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Chair's Column

Who is the Chair of the Family Law Section and What Does She Have Planned for the Section?

by Sheryl J. Seiden

I was honored and privileged to have been sworn in as the chair of the Family Law Section of the New Jersey State Bar Association on May 16. It has been a long journey to reach this milestone, and I am so thankful to all the wonderful colleagues, friends, and family who helped me achieve this goal. There have been some incredible lawyers and retired judges who have previously served as chairs of the Family Law Section and, having learned from their leadership, I look forward to following in their footsteps.

Before I begin to tell you about me and my goals for the year, I must commend Michael Weinberg, the immediate past chair of our section, for his dedication and leadership over the last year. He worked hard, never once complained, and made it look so easy to run our section.

A Little Bit About Me

So who am I and why am I a family lawyer? A nice Jewish girl, I was born in Philadelphia in a Catholic hospital while my dad was finishing dental school. I then moved to Biloxi, Mississippi, where my dad served as a dentist in the United States Air Force. We then relocated back to the Tristate area, living in Staten Island where my dad, together with my mother, built a successful dental practice. After graduating fifth grade, we moved to Marlboro, New Jersey.

After graduating from Marlboro High School, I attended The American University, where I studied in the School of Public Affairs and majored in justice. I interned for the United States Attorneys' Office, where I became inspired to become an assistant prosecutor. I then attended New York Law School, where I was the managing editor of the *New York Law School Law Review.* While in law school, I changed course. I was convinced I would become a bankruptcy attorney, not an assistant prosecutor, and certainly not a family lawyer.

Truth be told, family law was not even a thought for me in those early days. I did not even

complete a family law class in law school; in fact, it was the only class I dropped during my three years in law school. I started my legal career as a summer associate in a large New York City law firm, Thacher, Proffitt & Wood, which was located in Two World Trade Center, where I later became a first-year associate in the litigation department, specializing in maritime law. I then ventured to another large New York City law firm, Paul Hastings, where I practiced intellectual property litigation. I was then contacted by a recruiter who helped find me what turned out to be my dream job—working for Eleanor Alter and Helen Brezinsky at a law firm previously known as Kasowitz, Benson, Torres & Friedman, practicing family law.

Why Eleanor? Why Helen? Why family law? Well, having watched my parents go through a terrible divorce in New Jersey (which started when I graduated college and ended two years after I graduated from law school) I decided that I no longer wanted to work for big corporations. I wanted to help people during the most difficult time in their lives. Eleanor and Helen were both incredible role models for me in my career, teaching me the ropes of family law in high-net worth and high-profile cases, and I thank them for their guidance of me as a young lawyer.

After several years learning the ropes of family law in New York City, Helen and I had a New Jersey case, in Essex County, before Judge Convery, against our now Tischler recipient, Francis Donohue. As expected, Frank commanded the courtroom and took complete control of the case. I remember Judge Convery ordering Helen and I to subpoena the documents that Frank wanted if our client could not provide them. Recognizing that we needed local counsel to help level the playing field, we brought in Cary Cheifetz as local counsel to assist us in litigating this very difficult case. We settled the case before Judge Convery. But for Cary's impressive mediation skills, we might still be trying the case today.

After that case, having become tired of commuting, and with a toddler at home, I was persuaded by Cary to come to New Jersey and join the ranks of New Jersey's family lawyers. In July 2003, I joined Ceconi & Cheifetz, where I practiced family law for 13 years. Lizanne Ceconi encouraged me to get involved with the Family Law Executive Committee and, in 2008, I served as Young Lawyer Subcommittee co-chair, together with Carrie Schultz, under the leadership of our former chair, Edward O'Donnell.

On Oct. 1, 2016, I opened my own law firm, Seiden Family Law. A wonderful new legal assistant, Kristen Reynolds, agreed to take a chance with me, and together we began to build the firm. We then added our first associate, Shari Genser, and then added our next lawyer, Donald Schumacher. Before long, we added Christine Fitzgerald and Christine Tangredi. In two and one half years, Seiden Family Law has tripled in size. What an adventure it has been, and I thank each and every one of my team members for joining my firm, and helping to grow the firm.

What Does it Mean to be a Family Lawyer?

What does it mean to be a family lawyer? Well for starters, it is one of the hardest areas of the law to practice in. Half of our job is to navigate clients through the legal aspects of family law and the other half of our job is to counsel clients through the emotionally and financially difficult process. I chose to leave the world of litigation representing corporations to help people during some of the most challenging times in their lives.

Having watched my parents' contentious divorce, I wanted to give back. I thought I could really make a different in people's lives. I will never forget the day I learned my parents were getting divorced. I was graduating from college and my mom showed up to pick me up from college without my father, breaking the news to me that my parents had separated. It was truly one of the worst days of my life. No child ever wants to hear that their family is breaking apart. Going through that process taught me how to be resilient, lead a family in a time of need, and become stronger as a person. Most importantly, it served as the basis for me to become a family lawyer and continue to practice family law exclusively today. What better way to heal the pain than to embrace the world that caused it?

Despite the fears we hear from our clients about their children, I am here to tell you that children of divorce will be okay. I am okay. In fact, I am more than okay; each one of my three siblings are more than okay, as each one of us is more successful than the next.

My Initiatives for My Term as Chair

This year I have several goals that I hope you will help me achieve. First, I want to focus on the children of divorce. We need more resources to help guide children during these difficult times in their lives. We also need to find a way to assist the courts in making custody determi-

nations in those cases where parents cannot afford to pay for a full custody evaluation. It is my hope that we can work with our forensic psychologists to create a program to help the judges make these custody and parenting time decisions. I will be continuing our Children's Rights Committee on the Family Law Executive Committee, which will be tasked with addressing these issues.

A second goal for the coming year is to propose legislation that provides guidance and consistency for our courts in addressing how to handle parents' requests to relocate within the state of New Jersey. Without consent of the other spouse or a court order, a parent cannot relocate from Bergen County to New York City because it is an interstate relocation: however, that same parent can relocate from Bergen County to Cape May County without consent or court order. Michael Weinberg started this initiative by forming a committee that has reviewed the intrastate relocation laws in all states within the United States. We now have a data bank of research on this issue that I hope we can use to craft law in our state. This issue will be part of our Family Law Symposium on Jan. 25, 2020.

A third area of our law that we need to mend is the black hole that exists in the crossover between the elective share statute and the laws of equitable distribution. The elective share statute, which provides a spouse with one-third of the deceased spouse's augmented estate, does not apply to a spouse who was living separate and apart from the deceased spouse at the time of the divorce where there was grounds for a divorce at the time of the spouse's death. This law was created when New Jersey was still a fault state. Now that we are a no-fault state, this exclusion can apply to any marriage where the spouses were living separate and apart at the time of death. Moreover, the equitable distribution laws no longer apply once a spouse dies. For a spouse who does not have remedies under the elective share statute and does not have remedies under the equitable distribution statute, this has created what we refer to as the black hole in our law. Together with the New Jersey Law Revision Commission, the Family Law Section is working on proposed legislation that can mend this black hole. This initiative was launched by Jeralyn Lawrence during her year as chair and continued by Stephanie Hagan and Michael Weinberg. It takes years to make these changes, and I plan to continue with their initiatives.

My fourth goal is to find a way to help the Judiciary move cases. Whether it is to add more blue-ribbon blitz panels or mediators to the roster, we need to work together so we can really ensure best practices are met and people in our state are timely divorced.

My fifth goal is to elevate our young lawyers. The young lawyers are the future of our section. Last year, the Family Law Executive Committee created a mentoring program under the guidance of Derek Freed. We will continue this program during my term and continue to provide support to our young lawyers. This year, our Young Lawyer Subcommittee (YLS) is co-chaired by Rotem Peretz and Elissa Perkins. We will have three groups functioning under the subcommittee: social/sponsorship, led by Jayde Wiener and Alexandra Rigden; technology/education, led by Vito Colasurdo Jr. and Daniel Burton; and silent audition/holiday party, led by Kaitlyn Lapi and Shari Genser. Any young lawyers who would like to be a part of YLS should reach out to Rotem and Elissa. YLS will be responsible for educating the Family Law Executive Committee about the new developments in our case law and provide us with technology updates. They held their first meet and greet on June 25 at Stuff Yer Face in New Brunswick. The YLS kickoff party is planned for Sept. 19. Two mentoring workshops are planned for YLS on Nov. 12 and Feb. 11.

And finally, I want to encourage each of you to get out of your comfort zone and do something you have never done. You can mentor a young lawyer, volunteer for a blue-ribbon panel, speak at a seminar, volunteer to take a *pro bono* case, or attend the Family Law Retreat for the first time. It is important to give back, and I promise you will feel good about doing so in the process. As Darius Rucker, one of my favorite country music artists, says, "When Was The Last Time You Did Something For The First Time." I welcome each of you to do something for the first time this year, and let me know what you decided to do; I want to hear from each of you!

The Annual Meeting and the Year Ahead

The Family Law Section sponsored/co-sponsored nine seminars on family law-related topics at the NJSBA Annual Meeting in May. We presented the Serpentelli Award, which is awarded to a retired judge who has dedicated him or herself to the Family Law Section, to the Honorable Marie Lihotz J.A.D. (Ret.). At the NJSBA Annual Meeting, we were privileged to have three Family Law Section members sworn in as leaders of the state bar. Evelyn Padin is now the first Latina sworn in as the president of the NJSBA, Jeralyn Lawrence was sworn in

as second vice president, and Timothy McGoughran was sworn in as treasurer. We are very lucky to have family lawyers representing the state bar, and I hope you will join me in thanking them for their dedication and service to the section and the NJSBA.

Please save the date for some great upcoming events:

- The Hot Tips Seminar, with a focus on ethical issues in family law will be held on Nov.11.
- An open meeting of the Family Law Executive Committee will be held on Nov. 12.
- The Family Law Section Holiday Party is scheduled for Dec. 12, at Galloping Hill Park and Golf Course in Kenilworth.
- The Family Law Symposium will be held on Jan. 24 and Jan. 25, 2020, at the Hyatt Regency New Brunswick.
- The Family Law Retreat will be held from March 25 to March 29, 2020, in Nashville, Tennessee.

In closing, I thank each of you for putting your trust in me to lead our section for the next year. I thank each of you for being a part of this section, and I thank each of you for providing me with this opportunity. I encourage you to come forward to make a difference. It takes a village to run this section. I cannot do it alone. I am looking forward to a great year serving with you.

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Outgoing Chair's Column
Farewell Remarks

by Michael A. Weinberg

The Family Law Section is one of the largest and most active sections of the New Jersey State Bar Association. Our 1,300 members come from law firms across New Jersey. We hail from diverse backgrounds, from big cities and small towns, and from large firms and solo practices. Yet, despite our different cultures, political beliefs, tastes and temperaments, we are all united by a sincere desire to help our clients navigate moments of intimate upheaval in their personal lives and emerge stronger, happier, and more resilient. The Family Law Section has always been instrumental to achieving these goals, and this past year it was my privilege to serve as chair of the section. Below are some highlights of the many accomplishments of our section during my tenure.

Professional Activities

Over the past year, the section addressed several important issues that impact our practice, including matters related to domestic violence, DCP&P, and the establishment of a parenting coordination task force. In particular:

- We have proposed clarifying amendments to our state's existing probation child support statute, which continues to be misunderstood and misapplied. Jeralyn Lawrence and Stephanie Hagan, as well as their sub-committee members, have done significant work differentiating between the emancipation of a child in New Jersey and the termination of child support obligations administered through the Probation Department. As a result of their efforts, we now await confirmation that our section's proposed legislation to simplify and clarify how the child support termination statute will be implemented.
- After the Court's determination regarding matters involving interstate relocation in *Bisbing*, the section also studied the appropriate standard when a custodial parent seeks to relocate within the state of New Jersey. As further guidance is needed here, Sheryl Seiden and Ron Lieberman, as well as their subcommittee members, continue to advance this important issue.
- The section, under the direction of Amy Wechsler, proposed the establishment of an evidentiary rule for collaborative law communications. These proposals are currently under review, and we remain hopeful the section's recommendations will be made effective in a timely manner.
- In order to foster a continued understanding of diversity and equality, our section established a new Diversity and Equality Awareness Subcommittee. This subcommittee was chaired by Evelyn Paden, who was recently sworn in as the first Latina president of the New Jersey State Bar Association.

Generosity

As chair of the section, I was fortunate to oversee a significant expansion of the section's charitable and community outreach activities.

- In November, with the assistance of the section's Young Lawyers Subcommittee, the section held a Thanksgiving food drive for Elijah's Promise, a New Brunswick nonprofit committed to alleviating poverty and hunger across our state. The food donations and monetary contributions raised by these efforts enabled Elijah's Promise to provide approximately 100 meals to those in need during the holiday season.
- During the annual holiday party at The Addison Park in Keyport, the section raised over $10,000 for Urban Promise, a Camden-based charitable organization. Through the generosity of our members and their guests, Urban Promise is now better positioned to equip children and young adults with the skills necessary for academic achievement, life management, personal growth, and success.
- Most importantly, throughout the year, section members donated countless hours of their time to

improving the practice of family law. Members attended monthly meetings; participated in subcommittee meetings; and presented seminars throughout New Jersey, including the Family Law Symposium, an event attended by over 900 people. Because of the generosity and selflessness of our members, lawyers across the state are now more knowledgeable and better prepared to advocate for their clients.

Camaraderie

While participation in the section requires sacrifice, membership also provides some of the most enjoyable aspects of our profession. Membership gives each of us the opportunity to meet new colleagues and to foster lasting friendships.

- The Annual Retreat in Aruba provided a well-deserved beach getaway at the Hilton Aruba Caribbean Resort & Casino, a fabulous resort. Thanks to our sponsors and section members, this was an all-around great time with friends, both old and new.
- In a continued effort to build solidarity and to assist our young lawyers, this year we instituted a new mentoring program. Section members provided guidance, knowledge, and expertise to the young lawyers who will one day lead our section into the future. Initial feedback suggests that young lawyers were appreciative of the support and mentors found the experience meaningful and rewarding. I encourage others to participate in this new and impactful program.

Acknowledgments

The section's continued growth and success would not be possible without the sustained and unremitting devotion of its members. Several individuals were acknowledged for their career achievements and contributions to family law:

- At the section's annual meeting in May, Frank Donahue was honored with this year's Tischler Award in recognition of his lifelong dedication to the advancement of family law.
- Also in May, Judge Marie Lihotz was the recipient of the prestigious Serpentelli Award in recognition of her enduring and extraordinary contributions to the development of family law.
- We also commemorated the loss of our dear friend and colleague, John Finnerty, who passed on March 5. John was a true champion of justice. His contributions to the practice of family law and to our section, as well as his kindness and generous spirit, will be missed.

Together, section members have made significant advancements for the practice of family law, and I am confident that, through our continued participation in the Family Law Section, we will continue to find new and collaborative ways to serve both our profession and clients.

On a personal note, overseeing the Family Law Section and its many achievements this past year was a highlight of my career. I am grateful to all the section members for this honor, and to the many members without whose support I would not have been able to fulfill my duties. In particular, I wish to thank my partners Dawn Kaplan and Amy Smith, as well as my friends and colleagues at Archer & Greiner, P.C., for advancing my professional development and steadfastly encouraging my involvement in the section. Additionally, I thank my fellow officers: Sheryl Seiden, Ron Lieberman, Robin Bogan, Derek Fried, and Stephanie Hagan, as well as Young Lawyer Subcommittee co-chairs Alix Claps and Rotem Peretz. Finally, I am grateful to my good friend and confidant, Albertina Webb, for her unfailing assistance. Lastly, I remain truly humbled by and grateful to all those who actively participated in the section this past year for their contributions of time, resources and enthusiasm. ■

Editor-in-Chief's Column

The Parents' Education Program—Is the Right Message Being Sent?

by Charles F. Vuotto Jr.

Matrimonial litigants who have minor children are required to attend a Parents' Education Program promulgated under N.J.S.A. 2A:34-12.3 to assist and advise divorcing parents on issues concerning divorce, separation and custody. After pleadings are filed, the parties will be automatically scheduled to attend this program when custody, parenting time or child support is an issue in the pleadings filed by either party. The purpose of the program is to encourage cooperation between the parties and to assist parents in resolving issues that may arise during the divorce or separation process. The program is designed to educate parties as follows:

- Understanding the legal process and cost of divorce or separation, including a discussion of arbitration and mediation;
- Understanding the financial responsibilities for the children;
- Understanding the interaction between parent and child, the family relationship and any other areas of adjustment and concern during the process of divorce or separation;
- Understanding how children react to divorce or separation, how to spot problems, what to tell them about divorce or separation, how to keep communication open and how to answer questions and concerns the children may have about the process;
- Understanding how parents can help their children during the divorce or separation, and suggesting specific strategies, ideas, tools and resources for assistance;
- Understanding how parents can help children after the divorce or separation and how to deal with new family structures and different sets of rules; and
- Understanding that cooperation between parties may sometimes be inappropriate in cases of domestic violence.

Without question, the stated goals of the program are encouraging and obtainable. In a divorce situation, it is critical that parties understand the legal process, the cost involved, and the need to approach their disputes in a mature, reasonable and civil fashion with the goal of resolution by agreement rather than litigation. Clearly, the ultimate goal is to ensure that the best interests of the children are protected.

However, it has come to the author's attention that while this program is well intended, there are certain examples of how the execution of the program is negatively reflecting on the legal process, the Judiciary and counsel.

Without identifying the county, presenter or any other significant information, the author has been informed by a litigant who was present that certain program presenters have attacked attorneys as a group. In one presentation where the overall theme was to settle as much out of court as possible, the presenter warned against making the error of bringing a case to court thinking you will "do better" than you would if you settle with your spouse. One could argue that there is nothing much problematic with this message. However, the presenter went on to use a well-known and highly publicized divorce case as an example of what not to do. The presenter suggested that both parties in that well-publicized case wasted a lot of money pursuing things they thought they were entitled to when, in fact, the arguments they were making had no legal basis. It was suggested that not only should the litigants have known their arguments were not tenable and their goals not obtainable, but that their attorneys were also well aware their respective arguments and goals were unrealistic. It was suggested that had the parties in this well-known case been encouraged to mediate rather than litigate, they would have saved significant money and perhaps been able to preserve their relationship. The presenter empha-

sized that this well-known case was complicated and prolonged by the attorney involvement and the unreasonable positions taken by the parties.

The litigant who reported this to the author indicated her impression that there was "quite a bit of shade" thrown on attorneys by the presenter. One comment that this litigant remembers was the following statement, "the people that benefit most from extended conflicts are attorneys" and "when conflict is resolved the attorneys stop being paid." The author believed the message that this particular presenter was trying to send was quite clear, and an insult to the vast majority of matrimonial attorneys in the state.

In addition to the foregoing, the litigant who reported on the contents of the Parents' Education Program she attended indicated the presenter stated "attorneys are happy to fight for whatever you think you deserve, but the fact of the matter is that an attorney knows what the outcome will be from mediation or litigation 98% of the time, and it serves their financial interest to fight on the client's behalf, even though they know that the outcome will not be what the client wants."

The litigant went on to give another example provided by this particular presenter regarding a dispute over a child-related expense, and the ensuing litigation between the parties. The presenter made the comment that the attorneys could absolutely have predicted the outcome and, therefore, the only winners in the scenario were the attorneys' pockets. The litigant reporting on this Parents' Education Program indicated there were many times that in encouraging people to settle issues outside of court and mediation, the presenter referred to attorneys as the only real beneficiaries of the divorce conflict. The litigant walked away from the Parents' Education Program with a general feeling of not trusting attorneys.

It is certainly possible that the litigant who reported these things to the author could have been mistaken. The litigant could have misperceived or misconstrued what was said. Alternatively, the reporting may be accurate, and this may be an aberration of this particular county or even this particular program presenter.

Unfortunately, the above is not the only concerning example of this negativity. The author spoke to several colleagues from various regions of the state and was advised of similar troubling presentations.

If the reports are accurate, and this sort of message is being communicated to litigants on a repeated basis, the author believes it must stop and is simply wrong. Although there are certainly examples of over-litigious attorneys who churn files and fail to attempt to work toward a fair and appropriate resolution, it is the author's experience that such attorneys are the exception and not the rule in our practice. The vast majority of attorneys do try to resolve their cases in a fair and reasonable fashion, whether by direct negotiation, mediation, arbitration or use of some other form of alternative dispute resolution.

Again, if these reports are correct, it is inappropriate that a court-sponsored program would bash attorneys in this fashion. It may be necessary that there be some sort of review of the curriculum included in the Parents' Education Program and some sort of vetting of the presenters. To the author's knowledge, the Family Law Section of the New Jersey State Bar Association has never been involved in this aspect of the matrimonial dissolution process. It may be time for the Family Law Section to become involved in this process. As such, this issue is being considered by the Family Law Section Executive Committee. If you hear of other such negative examples, the author encourages you to come forward and speak up for the benefit of preserving the good that this program was intended to provide to the matrimonial litigants of the state. ■

The author thanks Sheryl J. Seiden, of Seiden Family Law, LLC in Cranford, and the current chair of the Family Law Section of the NJSBA, for her contributions to this column.

We Owe You 15 Years of 'Thank You's'

Dear Cindy:
I just wanted to thank you both again for helping me and [my daughter] get into our new home. As you both knew, I was very nervous and so unsure of myself during this process-however you both reminded me of what it means to have amazingly competent professional women surround you during crazy times-success! I remain extremely grateful. Let this brief email remind you of how important your work is.....

EJM (12/29/2017)

Hi Cindy,
Thanks for sharing the survey. We appreciate you taking care of our client JB. She's a lovely person. We continue to refer to you and Len because you're the best. Enjoy the beautiful day.

MAB, Esq. (10/5/2017)

The above is shared with you, the members of the NJSBA, with the vision of helping you to decide on the very best Home Loan Specialist to refer your clients to, or for your own personal mortgage financing. Our team has experience helping families going through divorce with mortgage lending options and can help your clients too.

Thank you again for trusting us with your client referrals for the past 15 Years!

Have a Happy, Healthy & Prosperous New Year!

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Executive Editor's Column

Special Evidentiary Privileges Can Cause Special Problems in Custody Matters

by Ronald G. Lieberman

As practitioners are well aware, there are numerous evidentiary privileges (N.J.R.E. 505—psychologist-patient privilege; N.J.R.E. 517—victim counselor privilege; and N.J.R.E. 534—mental health service provider privilege) that govern the release of therapeutic records. Those privileges make sense and are designed to allow a patient to meet with his or her therapist without fear that personal information would be released without a finding of necessity. That way, such a privilege "protects the individual from public revelation of inner most thoughts and feeling that were never meant to be heard beyond the walls of the therapist's office."[2]

That same point was made in prior case law, finding that the psychologist-patient privilege, N.J.R.E. 505, "preclude[s] the humiliation of the patient in the exposure of his most intimate thoughts and emotions."[1] But does the psychologist-patient privilege, the victim-counselor privilege, and the mental health service provider privilege make sense to preclude the release of a child's therapeutic records when a child is in therapy because of the actions of one or the other parent? Will not the invocation of any and all of those privileges thwart a judge's ability to determine the facts and review the custody factors under N.J.S.A. 9:2-4, including 'fitness of the parents'?

It is important to look at each of these various privileges separately to see if the public policy behind each is being met when information that a judge may need about a child is presumptively precluded from release by a therapist or counselor while the child may be in therapy or counseling in the first instance because of the parent. Can it be argued that such a presumption of confidentiality rewards the wrongdoer-parent by creating privileged communications that hide the truth when the child is only in therapy because of that parent?

Psychologist Patient Privilege, N.J.R.E. 505

With regard to this privilege that governs communications between and among a licensed practicing psychologist and individuals, the scope is greater than the physician-patient privilege.[3] The reason for such a scope of privilege is "the nature of the psychotherapeutic process is such that full disclosure to the therapist of the patient's most inmate emotions, fears and fantasies is required."[4] The privilege with the psychotherapist remains intact because the issue is the condition of the victim of the parent.[5]

There will not be a disclosure of therapy records unless the movant makes a *prima facie* showing under the three-prong test established in *In re Kozlov*.[6] There has been at least one decision where a court and the parties were allowed access to testing data by a court-appointed psychological expert to determine which parent was best suited for custody in a custody matter.[7] The trial judge determined that because the child's best interest and welfare is the utmost concern in child custody cases, the parties must know all the relevant elements the expert used to determine which parent would be best suited for custody. But that case did not deal directly with the release of a child's therapeutic records.

It appears under the statute that incorporates N.J.R.E. 505, N.J.S.A. 45:14B-31 *et al*, specifically Section 36, that all disclosures of confidential information about a child patient must be authorized by the patient or both parents. A therapist or counselor needs to be careful about waiving the privilege or violating it because there can be a cause of action for damages against a psychologist who releases the records inappropriately.[8]

Victim Counselor Privilege, N.J.R.E. 517

This privilege protects the victim of an "act of violence," as defined in N.J.R.E. 517(b)a, from a release of the confidential communications, including any information exchanged between the victim and the victim-counselor in private. A juvenile is able to waive this privilege if knowingly done pursuant to N.J.R.E. 517(c).

As with the psychologist-patient privilege, the concern

behind the victim-counselor privilege is the victim should be able to express their private fears and feelings to counselors without fear of disclosure, or else they will avoid useful counseling entirely.[9] There is a testimonial privilege under the statute that makes the statements immune from discovery or legal process.[10] This privilege would be in effect if a child is treating with a counselor because of acts of violence committed against that child by a parent.[11]

Mental Health Service Provider Patient Privilege, N.J.R.E. 534

This privilege modifies or replaces the different and occasionally inconsistent privileges between patients and various mental health service providers.[12] The patient has a privilege in refusing to disclose in a proceeding the confidential communications obtained during that session.[13] The term 'mental health service provider' includes 11 categories of mental health professionals, including psychologists, social workers, professional counselors and psychoanalysts. It is a broad privilege. There are 11 categories of exceptions where the privilege would not apply; however, none would cover the situation where a child is treating with a mental health provider because of the actions of a parent.

Common Law

All practitioners are aware that the maxim of 'unclean hands' holds that "a suitor in equity must come in to 'clean hands' and they must keep them clean after his entry and throughout the proceedings."[14] In other words, "a court should not grant relief to one that is a wrong doer with respect to the subject matter and suit."[15] This legal doctrine "means that a court of equity could refuse relief to [any] party who has acted in the matter contrary to the principles of equity."[16]

So a practitioner should be able to quote these legal principles to argue that if a parent's actions cause a child to attend therapy, that parent is coming before a court with unclean hands and cannot successfully hide behind privilege that would prevent a court from receiving information arising during therapy.

Given that a child cannot generally consent to treatment and requires a parent or guardian to consent on his or her behalf, should not a parent who consents on the child's behalf know what the contents are of the treatment? Should not a court know these facts in order to determine what is going on with the child who is in therapy because of the parent?

The American Psychological Association ethics code, Standard 4.02 "informed consent to therapy," states that when an individual cannot provide informed consent (for example, a minor), a psychologist should "consider such person's preferences and best interest." Moreover, Standard 5.05 states that a psychologist can disclose confidential information without consent of the patient "to protect the patient or others from harm." So these ethical standards recommend disclosure in order to protect the patient from harm. The actual harm to the child may come from a judge not learning of the child's thoughts as a result of the parent's abuse or neglect. Should not harm to that child be disclosed?

Potential Resolutions

There are several ways to resolve this issue. It would make sense to have an implied waiver of any mental health provider privilege as a result of filing a claim for custody of a child or, at the very least, a limited waiver of any privilege when the child is in therapy because of a parent. But, in order to make sure a privilege is not waived any further than would be necessary, a court should appoint a law guardian or guardian *ad litem* for the child to determine if such a privilege should be pierced and to what extent.

Because child custody is based on the best interest of the child, there frequently are issues regarding the mental health of a child, so the presence of psychotherapists in family court litigation is not uncommon. The author believes the evidentiary privileges discussed herein should bend to the need of a judge to learn the information that a child has revealed to a therapist when that counseling is caused by a parent. The author believes there should be a recognized exception to any and all of the evidentiary privileges set forth in this column that a judge should have the right to receive that information at least on an *in camera* basis.

Imagine if there is no litigation exception. Then there is a sword and shield situation where a parent can cause a child to go into therapy because of his or her own actions (the sword) and thereafter claim a privilege (the shield) when inquiry is made as to the matters discussed in the therapy.

Knowing that a privilege can be waived does not complete the analysis, however. Is there a complete waiver or a less-then-complete waiver? In other words, can there be a partial waiver or must there be a complete waiver as to all matters related to or discussed during

therapy? Just as an adult in therapy is likely to be calmed by the notion that the privilege allows him or her to reveal their innermost thoughts, a child's mental health provider would also hold equally important information about the child, including whether he or she has settled into a current environment or has fears about one of his or her parents. Because the information professionals can provide is so valuable, the author believes it should not be kept from a judge in a child custody matter.

Given that both parents will have divergent interests in a child custody dispute, why is there even a presumption that the privilege holder is a parent on behalf of the child? As a result, waiver of a child's psychologist-patient privilege or mental health care provider privilege is fraught not only with the therapeutic complications but also specific procedural requirements.

Individuals who have discussed a guardian *ad litem* or a law guardian being appointed for a child to waive a privilege have discussed the need for a review of the following four factors, which would help assess whether a privilege should be set aside on behalf of the child:

1) whether the child is mature enough to appreciate the issue; 2) if so, the preferences of the child; 3) the benefit of preserving the confidences if any; and 4) the value of the information held by the psychotherapeutic to the proceeding and the balance of the child's need for privacy with the court's need for the information.[17] The author believes New Jersey should consider adopting this analysis in child custody matters.

The law recognizes the value of maintaining a privacy of communications between a psychotherapist and a patient regarding the diagnosis or treatment of the individual's mental or emotional condition. This evidentiary shield applies in court, but the author believes it should be on a case-by-case basis depending on how valuable disclosure of information might be to a judge in a child custody matter. ■

Endnotes

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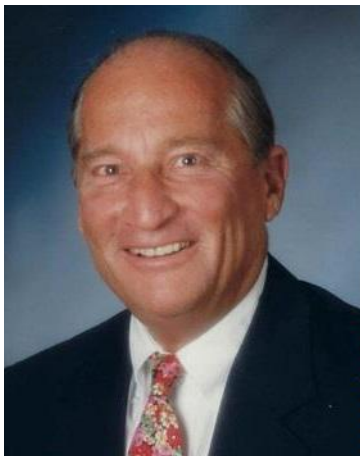
In Memoriam—David K. Ansell

by Andrea B. White



It is a privilege for me to write this tribute honoring the legal giant who introduced me to the practice of family law in Monmouth County. David K. Ansell, who passed on June 30 of this year, made an indelible impression upon anyone who had the opportunity and good fortune to know him. Ironically, the greatest impression David left with me had nothing to do with the practice of law; it was a life lesson I carry with me today. David once told me that one of the greatest joys in his life was coming to work every day knowing that his daughter, Allison, and his son, Mitchell, would also be at the office. He was eternally proud of his three children, Mitchell, Allison, and Gena, and was grateful to share the legacy of his father, Leon Anschelewitz, who was a founding member of the firm in 1929, 90 years ago. David had a supreme work ethic, which he passed down to his children; however, he also shared with them the gift of practicing law with family.

David's accolades in the practice of law were numerous and distinct. He was a senior member and chair of the matrimonial and family law department of Ansell, Grimm and Aaron, P.C., devoting his entire practice to matrimonial law. He received his B.A. from the University of North Carolina and his J.D. from the University of Virginia, School of Law. David was very involved in Supreme Court committee work and bar association activities. He served on numerous Supreme Court committees in the family law field and was a member of the original Pashman Committee, which formulated many of the rules and regulations regarding matrimonial law in the state of New Jersey. David served as president of the Monmouth Bar Association, president of the American Academy of Matrimonial Lawyers (New Jersey Chapter), and a trustee of the New Jersey State Bar Association.

In 2007, David was the honored recipient of the Abe Zager Professionalism Award from the Monmouth Bar Association. This award is given to the attorney who attains the highest degree of professionalism both in the practice of law and in public service, as decided through a vote of the Monmouth Bar Board of Trustees, upon receiving a recommendation from the past presidents of the Monmouth bar.

David was also among the recipients of the 2007 Professional Lawyer of the Year Award, annually presented by the New Jersey Commission on Professionalism in the Law. This award is presented in cooperation with bar associations across the state, and recognizes lawyers whose character, competence, and commitment to the highest professional standards mark them as outstanding members of the bar.

In addition, *Super Lawyers* magazine named David to its list of outstanding attorneys in the practice of family law in the state of New Jersey for the years 2005 through 2008.

Both professionally and personally, everything David did he did with fervor and speed. He walked fast, he talked fast, he drove fast, and he got down to business fast. The no-nonsense and direct manner in which he managed a case earned him the respect of the Judiciary, his colleagues, and his clients. David's reputation for being formidable, yet approachable, made him an exceptional lawyer.

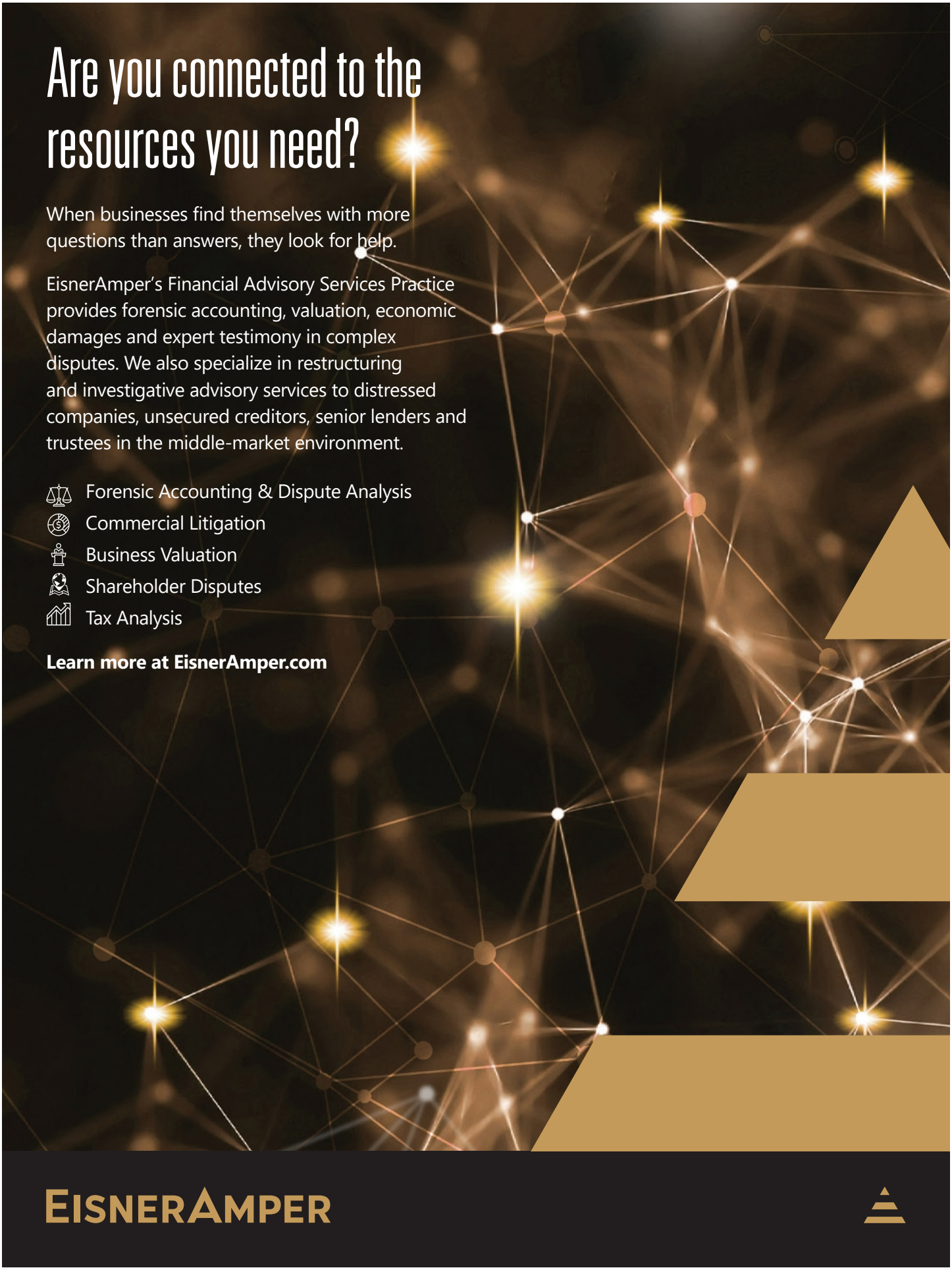
My mentoring by David began when I interned at the Ansell firm during the summer of 1993; this is where my passion for matrimonial law truly began. I found myself working primarily for David that summer, which meant working at what felt like the speed of light, channeling David's unbridled energy and passion for the law. One particular anecdote left an indelible impression upon me early in my summer internship and encapsulates David's unique practice style. Finding myself on a 'field trip' for the first time to Freehold, I remember being in awe of the regal Monmouth County Courthouse. As a young woman from New York City, I was struck by the remarkable manner in which the attorneys, sheriff officers, and court staff respectfully interacted with one another. For the first time, I could easily see myself planting roots outside of

New York and practicing law in this remarkable place. On this memorable day, David and I greeted our client in a conference room and then swiftly headed out to find David's adversary, Phil Jacobowitz. I will never forget Phil, calmly rising to greet David as he swiftly entered the conference room. As David marched into the room, he matter of factly asserted exactly what he thought should happen regarding the case, turned on his heels, and exited at a fast clip. Absolutely stunned, I stood frozen, not knowing if I should literally run after him or stay put. Evidently, the look of bewilderment was all over my face, as Phil, completely unfazed by David's seemingly abrupt manner, looked at me and kindly said, "Don't worry. You can stay here with us. He will be back in a few minutes." David's adversary was not upset with what could be discerned by some as his frankness; he was familiar with David's direct dance, his poignant way of communicating that produced results. He concisely made his point, which encapsulated his client's best interests, with a remarkable understanding of what needed to be done to resolve a case. David's unique style of practice brought him unparalleled success in his career and the vast respect of his peers.

Work hard. Play hard. Love hard. These are mantras David lived by. He was always early to the office, always a loyal presence at Giants games, and always put his family first. David taught me the importance of open, direct communication with an adversary. He believed in getting to the table early. Face time, in the traditional sense, was integral to initiating and resolving a case. He was famous for his early morning calls; letter writing was always secondary. The spoken word, especially David's, carried much weight.

Into the future, David's successful style of practice and work ethic will continue to live on through his children, Allison and Mitchell. Following in his footsteps by practicing matrimonial law, Allison has become a consummate professional with exceptional negotiating skills that echo her father's ability to get right to the heart of literally any matter. Mitchell, a revered criminal lawyer, has the unique ability to put everyone at ease and successfully navigate a client through difficult times. David's legacy clearly lives on in his children. In fact, the Ansell legacy runs deep and is furthered by David's brothers, Richard Ansell and Robert Ansell, as well as his nephews, Brian Ansell and Michael Ansell, who all greatly contribute to the firm that carries their family name.

Importantly, David's distinct mark on the practice of family law and the Ansell firm will continue to inspire his colleagues, friends, and family. The firm culture of family and the passion for the law will continue to live on through David's enduring imprint on us all. ■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Creating Families through Science and Law

by Serena H. Chen and Bill Singer

Within a generation, there has been exponential growth in the use of what is generally known as assisted reproductive technology (ART) to help people create families. ART medical advances have created opportunities for people who cannot conceive a child on their own, whether for medical or social reasons, to become parents of a newborn.

The ART arsenal offers a variety of techniques. The most common is in vitro fertilization (IVF). IVF is the creation of an embryo in a laboratory and the transferring of that embryo to a uterus. Other ART procedures include: 1) egg, sperm and embryo donation; 2) donor sperm insemination; 3) IVF using donor oocytes; 4) gestational surrogacy (where a woman genetically unrelated to the embryo gestates the child); and 5) cryopreservation of genetic material, whether sperm, eggs or embryos.

Relevant Statutes

Since 2001, New Jersey state law mandates that insurers provide benefits for assisted reproduction. In 2016, the law was updated to expand coverage for single women and same-sex female couples.[1]

Last year, New Jersey enacted the New Jersey Gestational Carrier Agreement Act, which branded the state as one of the more desirable locations for gestational surrogacy.[2] Surrogacy remains illegal or severely limited in some states and foreign countries, including most European nations. As a result of New Jersey's more advanced law in this area, potential parents from throughout the United States, and equally from abroad, may pursue creation of their families using New Jersey gestational carriers, medical facilities, and hospitals.

If the agreement between the intended parents and the gestational carrier follows the requirements of the act, the intended parents are able to obtain a pre-birth order confirming their parentage. This pre-birth judicial process is available to intended parents, regardless of whether they are New Jersey residents and regardless of whether they have a genetic connection to the child.

Also in 2018, the New Jersey Legislature amended the artificial insemination statute (N.J.S.A. 9:17-44) to make it more favorable to same-sex couples. The prior statute was restricted to couples where a husband consented to the artificial insemination of his wife. Although a court had given the statute a gender-neutral reading, the law's scope remained unclear.[3] The newly amended statute replaces the terms 'husband' and 'wife' with 'spouse or civil union partner.' The amended statute also expands access by allowing physician assistants and advanced nurse practitioners, in addition to doctors, to supervise insemination.

Technological advances, increased access to health insurance, shifting cultural perspectives, and new legislation, therefore, have led to increased use of ART to help build families in New Jersey. As more people in the state utilize ART services, it is important for lawyers to be familiar with the unique legal issues of families conceived through ART.

Consent Forms

Obtaining informed consent from all involved parties is a key issue in an ART practice. Medical clinics present ART patients with consent forms concerning whatever part of the ART process they will be using. ART-related consents are valid only if the patients signing them understand their rights and responsibilities when executing them.

Doctors are not lawyers and, thus, they cannot be expected to explain to patients potential legal consequences. At the same time, these consent documents can have lifelong impacts, so patients should not simply sign away certain rights without obtaining adequate, or any, legal advice. As a result, clinics often encourage consultation with an attorney. A knowledgeable attorney can help clients understand the legal implications of various requests and potential outcomes.

Depending on the ART techniques to be employed, patients could be asked to consider, understand and sign a plethora of consent forms. In each consent form, there is a detailed explanation of the contemplated medical procedure.

Here are some examples:

1. **Consent to health screenings.** ART participants must consent to rigorous health screenings and will be asked to sign Health Insurance Portability and Accountability Act (HIPAA) releases to give doctors access to all of their medical records. Those screenings and records may be shared with other potential parties.

   In the early 1990s, when ART techniques were first being used to create families, ART professionals, both medical and legal, were sued when a pregnancy resulted in consequences that could have been prevented through screenings. The Sixth Circuit heard a negligence action against medical and legal professionals for failing to test the sperm for cytomegalovirus (CMV). Both the surrogate and the child were infected.[4] In another matter, an appellate court in Pennsylvania heard a case against a surrogacy agency for failing to conduct psychological screenings of the ART participants, where the sperm donor father murdered the child he conceived through ART.[5]

   Since then, the Food and Drug Administration (FDA) has developed regulations requiring medical screenings of all ART participants.[6] In addition, the American Society for Reproductive Medicine (ASRM) promulgates guidelines for ART practitioners, including recommended screenings for sexually transmitted diseases, exposure to Zika virus, the psychological health of the participants, and similar issues.[7]
2. **Consent for receipt of donated egg.**
3. **Consent acknowledging risk of using donor agency.**
4. **Consent for use of donated egg and fertilization with male partner's sperm.**
5. **Consent to transfer a fertilized egg to the uterus of the female partner or gestational carrier.**
6. **Consent to use of assisted hatching and fragment removal using micromanipulation techniques that can promote attachment to uterus.**
7. **Consent to preimplantation genetic testing (PGT).** PGT is used to test an embryo for specific genetic conditions, including chromosomal abnormalities. It is favored for ART participants who: 1) are 35 years old or older; 2) have had repeated failures using IVF; 3) wish to screen for an inherited genetic disease; or 4) have had repeated miscarriages. As this technology becomes more accurate and less expensive, it may become routine to test all embryos to confirm normal chromosome numbers.
8. **Consent for in vitro fertilization/assisted reproduction using a gestational carrier.** When using a gestational carrier, consents can include:
   - a generalized consent form signed by the gestational carrier and spouse/partner;
   - a consent form by intended parents to transfer cryopreserved, thawed embryos;
   - FDA consent for genetic intended parents using a gestational carrier; and
   - a consent by intended parents to IVF using gestational carrier.

   In addition, in order to take advantage of the new law in this state, the intended parents and gestational carrier (and spouse) need to execute an agreement meeting the act's requirements, with the parties represented by independent counsel.
9. **Consent to cryopreserve embryos or gametes.** This consent is really a contract between clinics storing materials and patients. Patients who decide to cryopreserve gametes or embryos are required to provide specific instructions as to use and disposition. It will set forth storage costs and normal contractual provisions. The contract may state that if the owners of the material fail to pay the storage costs, the clinic may destroy the genetic material.

The owners of the material should direct who will pay for costs of storage and how the material will be handled over time, including divorce or death. Options may include donating material for scientific research or destroying it.

Of all the ART-related forms, contracts about the custody and use of frozen embryos have received the most judicial scrutiny. Cases are usually decided using either of two theories: the contract approach or the balance-of-interests approach.

Under the contract approach, courts are guided by the terms of the contract.[8] Under the balance-of-interests approach, a judge will weigh the interest of the party seeking to use the material to achieve parenthood in contrast to the party seeking to avoid procreation.[9]

Where the language of the contract is clear, judges often enforce the plain meaning of the agreement. However, there are exceptions. For example, divorcing couples have quarreled over cryopreserved embryos created by using the gametes of both spouses.[10] After demonstrating that due to medical circumstances, one party can no longer procreate using their own gametes,

courts have allowed one spouse to use the embryos.[11] When this occurs, judges have held the other spouse free from any liability for the child who may be born.[12]

To better understand the balance-of-interest approach, consider *In re Marriage of Rooks*.[13] The Colorado Supreme Court faced a dispute over embryos where there was no written agreement. In reaching its decision, the Court outlined factors to be considered in resolving a dispute while respecting each party's "procreational autonomy":

- the intended use of the party seeking to preserve the embryos;
- the party's demonstrated ability or inability to become a genetic parent through means other than the disputed material;
- the parties' reasons to undertake IVF in the first place;
- emotional, financial, logistic and hardship for the person seeking to avoid becoming a genetic parent; and
- any demonstrated bad faith or attempt to use embryos as unfair leverage in divorce proceedings.

The court also outlined facts that should not be considered:

- whether the person who wants to use embryos can afford to raise a child;
- the number of the parent's existing children; and
- whether the genetic parent could adopt a child or otherwise parent a non-biological child.

Lawyers who counsel clients on estate planning issues also need to inquire about any stored embryos or gametes. If clients do have embryos or gametes in storage, then their wills should direct disposition upon their death.

Conclusion

Science, society, and legislation are all making New Jersey a more popular place for parents to conceive children with ART. As such, New Jersey family lawyers should have a working knowledge and understanding of the science and law of ART so as to better guide their clients, while at the same time being able to articulate the applicable legal argument supporting the client's position. In particular, family lawyers assisting in the ART process should be familiar with the kinds of consent forms ART participants will be asked to sign, and with the consequences of those decisions, so they can best guide their clients through the legal aspects of the process. ■

Serena H Chen is the director of reproductive medicine at IRMS at Saint Barnabas Medical Center in Livingston and clinical associate professor at Rutgers NJ and Rutgers RWJ Medical Schools. Bill Singer is a partner in Singer & Fedun, LLC.

Endnotes

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4. *Stiver v. Parker*, 975 F. 2d 261 (6th Cir. 1992).
5. *Huddleston v. ICA*, 700 A.2d 453 (Pa. Sup. Ct. 1997).
6. 21 C.F.R. 1271 *et. seq.*
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9. *See, e.g., J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).
10. *See, e.g., A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).
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13. 2018 CO 85 (Colo. 2018).

Commentary:

The Legal and Scientific Perils of Modifying New Jersey's Custody Statute to Include a Presumption of Equal Custody

by Thomas DeCataldo and Eileen Kohutis

Consider a custody dispute involving the parents of a young child, age two. One parent is not employed and readily available to the child, serving primarily as a homemaker during the marriage. The other parent is a partner in an international law firm in New York City, and on average works between 80 and 100 hours per week. To avoid the challenges of commuting an hour both ways, the attorney now resides in Manhattan, with a live-in *au pair*. The case is bitterly acrimonious, and the parties' interactions are governed by a civil restraining order.

Now consider a custody dispute of a different two-year-old child. The parents are amicable and reside in close proximity to one another and their child's daycare. One parent is employed as a teacher and the other as a local police officer. The parents both have the flexibility to tailor their schedule to the child's needs, and benefit from having extended family nearby to assist with child-care when needed.

It takes little scientific or legal training to conclude that the hypotheticals above should likely result in different custodial arrangements. However, if proponents of a proposed overhaul to New Jersey's existing custody statute succeed in implementing a presumption of equal custody, there may soon be a time when these disputes are mechanically decided with similar, if not identical, outcomes.

As of Dec. 2017, over 20 states considered implementing laws with presumptions in favor of 50/50 joint physical and legal custody.[1] Arizona and Kentucky actually enacted laws presumptively favoring equal custody.

In joining with this emerging trend, since 2017 the New Jersey Legislature has introduced two bills that seek to establish a presumption that equal custody in all divorce cases is in the best interests of the child.[2] The bills present a dramatic deviation from longstanding decisional and statutory law and, the authors believe, place the 'best interests of the child' standard in direct peril. In fact, the proposal before the Senate goes so far as to impose a weighty burden on the parent opposed to 50/50 custody, requiring they demonstrate equal custody is "harmful to the child" before the court may deviate from equal custody.

Clearly, a change of this magnitude significantly alters the landscape of custody disputes in New Jersey. This article addresses the legal and scientific reasons the authors believe a presumption of equal physical custody is inappropriate and unwarranted.

The Evolution of Shared Custody Under New Jersey Law

In New Jersey, custody disputes have long been governed by statute.[3] The courts may only render a decision after considering 14 statutory factors, after which time they may award joint custody, sole custody, or any other custodial arrangement they determine to be in the best interests of a child. This exercise is required so family part judges broadly consider numerous factors touching upon the best interests of a child. The Supreme Court of New Jersey repeatedly recognized that a child's best interests are the "lodestar" consideration in a custody matter.[4]

Over the course of the last four decades, New Jersey jurisprudence governing custody and parenting time disputes changed significantly. At one time, New Jersey courts were constrained to award sole custody. It was not until the 1981 landmark decision in *Beck v. Beck* that the Supreme Court of New Jersey first authorized an award of joint custody.[5] In *Beck*, the Court granted joint legal custody *sua sponte*, despite neither party seeking such an award. In fashioning such relief, the Court noted that

joint custody "will prove acceptable in only a *limited class of cases*," purposefully declining to establish a presumption in a favor of a particular custody determination.

The Court also cautioned that in order for parents to qualify for joint custody, at a minimum both parents must be fit and capable of fulfilling the role of parent. Further, a parent must fulfill the additional requirement of exhibiting potential for cooperation in matters of child rearing, and be able to isolate their personal conflicts from their role as parent. The Court observed in its ruling that New Jersey's custody statute contained a "legislative preference for custody decrees that allow both parents full and genuine involvement in the lives of their children." This was consistent with the common law policy that a court should make every effort to "attain for the child the affection of both parents rather than one." The Court recognized that joint parenting, although not a new concept, was becoming a hot topic because the "absolute nature of sole custody determinations" meant one parent wins while the other loses.

Fourteen years later, in *Pascale,* the Supreme Court expanded upon *Beck,* distinguishing between legal and physical custody. The Court described the use of the phrase 'joint custody,' as "broad" and "misleading," holding that there are two elements of joint custody—legal and physical custody. The Court also noted "a review of New Jersey cases leads us to believe that 'joint physical custody' is as rare here as it is in other states,'" again declining to impose a presumption in favor of any particular custodial arrangement.[6]

Both *Pascale* and *Beck* demonstrate that the Supreme Court of New Jersey contemplated joint custody serving as the exception and not the rule, and a rejection of any presumptive arrangement. In the wake of these seminal decisions, varying forms of joint custody have become common in the everyday practice of family law. Legislative support for joint custody also grew, with the Legislature subsequently declaring that in custody disputes, the rights of the parents are equal, and that it is the public policy of the state to assure minor children frequent and continuing contact with both parents after a divorce or separation.[7]

Despite the increasing commonality of joint custody, there remains no presumption in favor of any joint or shared custodial arrangement, and, when appropriate, New Jersey courts still award sole legal custody.[8]

How then, did the law shift from awarding sole custody in the pre-*Beck* era, to contemplating mandatory presumptions in favor of equal custody? To answer that question, the elephant in the room must be addressed. There is an inescapable tension between the interests of divorcing parents and the interests of their children, and a challenging question of which party's interests should be given priority.

There is little question that New Jersey law strives to protect both interests, endeavoring to accomplish two potentially mutually exclusive goals:

- provide parents to a custody dispute equal rights; and
- establish custodial arrangements that protect the best interests of children.[9]

Commonly, achieving these two goals cannot be done symbiotically. In some instances, a parent's conduct may be to blame, such as in cases of domestic violence, substance abuse, abandonment, or physical abuse. Other times, the reason need not be nefarious or extreme. It may simply be a question of employment demands, or a parent's availability to the child. In cases such as these, it can be challenging for a parent to accept a diminished custodial role when they have done nothing 'wrong,' leading to pressure on state legislatures to implement presumptions protecting parents' rights in lieu of individually considering a child's interests.

The authors believe the trend towards expanding shared custodial arrangements tips the scales in favor of the rights of the parents and potentially to the detriment of the best interests of children. As this article will detail, the authors can cite scientific and legal reasons to safeguard the best interests of the children, even if doing so requires subordinating the rights of parents.

The Presumption of 50/50 Physical Custody

The social science research on shared custody is vast and has many tendrils. An in depth discussion of this topic exceeds the scope of this article; therefore, two critical areas are discussed to exemplify what the authors view as the dangers of a presumption of 50/50 physical custody:

(1) overnight parenting time with young children, and
(2) domestic violence

The term 'joint legal custody' and 'shared' parenting (SP) are used synonymously in the research, and both terms refer to the legal decision-making process related to the education, health, and religious practices of the child following parental separation. Physical custody refers to the residence of the child. To mimic the language presented in the proposed bills, shared parenting is used for purposes of this article.

The research on child custody is vast, and there are many areas of controversy and disagreement among custody professionals. One such controversy is that physical custody has not been clearly defined. Some studies consider joint physical custody a 50/50 arrangement where the child spends the same or almost the same amount of time in each parent's house, while other studies consider 35 percent joint physical custody, where the child spends four days out of 14 at the other parent's house.[10] This distinction is important because it limits the generalizability of the research findings.

Shared parenting may not be practical for all families because of a parent's work schedule or the distance between the parents' houses may be too great.[11] Professionals and researchers in the area of family law do agree that children in shared parenting do better academically, socially, and emotionally than children in sole custody families.[12]

Children's Needs Evolve Over Time

Children's developmental needs change as they mature. Spending overnights with the nonresidential parent is an area of major controversy among both practitioners and investigators. Some researchers state that overnights are harmful for children, while other researchers state there is no research to indicate whether overnights benefit a child or at what age overnights should begin.[13] A recent study of children who ranged in age from birth to age 18 found that infants and toddlers had the most difficulty adjusting to a shared parenting schedule, but by ages four and five children were able to adjust more successfully with a shared parenting schedule than a shared custody schedule. Children between the ages of five and 12 adjusted better than children in the joint custody when parental conflict was low, and adolescents wanted flexible parenting arrangements.[14] These findings seem to show that intricate and detailed parenting plans are needed to accommodate a child's development.

In families where the parents agree to joint legal custody, there is no need for the 50/50 presumption, and it is likely that parents with a shared parenting plan had a better relationship prior to the separation and divorce.[15] These parents also tended to have less conflict than parents with a sole custody arrangement.[16] Although the legal system may advocate for SP, this is based on the premise that before the divorce the parent and child had a good relationship and that SP will preserve the parent-child relationship.[17]

A presumption for SP is likely to occur when there is conflict between the parents, where one parent believes SP is not in the child's best interest.[18] Further, the parent arguing for SP initially does not need to offer any proof for this arrangement because it is the other parent who has to rebut the presumption. A best interest analysis only occurs when one parent rebuts the presumption and the best interest factors are focused on the needs of "a *particular* child."[19]

The authors believe joint legal custody presumptions are power imbalances and do not focus on the specific needs of each individual family.[20] Although children in general benefit from SP, that does not mean that "*any individual child will benefit*."[21] The best interest of child standard focuses on what is in each individual child's best interest and not children in general.[22]

Domestic Violence

In fact, in situations of domestic violence children and their parents could be at risk with such a joint legal custody presumption.[23] Allegations of domestic violence may include physical, emotional, sexual, and psychological abuse. It may include stalking and threatening behavior; it may include coercive control. The perpetrator may be able to demonstrate completion of a course on substance abuse or anger management, but the victim remains subject to coercive control by the perpetrator.[24] Parents who use coercive control exhibit different parenting behaviors than those who do not. Men who utilize coercive control may try to undermine the mother's authority and criticize her unrelentingly. These fathers may not be affectionate with their children, may not know what is going on in their children's lives, and may delegate parenting to the mother. Children who witness or are subject to such parenting tend to exhibit more behavioral and emotional problems than those who do not. Further, these children may learn that males should dominate females and that there are no consequences for their actions. Because such parents have poor interpersonal relationships, impaired family relationships, and poor conflict resolution, their children have an increased likelihood of becoming abusive parents as adults too.[25]

Children who have been exposed to domestic violence in a SP arrangement are exposed to different parenting styles, which may erode a child's feeling of stability and safety. In a SP arrangement, the abused parent will be required to engage in ongoing contact with the abuser as they negotiate issues about their child. This gives the abusive parent continuing access to the abused parent and

child. To rebut the SP presumption requires the kind of knowledge and experience with the law that some abused parents may not have and may not be able to afford to finance.[26] How to facilitate the parent-child relationship when a parent has been violent remains an issue for the courts as they protect vulnerable family members while avoiding intruding on the family.[27] Research demonstrates that children do best when parental conflict is low.[28]

The literature on SP versus sole physical custody (SC) is vast, and readers may turn to position papers for a quick overview of the field. However, some may be cleverly written and filled with minefields. For example, they may inaccurately or incorrectly discuss the results of studies or present data in a confusing and unclear manner. Some investigators do not specify whether the parents of children in sole custody were married and then divorced or if the parents in SC were ever married. Children living in an intact family with both parents who then divorce are different from children who have only lived with one parent.

Studies may not define how joint custody was reached. Parents who have reached joint physical custody (JPC) (defined in the research as having the children between 35 to 50 percent of the time) through mutual agreement may have had a different pre-divorce relationship than couples whose joint custody arrangement was court ordered.[29] Parents who have joint custody may have less conflict than parents with SC.[30]

Many investigations employed a cross-sectional design. This design provides information about a group of people at a specific point in time, which may not demonstrate a causal relationship. To illustrate a change over time, other research designs are needed.

The Need for Judicial Discretion and Individualized Consideration in Deciding Custody and Parenting Time

Although there is scientific research to support the benefits of shared parenting, the law repeatedly recognizes the need to give children involved in custody disputes individualized focus. In other words, while something may be good for most, it is not necessarily good for all.

Given the current debate over potentially establishing presumptions of equal custody, the Supreme Court's opinion in *Beck* from nearly 40 years ago appears clairvoyant. The Court specifically warned against presumptions, holding:

> despite our belief that joint custody will be the preferred disposition in some matrimonial actions, we decline to establish a presumption in its favor or in favor of any particular custody determination. Our concern is that a presumption of this sort might serve as a disincentive for the meticulous fact-finding required in custody cases. Such fact finding is particularly important in these cases because of the very interplay of parents and children that gives joint custody a potential value also creates complications different from those found in sole custody arrangements.[31]

The Court emphasized that the uniqueness of each family necessitated "meticulous fact-finding" to determine the most appropriate custody arrangement. The Court gave several enumerated examples of the individualized fact finding that must be made when effectuating an award of custody. The Court made clear that family part judges must examine whether both parents are 'fit,' and capable of fulfilling the role of parent, as well as their ability to effectively communicate and co-parent free of conflict. The Court identified other practical factors for physical custody, such as the geographical proximity of the two homes, and the preference of the child of sufficient age and capacity.

Obviously, these factors were so well reasoned they are now legislatively codified in N.J.S.A. 9:2-4 and mandatory considerations in all custody disputes. The Court recognized that application of these considerations routinely requires expert testimony, and reiterated that the paramount consideration in custody matters is the best interest of the child standard, which protects the "safety, happiness, and physical, mental, and moral welfare of the child."

Presumptions Favoring Equal Custody Subordinate the Child's Interests to the Rights of the Parents

The authors believe the inclusion of a presumption of equal custody in N.J.S.A. 9:2-4 would upend the implementation of the statute as presently situated and divest family part judges of the discretion they rely upon to render decisions in contested custody matters. Instead of undertaking an individualized and meticulous fact-finding, the courts would be compelled to implement 50/50 custody unless a finding was made that it would cause harm to a child(ren).

Viewed differently, there is no requirement that 50/50 actually be in the best interests of the child at issue, so long as it isn't harmful. The authors believe this prioritizes the desire of separating parents to share equal custodial roles over the best interests of the children at issue. Rather than ensuring a custodial arrangement serves the best interests of a child, the authors believe the parents should automatically have equal time so long as children are not subjected to harm.

The authors believe a presumption of equal physical custody dramatically alters the existing law and requires judges to implement a parenting plan that may not best serve a child's needs, simply to guarantee the rights of a parent are equal. Throughout New Jersey law, it is repeatedly noted that the rights of the child take priority over the rights of the parents. By way of an example:

- Parents may never waive child support or use it as a bargaining chip, as it is a right belonging to the child.
- Parties may not address custody or child support in a prenuptial agreement.
- Parents may not consent to an emancipation age if the child is not actually emancipated as defined by New Jersey law.
- Courts have broad discretion to appoint a guardian *ad litem,* whether or not this was requested by the parents, in order to protect the interests of a child in a litigated matter.
- Parents are required to attend parenting education workshops.
- Family part judges may be subject to reversible error if prioritizing calendar concerns over a party's right to have the children's best interests evaluated.

There has been a progressive trend in New Jersey decisional law giving children standing to pursue their parents for college contributions.

If enacted, the authors believe a presumption of equal physical custody would effectively serve as the *only* recognized area of New Jersey law where the rights of the child become subordinate to the rights of the parent. This would occur in the arena most critical to the child's best interests, governing the child's access to his or her parents.

Presumptions of Equal Custody Ignore Critically Individualized Considerations

Although research may show that children generally benefit from a shared custodial arrangement, the authors believe implementing a presumption would oversimply the best interests analysis and neglect the individualized attention a child may need. If parents are presumptively entitled to equal custody, the following considerations would go ignored:

- The child's age (*i.e.*, newborn versus teenage)
- The level of conflict between the parents
- Whether a child has special needs
- Whether a parent has a history of domestic violence
- Whether there is a history of physical abuse or substance abuse
- The quality and continuity of the pre-existing relationship between a parent and child
- Geographic proximity of the parents
- The parents' ability to communicate and agree on matters pertaining to the children

Although these factors could be presented in the context of overcoming a presumption of equal custody, considering their collective importance to a child's best interests the authors believe there is little reason they should only be considered in that context.

New Jersey Courts Have Rejected Presumptions in Similar Settings

The authors believe the dangers of presumptions pertaining to the best interest of children is analogous to existing published decisional law. In *Levine v. Levine,* the Appellate Division was faced with a dispute over competing school districts in a shared custodial arrangement. The parties had joint legal and physical custody of their daughter and nearly equal parenting time. The trial court conducted a plenary hearing and found one school to be superior to the other, based upon expert testimony and records from the New Jersey Board of Education. The Appellate Division reversed, finding that the court improperly basing its ruling on a comparison of the school districts without regard for the child's best interests. In finding an abuse of discretion, the Appellate Division held:

> In the context of the best interests of a child, any evaluation of a school district is inherently subjective. Just as a student cannot be summed up by IQ, verbal skills or mathematical aptitude, a school is more than its teacher-student ratio, or State ranking. The age of its buildings, the number of computers or books in its library and the size of its gymnasium are not determinative of the best interest of an individual child during his or her school years. Equally, if not more important, are peer

relationships, the continuity of friends and an emotional attachment to school and community that will hopefully stimulate intelligence and growth to expand opportunity.[32]

The rationale underpinning *Levine* is analogous to the implementation of a presumption in favor of equal custody, and the authors believe should be viewed broadly. Adjudicating a custody issue based solely on which school is superior to another school effectively functions in the same manner as a presumption. The authors believe the resolution of custody and parenting time issues should never be made so simple and generalized as to turn on which school may be better, or in the case of presumptive equal custody, which parenting plan is best for most children.

Even if one were to assume that an equal custodial arrangement is best for most children, which clearly is not an established scientific consensus, there still must be individualized consideration of whether equal custody is best for the specific child at issue in a custody dispute, or that family is done a grave disservice. The authors believe that, much like the Appellate Division held in *Levine*, a child's best interests cannot be generalized and summed up based upon conflicting scientific research or the pressure applied to legislative bodies. Instead, the factors codified in N.J.S.A. 9:2-4 require ongoing and individualized consideration to ensure the best interests of New Jersey children are adequately protected.

In sum, the authors believe presumptions in favor of equal custody needlessly jeopardize the best interest of children, with no legal or scientific reason to do so. ■

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Requests for Admissions in Matrimonial Actions

by Michael A. Gill

At the start of a typical dissolution matter, after the filing of a complaint, a practitioner will generally send out various forms of paper discovery such as interrogatories and a notice to produce. Occasionally, a case will merit a deposition. However, although a deposition can yield significant information, not every client can afford to have their spouse deposed. There is another method to ascertain facts and information relevant to a case. Requests for admissions are an underutilized vehicle to efficiently eliminate factual disputes and narrow the issues in dispute in a case.

It should be noted that requests for admissions differ from normal paper discovery and a deposition. Those devices are utilized to discover facts. The purpose of requests for admissions is to establish a fact as being conclusive.

The Authority for Requests for Admissions

Discovery in family actions is generally governed by Rule 5:5-1. Rule 5:5-1(d) makes a specific reference to requests for admissions as a proper discovery vehicle for family law litigation. However, requests for admissions are more specifically governed by Rule 4:22-1.

Requests for admissions are an under-utilized device, which can streamline the identification or resolution of factual disputes in matrimonial actions. They may also serve to more efficiently streamline trials and plenary hearings. The answers that are received from requests for admissions can also be used to resolve factual disputes to make an appearance before a matrimonial early settlement panel more productive.

The scope of requests for admissions is subject to Rule 4:10-2. Rule 4:10-2 allows a party to obtain discovery regarding any matter that is not privileged, is relevant to the subject matter involved in the litigation, or is seeking information that "appears reasonably calculated to lead to the discovery admissible evidence."[1]

Case law has recognized that the policy of "a Request for Admissions is to establish matters to be true for purposes of trial when there is not a real controversy concerning them yet their proof may be difficult or expensive."[2] Requests for admissions should serve to eliminate the necessity of proving facts that should be uncontroverted.[3]

The Utilization of Requests for Admissions

Requests for admissions may be served by a party any time after service of process, and answers must be provided within 30 days, although the court may allow for an extension, if appropriate.[4] Requests for admissions can take the form of factual assertions that are submitted to an adverse party in the discovery phase of a divorce. The party is then required to either admit or deny the factual assertion. Any fact admitted is deemed to be conclusively established, subject to a motion to withdrawal or amend.[5] If an adversary fails to provide answers to requests within 30 days, the factual assertions are deemed to be admitted.[6] This can be an effective and efficient tool to establish facts and narrow some of the issues for a *pendente lite* motion, the presentation to a matrimonial early settlement panel, trial, or simply for settlement discussions.

Requests for admissions are not only utilized for admitting or denying factual assertions. They can also be utilized to authenticate documents.[7] Requests for admissions may be sent with documents that are referenced in numbered requests for admission asking for the adverse party to either admit or deny the authenticity of the document. This may include a letter, text message, email, financial account statement, promissory note, credit card statement, prenuptial agreement, etc. The admissions can eliminate the need for foundational testimony as a prerequisite for moving a document into evidence, and can serve to avoid other evidentiary objections at trial.

Upon receipt of requests for admissions, an adversary will have to either admit or deny the assertions of facts presented, or admit or deny the authenticity of a submitted document within 30 days. Any matter admitted by the adverse party is then conclusively established in the litigation, subject to a motion by the adverse party seeking to withdraw or amend the admission.[8] The court may permit withdraw or amendment of the admission or denial when

> the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will be prejudicial to maintain the action or defense on the merits.[9]

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It should be noted that an answering party may not cite

> lack of information or a knowledge as a reason for failure to admit or deny unless they testify that a reasonable inquiry was made and that the information known or readily obtainable is insufficient to enable an admission or denial.[10]

Accordingly, a party cannot take the tact that is often seen in depositions, simply stating they "can't remember" or "are not sure." When served with a request for admissions, the responding party has to make a "reasonable inquiry" into the request for admission being made before answering.[11]

If an adversary makes a frivolous objection to a request for admission or otherwise gives an insufficient answer, there is a remedy. Rule 4:23-3 allows the court to award "reasonable expenses incurred in making [the] proof, including reasonable attorney fees" if a party fails to admit the genuineness of any document or the truth of any matter requested in the request for admissions and the party making the request thereafter proves the genuineness of the document or the truth of the asserted fact. Rule 4:23-3 states that the court "shall" enter an order for reimbursement of expenses and legal fees unless the court finds:

> (a) the request was held objectionable pursuant to R.4:22-1, or
>
> (b) the admission sought was of no substantial importance, or
>
> (c) the party failing to admit had reasonable grounds for not making the admission.

Accordingly, if an adversary does not provide good faith responses to requests for admissions, the other party may be reimbursed for the costs and time dedicated to proving a fact that should have been admitted.

If an adversary should object to a request for admissions based upon relevancy, privilege or any other reason, a motion may be filed asking the court to determine the sufficiency of the answers or objections to the request for admissions. Absent the court finding the objection being in good faith, the court shall order that an answer be asserted.[12] An award of fees is available to the party who prevails on such a motion.[13]

Improper Request for Admissions

Requests for admissions are not a panacea to resolve every factual issue in a case. There are some limitations. Requests for admissions cannot be used to establish the ultimate fact in issue in a case.[14] In *Dewalt v. Dow Chemical Co.*, the court noted that:

> an application for costs and counsel fees under R.4:23-2 should not be granted where the underlying Requests for Admissions are misused to the extent that they go 'beyond requests to admit underlying facts' and wrongfully attempt "to establish the ultimate fact in issue.[15]

Essex Bank v. Capital Resources is particularly instructive, and provides an analysis of the application and utilization of requests for admissions.[16] The *Essex Bank* court cautioned against the practice of "broadly stated Requests for Admissions," as that would cause trial courts to frequently be called upon to determine whether the "party failing to admit had reasonable ground for not making the admission."[17]

Requests for admissions are intended to elicit facts rather than opinions. The most basic authority for that proposition is a literal reading of Rule 4:22-1, which states that either party can serve a written request concerning "the truth of any matters of fact...." A New Jersey trial court has also explicitly held that requests for admissions are not intended to elicit a litigant's opinion but, rather, intended to establish facts.[18] However, it should be noted that Federal Rules of Civil Procedure specifically state that a request for admission can be submitted "that relate to statements or opinions of fact or the application of law to fact...."[19] Of course, the Federal Rules of Civil Procedure do not apply to matrimonial actions.

It is strongly suggested that requests for admissions should not be utilized to establish a cause of action for divorce. New Jersey is a no-fault state, and any request for admission that asks an adverse party to admit or deny a specific adulterous affair or specific acts of extreme cruelty will almost certainly be deemed to be irrelevant to the litigation. Some authority for this proposition can be found in Rule 5:5-1(c), which allows depositions in a matrimonial action "as to all matters except those relating to the elements that constitute grounds for divorce, dissolution of civil union, or termination of domestic partnership." Further authority would come from *Mani v. Mani,* which significantly limited the relevancy of marital fault in a dissolution action.[20]

Proper Use of Request for Admission

An overly broad request for admission is disfavored by the courts. The reality is that the narrower the requests, the greater benefit will be derived from their utilization. By way of example, consider a dissolution matter where one of the issues is one spouse's dissipation of assets and alleged reckless spending. A request for admission asking an adverse party to "admit or deny that you wasted marital funds on shopping during the marriage" can easily be denied, since it is overbroad and would be difficult to prove that the denial of the assertion is an outright lie. However, one can get the desired result with a series of narrow requests for admissions such as sending credit card statements and asking the adversary to admit or deny specific excessive spending on various dates and at various stores reflected on the statements. New Jersey Court Rule does not place a limit on the number of requests for admissions,[21] so the better tactic is to issue a series of narrowly tailored requests for admissions to get the result desired, which should be to conclusively establish relevant facts in the litigation.

Conclusion

Proper use of requests for admissions can be of great utility. When used properly, they can allow both sides to stipulate to many key facts at the outset of a divorce trial, which can save significant time introducing various documents into evidence, having the client authenticate them, and arguing over objections during trial. Numerous key facts can be simply stipulated into evidence and the trial can focus on the disputed matters. The author strongly suggested that requests for admissions should be added to a petitioner's discovery methods. ■

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3. *Id.*; *see also Hungerford v. Great Bay Casino Corp.*, 213 N.J. Super. 398, 404 (App. Div. 1986) (the purpose of requests for admissions is to streamline litigation by "weeding out items of fact and proof over which there is no dispute, but which are often difficult and expensive to establish by competent evidence, and thereby expedite the trial, diminish its cost, and focus the attention of the parties upon the matters in genuine controversy." (Citations omitted).
4. R. 4:22-1; it should be noted that a defendant shall not be required to answer or object to a request for admissions before the expiration of 45 days after being served with the initial complaint.
5. R. 4:22-2.
6. R. 4:22-1.
7. *Id.*; the rule does not specifically reference audio recordings but that could be subject to a case law expansion of the rule.
8. R. 4:22-2.
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10. R. 4:22-1.
11. R. 4:22-1.
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14. *Essex Bank, supra.*, at 533; *see also Pickens v. Equitable Life*, 413 F.2d 1390 (5th Cir. 1969).
15. *DeWalt v. Dow Chemical Co.*, 137 N.J. Super. 54, 59-60 (App. Div. 1989).
16. 179 N.J. Super. 523 (App. Div. 1981).
17. *Essex Bank, supra.* at 532 (*citing* R.4:23-3(c)).
18. *Williams v. Marziano*, 78 N.J. Super. 265, 270 (Law Div. 1963).
19. Federal Rule of Procedure 36.
20. *Mani v. Mani*, 183 N.J. 70 (2003).
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'Til Death Must One Pay? Seeking to Terminate Permanent Spousal Support Obligations Upon Retirement for Pre-September 2014 Divorce Agreements

by Robert H. Siegel

Effective Sept. 10, 2014, the New Jersey Legislature enacted N.J.S.A. 2A:34-23, the revised alimony statute. The statute set forth revised factors for modifying an existing alimony obligation in subsections (k)(1-10). It also attempted to resolve the longstanding issue of obligors paying permanent alimony who were now seeking to retire. Many of these litigants had previously asked New Jersey trial courts to reduce and/or terminate their respective spousal support obligations, often without success, and with no clear roadmap or guidance for doing so.

Just over four years after enactment of the legislation, which sought to directly address alimony-related retirement applications, there remains a troubling backlog of trial court litigation, as New Jersey's lower courts have struggled to interpret the law's two primary retirement provisions, N.J.S.A. 2A:34-23(j)(1), applicable to post-Sept. 10, 2014, alimony orders, and subsection (j)(3), applicable to pre-Sept. 10, 2014, alimony orders. With so-called 'permanent' alimony no longer available under the revised statute, obligors who prior to Sept. 2014 had agreed to what was once construed as permanent alimony are now lining up to seek relief based on the new retirement provisions of the statute.

As explained further below, the plain language of the statute itself, as well as the dearth of case law clarifying the law, has resulted in a barrage of post-judgment applications, including some filed under suspect factual circumstances. For example, in the unpublished Jan. 2017, case of *Marut v. Marut*, the defendant ex-husband, John Marut, attempted to vacate a consent order entered into by the parties in 2001, approximately nine years after their July 1992, divorce.[1]

The contested consent order provided for continuing the defendant's permanent alimony obligation upon either the defendant's ultimate retirement or the plaintiff's cohabitation. The Appellate Division in *Marut* rejected the defendant's argument that the rebuttable presumption in favor of terminating alimony upon retirement contained in subsection (j)(1) of the statute was applicable to his application. The Appellate Division held that subsection (j)(3) "follows the prior principles outlined in *Lepis v. Lepis* and its progeny, by mandating a court to determine whether the obligor, by a preponderance of the evidence, has demonstrated that modification or termination of alimony is appropriate."[2]

With respect to divorce agreements entered into prior to Sept. 2014, obligors previously had to rely on the generic principle of 'changed circumstances' set forth in *Lepis* as a means to modify and/or terminate alimony upon retirement.[3] Many divorce agreements drafted prior to Sept. 2014 only vaguely referenced retirement as an eventual change in circumstances. There was no statute in place at that time to codify eventual retirement as a change in circumstances warranting alimony modification. Prior to Sept. 2014, trial courts had no guidance in addressing post-judgment motions seeking relief from permanent alimony obligations. Such applications were treated under the same legal principles as child support modification requests, subject to an ever-changing changed circumstances threshold.

Despite a general lack of clarity as to which factors in subsections (j)(1) and (j)(3) should be weighed most heavily in determining retirement applications, New Jersey has been ahead of the curve in attempting to address this contentious and longstanding issue. In Pennsylvania, for example, no changes have been made to the Pennsylvania Divorce Code to address retirement and alimony termination. All alimony modification/termination applications in Pennsylvania, whether based on a retirement or different circumstance, are analyzed under the general changed circumstances principle.[4]

Subsection (j)(3) of the 2014 Statute

As part of the implementation of N.J.S.A. 2A:34-23, the Legislature introduced subsection (j)(3) for pre-Sept. 2014 alimony orders, referred to as "cases in which there is an existing final alimony order or enforceable written agreement established prior to the effective date [September 10, 2014] of this act."[5] Where applications to modify and/or terminate alimony obligations entered into before Sept. 2014 are filed based on retirement, the obligor reaching 'full retirement age' as defined by the revised statute "shall be deemed a good faith retirement age." In *Mueller*, the Ocean County trial court clarified that under the revised statute, full retirement age is the age at which a person is eligible to receive full retirement benefits under Section 216 of the Federal Social Security Act.[6] For agreements entered into after Sept. 10, 2014, that feature an alimony obligation, subsection (j)(1) of the revised statute provides the retiring payor with a "rebuttable presumption" that alimony shall terminate upon the obligor spouse attaining full retirement age.[7]

In *Mueller*, Judge Lawrence Jones discussed the key distinction between subsection (j)(1) and subsection (j)(3) with respect to burden of proof. For pre-Sept. 2014 agreements/alimony orders, subsection (j)(3) keeps the burden of proof with the payor spouse to determine why alimony should terminate, even if he or she has reached a good faith retirement age. For post-Sept. 2014 agreements/alimony orders, the burden of proof shifts to the recipient of spousal support to demonstrate why alimony should not terminate, with the obligor receiving the benefit of the aforementioned rebuttable presumption.[8]

The clear language of the revised statute indicates that the Legislature, while seeking to address pre-Sept. 2014 permanent alimony agreements, was still wary of providing obligors with too easy a path towards termination of their support obligations. In the absence of the rebuttable presumption language of subsection (j)(1), applications brought under (j)(3) for relief from pre-Sept. 2014 agreements face a higher legal threshold. For applications brought under subsection (j)(1), the spouse receiving support must overcome the rebuttable presumption in favor of termination upon retirement based on an analysis of the factors listed in N.J.S.A. 2A:34-23(j)(1)(a-k). Under subsection (j)(3), with no rebuttable presumption of termination upon retirement, the obligor must prove factors (a-h) by a "preponderance of the evidence."

Landers and the Appellate Division's Approach to Pre-September 2014 Divorce Agreements

The plain language of the revised retirement provisions of N.J.S.A. 2A:34-23 demonstrate the Legislature intended to provide some relief for obligors paying long-term alimony under pre-Sept. 2014 agreements. However, there has been little guidance from the trial courts or the Appellate Division regarding which factors the courts will weigh more heavily in deciding retirement applications brought under subsection (j)(3). In the only published Appellate Division decision directly addressing the factors (a-h) set forth in subsection (j)(3), the court in *Landers* for the first time—in Feb. 2016—explicitly noted that subsection (j) of the revised statute "distinguishes alimony orders executed prior to the amendment's effective date and those executed afterwards."[9] According to the court in *Landers*, this "unambiguous legislative directive" governs the trial court's examination of an alimony modification application based on retirement.[10]

The plaintiff ex-wife in *Landers* appealed a March 2015 Gloucester County Family Part order terminating the defendant ex-husband's alimony obligation after 24 years of payment, based on his retirement. At the time the defendant ex-husband in *Landers* moved to terminate his alimony obligation, he was 66 years old, had retired, and his income consisted of Social Security Retirement (SSR) benefits, as well as a pension. The defendant ex-husband decided to retire after various foot and leg injuries required surgery to preserve his ability to walk, and he had survived cancer. As part of her argument to continue receiving alimony payments from the defendant, the plaintiff asserted that the statutory amendments to N.J.S.A. 2A:34-23 "do not affect the terms of a FJOD entered prior to September 10, 2014, the effective date of the amendments."[11]

In addressing the plaintiff's appeal, the Appellate Division in *Landers* noted that prior to the Sept. 2014 statutory amendments, trial courts required a party seeking alimony modification to prove changed circumstances, whether the application was based on the obligor's retirement or any other circumstance. The Appellate Division held that subsection (j) of the amended statute "distinguishes alimony orders executed prior to the amendment's effective date and those executed afterwards."[12] The court then noted that the "rebuttable presumption" in favor of alimony terminating upon retirement included in subsection (j)(1) is not repeated in subsection (j)(3), but "replaced by a different

standard." The Appellate Division re-affirmed this important principle in the unpublished *Marut* decision in Jan. 2017. Subsection (j)(3) "elevates the ability of the obligee to have saved adequately for retirement,"[13] which is only listed as one factor under subsection (j)(1) of the statute. In the *Landers* holding, Judge Marie Lihotz remanded to the family part because the Gloucester County trial court judge relied mistakenly on subsection (j)(1), which applies only to agreements entered *after* the effective date of the revised statute. The parties in *Landers* were divorced many years before implementation of the Sept. 2014 amendments.

The Appellate Division in *Landers* held that by focusing on the (j)(1)(j) factor of N.J.S.A. 2A:34-23 ("the ability of the recipient to have saved adequately for retirement") for motions seeking termination of pre-Sept. 2014 alimony orders, this factor requires "explicit analysis" separate and apart from the others.[14] The court in *Landers* also highlighted factors (f) and (g) of subsection (j)(3), addressing the obligor's ability to maintain support payments post-retirement and the obligee's "level of financial independence." These two criteria once again must be viewed in conjunction with the factor pertaining to the obligee's ability to have saved financially during the duration of the alimony term set forth in subsection (j)(1)(j). Without the analysis of Judge Lihotz in *Landers*, trial courts would not have been encouraged to focus on the obligee's ability to have saved for the obligor's ultimate retirement. The *Landers* holding was also crucial in that it separated factors (f) and (g) from the rest of the factors in subsection (j)(3) of the statute.[15]

In *Landers*, the Appellate Division also clarified that pre-Sept. 2014 applications to terminate alimony based on retirement must be analyzed strictly under subsection (j)(3) of the statute. Also helpful in terms of post-judgment practice is that in *Landers*, Judge Lihotz identified factors (f) and (g) of subsection (j)(3) as crucial in the analysis of such retirement-based alimony applications for pre-Sept. 2014 agreements. The Appellate Division has not, however, provided guidance to trial courts with respect to how heavily the other (j)(3) factors are to be weighed. Without such guidance, many trial courts have resorted to directing parties involved in these post-judgment disputes to attend mediation. Until more trial court orders are issued either granting or denying alimony relief for pre-Sept. 2014 agreements based on retirement, the Appellate Division will not have the opportunity to deliver reliable guidelines to help trial courts more adequately address this issue of growing importance and relevancy.

The trial court in *Landers* applied the wrong subsection to the alimony termination request, but its decision allowed the Appellate Division to address important aspects of the revised statute and amendments.[16] The author believes without final orders from the trial courts on such post-judgment applications, whether entirely accurate or not, practitioners will not have the necessary guidance in drafting subsequent motions. If the majority of post-judgment applications seeking alimony termination for pre-Sept. 2014 agreements are simply sent to mediation, New Jersey trial courts will not have adequate guidance from the Appellate Division or Supreme Court to comprehensively deal with these cases moving forward. With the statutory amendments still in their early stages, the author believes applications regarding pre-Sept. 2014 divorce agreements will only become more frequent and burdensome. Over four years since implementation of the revised statute, the paucity of either published or unpublished Appellate Division decisions dealing with subsection (j)(3) of the statute seems to demonstrate the unease and hesitancy with which the trial courts have approached the law.

Potential Guidance from Unpublished Appellate Decisions

The Appellate Division's decision in *Marut*, while unpublished, illustrates the importance of decisions appealed from the trial court level. There is a legitimate concern that overzealous litigants may attempt to abuse the new law by attempting to vacate prior agreements where individuals explicitly consented to continue paying alimony after retirement. In *Marut*, as explained above, the parties were divorced in 1992, and entered a consent order in 2001 where they agreed the defendant ex-husband would continue paying alimony after his retirement. The defendant ex-husband then attempted to utilize the new alimony statute as a means to vacate the 2001 consent order, thereby terminating his alimony obligation.[17]

Similar issues have clouded how to enforce the revised alimony statute where post-judgment orders or consent orders have been entered prior to Sept. 2014 that may require the continued payment of alimony but conflict with the provisions of the new alimony statute, particularly the (j)(3) amendments for pre-Sept. 2014 agreements. For example, in *Spangenberg*,[18] the parties were divorced in June 2012, with the defendant

ex-husband having a $2,200 per month alimony obligation. The defendant filed multiple post-judgment motions to modify his alimony obligation based on a number of factors, including the plaintiff ex-wife's alleged cohabitation. By order dated Dec. 18, 2013, the trial court reduced the defendant's alimony obligation to $1,350 per month based on the plaintiff's cohabitation. The defendant ex-husband's motion for reconsideration seeking to altogether terminate the plaintiff's alimony was denied in March 2014. In late July 2014, the defendant moved for another review of the financial support terms of the parties' marital settlement agreement (MSA) based on a two-year review provision in the agreement.

The Appellate Division held that because the trial court's Dec. 18, 2013, order reducing the defendant ex-husband's alimony to $1,350 per month was entered before the effective date of the statutory amendments, the defendant could not rely on the new cohabitation provisions of the revised alimony statute to terminate his alimony obligation.[19] The Appellate Division stated: "Because the post-judgment order became final before the statutory amendment's effective date, the new cohabitation provisions do not apply or otherwise impact the alimony determination."[20]

In *Landers*, decided one year after *Spangenberg*, the Appellate Division was able to clarify the retroactive nature of the revised alimony statute. The legislative history accompanying the 2014 amendments stated "This act shall take effect immediately," and provided no guidance as to how prior agreements or orders would be dealt with.[21] However, the Appellate Division in *Landers* subsequently clarified that unlike other amendments to the statute, subsections (j)(1) and (j)(3) clearly make the crucial distinction between orders entered prior to the statute's effective date, and those entered after. Without the initial *Spangenberg* decision, this task would have been made more difficult without a prior case to use for comparison.

While refining the prior holding in *Spangenberg*, the appellate court in *Landers* made a point to confirm the importance of upholding most prior alimony agreements. As stated by Judge Jones in *Mills*, the intent remains to "prevent the amendments themselves from becoming an independent basis for a party to unilaterally attempt to un-do a contractual agreement on the standard for review, or to obtain a do-over on every alimony case previously decided before the amendments became law."[22] It is likely the Appellate Division will continue to sort through the various provisions of the revised alimony statute, particularly as they relate to agreements or orders entered prior to the statute's effective date. Given the court's holding in *Landers*, it seems unlikely the Appellate Division will be able to adopt a uniform approach in determining the retroactive nature of each particular amendment or provision of the statute.

New York and Pennsylvania Struggle to Adjust to the Changing Alimony Landscape

Other states continue to lag well behind New Jersey in this area. Pennsylvania has not attempted to address the alimony and retirement issue, but New York followed New Jersey's lead on June 24, 2015, by enacting State Senate Bill A-7645-2015.[23] However, the New York law, unlike subsection (j)(3) of the New Jersey amended statute, has no retroactive effect. New York changed Section 236 of its Domestic Relations Law in response to the request of its chief administrative judge upon the recommendations of the state's Matrimonial Practice Advisory and Rules Committee. Under the New York law, actual or partial retirement is now a ground for modification of post-divorce "maintenance" (alimony), assuming the retirement results in a "substantial diminution of income."[24] In contrast to subsection (j)(2) of N.J.S.A. 2A:34-23, the New York law cannot be used to change existing orders and agreements, and only applies prospectively to post-June 2015 agreements.

Given the head start provided by the revised Sept. 2014 alimony retirement statute, New Jersey has an opening to lead the way on an issue that will certainly arise more often in the near future. Any subsequent trial court order that is now appealed could help to clarify the remaining factors of subsection (j)(3), and would allow the Appellate Division to provide instructive guidance to the family part. Moving beyond *Landers*, all New Jersey family law attorneys would benefit from additional Appellate Division decisions that directly contemplate N.J.S.A. 2A:34-23(j)(3), addressing all of the revised statutory factors for pre-Sept. 10, 2014, agreements in subsection (j)(3). ■

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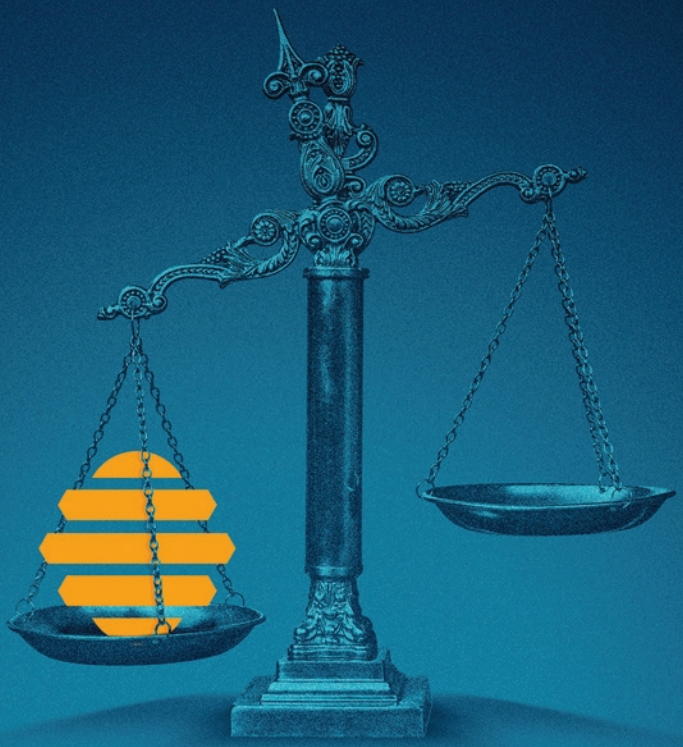
Endnotes

1. *See Marut*, 2017 WL 393934, decided Jan. 30, 2017, on appeal from the Monmouth County trial court. Pursuant to R. 1:36-3, unpublished opinions may be cited to the court if all other parties are served with a copy of the opinion, and any contrary unpublished opinions" known to counsel are disclosed.
2. *Id* at 3-4.
3. *See Lepis*, 83 N.J. 139 (1980).
4. *See* 23 Pa. C.S. Section 3701(e).
5. *See* N.J.S.A. 2A:34-23(j)(3).
6. *Mueller* at 587. *See* 42 U.S.C. Section 416 and N.J.S.A. 2A:34-23(n).
7. *See Mueller*, 446 N.J. Super. 582 (Ch. Div. 2016).
8. *Id* at 588-589.
9. *See Landers*, 444 N.J. Super. 315 (App. Div. 2016).
10. *Id* at 323-324.
11. *Id* at 319.
12. *Id* at 323.
13. *Id* at 324.
14. *Id* at 324-325.
15. *Id* at 325.
16. *Id* at 325.
17. *See Marut* at 1-2.
18. *See Spangenberg v. Kolakowski*, 442 N.J. Super. 529 (App. Div. 2015); As per *Landers*, the *Spangenberg* holding is superseded by the revised alimony statute, but only as it pertains to amendment/subsection (j)(3) of the revised statute for pre-Sept. 2014 alimony agreements.
19. *See* N.J.S.A. 2A:34-23(n).
20. *Id* at 539-540.
21. *Landers* at 323.
22. *See Mills v. Mills*, 447 N.J. Super. 78, 95 (Ch. Div. 2016).
23. New York Assembly Bill A7645, 2015-2016 Legislative Session.
24. NY DRL Section 236 Part B(9(b).



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Alimony Rules of Thumb Under the TCJA

by Charles F. Vuotto Jr. and Brian G. Paul

The Tax Cuts and Jobs Act (TCJA) is the most significant tax legislation in the last few decades, generating much discussion both in and outside the context of family law. With the change in the tax laws, family law professionals, including but not limited to lawyers, accountants and perhaps some judges, are straining to convert the prior perceived 'rule of thumb' regarding alimony to its post-tax equivalent. These efforts have resulted in conclusions that appear to fall within the range of 20 to 25 percent. These percentages have been arrived at by reducing the rule of thumb one-third rate (33.33 percent) by a range of presumed effective tax rates running from about 25 to 40 percent.

However, one must ask why. Although there is an argument that more guidance is needed regarding how to fix the duration and amount of alimony awards, for over 175 years New Jersey courts have resisted the temptation to use mathematical formulas or bright-line rules to determine the amount or duration of an alimony award. Nevertheless, such rules of thumb have proliferated with great frequency, even by those who have argued vociferously for their rejection. In light of this current push to arrive at the post-tax rule of thumb, it seems an apropos time to review the applicable pronouncements from the various courts.

In order to ensure an alimony award does not punish a payor spouse, nor result in an unjustified windfall to a payee spouse, New Jersey courts have continuously refused to sacrifice customized decisions rendered through a careful analysis of the particular facts of the case for the use of a mathematical formula that would result in the same amount and duration of alimony being awarded in marriages of comparable duration or earning capacity.

In fact, as early as 1838, Chancellor William Pennington held in the case of *Richmond v. Richmond*[1] that "it is impossible to frame a fixed, general rule for allowances of this character which would work justly in all cases; every case must depend very much on its own peculiar circumstances."[2]

Accordingly, whenever litigants or attorneys have attempted to advocate to the appellate courts for a strictly formulaic approach to alimony in New Jersey, such as awarding a non-working spouse one-third of the other spouse's income (or a working, yet still dependent, spouse one-third of the disparity between the parties' respective incomes) the appellate courts have consistently rejected such notions. For instance, nearly 65 years ago, in *Turi,*[3] the Appellate Division admonished:

> It may be noted, in passing, that the observation made in Dietrick that the amount allowed the wife is "usually about one-third of the husband's income" — see Hebble v. Hebble, 99 N.J. Eq. 53, 56 (Ch. 1926), affirmed Ibid. 99 N.J. Eq. 885 (E. & A. 1926), and Andreas v. Andreas, 88 N.J. Eq. 130, 133 (Ch. 1917), for a similar statement — has lost any significance it may have had in view of changing economic and social conditions. *The one-third standard has never been more than a guide, and has been referred to as "not a rule, even in a loose sense."* O'Neill v. O'Neill, 18 N.J. Misc. 82, 93, 11 A.2d 128 (Ch. 1939), affirmed 127 N.J. Eq. 278 (E. & A. 1940). *This criticism is justified in view of the provisions of N.J.S. 2A:34-23 and 24, whose language has been followed by our highest courts. As observed in the O'Neill case, to follow the one-third rule would result in the total obliteration and undiscriminating exclusion of the many other factors that should be considered and which have more or less importance, depending on the circumstances of particular cases.* (Emphasis added).[4]

There appears to be one outlying unpublished case of recent vintage that refers to the rule of thumb without negative commentary in the context of a malpractice action.[5] However, in that case the court simply referred to the malpractice expert's use of the rule of thumb when addressing the duty of care in that matter, and determined it was sufficient to avoid the granting of summary judgment dismissal of the plaintiff's case. Importantly, because the case was at the summary judgment stage,

the expert had not yet been cross-examined on how the so-called rule of thumb could possibly constitute a duty of care when it is inconsistent with the well-settled case law discussed above.

Indeed, the appellate courts have repeatedly admonished that the amount of any alimony award, whether *pendente lite*, at final hearing or post-judgment, is determined by performing the following three-part test: 1) determine the dependent spouse's reasonable needs in light of the marital lifestyle; 2) determine the dependent spouse's ability to contribute to their own expenses; and 3) determine the amount of alimony the payor spouse has the ability to pay toward the dependent spouse's monthly shortfall.[6]

Proper application of this three-part test to determine the amount of an alimony award requires an analysis of virtually all the statutory factors, except factors 2 and 13, which are more relevant to the duration of an alimony award. For instance, consider the following:

- **Factor 1** (need and ability to pay) is covered by part 1 and 3 of the test;
- **Factor 2** (duration of the marriage) goes to duration;
- **Factor 3** (age, physical and emotional health) mostly goes to duration, but also can be relevant to ability to support oneself (part 2 of test) and obligor's ability to pay (part 3 of test);
- **Factor 4** (marital lifestyle) is covered by part 1;
- **Factor 5** (earning capacities) is covered by part 2 and part 3;
- **Factor 6** (length of absence from job market) is covered by part 2 (when determining whether to impute income and how much) and also goes to duration;
- **Factor 7** (parental responsibilities) again is covered by part 2 (when determining whether to impute income and how much) and also goes to duration;
- **Factor 8** (time and expense to acquire education and training) is covered by part 2 and goes to duration, while ability to acquire future capital assets is covered by inclusion of a savings component in part 1 of the test and when deciding whether or not to allow investment income to be accumulated as additional savings (part 2 of test);
- **Factor 9** (history of financial contributions and career interruption) is covered by part 2 (when determining whether to impute income and how much) and also goes to duration;
- **Factor 10** (equitable distribution ordered) goes to part 2 (whether to impute investment income from distributed assets when determining ability to support oneself), whereas paying out an equitable distribution award through the payor's future earnings goes to part 3 (ability to pay);
- **Factor 11** (income available to either party through investment of assets) goes to imputing income to investable assets and is covered via part 2 and 3;
- **Factor 12** (tax treatment) is factored in by using after tax dollars when performing parts 1, 2 and 3 of the test;
- **Factor 13** (nature, amount and payout of pendente lite support) goes to duration.

In summary, to the extent rules of thumb were used (contrary to case law) to calculate alimony, they cannot apply any longer. Although the search for greater guidance in setting the amount and duration of alimony should not be abandoned, it is suggested the best shorthand approach (if one is sought) is to begin the analysis with an assessment of the parties' post-divorce, after-tax cash flows (after removing child-related expenses and child support from the analysis) and their respective post-divorce projected budgets computed and analyzed in conjunction with the statutory factors under N.J.S.A. 2A:34-23 (b). The old supposed rule of thumb (that wasn't law and expressly rejected) should be rejected in favor of applying the statutory factors via the three-part test. One shouldn't try to translate an old disallowed rule to fit the post-TCJA world. Therefore, the authors suggest utilizing the *Crews* three-part test through the following seven-step process to determine the amount of alimony (modified as needed to fit the particular facts of any case):

1. The first step (although not suggesting giving it greater weight) should be to determine marital lifestyle for the intact family.
2. Second, determine the dependent spouse's reasonable post-divorce budget in light of the marital standard of living.
3. Third, break out the children's portion of the budget and remove it from the analysis.
4. Fourth, determine each party's gross income (actual or imputed).
5. Fifth, determine each party's net-after-tax monthly disposable incomes. Does the spouse seeking alimony have enough after-tax income to meet their reasonable post-divorce budget in light of the marital lifestyle? If not, what is the amount of non-taxable alimony needed to provide the dependent spouse with his or her budget? Importantly, however, that is not the end of the analysis.

6. Next, the parties need to look at the payor's side. Does the payor have the ability to cover the full shortfall? Is it fit, reasonable and just under the circumstances of the case for the payor to do so? If so, that is the amount of the alimony award. Remember, under the amended statute neither party has a greater entitlement to the marital standard of living.
7. Finally, if it is not fit, reasonable and just for the payor to cover the full shortfall, then what amount is fit, reasonable and just under the circumstances of the case after considering all statutory factors and all relevant facts of the particular case?

While there has been much concern and apprehension regarding the impact of alimony becoming non-taxable, in many ways dealing exclusively in terms of after-tax dollars makes application of the *Crews* three-part test much easier to apply when determining the amount of alimony in a manner that is consistent with case law. Thus, rather than looking to a non-existent one-third rule (or its new equivalent) that the appellate courts have repeatedly disavowed, counsel should instead look at and apply all of the statutory factors via the *Crews* three-part test and determine an alimony award that is fit, reasonable and just in light of the particular facts of the case. ■

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Endnotes

1. 2 N.J. Eq. 90, 92 (Ch. 1838).
2. *Turi v. Turi*, 34 N.J. Super. 313, 321 (App. Div. 1955).
3. *Supra*, 34 N.J. Super. at 321-22.
4. *See also Capodanno v. Capodanno,* 58 N.J. 113, 119-20 (1971). (New Jersey Supreme Court rejecting use of one-third rule and instead focusing on the particular facts of the case before it).
5. *See Smith v. Grayson*, A-1072-10T4, 2011 WL 6304145, at *3 (N.J. Super. Ct. App. Div. Dec. 19, 2011).
6. *Crews v. Crews*, 164 N.J. 11, 32-33 (2000). *See also Gross v. Gross*, 22 N.J. Super. 407, (App. Div. 1952). (Appellate Division noting that *pendente lite* support is calculated based upon the wife's needs in light of the standard of living enjoyed when the couple was living together and husband's ability to pay); *Miller v. Miller*, 160 N.J. 408, 420 (1999). (New Jersey Supreme Court noting that the standard that governs the modification of alimony is the same standard that applies at the time of original judgment).