, protect the family (with special emphasis on the impact of divorce on children) and serve our constituents. To accomplish this mission, we adopt the following goals for the section:

1. *To be sensitive to the needs of children and to protect children from the negative impact of divorce or other involvement in the judicial system;*
2. *To promote and protect the concept of "family" in all of its various forms;*
3. *To provide a forum for the discussion and resolution of family law issues and be the preeminent resource to judicial, civic, governmental and public organizations in matters affecting family law;*
4. *To serve, educate and enhance the skills of our members in various ways including the publication of the* New Jersey Family Lawyer *and involvement in continuing legal education programs;*
5. *To review legislative and administrative proposals, rules and statutory changes and, where appropriate, initiate legislation and legal reforms in the areas of family law;*
6. *To improve public and professional understanding of family law issues;*
7. *To increase the diversity and participation of our membership;*
8. *To improve professionalism of all participants in the administration of family law;*
9. *To promote and develop*

appropriate alternative dispute resolution approaches to family law issues; and

10. *Undertake all such other activities as may be authorized, from time to time, by the Executive Committee of the section for the purpose of accomplishing the foregoing goals.*

I am pleased to announce that this revised mission statement was approved by the executive committee at our first meeting, on June 9, and passed with only one slight change regarding cultivating camaraderie among family lawyers. It has now been submitted to the NJSBA Board of Trustees for approval.

PRIOR THEMES

I would also like to suggest that we continue certain themes of past chairs. Namely, Ivette Alvarez's theme of diversity, Lizanne Ceconi's C.O.R.E. approach and Ed O'Donnell's MORE approach.

No one can dispute the wisdom and laudable goals of having a diverse executive committee leading a diverse Family Law Section, which itself represents a diverse state population. The current population of the state of New Jersey exceeds 8.7 million, and is divided into numerous and diverse ethnic groups. It is eminently appropriate that the group that leads the family law attorneys in this state strive to be at least as diverse as the population it will service.

Further, a group cannot lead from an ivory tower. Lizanne made significant strides in breaking down the concerns of some of the general membership that the executive committee was an elite group detached from the vast majority of family law practitioners. Her C.O.R.E. approach (an acronym for communication, outreach, relationships, and education) was implemented through various methods, including but not limited to, the continuation of meet and greets between the state and county bars, creating the e-newsletter, improving the involvement of liaisons between the county bars and the executive committee, continuing outreach efforts to garner new members, and other endeavors. Ed O'Donnell continued Lizanne's C.O.R.E. approach, but introduced it as the MORE approach for those who needed a catchy phrase, MORE communication, MORE outreach, MORE relationships and MORE education. I would like to propose that these concepts be continued, not only during my year as chair, but in subsequent years.

We continue to invite participation in the *Family Lawyer* by those seeking to write…and to be involved on the board itself.

Regarding the meet and greets throughout the state, we intend to have them in North Jersey, Central Jersey, and South Jersey. Prior years' meet and greets have been well-attended, and served as excellent vehicles to convey county-level concerns to the executive committee.

At Lizanne's suggestion, as first vice chair I launched the e-newsletter. The goal was to demystify the workings of the executive committee and open communications with *all* members of the section. Amy Cores took over my role and will continue in this laudable task.

YOUNG LAWYERS COMMITTEE

An extremely important part of the section is our Young Lawyers Committee (YLC). Last year, the YLC was co-chaired by Sheryl Seiden of Ceconi & Cheifetz and Carrie Schultz of Lesnevich & Marzano-Lesnevich. They did an incredible job! Their year included a wine-making event, which was held at A Little Taste of Purple in Livingston; teaming up with the state bar's Young Lawyers Division for the Hunt at Far Hill's Races; a three-part seminar series; a Halloween party for the entire Family Law Section; and various other events throughout the year.

This year, the YLS will be co-chaired by Kimber L. Gallo of Skoloff & Wolfe and Megan S. Murray of Paone & Zaleski. Kimber and Megan hope to provide young lawyers with educational and networking opportunities, and to enhance overall participation in the Family Law Section by organizing various service projects, educational seminars, and networking events. They also plan for YLS to assist the executive committee with various projects throughout the year. We look forward with excitement to another wonderful year of events organized by our young lawyers.

NEW JERSEY FAMILY LAWYER

In addition to my role as chair of this section, I am a co-managing editor of this publication of the Family Law Section. We continue to invite participation in the *Family Lawyer* by those seeking to write (in fact we encourage authors to submit articles) and to be involved on the board itself. Needless to say, there will be a close connection between the executive committee and the editorial board with a view toward the publication of timely and informative issues. I wish to thank the board, and most importantly its editor-in-chief, Mark Sobel, and editor-in-chief *emeritus,* Lee Hymerling, for all their many years of tireless work and commitment to this publication.

SECTION EVENTS

There are many events to look forward to in the year to come. After our summer respite, we started the fall with "Hot Tips" on October 3, which is second only to the Annual Family Law Symposium in attendance and second to none in the number of experienced speakers. Our first vice chair, Andrea White O'Brien, organized "Hot Tips" this year, and made it an incredible learning experience.

Our annual holiday dinner is always a blast. Last year's party was organized by Lizanne and took place at the PNC Arts Center. This year's holiday party will again be organized by Lizanne and take place at the PNC Arts Center on Dec. 16, 2009.

I must again thank Frank Louis for the unparalleled efforts he puts into the Annual Family Law Symposium and everything else he does for the section. If you attend no other seminar during the year, the symposium is the one you can't miss.

FELLOW OFFICERS

As you can see, I have a rather ambitious agenda for my tenure. I am confident we will be successful because I have my fellow officers to assist and help lead the way. At this time I would like to thank them in advance.

- **My chair-elect, Tom Snyder,** who brings an informed, intelligent, calming and metered approach to every issue.
- **My first vice chair, Andrea White O'Brien** whose tireless energy and enthusiasm never ceases to amaze me.
- **Our second vice chair, Pat Judge,** who is always the voice of reason in an often unreasonable practice.
- **Our secretary, Brian Schwartz,** who is my rudder. He will never shirk at telling me where I'm wrong, which is quite often in his opinion. I thank you for your past help and for the anticipated assistance in my year to come.

I wish to thank our immediate past chair, Ed O'Donnell, for the incredible year we have had. He championed the cause of the section on such issues as the palimony bill (which I will continue), CourtSmart and many other issues. He led us in healthy and productive debates and threw one of the best retreats in section history in Cabo! Thank you, Ed!

ANNUAL RETREAT

I am pleased to announce that the 2010 Family Law Section Annual Retreat will be held at the Hyatt Regency in Aruba from March 10, 2010, to March 13, 2010. Please note it in your calendar. We have a 110-room block reserved at this time. Please remember you can make reservations at the Hyatt Regency Aruba Resort & Casino at http://aruba.hyatt.com/groupbooking/arubanjsb2010. Our group name is New Jersey State Bar Association. Reservations can also be made by calling 1-800-233-1234. All reservations must be made individually by Feb. 16, 2010. Airfares are low now, so you may want to think about getting your tickets early.

I am turning over the reins to Lizanne Ceconi, as past chairs have done, to help organize this trip. No one could do a better job!

CONCLUSION

As I close, I wish to remember the great contribution of past chairs and give you my promise that I will do all that is within my ability to honor their service and commitment to the advancement of family law in this state and the improvement of the lives of the lawyers who practice in this field. I also wish to emphasize my goal to remember the family, remember the litigants, and most of all remember the children. ■

Meet the Officers

Charles F. Vuotto Jr. (Chair) is a partner in the Matawan-based law firm of Tonneman, Vuotto & Enis, LLC. He was previously a shareholder with the Woodbridge-based law firm of Wilentz, Goldman & Spitzer, and is certified by the New Jersey Supreme Court as a matrimonial attorney. Mr. Vuotto is co-managing editor of the *New Jersey Family Lawyer* and co-chair of the Matrimonial Section of the New Jersey Association for Justice. He has been selected by his peers for inclusion in the 2009 and 2010 editions of the *Best Lawyers of America*® in the area of family law, and has been admitted into Litigation Counsel of America.

Mr. Vuotto has lectured on family law for the Institute for Continuing Legal Education, including during the 2004 and 2008 Family Law Symposiums. He has also lectured on behalf of the New Jersey State Bar Foundation; the American Institute of Certified Public Accountants at its annual meeting in Dallas, Texas, in 2001; and for the New Jersey Society of CPAs. He regularly lectures to the public, bench, bar, accountants and paralegals on various family law-related issues.

He has been appointed as a discovery master by the superior court, and is an active panelist of the Union County Early Settlement Program. Mr. Vuotto authored the brief in support of the New Jersey State Bar Association's motion for leave to appear as *amicus curiae* in the case of *Brown v. Brown,* 348 N.J. Super. 466 (App. Div. 2002), and has authored or co-authored numerous articles on the topic of family law.

He was admitted to the New Jersey bar and to the U.S. District Court of the District of New Jersey in 1986. Mr. Vuotto graduated from Seton Hall University with a B.A. in 1983 and from Ohio Northern University, Claude W. Pettit College of Law with a J.D. in 1986.

Thomas J. Snyder (Chair-Elect) is a partner with the law firm of Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, and devotes his practice exclusively to family law matters. As a member of the state bar, he has contributed to the New Jersey State Bar Association *amicus curie* brief submitted in the matter of *Lewis v. Harris,* 185 N.J. 415. As a former legislative chair for the section, he has testified on behalf of the New Jersey State Bar Association before state legislative subcommittees involving open adoption. For his lobbying efforts, he received the New Jersey State Bar Association's Annual Distinguished Legislation Award for 2006.

He has litigated the following reported cases: *Anyanwu v. Anyanwu,* 339 N.J. Super. 278 (App. Div. 2001) and *Steneken v. Steneken,* 367 N.J. Super. 427 (App. Div. 2004) trial level—unreported. Mr. Snyder has lectured on family law matters on behalf of the state bar association, the New Jersey State Bar Foundation and the New Jersey Institute for Continuing Legal Education. He is a member of the Association of Trial Lawyers of America, and a graduate of the National Institute of Trial Advocacy.

Mr. Snyder graduated from Seton Hall School of Law, and served as judicial law clerk for the Honorable Peter B. Cooper, Superior Court of New Jersey, Essex County.

Andrea White O'Brien (First Vice-Chair) is a partner in the family law department of Lomurro, Davison, Eastman & Munoz, located in Freehold. Ms. O'Brien has been certified by the Supreme Court of New Jersey as a matrimonial law attorney, and is qualified pursuant to Rule 1:40 to mediate family law cases. She was one of the 2006 recipients of the Women of Achievement Award from the Women Lawyers of Monmouth County, and is an associate managing editor for the *New Jersey Family Lawyer.*

Ms. O'Brien is an officer in the New Jersey State Bar Association Family Law Section and served three terms as the co-chair of the Monmouth Bar Family Law Committee. In addition, Ms. O'Brien is the chair-elect of the New Jersey State Bar Association's Certified Attorney Section. She is also a member of the Association of Trial Lawyers of America, New Jersey Chapter; the Monmouth Bar Association; the Ocean County Bar Association; the Women Lawyers of Monmouth County; and the Jersey Shore Collaborative Law Group. In addition, Ms. O'Brien serves as a panelist in the Monmouth County Early Settlement Program and lectures on family law issues.

She earned her B.A. from Villanova University and her J.D. from Brooklyn Law School. She also served as a judicial law clerk for the Honorable Clarkson S. Fisher Jr.

Patrick Judge Jr. (Second Vice-Chair) is a shareholder in the family law department of Archer & Greiner, P.C., located in Haddonfield. Mr. Judge is an associate managing editor for the *New Jersey Family Lawyer.* He is a member of the New Jersey Supreme Court Committee on the Unauthorized Practice of Law and a member of the

District IV Ethics Committee for Camden and Gloucester counties. In addition, Mr. Judge serves as an early settlement panelist in Burlington, Camden and Gloucester counties and lectures on family law issues. He also serves regularly as a blue ribbon panelist. Mr. Judge is the author of several articles that have been published in the *New Jersey Family Lawyer.*

Mr. Judge earned his B.A. from Allentown College of St. Francis de Sales, where he graduated *cum laude,* and his J.D. from Widener University School of Law, where he also graduated *cum laude.* He served as judicial law clerk for the Honorable Donald P. Gaydos in Burlington County, Family Part.

Brian M. Schwartz (Secretary) is a partner in Ceconi & Cheifetz, LLC, in Summit. Mr. Schwartz is an associate managing editor of the *New Jersey Family Lawyer.* He has authored numerous articles for the Institute for Continuing Legal Education (ICLE), the *New Jersey Family Lawyer, NJAJ* and *Sidebar*. He has been selected six times by ICLE to lead the Skills and Methods Course in family law for first-year attorneys. Mr. Schwartz is a frequent moderator and lecturer for ICLE, NJAJ, NJSBA, NJSCPA and local bar associations. He is a barrister of the Northern New Jersey Inn of Court–Family Law.

Mr. Schwartz received his B.A. from the George Washington University and his J.D. from the University of Pittsburgh School of Law.

Edward J. O'Donnell (Immediate Past Chair) is certified as a matrimonial law attorney by the Supreme Court of New Jersey and is a partner in Donahue, Hagan, Klein, Newsome & O'Donnell, P.C., concentrating his practice in family law with an emphasis in divorce litigation. Mr. O'Donnell is the president of the Essex County Bar Association, the past chair of the association's Family Law Committee and the 1998 recipient of the Essex County Bar Association Family Law Achievement Award. He is also an officer of the Family Law Section of the Association of Trial Lawyers of America, as well as the immediate past president of the Northern New Jersey Family Law Inn of Court.

Mr. O'Donnell has lectured on family law issues for the Institute for Continuing Legal Education, the Association of Trial Lawyers of America, the New York State Bar Association, the Canadian Institute, the New Jersey Family Law Inns of Court, and the Essex and Bergen County Bar Foundations. A published author, he has contributed to *New Jersey Family Law Practice, 11th Ed.,* published by NJICLE, and the Essex County Bar Association publication *Traps for the Unwary.* ■

Marital Lifestyle as a Factor to be Considered by the Court in Determining Cohabitation Applications

by Amy C. Goldstein

The right of a supporting spouse to file a post-judgment application to decrease alimony based upon the supported spouse's cohabitation is a firmly established and frequently exercised right. The case law is clear that the test for a post-judgment decrease in alimony based upon cohabitation is a "change of circumstances" analysis as that term is defined in *Lepis v. Lepis*.[1] Specifically, it is a financial test that analyzes the extent to which the supported spouse has experienced a change in financial circumstances since the entry of the final judgment of divorce as a result of his or her new status as a cohabitant.

Conversely, the case of *Crews v. Crews*[2] determined that a comparison of the parties' marital lifestyle with their post-judgment lifestyle may serve as a justification for post-judgment applications by supported spouses to increase alimony.

Although there is a definite connection between cohabitation applications by supporting spouses to *decrease* alimony and *Crews* applications by supported spouses to *increase* alimony, courts have not yet synthesized the two concepts. How many times have we as practitioners tried to answer the question posed by our alimony-dependent cohabiting clients: "Why can he get remarried (or live with someone) without consequences, and I am penalized?"

The client is right, and the answer is that before the court decreases alimony as the result of cohabitation, it should be obligated to conduct a marital standard of living analysis relative to both spouses. In other words, a *Crews* analysis should be required in every cohabitation case before alimony is decreased.

COHABITATION AS A BASIS FOR DECREASING ALIMONY

Lepis v. Lepis firmly established that the party seeking modification of support has the initial burden of showing "changed circumstances" before the court can consider a modification of support:

> The party seeking modification has the burden of showing such "changed circumstances" as would warrant relief from the support or maintenance provisions involved. A *prima facie* showing of changed circumstances must be made before a court will order discovery of an ex-spouse's financial status. (Citation omitted)[3]

Lepis also specifically recognized that cohabitation by a supported spouse may constitute a change in circumstances warranting a decrease in alimony.[4]

Although *Lepis* recognized that cohabitation may constitute a change in circumstances, cohabitation cases actually differ from all other *Lepis*-governed modification cases in that in cohabitation cases, the moving party does *not* have to first show his or her own change in circumstances; rather, in cohabitation cases, the supporting spouse is permitted to make an application to the court based on the change in circumstances of the *other* party (*i.e.* the supported spouse).

Cohabitation cases are the exception to the firmly established *Lepis* two-step process that requires the moving party to first show his or her own changed circumstances before the court will look into the other spouse's financial circumstances. Thus, when the question comes from the alimony-dependent cohabiting client regarding why the person making the application (the supporting spouse) does not have to subject his or her own financial circumstances to judicial scrutiny before alimony is decreased, it is a legitimate question, since in every other post-judgment modification situation, such a showing does indeed have to be made.

[B]efore the court decreases alimony as the result of cohabitation, it should be obligated to conduct a marital standard of living analysis relative to both spouses.

Shortly after *Lepis* was decided, the cohabitation case of *Gayet v. Gayet*[5] made its way to the New Jersey Supreme Court. That Court recognized that cohabitation falls between the strict rule that alimony terminates upon remarriage and

the well-established legal concept that a person has the right to "privacy, autonomy and the right to develop personal relationships free from governmental sanctions."[6] In an effort to strike that balance, the Court did not automatically terminate alimony upon cohabitation, but instead focused on the economic needs of the supported spouse.

The *Gayet* Court held that the *Lepis* "changed circumstances" test in cohabitation cases would be met if: 1) the third party contributes to the dependent spouse's support, or 2) the third party resides in the dependent spouse's home without contributing anything toward the household expenses.[7] Put another way, the cohabitant must contribute "exactly" the cost of his or her support in order to avoid a reduction in alimony.[8] The fact that the two-step process established in *Lepis* was ignored in *Gayet* was never mentioned.

In further development of the cohabitation issue, the appellate court shifted the burden of proof from the supporting spouse to the dependent spouse in *Ozolins v. Ozolins*[9] when it held that once there has been a *prima facie* showing of cohabitation by the payor spouse, "the burden of proof, which is ordinarily on the party seeking modification, shifts to the dependent spouse" because "it would be unreasonable to place the burden of proof on a party not having access to the evidence necessary to support that burden of proof."[10]

THE MARITAL STANDARD OF LIVING AS A BASIS FOR AN INCREASE IN ALIMONY

Although *Crews* was decided in 2000, the concept of the marital standard of living as a factor in determining alimony has been the law of the state of New Jersey since the 1876 case of *Boyce v. Boyce*.[11] In that case, the chancellor in equity determined the husband's property was valued at $66,396, and his average annual income in the 10 years prior to the divorce was $5,818, while his income in the year preceding the decision was $6,474.36. In awarding the wife permanent alimony, the chancellor stated:

> Under the circumstances of this case, taking into consideration the situation and station in life of the parties, and the amount of the defendant's property and income, I am of the opinion that the sum of $1,000 a year will be a proper provision for the support and maintenance of the complainant. This sum will provide for her a support and maintenance equal, in all respects, to that which, taking into consideration the amount of his income, she had a right to expect at the hands of her husband had she continued to live with him.[12]

In the case of *Dietrick v. Dietrick*,[13] decided in 1918, the Court stated that the amount of alimony should take into account the "social position of the parties." This concept was carried forward to more modern times in the 1971 case of *Khalaf v. Khalaf*[14] and in *Lepis,* both of which quoted directly from *Boyce* and *Dietrick* when they recognized "social position" and "what the wife would have the right to expect if living with her husband" as two of the factors applicable in determining alimony.

The *Crews* case specifically sanctioned post-judgment applications for an increase in alimony based upon the payee's inability to maintain the former marital standard of living. In fact, the marital standard of living was described in *Crews* as "the touchstone" both for initial alimony awards and for post-judgment modification motions:

> In this matter, we reaffirm the *Lepis* principle that the goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed during the marriage. The importance of establishing the standard of living experienced during the marriage cannot be overstated. It serves as the touchstone for the initial alimony award and for adjudicating later motions for modification of the alimony award when "changed circumstances" are asserted.[15]

On a policy level, the *Crews* Court was specifically concerned with the class of cases in which the initial support award was insufficient to allow either spouse to maintain the marital lifestyle, and in later years, while the payee's financial circumstances did not improve, the financial circumstances of the payor spouse did improve substantially. "Some studies have concluded that the standard of living for a woman decreases 30% after a divorce, while men enjoy a 10% increase in living standards on average…The statistics are troubling."[16]

[T]he *Crews* Court was specifically concerned with the class of cases in which the initial support award was insufficient to allow either spouse to maintain the marital lifestyle, and in later years, while the payee's financial circumstances did not improve, the financial circumstances of the payor spouse did improve substantially.

Contrary to post-judgment modifications in cohabitation cases, the *Crews* Court maintained the two-step requirement in *Lepis* that the party making the application must first demonstrate a negative change in his or her financial circumstances that "substantially impaired the ability to support himself or herself"[17] before the Court will examine the financial circumstances of the other party. However, the *Crews* Court

also pre-determined that the moving party will have successfully demonstrated a change in circumstances sufficient to go to the next step of examining the financial circumstances of the supporting spouse if the "supporting spouse's financial condition substantially improves and if the supported spouse demonstrates that he or she is still unable to achieve a lifestyle level that is reasonably comparable to the marital lifestyle."[18] In other words, the common post-divorce economic reality whereby the supported spouse has a decreased standard of living and the supporting spouse has an increased standard of living was determined to be, in and of itself, a sufficient change in circumstances to warrant the courts to open up the finances of the supporting spouse and consider an increase in alimony.

THE MARITAL STANDARD OF LIVING AS A FACTOR FOR THE COURTS TO CONSIDER IN DETERMINING COHABITATION APPLICATIONS

What is notably missing from the cohabitation line of cases is an examination of the marital standard of living before alimony is decreased as a result of cohabitation. Because of the similarity between remarriage and cohabitation, it is perhaps understandable that in cohabitation cases, the supporting spouse can initially avoid the *Lepis* requirement that he or she must first show his or her own negative change in financial circumstances. It is not, however, understandable that the supporting spouse can completely avoid inspection of his or her post-marital standard of living in cohabitation cases. It is also contrary to the *Crews* admonition that an examination of both parties' post-marital standards of living is essential in all support modification applications.

> It is clear from *Lepis* and its progeny that motion courts have found that the marital standard of living is an *essential component in the changed-circumstances* analysis when reviewing an application for modification of alimony." (Emphasis added)[19]

As discussed earlier, cohabitation cases *are* changed-circumstances cases. Accordingly, an examination of the parties' post-marital standard of living as compared to their marital standard of living in cohabitation cases is not discretionary, and it is certainly not a component that should be entirely ignored as it now is in cohabitation cases. The marital standard of living is a component that must be considered whenever the court is considering modifying alimony. It is true that the language in *Crews* related to a dependent spouse's application to increase alimony; however, the economic realities and the policy concerns behind the rule that marital standard of living must be examined are no less applicable in the case of a supporting spouse's application to decrease alimony due to cohabitation.

In cohabitation cases, a motion is filed by the supporting spouse requesting that the court decrease alimony due to the supported spouses' cohabitation. The fact of cohabitation is not all that difficult to prove. The number of overnights spent by the third party with the dependent spouse, leaving items of personal property at the dependent spouse's home, joint bank accounts and the like are all factors upon which a court can base a finding of cohabitation. And what family law practitioner can forget that the sharing of the remote control for the garage is as sure a sign of cohabitation as anything else?[20]

After the fact of cohabitation has been proven, the burden shifts to the dependent spouse. The dependent spouse must walk the fine line between proving to the court that he or she has accepted some money from the third party but has not accepted too much money from the third party, which would translate into "being supported by" the third party. It is at this phase of the hearing that the dependent spouse, to whom the burden has shifted anyway, should be entitled to make a *Crews* showing that either he or she has not reached the marital standard of living *even with* the contributions of the third party, or that he or she has only reached the marital standard of living *because of* the contributions of the third party.

In either event, the cohabiting dependent spouse should be entitled to show the court that if the supporting spouse is successful in decreasing alimony due to his or her cohabitation, the result will be that he or she will be living below the marital standard of living. In that event, the court should be obligated to open up the finances of the supporting spouse and conduct a *Crews* analysis. While the result of the *Crews* analysis in this context may not be an increase in alimony, it should certainly be a legitimate reason to deny the supporting spouse's application to decrease the alimony. In fact, the decision to share expenses with a third party can be seen by the court as part of the supported spouse's obligation to contribute to his or her own support, a concept that was heavily emphasized in the *Crews* case. Such an interpretation would go far in the court's emphasis on the economic impact of sharing living expenses rather than the mere fact of cohabitation.

All of this, of course, begs the questions why cohabitation cases are the only post-judgment modification cases that do not require an analysis of the post-marital standard of living of both parties. After all, supposedly it is "the extent of actual economic dependency, not one's conduct as a cohabitant (that) must determine the duration of support as well as its amount."[21] If we are going to be honest about it, however, without the opportunity for a *Crews* analysis, "one's conduct as a cohabitant"[22] *does* deny the supported spouse an important

right held by every other alimony-dependent spouse in the context of a post-judgment modification. This is precisely the reason the question of why a supporting spouse can move on with life by remarrying or cohabiting without any consequences, while the same does not hold true for the supported spouse, makes us (or should make us) uncomfortable.

Permitting alimony-dependent cohabiting spouses the same opportunity to present a *Crews* argument as all other alimony-dependent spouses would mean that cohabitation cases would finally be about economic realities and not about the cohabitation. ■

ENDNOTES

1. 83 N.J. 139 (1980).
2. 164 N.J. 11 (2000).
3. *Lepis* at 157.
4. *Id.* at 151.
5. 92 N.J. 149 (1983).
6. *Gayet* at 151.
7. *Id.* at 153.
8. *Frantz v. Frantz*, 256 N.J. Super. 90 (Ch. Div. 1992).
9. 308 N.J. Super. 243 (App. Div. 1998).
10. *Ozolins* at 248-249.
11. 27 N.J. Eq. 433 (Court of Chancery, 1876).
12. *Boyce* at 433.
13. 88 N.J. Eq. 560 (Court of Errors and Appeals, 1918).
14. 58 N.J. 63 (1971).
15. *Crews* at 16-17.
16. *Id.* at 31-32.
17. *Lepis* at 157.
18. *Crews* at 19.
19. *Id.* at 25.
20. *Konzelman v. Konzelman*, 307 N.J. Super. 150 (App. Div. 1998).
21. *Gayet* at 154.
22. *Id*.

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Medical Benefits for a Dependent Spouse

The Limited Judgment of Divorce and COBRA Privileges (Under New Jersey and Federal Law)

by Christopher Rade Musulin

Divorce attorneys are frequently confronted with situations involving a dependent spouse in need of medical insurance benefits. What options are available to create viable provisions for medical insurance coverage incidental to matrimonial dissolution? Several options exist, including the entry of a limited judgment of divorce, the exercise of COBRA privileges, or utilization of service-related military benefits. This article will briefly discuss considerations related to these options, and hopefully provide some guidance in making the appropriate selection.

MAINTENANCE OF MEDICAL BENEFITS

Because the marital bond continues to subsist as no final judgment of divorce is entered, the parties continue as husband and wife, and the dependent spouse remains eligible for family medical benefits typically maintained by the payer spouse through employment. Each medical plan promulgates a summary plan description detailing eligibility and participation regarding healthcare benefits. The summary plan description includes definitions of dependents, typically children and spouses.

With regard to the definition of a spouse, most plans provide coverage for lawfully married spouses or state-recognized, common law spouses. However, there is often a disqualification for legally separated spouses unless coverage is otherwise required by state law.

N.J.S.A. 2A:34-3 constitutes the state law requirement to obviate the disqualification protocol. It is suggested that counsel mail a copy of the statute to the plan administrator if issues of qualification or eligibility arise. If necessary, a post-judgment application can be made to join the insurance carrier to the matrimonial case for purposes of compelling recognition of the limited judgment.

The entry of a limited judgment of divorce will also allow the spouse of a military service member to continue medical and dental care at military facilities, and coverage under the TRICARE program.

A divorce from bed and board is the New Jersey version of a legal separation, as it does not terminate the bond of matrimony. The parties are still legally married. It is often referred to as a decree of separate maintenance.

DIVORCE FROM BED AND BOARD

A divorce *a mensa et thoro* is Latin for a divorce from table and bed, which is more commonly known as a divorce from bed and board. A divorce from bed and board is permissible pursuant to N.J.S.A. 2A:34-3. A judgment of this nature can only be entered by consent of the parties. Further, a judgment may be entered based upon the same causes of action as an absolute divorce. Conversion to a final judgment must be granted as a matter of right.

A divorce from bed and board is the New Jersey version of a legal separation, as it does not terminate the bond of matrimony. The parties

COMMON SITUATIONS FOR USE OF A LIMITED JUDGMENT

Several factual situations may exist suggesting utilization of a limited judgment of divorce. For example, a dependent spouse may be required to wait for a period of open enrollment for several months until medical insurance benefits are available through employment. Also, in a rehabilitative situation, a dependent spouse may need one or two years of additional education or training to achieve a circumstance of rehabilitation, and subsequent employment with medical benefits. There may also be a situation where the dependent spouse is one or two years away from Medicare eligibility.

In these situations, the limited judgment is entered for a period of time commensurate with the unique factual circumstance. Counsel most often include a specific period of time where the limited judgment can later be converted to an absolute judgment. Most courts accept a subsequent consent final judgment of divorce that includes a provision for each party to be responsible for the maintenance and cost of any healthcare insurance. It is often good practice to have the consent final judgment executed contemporaneously with the property settlement agreement, and held in escrow by counsel.

CONTINGENT PROVISIONS FOR CONVERSION

What if it becomes necessary to convert to a final judgment prior to the stated time period articulated with the limited judgment?

When representing the dependent spouse, the author typically includes a provision requiring the other spouse to be responsible for COBRA premiums for the balance of the agreed-upon term. Funds necessary to service the premiums can also be escrowed and provided for within the property settlement agreement. The tax characterization and consequences of such payments should also be in the agreement.

COBRA BENEFITS

In 1986, Congress passed the landmark Consolidated Omnibus Budget Reconciliation Act, which included significant healthcare benefit provisions for dependent spouses. The statute amended the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code and the Public Health Service Act to provide for the continuation of group healthcare benefits at participant cost for individuals who might otherwise be terminated.

COBRA applies to "qualified beneficiaries," which include former employees, retirees, spouses of former employees or retirees, former spouses, dependent children or children born to adoption. It is applicable to both the private sector and state and local governments.

With regard to spouses, they may exercise benefits under the statute upon the voluntary or involuntary termination of employment of their spouse, a reduction in the number of hours of the spouse, in the event the working spouse becomes eligible for Medicare, upon the death of the worker spouse, or upon divorce or legal separation. Interestingly, dependent children are also eligible as a result of any of the above-described qualifying events.

To qualify for benefits, the worker employee must have been using coverage for him or herself, spouse or dependents. If the employed spouse was not participating in the healthcare plan at work, COBRA benefits will not exist for the qualified individuals.

Upon the occurrence of the qualifying event, an employer must notify the health insurance plan within 30 days. The qualified beneficiaries must notify the plan within 60 days that they intend to elect benefits, and have 45 days thereafter to pay premiums, retroactive to the date of the qualifying event.

A divorced spouse may elect coverage for 36 months after the date of the qualifying event. The other qualifying individuals may elect coverage for 18 months. The premium cost is 102 percent of the cost paid by the participant spouse, along with a two percent administrative cost.

A military COBRA plan has been in effect since Oct. 1, 1994. Divorced spouses of service members are also eligible for three years of coverage. They are not eligible if they remarry or maintain qualification for medical benefits under the 20/20/20 or 20/20/15 tests discussed below.

MILITARY-RELATED MEDICAL BENEFITS FOR DEPENDENT SPOUSES

In the event either spouse served in the United States military, an additional option may exist for providing medical benefits to a dependent spouse. The so-called 20/20/20 test is satisfied if a former spouse was married to a service member for at least 20 years, the service member accrued 20 years of service, and at least 20 years of the marriage overlapped 20 years of military service. The so-called 20/20/15 test is different in that only 15 years of the marriage overlapped 20 years of service.

Former spouses (not remarried) who meet the 20/20/20 test will qualify for TRICARE medical insurance, medical and dental benefits at military medical facilities, as well as other significant benefits. Former spouses (not remarried) who meet the 20/20/15 test will qualify for medical benefits if they are under age 65 and are not yet eligible for Medicare. There are also three tiers of benefits depending upon the date of final judgment.

Counsel should consistently update their awareness of military-related medical benefits, as they frequently change with annual military appropriations legislation.

CONCLUSION

Upon divorce, the best possible option for both parties is the maintenance of health insurance benefits through employment. If a dependent spouse is not working, a limited judgment, COBRA benefits or military-related benefits present a nice variety of alternatives for the maintenance of health insurance coverage, a critical issue at any age. ■

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Reframing the Conversation

Using Kinship Legal Guardianship in DYFS Cases

by Mary E. Coogan

Every year, about 7,000 children in New Jersey are removed from their homes because of allegations of abuse and/or neglect.[1] Most are eventually returned to their homes. For those who cannot be returned to their parents, the Division of Youth and Family Services (DYFS) is obligated to find them another permanent home. Historically, adoption has been the goal in these situations. In 2002, another option to achieve permanency became available to resolve DYFS litigation cases: kinship legal guardianship (KLG).[2] This law strengthens the legal authority of relatives and family friends (*i.e.,* kin) who are providing long-term care for a child, and provides greater stability and permanency for the children involved without terminating the parents' rights.

The caregiver seeking to become the kinship legal guardian must have biological, legal, or psychological relationship to a child and be committed to caring for the child until the child turns 18 or finishes high school. The child must have resided in the caregiver's home for at least the last 12 consecutive months prior to the caregiver applying to become the KLG. The court must find that the parents are unable to care for their child because of a serious incapacity that is unlikely to change for the foreseeable future before awarding KLG status to the caregiver. A kinship legal guardian has the same rights and responsibilities as a parent, except that they cannot change the child's name or consent to the adoption of the child. The parents retain their right to parenting time with their child as determine by the court and their obligation to pay child support.

Since its inception, the use of KLG to resolve DYFS court cases has grown tremendously, from 19 in 2002 to 2,258 in 2006.[3] While discussions with stakeholders throughout the state indicate that the use of KLG has decreased in the last two years, there were 2,524 children in subsidized KLG placements at the end of fiscal year 2008.[4]

There is much debate regarding its use. When should KLG be used? Is it being used too much? Not enough? Is the KLG arrangement in the best interest of the child or the parent? Debate is helpful when implementing a new law and process. The dialogue helps educate us all and keeps the process honest.

At the Children's Legal Resource Center at the Association for Children of New Jersey (ACNJ), staff respond to many questions about DYFS policies raised by caretakers of children, some of whom are related to the children and others who are not. An increasing number of callers have questions about KLG and adoption. Many are confused by information they receive and by the actions of some caseworkers, attorneys and judges. ACNJ has learned a lot from these conversations.

A training grant provided ACNJ with an opportunity to visit many family court vicinages and talk with stakeholders about the implementation of KLG. Asked by one vicinage to provide research on outcomes of both adoption and legal guardianship, we learned more. This article examines the current debate and the research. It sets out what we think are the important elements to cover in conversations with resource parents (*i.e.,* foster parents), both relatives and non-relatives, about permanency for children living in foster care.

The case practice model currently being implemented by DYFS contemplates a family team approach to decision-making and engagement of the family in the decision-making process.[5] Given the fact that DYFS is ultimately responsible for the health and safety of a child in its care, the question at the heart of the debate is how much weight the wishes of the family, in particular the preference of the kin caregiver, should carry in the final placement decision when reunification is no longer the goal.

ACNJ believes, for the reasons stated in this legal bulletin, that federal and state laws reflect a hierarchy to achieving permanency for children living in foster care. Reunification with a parent is almost always the initial goal when a child enters foster care. If reunification cannot happen, adoption is preferred over legal guardianship, and legal guardianship is preferred over an alternative permanent placement or the child continuing to languish in foster care. This is the legal framework through which the conversation with the resource parent about the child's permanent plan should begin.

The conversation with the resource parents about permanency options for that child should include information about the research, the law and the needs of the child. To some extent, the needs of the caregiver who has agreed to assume responsibility for the child impact the decision as well. Although a caregiver related to the parent of a child may want to factor in the needs of the parent, DYFS and the court are statutorily mandated to focus on the health, safety and permanency needs of the child.

WHY IS PERMANENCY IMPORTANT?

Children need consistent nurturing from a dependable and committed caregiver to ensure they grow into successful adults.[6] The quality of the parent-child bond can profoundly affect the relationships children have with all other people in their lives. A secure attachment reflects "the warmth and trust of early caregiver-child relationships. It provides a foundation for positive relationships with peers and teachers, healthy self-concept, and emotional and moral understanding."[7] "For any child, a stable relationship provides the structure to learn coping skills, how to adapt to change and how to sooth themselves when they are distressed."[8]

Achieving stability is especially important for children in foster care because they have lacked this consistent, permanent caregiver-child relationship. "[C]hildren in foster care have often experienced family instability and other types of maltreatment that compromise their healthy development. However, providing safe, stable, and nurturing homes for these children may lessen the harmful effects of their experience by exposing them to protective factors that can promote resilience."[9]

Children left for extended periods of time in foster care rarely experience the world as safe and predictable. The repeated experience of separation and loss resulting from moving through a succession of foster homes before reaching a permanent home increases the risk that a child will develop serious behavioral and/or emotional difficulties. Consequently, the goal for children living in foster care is to find a permanent home that gives them a sense of family stability, safety and security, which most children experience.[10]

The laws governing abuse and neglect cases in New Jersey and all other states are based upon this concept of *permanency*, the idea that children need predictability and healthy, secure attachments to succeed later in life.[11] They need to know "who will care for, care about and be there for them during good times and bad. In children's terms, permanence means knowing where they will be for their next birthday, the next holiday, next summer vacation. Mostly, it means they do not have to worry about being moved and moved and moved and moved."[12]

PERMANENCY DEFINED IN FEDERAL LAW

It is common to cite the Adoption and Safe Families Act of 1997[13] (ASFA) as the law that focused child welfare systems on achieving timely permanency for children living in foster care. But in New Jersey, the emphasis on permanency began in 1978 with the enactment of the Child Placement Review Act.[14] Two years later, the federal Adoption Assistance and Child Welfare Act of 1980,[15] seeking to prevent children from languishing in foster care, established timetables for reviewing placements, and provided federal money to move children toward adoption when they could not be reunified with their parents.[16]

Between 1984 and 1994, the number of children entering foster care had grown by 70 percent, to an estimated 468,000.[17] When Congress was considering ASFA, great concern was expressed about the need to expedite permanency decisions for more than 100,000 children lingering in foster care without permanent homes.[18] According to a literature review by the Evan B. Donaldson Institute in 2004, the consensus of experts in the mid-1990s "suggested adoption was more fiscally sound, more stable and better for children than foster care or long-term guardianship."[19] Several experts recommended improving adoption practice and promoting adoption over foster care or long-term guardianship.[20]

ASFA re-emphasized the importance of timely permanency for children, shortening the timeframes within which the child's permanency goal must be identified and achieved. It required that proceedings initiating termination of parental rights begin once a child has been in foster care for 15 of the previous 22 months. Although the law allowed exceptions to filing for termination of parental rights, including placing the child with a relative, "[s]ubsequent ASFA regulations emphasized that these exceptions could be invoked only on a case-by-case basis and that permanency efforts had to be continued, even when such exceptions were invoked for termination of parental rights."[21]

ASFA provided financial incentives for states to increase the number of adoptions from foster care. Long-term foster care was eliminated as a permanent placement option.[22] "[T]he preamble to the ASFA regulations explained that '[f]ar too many children are given the permanency goal of long-term foster care, which is not a permanent living situation for a child.'"[23] Relative or kinship care was formally recognized and as in AWCWA, legal guardianship identified as a permanency option.[24] But no money was appropriated for legal guardianship subsidies.[25] Arguably, this was because adoption remained the preferred permanency option when reunification with a parent was not possible. Instead the federal government allocated funds for waiver demonstration projects,[26] including subsidized legal guardianship programs.[27]

Any remaining question regarding the preference for adoption over legal guardianship was resolved by the Fostering Connections to Success and Increasing Adoptions Act of 2008 signed into law by former President George W. Bush on Oct. 7, 2008. While the law permits states to claim federal funds for kinship guardianship payments to relatives who are committed to providing a permanent home for a child leaving foster care, the law specifically requires the state agency to determine that "being returned home or adopted are not appropriate permanency options for the child" before making the claim for federal dollars.[28]

> The law deems a child eligible for a kinship guardianship assistance payment under this subsection if the State agency determines the following:
> (i) The child has been—
> (I) removed from his or her home pursuant to a voluntary placement agreement or as a result of a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child; and
> (II) eligible for foster care maintenance payments under section 472 while residing for at least 6 consecutive months in the home of the prospective relative guardian.
> (ii) *Being returned home or adopted are not appropriate permanency options for the child.* [emphasis added]
> (iii) The child demonstrates a strong attachment to the prospective relative guardian and the relative guardian has a strong commitment to caring permanently for the child.
> (iv) With respect to a child who has attained 14 years of age, the child has been consulted regarding the kinship guardianship arrangement.[29]

NEW JERSEY COURTS ON LEGAL PERMANENCY[30]

New Jersey, like other states incorporated ASFA into its state statute, and will have to comply with Fostering Connections as a condition precedent to receiving federal dollars. As previously noted, even before the enactment of these federal laws, New Jersey law emphasized the importance of permanency for children who could not be reunited with their parents. "If one thing is clear, it is that the child deeply needs association with a nurturing adult. Since it seems generally agreed that permanence itself is an important part of that nurture, a court must carefully weigh that aspect of the child's life."[31]

In *Matter of the Guardianship of J.C., J.C., and J.M.C., Minors*, the court acknowledged "the paramount need [that] children have for permanent and defined parent-child relationships."[32] "Children have an essential and overriding interest in stability and permanency."[33] The Supreme Court in *Matter of the Guardianship of K.H.O*, acknowledged "New Jersey's strong public policy in favor of permanency," in particular reunification or adoption over long-term foster care.[34]

PERMANENCY DEFINED IN STATE STATUTES AND REGULATIONS

The goal of *legal permanency* governs DYFS in three ways. *Family preservation* policies require that DYFS attempt to keep the family unit together by offering services to strengthen the family.[35] As of the end of 2008, 38,317 children were receiving services from DYFS in their own homes.[36] When the child's safety in the home cannot be ensured, DYFS must remove the child—a step that requires court approval absent imminent risk of harm to the child. Per statute, the health and safety of the child is paramount.[37]

Once children enter foster care, there is a hierarchy in the steps toward permanency. The initial goal mandated by law in almost all cases is to return the child to a biological parent, or *family reunification*. DYFS has a legal obligation to offer services and to work with the parents to address the problems that resulted in the child being placed into foster care, *i.e.* to provide "reasonable efforts" to reunify the family.[38]

If the child cannot be safely returned to a parent within a timely manner, the division must find *another permanent plan* for that child.[39] "When a child cannot safely return home, adoption is the preferred legal permanency option. Adoption gives the child a sense of belonging to a stable family and offers the child physical and emotional security that lasts a lifetime. Adoption is the most immune from future legal attack and ends state oversight over the case."[40]

If adoption is ruled out, the law requires that the division consider other legally permanent arrangements such as legal guardianship. "Subsidized guardianship allows children to maintain their family and community roots when they can no longer live with their parents and in those circumstances where adoption is not an appropriate option for the children."[41]

New Jersey's kinship legal guardianship is less permanent than adoption but more permanent than custody to a relative or the child remaining in foster care indefinitely. Unlike adoption, the kinship legal guardianship relationship is not binding for a lifetime; rather the guardian retains the continuing legal right and responsibility to care for the child until the child reaches age 18 or finishes high school, whichever event occurs later.[42] KLG judgments can be vacated through a petition to the court to seek to return the child to the parent, or if the KLG is no longer in the child's best interests.[43] This can include situations in which the guardian is seeking to return children to DYFS' custody.

If adoption and kinship legal guardianship are determined not to be an appropriate permanency plan for the child, then DYFS must develop *another planned permanent living arrangement*, defined by ASFA as "any permanent living

arrangement not enumerated in the statute."[44]

In light of these policies, laws and court decisions, when a child cannot be safely reunified with a parent, the first preference is adoption. Adoption is the most permanent legal option, providing the child with the highest level of legal and emotional security, a new *forever family*. ACNJ has always been an advocate for adoptive homes for children who cannot be reunified with their parents because they need a family; a nurturing, consistent parent to raise them and be there for them even as an adult. The research and the law clearly support this position as a policy matter. However ACNJ also believes that each case must be decided on its own facts; permanency plans should reflect the best interests of the individual child.

THE NEW JERSEY KINSHIP EXPERIENCE

While kin have often served as alternate or supplementary caregivers when birth parents were unable to care for their children, relatives were very rarely formally designated as foster parents for related children. Although DYFS policy always permitted relatives to become licensed foster parents and thus receive subsidies, prior to the reform plan of 2004[45] this did not occur unless the relative affirmatively sought to become a licensed foster parent. DYFS made a commitment in its reform plans to place more children with relatives and current practice presumes that relatives receive the subsidy and become licensed resource parents. As of Dec. 31, 2008, 37 percent of children living in foster care were in kinship homes.[46]

Many children not involved with DYFS are raised by relatives or other close family friends (*i.e.* kin). In New Jersey in 2006, 53,859 children were being raised by their grandparents.[47] Most of these families are not involved with DYFS. These living arrangements exist for different reasons: employment, financial, parents having mental health issues or substance abuse problems.

Some parents leave their child in the physical custody of a relative for a short time; others indefinitely. Relatives who have physical custody and/or legal custody of a child, when DYFS is not involved, can seek child support from the parents, or can obtain the child-only grant through a county board of social services. (In these instances, the board of social services is authorized to seek support from the parent.) Some caregivers are financially able and choose to cover the child through their own health insurance; others apply for New Jersey Medicaid, now included as part of New Jersey FamilyCare.

The relationship between the relative caregiver and the parent impacts the wellbeing of the child. In many instances all parties are in agreement with the arrangement and the child grows up in a stable secure home. However, if the relationship between the relative and the parent is problematic, or if a custody order is contested by the parent on a regular basis, even if unsuccessful, the child may experience confusion and uncertainty about where he or she belongs. Continuous litigation can be disruptive to a child, even if the child is not directly involved.

It was the uncertainty of these private custody situations which ACNJ and other advocates sought to address through the kinship legal guardianship statute, which took effect Jan. 1, 2002. The statute legally recognized arrangements wherein children are *already* living with relatives or close family friends because of their parents' unavailability or long-term inability to parent. In these situations, the statute provided legal protection to the caregiver who had become the consistent nurturing "parent" to the child and stability for the child living in that home. KLG is more than custody.[48] In the vast majority of cases, DYFS was not involved with the family.

PROVISIONS IN THE KLG LAW SPECIFIC TO DYFS CASES

When the wording of the kinship legal guardianship law was being formulated in 2001, concerns were voiced about using KLG in cases where other legal obligations upon DYFS come into play.

Reasonable Efforts

One concern was that the KLG statute not be used as means for DYFS to avoid meeting its legal obligation to provide services to parents to rectify the problems that caused the placement and help reunify the child with the parents. For that reason, the KLG statute requires the judge to make a finding that reasonable efforts to reunify (*i.e.,* services) were either unsuccessful or unnecessary under the statute.[49]

Adoption is Neither Feasible nor Likely

The other issue concerns the obligation of DYFS to ensure permanency for any child who comes under DYFS care due to abuse or neglect. The division is ultimately responsible to ensure the health, safety and permanency for any child living in foster care.[50] While the parent may support KLG as the permanency plan, only DYFS, with the consent of the relative caregivers, has legal standing to seek a KLG arrangement, or it may be implemented by court order.[51] The parent does not have legal standing to request kinship legal guardianship as a disposition in a Title 9 or Title 30 proceeding.

The limitations placed by the Legislature on the use of kinship legal guardianship arrangements as a permanency option reflect the clear preference in the law for adoption as the primary permanency alternative for children who cannot be reunified with birth parents.[52] For a KLG judgment to be used to resolve DYFS litigation, the judge

must find that "adoption of the child is neither feasible nor likely."[53]

New Jersey regulation requires that DYFS "[determine] that the child cannot be returned to his or her parent and that adoption is neither likely nor feasible" prior to a child becoming eligible for the DYFS Legal Guardianship Subsidy Program.[54] The meaning of the phrase "adoption is not likely or feasible" is at the center of the current debate. Who makes the determination? The caregiver? What authority, if any, does DYFS have to remove a child from a caregiver if the caregiver is not willing to adopt? Does "feasible" mean that the child is not adoptable in any home or is it referring only to the home in which the child currently resides? Should the length of time the child has lived with the relative be a factor? Does the age of the child matter?

"The safety of the child must be paramount, and steps must be taken to ensure permanency and minimize disruptions. Other permanency options, such as safe return to birth family or adoption, should be seriously considered before subsidized guardianship is selected, in order to rule out other possible placement alternatives and to minimize the possibility of later disruption of the guardian arrangement."[55]

RECENT COURT DECISIONS PROVIDE SOME ANSWERS

The Appellate Division first considered kinship legal guardianship in a published decision in *New Jersey Division of Youth and Family Services v. S.V.*[56] Reviewing the provisions of the kinship legal guardianship statute and the legislative intent and findings, the appellate court concluded that kinship legal guardianship was created to meet a very specific need.[57]

> In our view, this newly-enacted statute *is not intended* as an equally available alternative to termination that must be considered in order to satisfy the third element of N.J.S.A. 30:4C-15.1. Rather, as DYFS has argued in its brief, it is an intended option where parental neglect and poor prospects for change in the foreseeable future are established, but adoption 'is neither feasible nor likely,' the child is in the care of 'a family friend or a person with a biological or legal relationship with the child,' *N.J.S.A.* 3B:12A-2, and therefore 'kinship legal guardianship is in the child's best interest.' N.J.S.A. 3B:12A-6d(4). Here adoption is both feasible and likely, making kinship guardianship inappropriate.[58]

In *New Jersey Division of Youth and Family Services v. P.P. and S.P.*, the New Jersey Supreme Court held that "when permanency provided by adoption is available, KLG cannot be used as a defense to termination of parental rights under N.J.S.A. 30:4C-15.1a(3)."[59] The Supreme Court indicated in its opinion in *P.P.* that on its face KLG was not meant to be a substitute for the permanency of adoption but rather to provide as much permanency as possible when adoption is not feasible, rather than the child remaining in foster care. "The plain language of the Act, as well as its legislative history, establish kinship legal guardianship as a more permanent option than foster care when adoption 'is neither feasible nor likely' and 'kinship legal guardianship is in the child's best interest.'"[60]

In *New Jersey Division of Youth and Family Services v. S.F.,* the appellate court held that DYFS proved by clear and convincing evidence that adoption was not feasible nor likely because the paternal grandparents, although committed to raising their grandsons, were not willing to adopt.[61] The father had consented to awarding KLG to his parents.

In February 2008, the Appellate Division, held that KLG can be deemed a permanent placement option in appropriate circumstances specified in statute.[62] In *Division of Youth and Family Services v. DH and JV*, the maternal grandmother had custody of the five-year–old child for most of her life, was willing to raise her granddaughter but unwilling to adopt the child because she believed that "adoption would only cause family turmoil."[63] Moreover, DYFS had approved the grandmother to adopt the child.[64] When the grandmother preferred to become the kinship legal guardian, the division's permanency plan was select-home adoption (adoption by strangers) and approved by the trail court. The Appellate Division reversed the trial court's permanency order, finding that select-home adoption was not in the child's best interests.[65] The maternal grandmother had custody of the five-year-old child for most of her life, was willing to raise her granddaughter and removal of the child from her grandmother's home "would only cause her emotional and psychological harm."[66]

In *New Jersey Division of Youth and Family Services v. E.P.*,[67] the Supreme Court again noted the hierarchy of permanency options when it held that "a court may appoint a kinship legal guardian when adoption of the child is neither 'feasible [n]or likely,' thus preserving the parental relationship, *citing N.J. Div. of Youth & Family Servs. v. P.P.,* 180 N.J. 494, 510 (2004). The Supreme Court reminded us that "[t]he 'good' done to a child in [termination of parental right] cases in which reunification is improbable is permanent placement with a loving family, which after all is the principal goal of our foster care system."[68]

However, in *E.P.,* no one was available to serve as a kinship legal guardian, and the permanency goal was select-home adoption. The 13-year-old had been in numerous foster homes and her "only enduring bond [was] with her mother."[69] Given the unique circumstances of the case, the court held that this child's relationship with her mother which continued to provide emotional sustenance "should not have been severed based upon the

unlikely promise of a permanent adoptive home."[70]

THE CONVERSATION WITH RESOURCE PARENTS[71]

The Current Conversation Leaves Some Caregivers Confused

ACNJ receives telephone calls and emails from resource parents, both relatives and non-relatives, with questions about the DYFS court process. They are often confused by this complicated process, particularly since they are not participants in this process, other than to address the court when the confidential proceedings have ceased. Some ask about the differences in financial supports to families through adoption verses KLG. Information is provided about adoption and KLG, specifically the differences in legal authority and responsibility for the child. Resource parents seem to think they are supposed to 'pick' an option and are not sure what to do.

Many of these resource families feel pressure from all sides. From a DYFS case manager, they may hear that if they do not adopt, the child will be removed from their home. From the parent's attorney, they may be asked to refuse to adopt and tell the judge they will only become a KLG to avoid termination of the parent's rights. From the law guardian, they may hear either perspective, depending upon the child's wishes. We recognize that while the conversations between resource parents and caseworkers, and between resource parents and parents' attorneys are more extensive that this, some relatives take away nothing more than this from the discussion. These discussions clearly reflect the competing interests of the stakeholders involved in the litigation.

Beginning in 2002, there were an ever increasing number of KLG filings. Some argue that DYFS promoted KLG as a permanency plan because it was expedient when DYFS was trying to reduce caseloads. The past two years have shown a significant decline in filings, which suggests that DYFS has rethought its use of KLG. At the same time, however, parents' attorneys rightly try to employ KLG as a means of retaining some legal rights and hope for parents who have recognized their inability to parent their children for the foreseeable future, but who do not want to forfeit their rights to their children forever.

Caregivers can be caught in the middle, which is not fair to the caregiver, nor does it benefit the children involved. Caregivers may pursue a less permanent option for the child to end the case, which may not be what is best long-term. More consideration is needed in these cases.

All involved in a case should carefully examine the particular facts of that case, and help the caregivers make an informed choice that is best for the child in their care, not simply tell them what that choice must be. The caregiver needs to fully appreciate the long-term consequences of their decision. The caregiver's informed choice should then become part of the permanency planning.

The Child's Individual Needs and Safety Concerns Must be Part of the Conversation

While families and children may have similar characteristics, every case is different, and every family is different. Every child is unique, with individual needs based upon his or her personality and temperament, living circumstances, current age, age when entering foster care, placement history, medical needs, educational needs and relationships with siblings and family members. Permanency plans must take into consideration these unique characteristics and needs.

There are situations where DYFS caseworkers will and should tell a caregiver they think the parent is a danger to the child, and that DYFS case managers feel the parent's rights should be terminated. DYFS is doing its job of protecting the health and safety of the child. In that context, the division is appropriately asking relatives if they will adopt when DYFS seeks guardianship. However, caregivers should not be pressured to espouse DYFS's view of the parent.

There are also times when, through the licensing process, DYFS learns something about the caregiver, which gives DYFS concern or makes it inappropriate for the caregiver to keep the child. Some relatives are not capable of meeting the special needs of a particular child. These concerns should be addressed early and decisions made quickly, not 12, 18 or 24 months later. It is DYFS' job to protect the child. Attention should promptly turn to finding another home for the child.

The Conversation Should Include the Research

Adoption

Following the passage of The Adoption Assistance and Child Welfare Act of 1980 (AACWA), adoptions of children from foster care were finalized at increasing rates causing concern by some that a growing incidence of adoption terminations would follow. Researchers studied the validity of that prediction,[72] finding that "termination rates after AACWA were not as high as child welfare professionals had feared."[73]

The Evan B. Donaldson Adoption Institute completed a literature review of 20 years of relevant social science research and conducted a survey of 15 states' information-collection capabilities, issuing a report in 2004. The report concludes that while data collection is inadequate and the definitions of what constitutes an adoption disruption, displacement or dissolution are inconsistent, "the vast majority of adoptions from foster care remain stable over time."[74] The report further concludes that "termination rates for adoption are

much lower than those for long-term foster care."[75] 'Adoption termination' per the Donaldson study is adoption instability and includes adoption disruption, displacement and dissolution.[76] The Donaldson study noted that the research by the General Accounting Office is the only research on adoption stability subsequent to the passage of ASFA in 1997.[77]

Child welfare experts have concluded that "of all the placement possibilities for children, adoption is the least likely to fail. In other words, the adoption alternative is least likely to result in the child being moved after placement or adoption."[78]

The Donaldson study defined adoption disruption as the termination of a placement before the adoption is legally finalized.[79] Studies from 1980 to mid-1990s found overall disruption rates of 10 percent to 27 percent, with rates about 3.3 percent or less for younger children.[80] A 2002 report by the U.S. Government Accounting Office (GAO) on disruption data from 21 states estimated five percent of adoptions planned in 1999-2000 did not occur. Rates have remained fairly consistent since 1980s.[81]

Adoption displacement is the temporary (short or long) return of a child to state custody after adoption is legally finalized.[82] Empirical research studies estimated displacement rates in the 2 percent to 8 percent range. The rate may vary, depending on whether studies include all displacements or only long-term displacement.[83] The GAO survey of states found that "of adoptions planned in 1999-2000, approximately 1 percent resulted in re-entry into foster care."[84]

Adoption dissolution in the Donaldson study is defined as the termination of an adoption after it is legally finalized.[85] Data is not readily available, because children's last names change after adoption. The researchers reported that terminated adoptions often take the form of long-term displacements, rather than legal dissolution. The "best estimate is from studies from1988–1990 which estimate[d] that less than 2 percent of adoptive placements dissolve after finalization."[86]

Empirical studies document specific child- and parent-related factors posing greater risk to adoption stability. The research connotes that knowledge of these risks can promote more effective matching and attention to those known risks.[87] For example, age at time of placement is generally cited as the greatest challenge to stability.[88]

Behavioral and emotional issues are important indicators of termination risk because they put stress on adoptive placements. The parent's expectations may be unrealistic (due in part to lack of information from the agency) and experience in parenting special needs children.[89] So in addition to careful matching and preparation before placement,[90] post-adoption services are vital to reducing termination risk.

The Donaldson study reported mixed research results on kinship adoptive placements. Kin adoptions are reported as more likely to have "highly positive outcomes" than other adoptions by families unrelated to the child. Reasons for this outcome may be that these children have fewer factors predictive of termination risk. These children tend to have fewer moves while living in foster care, and lower incidents of physical and sexual abuse. These relatives are more likely to know of important aspects of child's background, and attachment problems are less common.[91] The next most secure permanent placements are foster home adoptions. The most problematic are "matched adoptive parents," (*i.e.,* the state agency is finding a family other than the foster family to adopt the child).[92] In New Jersey these placements are called select-home adoptions.

Another study, which reported a 50 percent disruption rate among 875 potentially permanent relative placements, identified the following reasons: "inability of relatives to maintain appropriate boundaries around contact with birth parents, difficulty of children from long-term substance abusing families adapting to a more structured environment, children's psychological and behavioral problems, relatives' advanced age and poor health and unmet service needs."[93]

Kinship Care

National research on kinship care has identified advantages and disadvantages to placing children with relatives. Children in kinship care, regardless of age, experience fewer placements than those in non-kinship care. Stability in placement generally results in better outcomes for all children living in out-of-home care.[94] If the child knows the relative, placement with kin "[may] lessen separation trauma, sense of loss, and identity conflicts that sometimes develop when children are adopted, especially if they are old enough to remember their parents."[95] Living with kin is generally not considered unusual or stigmatizing. Children in formal kinship care placements are less likely to run away and more likely to have contact with parents and siblings.[96] Birth parents may still be involved in their children's rearing.[97]

There are disadvantages. Kinship placements may decrease the possibility of birth parent reunification. When children are placed in kinship care, parents are typically able to visit or call as much as they want. This can reduce their motivation to become their child's primary caregiver again. Kinship caregivers note that some "birth parents are happy to have their freedom back and to pass along the responsibilities of parenthood."[98]

Kinship care placements also carry risks. A relative could be part of the family dysfunction that necessitated removal of the child. The child may not be sufficiently protected in the kinship home,[99] or the child's new caregiver may have similar problems as the offending parent.[100]

Another issue is the lack of preparedness among some kinship foster homes. Unlike licensed resource families, who typically prepare for their new role as parents, kinship caregivers often fall into parenthood in response to a family emergency. In addition, the age and socioeconomic circumstances of kinship caregivers may impede their ability to provide high-quality care.[101] Almost all studies that have collected data on the income of kinship foster caregivers have found that they are older, in worse health and significantly poorer than non-kin foster parents.[102] "Family stressors that undermine the stability of these living arrangements include conflicts with biological parents, challenging behaviors and special needs of children and adolescents, and health limitations of relative caregivers."[103]

With so much conflicting evidence on the benefits versus risks of placing children with kin, a recent study "sought to estimate the association between placement into kinship care and the likelihood of behavioral problems after 18 and 36 months in out-of-home care."[104] Children placed into kinship care had fewer behavioral problems three years after placement than children who were placed into foster care. Although the authors of the study indicated there should be further research to confirm and elaborate on these findings, "the findings support efforts to maximize placement of children with willing and available kin when they enter out-of-home care."[105]

While kinship care is a viable option, "it is important to recognize that kinship care is not an unconditional safety net."[106] Kinship care placements do disrupt. Some research suggests that rates of disruption may be "sensitive to both the level of financial support and the availability of post-discharge services to families."[107]

New Jersey law requires DYFS to search for and assess relatives if children come into foster care.[108] This law is good public policy based on solid research that generally shows children do better when placed with family. However, all children who are removed from their parents' homes do not belong with their relatives. The research is just as clear about the negatives of relative placements. Each case needs to be assessed based on its own facts.

The largest randomized controlled trial of subsidized guardianship for child abuse and neglect cases was done in Illinois as part of a federal waiver demonstration project.[109] Mark F. Testa, Ph.D., from the Children and Family Research Center at the University of Illinois at Urbana-Champaign, coordinated the Illinois project.

In the Illinois study both the caregiver and the child viewed the placement as permanent. The study found the intentions of caregivers to raise a foster child to adulthood do not differ for families who can choose between adoption and guardianship as compared to families who can select only adoption. Also, children do not express any lesser sense of belonging in families that adopt or become guardians as compared to families that only adopt. Finally, the homes of guardians are no more likely to disband than the homes of caregivers who can only become adoptive parents.[110]

From the first five years of the project, "the rates of guardianship ruptures [were] similar to adoption ruptures, controlling for differing ages at entry."[111] In his most recent report, Testa wrote that "[g]uardianships are more likely to displace but not because guardianships are less permanent. The kinds of children and caregivers that select guardianship are more prone to displacement regardless of whether they stay in foster care or become adopted."[112]

Testa is of the opinion that most families are in the best position to determine whether adoption or guardianship best fits their particular circumstances.[113] ACNJ would add, provided the family is fully informed about all options and understands the consequences of each.

The Illinois waiver project included one group of caregivers that were given the option of adoption only, and another that were give the option of adoption or subsidized guardianship. The availability of subsidized guardianship reduced the average time that children spent in foster care. However, "follow-up studies suggested that as many as two-thirds of the children taken into legal guardianship might have eventually been adopted in the absence of the waiver."[114]

In May 2008, Testa examined the interim findings from subsidized demonstration projects in Wisconsin and Tennessee. The Wisconsin demonstration project was operating for two years at the time of the report and the project in Tennessee for one year. At that time, the two waiver demonstrations were showing similar results to the Illinois demonstration project (*i.e.,* that "federally subsidized guardianship is a permanent and cost effective alternative to retaining children in long-term foster care").[115]

The Conversation Should Be Ongoing and Focus on Best Interests of the Particular Child

The permanency decision is not a single conversation between the caregiver and the DYFS caseworker. There should be an ongoing dialogue over time, during which the caregivers are asked questions about their household and future plans. They should be given information regarding what permanency means for children in foster care and details about different legal arrangements and what each means for the child and the caregiver. Caregivers need to process the information over time in the context of their family's dynamics and needs. The financial support for each option must be made clear.

ACNJ receives calls from relatives who in hindsight wish they

had made a different decision. They did not expect their arrangement to continue this long. They thought the parent would be better by now. The caregiver wants to enjoy retirement, or the caregiver is disabled and the child's behavior is having a negative impact on his or her health. They want to give the child back. We also receive calls from kinship guardians who now want to adopt. They called DYFS and were told there is nothing to litigate so DYFS cannot help them now. They have to file for adoption privately and do not know how to proceed or what is required.

Questions are helpful to the conversation. Alice Nadelman, Ph.D., participated in ACNJ's training project. Nadelman is a licensed clinical psychologist in both New Jersey and New York, and has provided therapy and expert consultation in DYFS cases for over 25 years. She identified four areas of inquiry which can assist DYFS and other stakeholders in determining the appropriate permanency plan for a child who cannot be safely reunified with a parent.

The first is *safety*. Does the parent present any physical or emotional danger to the child if continued contact were required? The second is *attachment*. With whom is the child's primary attachment or identification? Will the child accept adoption? *Uncertainty* is the third area. Can the child tolerate uncertainty regarding the possible loss of the current caregiver in the future if the parent were to seek to vacate the KLG? Could the child cope with another round of evaluations to assess best interests? Does the child wish to return to the parent? The answers should include consideration of the child's age, developmental state and any special needs. And finally, the fourth area is *cooperation*. Can the caregiver and parent work together cooperatively for the best interest of the child? Does the caregiver value and respect the child's need for positive family identity? Does the parent accept and respect the caregiver's authority?[116]

Questions Related to the Caregiver's Future Plans

One of the first inquiries should address visits. Everyone may be getting along now because DYFS is facilitating the visits and the court is monitoring. The caregiver may get along with his or her relative who is the child's parent, but how does the caregiver get along with the other parent and the other parent's relatives? If one parent is currently in jail or not around, what will happen when that parent returns? Some caregivers do not understand that both parents retain their right to visit and that the caregiver will have to work out the logistics and transportation with the parents once the court enters the final judgment. The caregiver may not know to ask the court to craft a specific parenting time plan for both parents at the time the KLG judgment is entered.

Where does the caregiver plan to be five years from now? Will he or she still be working or retired? If retired, will the caregiver remain in New Jersey or move out of state? In *Division of Youth and Family Services v. T.M.*,[117] the Appellate Division held that a kinship legal guardian wishing to relocate out of state is similar to a custodial parent moving out of New Jersey.[118] The noncustodial parent remaining in New Jersey is entitled to have the court determine whether the kinship guardian has proven that there was a good faith reason for the move and that the move will not be inimical to the best interests of the child.[119]

Some caregivers fail to understand that an adoption does not prohibit contact between the birth parent and the child. The adopting parent can allow contact between child and birth parent at their discretion. The adoptive parent becomes the decision maker.

Questions About the Relationship Between Caregiver and Parents

Caregivers must understand the problem that necessitated the child's placement in their home. Is the parent getting help for that problem? Is the caregiver expecting her relative, the child's parent, to get better and then to return custody back to the parent? What if that does not happen? If the problem is related to drugs or alcohol, what happens when the parent relapses, understanding that relapse is part of rehabilitation. Everyone may be getting along now, but what happens when the parent and the caregiver do not get along? Does the parent interfere with the caregiver's parenting decisions? How does the caregiver handle that interference?

Some caregivers do not understand that with a KLG arrangement, the parent can later seek to vacate the judgment and have custody returned to them. Presently pending before the New Jersey Supreme Court is a case involving which party has the burden of proving that the circumstances, which resulted in the KLG judgment have changed and that the KLG order should be vacated.[120] The Appellate Division, in an unpublished opinion, compared the application to vacate the KLG to an application to modify a custody order. The court held "the 'changed circumstances' requirement reflects a public policy of affording a child a dress of permanence in his or her daily living arrangement."[121]

Questions About the Child

The conversation should also include questions about the child's age, school grade, and whether there are any medical, educational or behavioral problems. Are those problems being addressed? How? Is progress being made? How does the problem impact the caregiver and other family members? Is the caregiver currently struggling to meet the child's needs? Does he or she understand that the needs of a child change over time? Does the parent understand these problems?

Questions About Financial Supports[122]

Many questions involve financial issues. The legal arrangement between the caregiver and the child determines the financial supports. Financial supports available through adoption have until recently been more generous than those available to kinship legal guardians. DYFS has added more supports for KLGs and the Fostering Connections law provides federal dollars for those supports.[123] With adoption there are special services available, such as post-adoption counseling and respite care. Relative KLGs may also qualify for help from New Jersey's *Kinship Navigator Program*, once the DYFS case is closed. Many teens who are adopted or in a KLG arrangement are eligible for our state's Foster Care Scholars Program.[124]

CONCLUSION

The decision regarding the most appropriate permanency plan for the child for whom reunification with a parent is not possible should be made once all parties are fully informed about the options and have considered the long-term implications of each alternative within the individual family's dynamics. Kinship caregivers should have a complete understanding of what each choice means for the child and themselves. There are some clear and some subtle differences between adoption and KLG that caregivers may not fully understand and which some DYFS staff, attorneys and judges may not fully appreciate or explain in a timely fashion.

While the use of KLG will most certainly continue to be litigated in New Jersey, hopefully there will also be more dialogue in each case about permanency options and what is appropriate for the particular child. Recent research suggests the form of legal permanence—adoption or guardianship—"may have less effect on family stability than does the caregiver's relationship to the child, sense of family duty, affection, and length of acquaintance."[125] And it needs to be acknowledged that much of the adoption research was completed prior to regular use of subsidized legal guardianship.

Clearly, no one wants children to linger in foster care. Data from the New Jersey Administrative Office of the Courts (AOC) indicate that as of January 2009 there are 1,586 children living in foster care whose parents' rights have been terminated still waiting for permanent homes.[126] Some of these cases are on appeal, and many of these of these children will ultimately be adopted by their current caregivers. Credit is due to all working with these cases who have diligently tried to significantly reduce this number over the past several years. Judges are appropriately sensitive to terminating parents' rights when the DYFS permanency plan is to find an adoptive home for the child (select-home adoption) and there is a relative willing to become the child's legal guardian, especially when the child is older.[127]

On the other hand, DYFS is successful in finalizing adoptions for younger children in foster care. And DYFS has a legitimate concern that guardians not return children to state care when the parent does not seek reunification as anticipated by the relative caregiver, or when children become problematic teenagers. KLG should not replace long-term foster care. Although some argue that long-term foster care is appropriate for some children, there were valid policy reasons for eliminating long-term foster care as a permanency option.

Arguably, a good match of child and caregiver does more to ensure the permanency of the relationship than a court order defining its status. A longitudinal study of both adoption placements and KLG placements in New Jersey would provide an opportunity for all to learn more and better serve the children entrusted in the state's care.

The availability of subsidized legal guardianship provides an opportunity to provide a permanent family for children living in foster care who might otherwise not find a permanent home. KLG should be used with great care, and after there has been a thorough discussion about adoption. ■

ENDNOTES

1. In 2006, 6,677 children entered out-of-home care; in 2007, 5,862 children entered out-of-home care. www.state.nj.us/dcf/home/childdata/outcome/ChapinEntryVExitDYFSOOHPlcmt02-07_04.16.09.pdf, lasted visited April 21, 2009.
2. *Kinship Legal Guardianship Act*, N.J.S.A. 3B:12A-1 *et. seq.* and N.J.S.A. 30:4C-84 *et. seq*.
3. "Child Protection Data Report" (ACNJ 2007) at pages 2 and 15 citing data from NJ Administrative Office of the Courts; Chart reflecting Number of Children Receiving Adoption and KLG Subsidy Payments in 2007, www.state.nj.us/dcf/home/childdata/outcome/AdoptionKLGJan06-Jun07RAWbymonth.pdf, lasted visited April 27, 2009.DYFS Data Report citing data from the NJ Administrative Office of the Courts (ACNJ 2007)
4. www.state.nj.us/dcf/home/childdata/outcome/SubsidizedKLG02-08_03.03.09.pdf, last visited April 21, 2009.
5. www.state.nj.us/dcf/about/case/DCFCasePracticeModel-Jan2007.pdf, last visited March 30, 2009.
6. Attachment and trust are necessary for children to adjust socially, and to develop empathy as well as the cognitive and behavioral skills necessary for successful functioning later in life. Nadelman, Ph.D., Alice, PowerPoint presentation titled "Permanency: What it is and what it means for children in foster care" based upon research of John Bowlby and

Mary Ainsworth (June 19, 2008) available at www.kidlaw.org; *see also* JoAnne Solchany, and Lisa Pilnik, "Healthy Attachment for Very Young Children in Foster Care," Vol. 27, No. 6 *Child Law Practice* 81 (American Bar Association, August 2008).

7. Thompson, Ross A., "Development in the First Years of Life," 11:1 *The Future of Children* 21, 26 (2001).
8. Solchany and Pilnik, *supra*, fn. 6 at 90.
9. Jones Harden, Brenda "Safety and Stability for Foster Children: A Developmental Perspective" 4 Number 1 *The Future of Children* 31, 36 (Winter 2004) page 36.
10. Nadelman, *supra,* fn 6.
11. Solchany and Pilnik at 90.
12. Nadelman, *supra*., fn 6.
13. *Adoption and Safe Families Act of 1997*, Public Law 105-89.
14. N.J.S.A. 30:4C-50 *et. seq*.
15. Adoption Assistance and Child Welfare Act, Public Law 96-272.
16. Allen, MaryLee and Bissell, Mary, "Safety and Stability for Foster Children: The Policy Context," 14, Number 1 *The Future of Children* 49, 50-51, 72 (The Lucille and David Packard Foundation Winter 2004);"What's Working for Children: A Policy Study of Adoption Stability and Termination," (Evan B. Donaldson Adoption Institute 2004) [hereinafter cited as the Donaldson study].
17. Freundlich, Madelyn, "The Future of Adoption for Children in Foster Care: Demographics in a Changing Socio-Political Environment" at 2 citing the Congressional Research Service, 1997, (The Evan B. Donaldson Adoption Institute); *see also* "When Children Cannot Return Home: Adoption and Guardianship," Mark F. Testa, Ph.D. reporting that: "By the early 1990s, more than 500,000 children were in foster care – the highest number ever recorded up to that time." Volume 14, Number 1 *The Future of Children* 115, 116 (The David and Lucile Packard Foundation, 2004).
18. Allen and Bissell at 62.
19. Donaldson Study at 8.
20. *Id*. *citing* Richard Barth and Marianne Berry.
21. Allen and Bissell. at 53 *citing* 45 C.F.R. § 1356.21(d).
22. *Id*. at 54.
23. Renne, Jennifer, "Reasonable Efforts to Finalize A Permanency Plan for 'Another Planned Permanent Living Arrangement,'" 21, No. 3 *Child Law Practice* 33, 38 (American Bar Association, May 2002) *citing* 65 Fed. Reg. 4036 (Jan. 25, 2000).
24. Allen at 54; Fiermonte, Cecelia, "Reasonable Efforts to Finalize a Permanency Plan for Relative Placement, 21 No. 1 *Child Law Practice* 1 (American Bar Association, March 2002) *citing* 42 U.S.C. §675 (c), 45 C.F.R. §1365.21 (h); Mark F. Testa, Ph.D., "Symposium: The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption: The Quality of Permanence – Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption" 12 *Va. J. Soc. Pol'y & L.* 499, 504-07(2005).
25. Testa, *supra*. fn 24 at 504.
26. Waiver demonstrations projects permit states to test new approaches to the delivery of child welfare services in order to improve outcomes for children. The federal government "waives" certain provisions of federal law to provide States with greater flexibility in using federal dollars for services that can facilitate permanence for children.
27. *Id*. at 507. All subsidized waivers made rule-out of both reunification and adoption as pre-conditions for approved guardianship assistance agreement. *Id*. at 508. Testa argues that ASFA did not establish adoption as presumptive best placement for children who cannot be reunited with their birth parents. ACNJ disagrees with this analysis.
28. "New Help for Children Raised by Grandparents and Other Relatives: Questions and Answers About the Fostering Connections to Success and Increasing Adoptions Act of 2008," Center for Law and Social Policy, Children's Defense Fund, Alliance for Children and Families/United Neighborhood Centers of America, *et.al*. at 33-39 (January 2009).
29. P.L.110-351 §101(d)(3)(A); 122 STAT 3949, 3951.
30. It should be noted that at the time of these court decisions, the choice was between adoption and remaining in foster care to give a parent more time to rehabilitate. A long-term foster care agreement was available in very limited circumstances and viewed as an exception to the general rule favoring adoption. State child protective service agencies like DYFS were just beginning to increase the use of relative homes as licensed foster homes, and a greater utilization of legal guardianship arrangements was just beginning.
31. *New Jersey Division of Youth and Family Services v. A.W.*, 103 N.J. 591, 610 (1986).
32. 129 N.J. 1, 26 (1992); *see also In the Matter of the Guardianship of K.H.O.*, 161 N.J. 337, 357-58 (1999).
33. *J.C.,* 129 N.J. at 26.
34. *K.H.O*. at 357.
35. N.J.S.A. 9:6-8.8b(2).
36. www.state.nj.us/dcf/home/childdata/dyfsdemo/index.html (last visited Jan. 1, 2009).
37. N.J.S.A. 9:6.8-8.
38. N.J.S.A. 9:6.8-8b(2); N.J.S.A. 30:4C-11.
39. N.J.S.A. 9:6.8.8(4).
40. Renne, Jennifer, "Reasonable

Efforts to Finalize a Permanency Plan for Adoption" 20 No. 6 *Child Law Practice* 65, (American Bar Association, August 2001).

41. Bissell, Mary and Miller, Jennifer L., Editors, "Using Subsidized Guardianship to Improve Outcomes for Children," at 1 (Children's Defense Fund and Cornerstone Consulting Group 2004): CDF did a national survey in 2003, finding that 34 states and the District of Columbia had subsidized guardianship programs. "All states required a trained child welfare caseworker to determine whether subsidized guardianship is the best option for the child…. The majority of states also required that the supervising agency consider the possibility of safe reunification with the birth parents or adoption before subsidized guardianship is chosen as a viable permanency option." *Id.* at 3-6. Under federal law *legal guardianship* "means a judicially created relationship between child and caretaker, which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making. The term 'legal guardian' means the caretaker in such a relationship." *ASFA,* Public Law 105-89 Sec 101(b), 42 U.S.C. 675(7*).*
42. N.J.S.A. 3B:12A-4a(6).
43. N.J.S.A. 3B:12A-6(f).
44. Renne, *supra*, fn 23 at 33 *citing* 42 U.S.C. 475(5)(C); N.J.S.A. 9:6-8.8(3).
45. "A New Beginning: The Future of Child Welfare in New Jersey" James M. Davy, Commissioner (2004).
46. www.state.nj.us/dcf/home/childdata/dyfsdemo/ChildrenInPlcmtTYPEDec08_01. 30.09.pdf (actual number is 3,250) (lasted visited April 21, 2009).
47. *New Jersey Kids Count 2008: State of Our Children* (Association for Children of New Jersey 2008) available at www.acnj.org.
48. N.J.S.A. 3B:12A-1c, Legislative findings.
49. N.J.S.A. 3B:12A-6d(3)(a).
50. N.J.S.A. 9:6-8.8b.
51. N.J.S.A. 30:4C-87a.
52. N.J.S.A. 3B:12A-1b, Legislative findings.
53. N.J.S.A. 3B:12A-6d(3)(b).
54. N.J.A.C. 10:132A-1.6(b)4 (Dec. 1, 2008).
55. Bissell and Miller, *supra*, fn 36 at 5.
56. *New Jersey Division of Youth and Family Services v. S.V.*, 362 N.J. Super. 76 (App. Div. 2003).
57. *New Jersey Division of Youth and Family Services v. S.V.*, 362 N.J. Super. 76, 86 (App. Div. 2003).
58. *Id.* at 88.
59. *New Jersey Division of Youth and Family Services v. P.P. and S.P.,* 180 N.J. 494, 513 (2004).
60. *Id.* at 512.
61. *New Jersey Division of Youth and Families Services v. S.F.,* 329 N.J. Super. 201, 213 (App. Div. 2007).
62. *Division of Youth and Family Services v. D.H. and J.V.*, 398 N.J. Super. 333 (App Div. 2008).
63. *Id.* at 342.
64. *Id.* at 343.
65. *Id.* 335 and 338.
66. *Id.* at 343.
67. *New Jersey Division of Youth and Family Services v. E. P.*, 196 N.J. 88 (2008).
68. *E.P.* at 26.
69. *Id.* at 109.
70. *Id.* at 114.
71. The term 'resource parent' includes all licensed foster parents, both relatives and non-relatives.
72. Donaldson study *supra*. fn. 16 at 7.
73. *Id.*
74. *Id.* at 3 and 11.
75. *Id.* at 8 *citing* Barth and Miller, Richard Barth and John Triseliotis.
76. *Id.* at 7.
77. *Id.* at 8.
78. Gelles, Richard J. and Ira Schwartz, "Children and the Child Welfare System," 2:1 U. Pa. *Journal of Constitutional Law* 95, 106 (Dec. 1999) *citing* Richard Barth.
79. *Id.* at 7.
80. *Id.* at 9.
81. *Id.*
82. *Id.* at 7.
83. *Id.* at 10 *citing* Mark Testa 2004 report on AFCAR data.
84. *Id.*
85. *Id.* at 7.
86. *Id.* at 10-11 *citing* studies by Groze (1996) and Festinger (2001); Donaldson also reports GAO research gathered from 21 states found that about 1 percent of adoptions finalized between 199 to 2000 later resulted in legal dissolution, *citing* General Accounting Office Report at 22-23 (2002).
87. *Id.* at 6.
88. Controlling for other factors, children ages 5-9 were almost twice as likely to experience disruption than children under age 1. Children ages 10-14 were more than five times as likely to experience disruption than children under age1. Children ages 15 or older were nine times more likely to experience disruption than children under age 1 Donaldson at 12 citing numerous reports.
89. Donaldson study at 13-14.
90. Donaldson study at 37 *citing* Berry (1997), McRoy (1999) and Barth interview (1992).
91. Donaldson study at 19-20 citing Howard and Smith 2001.
92. Donaldson study at 19 citing Testa 2004.
93. Donaldson study at 20 citing Terling-Watt, 2001.
94. Rubin, David, MD, MSCE; Kevin Downes, MD; Amanada L. R. O'Reilly, MPH; Robin Mekonnen, MSW; Xianqun Luan, MS; Russell Localio, PhD, "Impact

of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care," 162 (NO. 6) *Arch Pediatr Adolesc Med/Bol* 550 (American Medical Association June 2008) downloaded from www.ARCHPEDIATRICS.COM on Sept. 19, 2008.

95. Testa, Mark F. "When Children Cannot Return Home: Adoption and Guardianship," Volume 14, Number 1 *The Future of Children* 115, 121 (The David and Lucile Packard Foundation 2004).
96. *Id*., Gleeson, James P., "Kinship Care Research and Literature: Lessons Learned and Directions for Future Research," 2, Number 2 *Kinship Reporter* 1, 10 (Child Welfare League of America, Summer 2007).
97. Testa, *supra*. fn 92 at 121.
98. Geen, Rob. "Finding Permanent Homes for Foster Children: Issues Raised by Kinship Care," Series A, No. A-60 at 2-3 (The Urban Institute, April 2003).
99. Fiermonte, Cecelia, "Reasonable Efforts to Finalize a Permanency Plan for Relative Placement," Vol. 21, No.1 *Child Law Practice*, 1, 7-8 (American Bar Association, March 2002); Rubin *et al*, *supra*, fn 91at 551.
100. Rubin *et al*, *supra*, fn. 91at 551.
101. *Id*.; Gleeson, James P., "Kinship Care Research and Literature: Lessons Learned and Directions for Future Research," Volume 1, Number 2 *Kinship Reporter* 1 (Child Welfare League of America, Summer 2007).
102. Berrick, Jill Duerr. "Assessing Quality of Care in Kinship and Foster Family Care," *Family Relations* Vol. 46, No. 3 (July 1997): 273-280.
103. Gleeson, *supra,* fn. 98 at 8.
104. Rubin *et al*, *supra*, fn 91 at 551.
105. *Id*. at 550.
106. Testa, *supra*, fn. 92 at 124.
107. *Id. citing* a study in Texas showing disruption levels as high as 50 percent when children in foster care were discharged to custody of kin. Texas did not have subsidized guardianship program and provided few services. Contrast this with the subsidized guardianship program in Illinois where only 3.5 percent of 6,820 children placed with kin were no longer living there five years later. Of the disrupted placements, records indicated that one-third of the guardian ruptures were attributable to the death or incapacitation of the guardian and two-thirds occurred because the caregiver no longer wanted to exercise parental authority.
108. N.J.S.A. 30:4C-12.1.
109. Testa, Ph.D., Mark F. "Subsidized Guardianship: Testing The Effectiveness of an Idea Whose Time Has Finally Come," at 1, *Children and Family Research Center*, (The University of Illinois at Urbana-Champaign, May 2008).
110. Testa, Ph.D., Mark F., "Symposium: The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption: The Quality of Permanence – Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption," 12 *Va. J. Soc. Pol'y & L*. 499, 533.
111. Testa, *supra*, fn 92 at 124. Starting in 1997 6,820 children entered subsidized guardianship in Illinois waiver demonstration project. As of March 2002 only 3.5 percent of those children had been moved. Approximately one-third had been moved because the guardian had died or become incapacitated. The other two-thirds had been moved "because the caregiver no longer wanted to exercise parental authority." In these latter cases, the guardianship was legally dissolved.
112. Testa, *supra*, fn 106 at 24.
113. Testa, *supra*, fn. 107 at 534.
114. Testa, *supra*, fn. 106 at 3.
115. Testa, *supra*, fn. 106 at 4 and 24.
116. Nadelman, Ph.D., Alice developed a list of questions for caregiver(s), parent(s), and the child which may be helpful.These can be found at www.kidlaw.org.
117. *New Jersey Division of Youth and Family Services v. T.M.*, 399 N.J. Super. 453 (App. Div. 2008).
118. *Id*. at 466.
119. *Id*. at 468 *citing Baures v. Lewis*, 167 N.J. 91, 118 (2001).
120. *New Jersey Division of Youth and Family Services v. L.L.*, A-2459-07T4, unpublished slip opinion (App. Div., Oct. 17, 2008).
121. *Id*. at 7.
122. See materials at www.kidlaw.org for details.
123. Details regarding subsidies and other financial benefits applicable to adoption and KLG are available at www.kidlaw.org.
124. Details regarding eligibility for NJFC Scholars Program can be found at www.safsonline.org.
125. Gleeson, *supra* fn. 98 at 9.
126. "The Legal Orphan Report" (Post-TPR Cases), Administrative Office of the Courts (Jan. 18, 2009).
127. *E.P., supra,* at 98 where Court's opinion reflected testimony of a DYFS adoption specialist "that it could take two to three years to find a placement for an older child through 'select home adoption.'"

***Mary Coogan** is the assistant director of the Association for Children of New Jersey (ACNJ), a statewide nonprofit research and advocacy organization dedicated to advancing programs and policies that will improve the lives of New Jersey's children. Her primary responsibility is to coordinate ACNJ's Children's Legal Resource Center, which provides information, training and publications concerning laws and legal processes impacting New Jersey's children. She has authored several guides and reports in the area of child welfare.*

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