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As the World Changes Because of the Pandemic, So Must Our Section

By Ronald G. Lieberman

On May 18, 2020, I had the honor and privilege of being sworn in as Chair of the Family Law Section, taking over for Sheryl Seiden who led us through the difficulties of COVID-19 and showed strength and leadership throughout her year. Just as COVID-19 has changed the way you address your legal practice and caused you to adjust your personal life, the area of family law and our Section must adjust as well. If not, we are going to be left behind, and that is not in anyone's best interest.

Prior to COVID-19, the Family Law Section would have gone to Nashville for Sheryl Seiden's Family Law Retreat. But, it was canceled. We were looking forward to a three-day, in person annual meeting in May 2020 at the Borgata, but that was canceled. We've all been looking forward to sponsor appreciation events and other get-togethers during the summer. All of those have been canceled. Custody and parenting time matters were thrown into disarray with the pandemic and safety protocols and procedures. Domestic violence trials came to a halt. So what do we do with regard to the law and our Section in this new reality? I have some ideas and I hope you will work with me regarding them during my year as Chair.

First and foremost, our Section needs to stay relevant, and by that I mean we need to look at the major practice areas—alimony/child support; equitable distribution; child custody; and domestic violence—to see where the new reality intersects existing law. Those areas need to be thoroughly reviewed by way of statutes, case law and court rules to see if and where the changing times require the law being brought current. To that end, each of the Officers, Robin Bogan, Derek Freed, Megan Murray, and Jeffrey Fiorello, have agreed to create a committee on each practice area, and thoroughly review it over the next several months. Both Sheryl Seiden and Michael Weinberg have each agreed to oversee two of those committees. The goal will be to have reports from each of those committees presented to the

Family Law Executive Committee for a thorough vetting and review, ultimately culminating in potential new legislation.

For now, we cannot have in-person events of any sort because of social distancing and space limitations at the Law Center. Therefore, we are going to continue to use virtual platforms such as Zoom or Teams.

We need to be creative as to how we reach out to our sponsors to integrate them and show them how important they are to us as a Section. This may be challenging without live events. I have reached out to every single sponsor that signed up over the last two years to sponsor the family law retreats and heard from most of them as to how they want to stay relevant. Our sponsors allocate their marketing dollars to the Section which would be dedicated elsewhere. The least we can do as family lawyers is know who our sponsors are and reach out to them for their assistance in appropriate cases. I will be working with the State Bar to make sure that sponsors continue to be highlighted and that sponsorships are improved upon.

Another area that requires improvement is the level of coordination between New Jersey ICLE and the Family Law Section when it comes to family law programs. As all of us know, NJ ICLE is the division of the State Bar that is in charge of putting together programming and allowing professionals to showcase their knowledge, skills, and expertise to their peers in their practice areas. But, the level of coordination between NJ ICLE and the Family Law Section for family law programs is not where I would like it to be. After all, those of you who are involved in our Section and particularly, on the Family Law Executive Committee, have the skills and experience and knowledge that should be shared with our peers. Our sponsors need to be highlighted and able to show our colleagues who they are and what they can do for our clients.

What are we going to do regarding our major events, such as hot tips, holiday party, Tischler award, the symposium, and the idea of a retreat during my year? Well, I thought the retreat would be easy and would be in Las Vegas, but COVID-19 has changed those plans, not only for the Section, but for the New Jersey State Bar mid-year meeting. As of now, we are still going to Las Vegas. I encourage you to go but only if you believe it to be safe for you and your family.

The other major events will go on, but in what form, no one can tell. The symposium is going to have a far different feel in January 2021 than what I thought it would be when I was watching Sheryl Seiden run it very smoothly in January of this year. The best I can tell you for all of these events is "stay tuned."

I need to know from you, the Section members, what you would like from your Section. Why is it that you joined? What do you hope to get out of it? Feel free to reach out to me with answers to these questions. It is through collaboration and cooperation that the Section will continue to be the best section that State Bar has to offer.

I thank Sheryl Seiden and all of the prior Chairs for leading the way and providing me with guidance. I thank each of the Officers in advance for what I'm sure will be a far different year for them than what they envisioned as well. I thank each of our sponsors for being willing to dedicate their marketing dollars to us, especially in these challenging economic times. Most of all, I thank each of you for the privilege of allowing me to act as your Chair. ■

Inside this issue

Beware Changes in Intrastate Relocation in New Jersey per *AJ v. RJ*

By Charles F. Vuotto, Jr.

All family law practitioners should review the recent published decision in *AJ v. RJ*[1] issued on Oct. 7, 2019 that is poised to potentially disrupt expectations regarding many custody and parenting agreements. The holding as to intrastate relocation reads:

> *We further hold where a parent of primary residence seeks an intrastate relocation and the parent of alternate residence opposes it, the parent of alternate residence must convince the court the move constitutes a change in circumstance affecting the best interests of the children. If a prima facie case is established, the trial court must assess custody and parenting time, by applying the N.J.S.A. 9:2-4 factors to determine whether the best interests of the children requires a modification of one or both.*

This change in the law exposes almost all custody and parenting time agreements to being re-addressed in the event of an intrastate move that constitutes merely a "change in circumstances" affecting the best interests of the child(ren) as opposed to an intrastate move that is deleterious to the relationship between the child and the non-residential custodial parent, or being otherwise inimical to the child's best interests (as required by *Schulze v. Morris*[2]). *AJ v. RJ* conflicts with this prior Appellate Division case and represents a major change in New Jersey's intrastate relocation law. *AJ* further conflicts with various unreported decisions such as *Clemas v. Clemas*[3] and *Moreno v. Javan*.[4]

New Jersey Courts had consistently concluded that the relocation of a child to another residence in New Jersey by the primary residential custodial parent in a joint legal custodial relationship does not constitute a statutory removal action under N.J.S.A. 9:2-2, which would require court approval for that relocation. (See *Schulze v. Morris*.)[5] In the *Schulze* case, the father appealed from denial of his application to require the mother to relocate with the child from Sussex County, where she moved, back to Middlesex County, where she and the child and the father had lived prior to the move to Sussex.[6] The *Schulze* Court further concluded that while relocation in the state by a joint residential custodial parent does not constitute removal action under N.J.S.A. 9:2-2, it "may constitute a substantial change in circumstances warranting modifications of the custodial and parenting time arrangement," (emphasis added). Furthermore, as noted in *Schulze*, there is "no corresponding requirement or burden of application placed upon a residential custodial parent who desires to move, with the child, from one location within New Jersey to another."[7] It is critical to note that implicit in this ruling is the ability to change the children's school. This is so since, in almost all situations, any change in residence to another location in the state (outside the existing school district) would require a change in schools.

Prior to *AJ v. RJ*, the question was whether the move is far enough to significantly impact the non-custodial parent's timesharing. The burden on the non-custodial parent was not to merely show a "change in circumstance." Specifically, the *Schulze* Court held that:

> When a non-residential custodial parent opposes the intrastate relocation of his or her child by the primary residential custodial parent on the basis that the move will be deleterious to the relationship between the child and the non-residential custodial parent, or will be otherwise inimical to the child's best interests, those factors outlined by Justice Long in Baures, supra, 167 N.J. at 116-17, 770 A.2d 214, as well as other relevant matters, should be considered in determining whether modification of the custodial and parenting-time arrangement is warranted. Of course, as noted by the Court, "not all factors [would] be relevant and of equal weight in every case." Id. at 117, 770 A.2d 214.[8] (Emphasis added)

Therefore, there is a two-step process under *Schulze*. There is a threshold showing required to be made by the non-custodial parent (i.e., that the move will be deleterious to the relationship between the child and the non-residential custodial parent, or will be otherwise inimical to the child's best interests). If that threshold is made, the factors under *Baures* would be triggered. It is only the second step that needed to be modified due to *Bisbing*. Instead of applying the *Baures* analysis after the threshold showing was made, the analysis under *Bisbing* must be made. That is essentially a best interest analysis.

Further, as to schooling, the only question was whether the new schools adequately provide for the children's needs and were not contrary to their best interests.

There are various unreported cases that followed *Schulze* and helped explain how it was to be applied in a fair and equitable manner. In the unpublished Appellate Decision case of *Clemas v. Clemas,*[9] the defendant appealed from the denial of his application seeking to restrain plaintiff from relocating the parties' children from Bridgewater to Egg Harbor. The court found, as a matter of law, that plaintiff was the parent of primary residence and as such, she was permitted to relocate within the state (and obviously change the children's school). The Court further determined that it was the defendant's burden to demonstrate changed circumstances infringing upon the best interests of the children and the Court found that the father did not meet that burden and thus was not entitled to a hearing as to why the new school district could not accommodate his children's needs or demonstrate that he wouldn't be able to maintain the same parenting schedule or a "reasonable alternative." Further, and critically, in *Clemas*, the Court found that the relocating party was a "primary caretaker, who had significantly more parenting time and had primary responsibility for the children's academies."

Again, in the unpublished decision of *Moreno v. Javan,*[10] the parties separated, and the mother moved from Piscataway and took the child to live with her mother and herself in Queens, New York. The father objected and argued their agreement stated that they "must live in close proximity" to one another in order to effectuate their parenting plan. The mother then informed the father she would move to Flanders, New Jersey, a town approximately 30 minutes driving distance away from the father's Piscataway home. The father filed a post-judgment application seeking to compel the mother to move closer, specifically within a 5-mile radius. Even with a clause in their marital settlement agreement (MSA) requiring the parties to live "in close proximity" the Family Part Judge denied the father's request concluding that the father failed to demonstrate a substantial change in circumstances. The Judge further found that the mother choosing to reside less than an hour away did not violate the spirit of the agreement and when they bargained for 'close proximity' it did not mean they are necessarily chained to a particular location..

It should be noted that generally, a party seeking modification of a judgment, incorporating a settlement agreement regarding custody or visitation, must meet the burden of showing changed circumstances and that the agreement is now not in the best interests of a child. See *Todd v. Sheridan*, [11] *Mastropole v. Mastropole*,[12] *Sheehan v. Sheehan*,[13] and *Borys v. Borys*.[14]

A spousal agreement is viewed with "a predisposition in favor of its validity and enforceability." See *Petersen v. Petersen*[15] and *Quinn v. Quinn*.[16] ("Therefore, fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed.") There is no legal or equitable basis to reform the parties' MSA absent "unconscionability, fraud, or overreaching in the negotiations" of the MSA (see *N.H. v. H.H* [17]). A marital agreement is enforceable in equity, and the language of the MSA controls so long as it is fair and just.[18] (see *Eaton v. Grau).*[19].

Therefore, it is this author's opinion that *AJ* was correct to note that the standard in *Bisbing* must be applied in place of *Baures*. However, the initial threshold showing referenced in *AJ*, before we get to a best interest analysis under *Bisbing* must be clarified. The burden on the non-custodial parent should not be to merely show a "change in circumstance" due to the custodial parent's intrastate relocation, but the heightened standard under *Schulze* to show that the move will be deleterious to the relationship between the child and the non-residential custodial parent, or will be otherwise inimical to the child's best interests. Otherwise, custodial parents will be doomed to endure unnecessary litigation in the event of virtually any desired move within the state of New Jersey.

Lastly, we now have conflicting Appellate Division decisions (*Schulze* and *AJ*). This conflict must be resolved. When there are two conflicting opinions, the first question is whether the most recent expressly overruled the earlier. In the case of *AJ*, it is clear that *Schulze* is overruled by *AJ* to the extent that *Baures* was made part of the

process as detailed in *Schulze*; it is now replaced with *Bisbing*. The question is whether, as noted above, the initial threshold event triggering a review has been expressly changed. That, in this author's opinion, is not as clear. Assuming, there is no express statement in *AJ* overruling the earlier matter, then the two opinions have the same value. Two panels may examine the same issue and reach two different conclusions – each is equally viable. One appellate part need not follow another part's determination. They both stand until the Supreme Court rules on the issue. ■

Endnotes

1. *A.J. v. R.J.*, 461 N.J. Super. 173 (App. Div. 2019)
2. *Schulze V. Morris*, 361 N.J. Super. 419 (App. Div. 2003)
3. 2015 WL 345785 (2015)
4. 2012
5. 361 N.J. Super 419, 421 (App. Div. 2003)
6. Id. at 421
7. Id. at 426
8. *Schulze V. Morris*, 361 N.J. Super. 472, 473
9. Docket No. A-05499-13T3
10. 2012 N.J. Super, an unpublished case, LEXIS 2610 (App. Div. 2012)
11. 268 N.J. Super. 287, 298
12. 181 N.J. Super. 130, 137
13. 51 N.J. Super. 276, 287
14. 76 N.J. 103, 115-116 (1978
15. 85 N.J. 638, 642 (1981)
16. 225 N.J. 34, 44-45 (2016) (internal quotation marks and citation omitted)
17 418 N.J. Super. 262, 282 (App. Div. 2011) (citation omitted)
18. Id. at 279-80
19. 368 N.J. Super. 215, 224 (App. Div. 2004)

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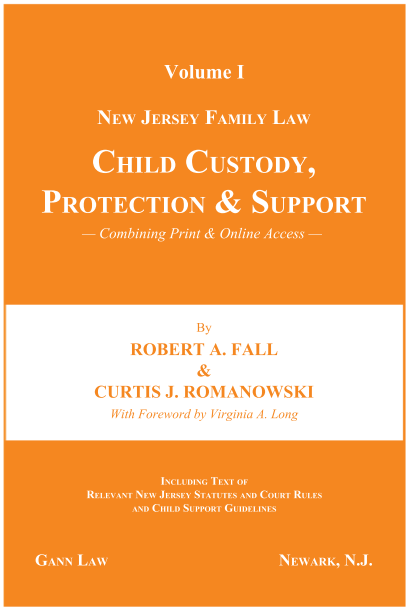

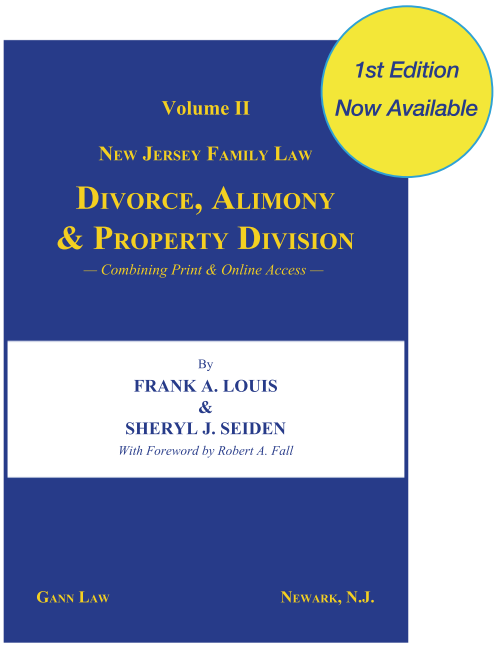

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Mandatory Reporter Law in New Jersey

by Chiori Kaneko

This article is an overview of the current law in New Jersey regarding mandatory reporting of child abuse and neglect. It will also discuss concerns and problems that have arisen under the current reporting scheme.

Who is a Mandatory Reporter?

A mandatory reporter is an individual who is required by law to report child abuse and neglect.[1] In New Jersey, *every person* is a mandatory reporter. NJSA 9:6-8:10 states "Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to DCF's Child Protection and Permanency (CP&P) by telephone or otherwise." So, failure by any person in this state to report an act of child abuse is a disorderly persons crime.[2] Although every state has laws regarding mandatory reporters of child abuse, New Jersey is in the minority in designating *every person* as a mandatory reporter.[3]

Prior to 1971, New Jersey limited mandatory reporting obligations to physicians and hospitals.[4] The law was amended in 1971 to include all persons as mandatory reporters. This deliberate change in the law, as well as the broad immunity from civil and criminal liability afforded to those making a report, exemplifies New Jersey's commitment to eradicating child abuse.

Most states specify certain professionals as mandatory reporters.[5] The most common professionals designated as mandatory reporters are social workers, teachers and other school personnel, physicians and other health care workers, counselors and other mental health professions, child care providers, coroners, and law enforcement officers.[6] Additionally, some states include other professions such as commercial film or photograph processors, computer technicians, substance abuse counselors, probation officers, and employees/volunteers at camps and recreation centers. In those states where only certain professionals are designated as mandatory reporters, all other persons are "permissive reporters" who may voluntarily report child abuse but are not legally required to make a report.[7]

New Jersey also provides immunity from any civil or criminal liability to those making a report.[8] This immunity is "broadly and liberally construed in favor of the reporting person" in order to protect the reporting person and children.[9] New Jersey also allows a reporter to file for employment, back pay, or other equitable relief in court if the reporter experiences discharge or discrimination from employment resulting from a report made in good faith.[10]

Reporting Child Abuse or Neglect

Department of Children and Families directs the public to immediately report child abuse and neglect to the State Central Registry by calling their hotline 1-877 NJ ABUSE (1-877-652-2873).[11] A caller can make a report anonymously and does not need to provide any proof of abuse or neglect.[12] The caller needs to provide the child's name, age, address and the parent/caregiver's name, as well as the name of the alleged perpetrator and that person's relationship to the child.[13] The caller will also be asked to provide details of the abuse, such as type and frequency of alleged abuse/neglect, current or previous injuries to the child, when the alleged abuse/neglect occurred, when the caller learned of it, where the incident occurred, where the child is now, whether the alleged perpetrator has access to the child, and likelihood of imminent danger for the child.[14] An investigator from the Department of Child Protection and Permanency will investigate the allegations.

In 2018, the child abuse hotline received 79,791 calls and 90,056 children were referred to DCPP.[15] (One call may refer more than one child, such as siblings in the same household.) Of all the children referred to DCPP, reports for 2,784 children (approximately 3%) resulted in a finding of substantiation for child abuse or child neglect after an investigation by DCPP.[16] The most number of calls (19,992 of them) came from individuals who did not identify any affiliation with a profession or an organization.[17] Of the calls that came from individuals with a professional or organization affiliation, the most number of calls came from school staff (18,317 calls), followed by law enforcement (14,080 calls) and health care provider (11,169 calls).[18]

Ethical Implications for Family Law Attorneys

As family law practitioners, we are very likely to encounter allegations of child abuse and neglect in our professional capacity. A typical example may be accusations of child abuse or neglect by parties in a child custody proceeding. Another possible situation faced by a family law attorney is learning during the course of representation that a client had previously committed acts of child abuse. An attorney may also learn of a client's recent activities or mental or physical conditions that lead the attorney to conclude the client is not capable of caring for a child. What are our legal obligations under the mandatory reporter statute in light of our obligations to maintain attorney-client privilege?

A. Key Concepts under Mandatory Reporter Statute: "Reasonable Cause" and "Child Abuse and Neglect"

The mandatory reporter statute is simple: it imposes the same legal obligation for reporting child abuse to every person in New Jersey, regardless of occupation or organizational affiliation. So, unlike some other states, New Jersey attorneys, physicians, therapists, clergy or any other professionals are under the same reporting standards as any other person..[19] The statute requiring "[a]ny person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately…" contains two important legal standards that require explanation: the evidence needed to meet the standard of "reasonable cause" that obligates a person to make a report and the definition of child abuse and neglect.

The standard that triggers the reporting requirement is "reasonable cause." This standard is best illustrated by *L.A. v. New Jersey Div. of Youth Family Services*, 217 N.J. 311 (2014). In *L.A.*, an emergency room physician, who treated a 2-year-old child for ingestion of cologne, failed to report the incident to the Child Abuse Hotline. The child was examined, treated for accidental ingestion, and was released to her father. In the months subsequent to the emergency room visit, DYFS received reports for incidents, separate from the cologne ingestion, that the child was abused. DYFS eventually removed the child from her home due to child abuse. New Jersey Supreme Court found that, despite the events that transpired subsequent to the emergency room visit, the emergency doctor did not have "reasonable cause" to believe the child was abused. The Court explained the "reasonable cause" standard as "if, objectively viewing the circumstances of the child's admittance, an emergency medicine specialist involved in handling this treatment should have believed that S.A.'s parents or guardians had been reckless or grossly negligent in supervising her or in allowing her to access and/or consume the cologne."[20] The Court concluded that the doctor did not have "reasonable cause" because there were no evidences of intentional behavior by the parents, and cologne is a common household item that is not inherently dangerous like a weapon or poison.[21] In other words, "reasonable cause" is not a mere suspicion of child abuse but a standard of objective reasonableness of a person in a particular circumstance.

Child abuse and child neglect are concepts that defy the use of bright-line rules and need a fact specific determination. The legal definition of an "abused child" is set forth in N.J.S.A. 9:6-8.9 :

> "Abused child" means a child under the age of 18 years whose parent, guardian, or other person having his custody and control:
>
> a. Inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ;
>
> b. Creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; or
>
> c. Commits or allows to be committed an act of sexual abuse against the child;
>
> d. Or a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, or such other person having his custody and control, to exercise a minimum degree of care (1) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or

other reasonable means to do so, or (2) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment or using excessive physical restraint under circumstances which do not indicate that the child's behavior is harmful to himself, others or property; or by any other act of a similarly serious nature requiring the aid of the court;

e. Or a child who has been willfully abandoned by his parent or guardian, or such other person having his custody and control;

f. Or a child who is in an institution as defined in section 1 of P.L.1974, c. 119 (C. 9:6-8.21) and (1) has been so placed inappropriately for a continued period of time with the knowledge that the placement has resulted and may continue to result in harm to the child's mental or physical well-being or (2) has been willfully isolated from ordinary social contact under circumstances which indicate emotional or social deprivation.

A child shall not be considered abused pursuant to subsection f. of this section if the acts or omissions described therein occur in a day school as defined in section 1 of P.L.1974, c. 119 (C. 9:6-8.21).

Some acts of child abuse listed in the statute are obvious and uncontroversial, such as injury "which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ." However, some acts are more subjective, such as failure to exercise "minimum degree of care" and "excessive corporal punishment."

What constitutes "minimum degree of care" and "excessive corporal punishment" are context specific. In case law, there are no bright line rules that separate corporal punishment that is legal in the state of New Jersey, from "excessive corporal punishment" that is considered child abuse. Corporal punishment that leaves a bruise may be lawful in some contexts but unlawful in others.[22] A parent hitting a child with an instrument may be committing child abuse in some contexts but not in others.[23] The determination has to be made on a case-by-case basis by examining the particular facts of the situation. Similarly, the line between "merely negligent" acts that are not considered child neglect and "grossly or wantonly negligent" acts is highly fact-specific.[24]

B. Attorney-Client Privilege

For family law attorneys, obligations under attorney-client privilege present additional layers of ethical concern. An attorney may learn of a client's child abuse in the context of representing the client in a custody proceeding. Reporting a client's child abuse not only may be contrary to attorney-client privilege but it also may work directly against the client in the custody proceeding for which the attorney was hired. The Advisory Committee on Professional Ethics appointed by the New Jersey Supreme Court issued two opinions concerning this subject. In the first opinion, the committee addressed a situation in which an attorney gains knowledge of a client's *past* actions of child abuse that is unknown to the government child protection agency. In this instance, the committee concluded that attorney-client privilege precluded disclosure of client's past child abuse and cited Disciplinary Rule 4-101(B)(2), which provides that an attorney shall not knowingly use a confidence or secret of his client to the latter's disadvantage, and Disciplinary Rule 7-101(A)(3), which prohibits attorneys from prejudicing a client's cause during the course of the professional relationship.[25]

In the second opinion, the committee addressed a different question, "Does the privilege rule apply where the attorney for the mother has knowledge of his client's activities, physical condition or mental attitude, of a continuing nature, such as in the attorney's judgment would tend to demonstrate the continued propensity of the mother to abuse the child?"[26] In this case, the committee concludes that attorney client-privilege does not apply to continuing crimes or crimes to be committed and does not apply

> …where the communication is obtained in the course of legal services sought in aid of commission of a crime or a fraud. Hence, where an attorney who is representing a parent on child abuse learns, in whatever manner, that the pursuit of the client's objective to maintain parental control will probably constitute fraud on the court in misrepresenting the parent's continuing fitness, the privilege cannot apply."[27]

In such cases, the attorney must make a report to the agency in charge of child protection.

Issues Arising from Mandatory Reporter Requirement

New Jersey's mandatory reporter requirement eliminates typical barriers to reporting child abuse because every individual is tasked with reporting it. Thurs, it avoids the confusion of having to navigate organizational hierarchy to report to the right person in charge. The reporter is assured immunity from liability in a court of law and is also assured that their employment will be not be affected. Such a simple and straightforward statutory scheme encourages reports of child abuse, but it also raises the problematic issue of over-reporting.

Under the current reporting scheme, a person who has a mere hunch or a suspicion of child abuse is better off making a report, however reasonable or unreasonable, rather than weighing whether the act meets the legal standards for reporting first. A person who fails to report child abuse is committing a crime, while those who mistakenly report a harmless activity as child abuse enjoy immunity from liability. Furthermore, just as parenting practices differ from one household to another, the idea of "child abuse" vastly differs from person to person, from neighborhood to neighborhood, and from community to community. Spanking may be a perfectly normal method of child discipline in one household or community, while raising one's voice at a child or hurling insults may be considered "verbal abuse" in another household or community.

When mandated reporters are limited to individuals in certain professions, they can be required, as part of their licensing process, to receive training regarding the legal standards and to have an awareness of what should and should not be reported as child abuse. When every person in the state is a mandatory reporter, however, education about legal standards for reporting becomes much more difficult. As a result, each person is left to use his or her own judgment about child abuse and child neglect to make a report that may have tremendous consequences for those who are being reported. Even if the reporter only has good intentions, a person may have prejudices and cultural biases that color their views about what is abuse and what is proper parenting practice.

Child abuse hotline screeners and DCPP investigators are the only line of defense to separate those reports that meet the legal standard from those that do not. The child abuse hotline screeners are trained to categorize cases that are allegations of abuse or neglect from those cases in which a child or a family merely needs welfare or social services. The investigators are also trained to determine whether the case meets the legal standard of child abuse or neglect. However, the screening process may be inadequate in mitigating the negative consequences of over-reporting. One of the negative consequences of over-reporting is intrusive government investigations in private homes and family life. Targets of investigations may be required to undergo tests, evaluations, and programs even when the investigation does not find evidences to meet the legal standard of child abuse.[28] Another negative consequence is that the investigative records of such cases remain part of a person's permanent record kept by DCPP, and can be disclosed years and decades later to certain government agencies, private entities, and individuals.[29] In other words, this record of investigation, even when evidence of child abuse did not meet the legal standard of proof, may nevertheless may become an obstacle for a person trying to adopt a child or gain custody of a child years and decades later.

New Jersey's policy decision to designate every person as a mandatory reporter is rooted in its commitment to child safety. Undoubtedly, these calls from individuals have saved children from harm and injuries. However, the policy is not without problems. For example, the allocation of resources currently being spent on investigating nearly 80,000 calls each year, approximately 97% of which does not result in a child abuse substantiation, is an issue. Are those resources better if allocated in other ways to help victims of child abuse and neglect? Another problem is that families and individuals who are targets of investigations based on mistaken, misinformed, or purposefully false reporting suffer short-term and long-term consequences sometimes occurring years and decades later. Also, the investigation process itself can be traumatic for families and children who may be put through a battery of interviews, medical examinations, and psychological examinations, based on mistaken or purposefully false reporting. New Jersey faces the difficult task of resolving these issues borne of its mandatory reporting law while keeping children safe from abuse and neglect. New Jersey may want to consider looking at other states and seek reform in its reporting laws in order to reduce false reporting and the traumatic impacts on families.

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Endnotes

1. 42 U.S.C. §5106a(b)(2)(B)(i) (requiring each state to have mandatory reporting laws)
2. NJSA 9:6-8.14.
3. CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, childwelfare.gov/pubPDFs/manda.pdf#page=2&view=Reporting by other persons [Hereinafter *Child Welfare Gateway*].
4. L.A. v. New Jersey Div. of Youth and Family Services, 217 N.J. 311, 328 (2014). (Discussing the history of mandatory reporting law in New Jersey and citing L.1964, c.30).
5. *Id* at 2.
6. Child Welfare Gateway at 2.
7. Child Welfare Gateway at 2.
8. NJSA 9:6-8.13.
9. F.A. by P.A. v. W.J.F., 280 N.J.Super. 570, 572 (1995).
10. *Id*. at 8.
11. nj.gov/dcf/reporting/how/ [Hereinafter *DCF Website*].
12. *Id*.
13. *DCF Website*.
14. *DCF Website*.
15. njchilddata.rutgers.edu/portal/ [Hereinafter *Rutgers Portal*]
16. *Id*. After an investigation of an allegation, DCP&P categorizes its findings into one four categories, "substantiated," "established," "not established," and "unfounded. The allegations are "substantiated" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in NJSA 9:6-8.21, and the perpetrator's name is placed on the state-wide Child Abuse Record Information. An allegation is "established" if the preponderance of the evidence indicates that a child is an "abused or neglected child" but the act or acts committed or omitted do not warrant a finding of "substantiated." In 2018, investigations regarding 2939 children (approximately 3%) resulted in a finding of "established." An allegation is "not established" if there is not a preponderance of the evidence that a child is an abused or neglected child but the child was harmed or placed at risk of harm. In 2018, investigations regarding 58,668 children (approximately 65%) resulted in a finding of "not established." An allegation is "unfounded" if the child was not harmed or placed at risk of harm. In 2018, investigations regarding 25,492 children (approximately 28%) resulted in a finding of "unfounded."
17. *Rutgers Portal*. According to the child abuse hotline data for 2018 compiled by DCF, 7,596 calls came from anonymous sources, 6,404 came from parents, 5,506 came from relative/friend/neighbor, and 486 came from the child himself or herself.
18. *Rutgers Portal*.
19. NJSA 9:6-8.16 addresses a specific circumstance for physicians only. It states, "Any physician examining or treating any child ... is empowered to take the said child into protective custody when the child has suffered serious physical injury or injuries, and the most probable inference from the medical and factual information supplied, is that the said injury or injuries were inflicted upon the child by another person ... into whose custody the child would normally be returned." This statute, however, is separate and different from the mandatory reporter requirement in that the decision to take a child into protective custody is not required and merely "empowers" the physician to do so in the particular circumstance. This statute does not exempt physicians from the mandatory reporting requirement and does not impose a different standard for them.
20. L.A. at 333.
21. *Id*.
22. DYFS v. K.A. 413 N.J. Super 504 (2010)(mother who struck a child on the shoulder and left a bruise did not engage in excessive corporal punishment), *but see* DYFS v. C.H., 416 N.J. Super. 414 (2010)(parent who left numerous marks on a child engaged in excessive corporal punishment).
23. DYFS v. S.H., 439 N.J. Super. 137 (2015)(mother who hit her teen with a golf club found to have engaged in abuse), *but see* DYFS v. O.D. 2007 WL 2471295 (unpublished)(mother who struck a 10-year old with a coat hanger and an extension cord did not commit child abuse).
24. DYFS v. T.B., 207 N.J. 294 (2011)(mother who left a 4 year old unsupervised for two hours was not grossly or wantonly negligent.) *but see* DCF v. S.F., 2012 WL 371372 (unpublished)(aunt who left a 6 year old child home alone was grossly or wantonly negligent.)
25. 97 NJLJ 361 (May 16, 1974).
26. 97 NJLJ 753 (October 3, 1974).
27. Id.
28. In 2018, investigations regarding 58,668 children were closed with a finding of "not established." These cases are defined in NJSA 9:6-8.21 as "there is not a preponderance of evidence of child abuse or neglect, but evidence indicates that the child was harmed or placed in risk of harm." In other words, these are cases in which there was not enough evidence to meet the legal standard of child abuse or child neglect, but become part of the permanent record kept by DCPP, not subject to expungement.
29. NJSA 9:6-8.10a(b).

Custodial Arrangements and the Presumption of Equal Custody: Is there Really Such a Presumption?

by Albertina Webb

There has been much discussion lately about the presumption of equal custody (legal and physical) for parties going through a divorce. As many family practitioners know, the determination of custody as a result of divorces, if not resolved between the parties, is left for the Judge to determine after a plenary hearing considering what is in the best interests of the children. In New Jersey, two proposed bills, S3479 and A5189, have been circulating for the past two years in favor of the presumption for equal joint and physical custody at the time of a divorce. Arguments were made for and against the "presumption." But is there really such a presumption, and if so, when did it come about? Is it enforceable? Is such a law for equal and joint physical custody in the child's best interests?

The bills, which were introduced in New Jersey's legislature in or about November 2018, support a presumption of equally shared legal and physical custody at the time of the divorce. Neither bill has been passed, but if passed, would drastically change how child custody determinations would be made in a divorce.

At common law and well into the 18th Century, the father had absolute dominion and control over children and property. The mother had no rights to their children. A father could assign his parental rights, without the mother's consent, to a third party both during his life and by will at the time of his death.[1] Children were treated as chattel and in the rare instance when the husband "granted" the wife a divorce, the children almost always remained with the father (with possibly the occasional exception of daughters, when the father did not want to be burdened). In fact, mothers were not entitled to custody and entitled "only to reverence and respect."[2]

Fast forward to 19th Century and the creation of the tender years doctrine. Caroline Norton coined the term "tender years doctrine" when she lost custody of her children in her divorce. Caroline campaigned for and British Parliament passed the Custody of Infants Act of 1839, which permitted mothers to petition for custody of their children who were younger than 7 years old and for "access" to children older than 7. The Courts in the United States accepted the doctrine. In divorce and separation disputes, the children were awarded to the mother solely because a mother was "God's own institution for the rearing and upbringing of the child" and the child would be left in the hands of an "expert."[3] In fact, the preference for a child to be raised by the mother, "is simply a shorthand method of expressing the best interest of children and this section enjoins judges to decide custody cases according to that general standard."[4] Children are best served being raised by their mothers.[5]

The tender years doctrine was abolished with New York's decision in *Watts v. Watts* in 1973[6] holding that any presumptive preference in favor of maternal custody violated the father's right to equal protection under the Fourteenth Amendment. The Fourteenth Amendment provides that every person should have equal protection of the laws.[7] In a family law context, this means that neither parent should have a greater entitlement to custody of a child over the other.

Realistically, both parents should be afforded the right to have parenting time with their child and the ability to raise their child as they see fit. But should it be dictated to them that they are each entitled to equal joint and physical custody as an initial presumption? Our case law and constitution have dictated that parents should also benefit from the "companionship" with their child, as a "fundamental right" protected by the U.S. Constitution.[8] Furthermore, New Jersey's custody statute[9] authorizes a court to enter an order of joint custody, (N.J.S.A 9:2-4(a)) or sole custody (N.J.S.A. 9:2-4(b)), of a child. The statute, however, also includes and authorizes a court to consider a rarely invoked but equally available third option under N.J.S.A 9:2-4(c), which permits a court to enter any other custody arrangement as the court may determine to be in the best interests of the child. Such arrangement may include, when in the child's best interests, a temporary hybrid combination containing elements of both joint custody and sole custody, regarding a child's need for medical attention or other immedi-

ate needs when specific factual circumstances so require.

New Jersey, as a matter of public policy, favors awards of joint legal custody.[10] Joint legal custody permits both parents to be actively involved and have a "equal" right to share in the important decisions and issues raised by their child, i.e., health, medical, educational and religion. However, how can this occur when the parties cannot or refuse to co-parent? When the parties live in different states? When there is a history of domestic violence and a final restraining order is in place? When no parental relationship existed for one parent for many years prior to the divorce?

There are few reported cases in New Jersey that have awarded "sole legal custody." In 1993, our court granted the residential parent authority to make the decision for their child to undergo non-emergency elective surgery.[11] This sole authority has been applauded by our court in the case of *Pascale v. Pascale*[12] as "child centered view."

In an unreported decision by Lawrence R. Jones, J.S.C. (Ret.) from Ocean County in 2014, he explained in his decision when sole legal custody should be awarded to a parent and further explained why, in this particular case, based on the facts, he continued the award of joint legal custody.[13] He warned the litigants, however, that an award of sole legal custody may ultimately be in the child's best interests. Sole legal custody is rarely awarded after a custodial trial. The child at the middle of the custody battle in the Ocean County case was a special needs child with autism who had an Individual Education Plan and required special medical attention. The sparring parents could not see past their anger for the other and naturally, decisions for the child were either delayed and/or not made. Judge Jones, thinking outside the box, proposed that the parties attend joint parenting training classes, "in raising a child with autism" based on the court's *parens patriae* role, and ordered the parents to attend professional interventions together, as an ongoing condition of joint legal custody.[14] This case provides much commentary on the reasoning for a sole legal custody award when parents cannot or refuse to co-parent and their inability to do so negatively impacts their child. Dictating to parents that they have equal joint decisions, when they cannot reach agreement, could be significant to a child's well being and ultimately their best interests being negatively impacted. The decision had a footnote that confirmed that the parents attended the joint sessions and the therapist reported that the parents started to "deal with each other in a positive and mutually respectful fashion." Would that have been the outcome if the Judge directed the mother to have sole legal custody? Probably not.

In *Pascale*, the court clarified the custodial terms used in divorce matters. The court granted the parties joint custody of the children and designated the mother as the "residential custodial parent." The Judge refused to use the term "joint custody" and recommended that in the future, the parties differentiate between "legal custody" and "physical custody" in defining the relief being sought. Citing *Beck v. Beck*,[15] the court stated "[t]herefore, we reaffirm that properly analyzed, joint custody is comprised of two elements—legal custody and physical custody," and find it important to break down the term "joint custody" into legal and physical in reviewing the court's determination of child support. The court further commented that joint legal custody with "physical custody" given to only one parent, the "primary caretaker—the custodial parent" and "secondary caretaker—the non-custodial parent" is much more common in New Jersey, while joint physical custody is as rare in New Jersey as in other states.[16]

In 1975, only North Carolina had a statute permitting an award of joint legal and physical custody.[17] Within a decade, 30 states had adopted similar laws.[18] Pushing the needle further, it has recently been reported that more than 20 states in the United States, including New Jersey, are considering passing laws which would make equal shared physical and legal custody of children after a divorce or separation the default standard.

In the event of a presumption of equal shared legal and physical custody at the time of the divorce, all practitioners should consider the best interests standard factors and carefully scrutinize such factors against the parties' specific lifestyle and facts for each family in an attempt to persuade a Judge or Arbitrator why or why not equal legal and physical custodial arrangements should not be presumed in that particular case.[19] Pleadings should be created to clearly demark proposed custodial outcomes upon entry of a judgment of divorce. Raising those issues at the outset should flesh out any concerns of custodial arrangements during the divorce process.

Attorneys must consider the practical considerations of an award of equally shared legal and physical custody and should be prepared to make relevant arguments for and against such a presumption:

1. If the parents cannot communicate on any topic or issue, and they are acrimonious with each other, there is no productivity for the children with joint legal

custody because they could never reach agreement.
2. Joint physical custody does not work where the parties live far apart and travel is significant (defined as more than 1 hour, 45 minutes, 2 hours or whatever works for each particular family).
3. Based on the ages of the children, transitions between the households could make the children suffer and have difficulty keeping and maintaining friendships. Backpacks and shoes get lost, causing more friction and anxiety for the children and hence the parents, which is counterproductive.
4. The transitions between two households is too stressful for the children.
5. If there is a record of domestic violence, it would be extremely difficult for the parties to share legal and physical custody.
6. Mental and medical instability of one parent may further erode the productivity of equal legal and physical custody.
7. Work responsibilities of the parents may make it too difficult to automatically award one parent "equal" parenting time.
8. Consideration should be given whether a parent "wants" equal parenting time.

Although there are few cases that have awarded sole legal custody in New Jersey, there are no reported decisions stating that sole legal custody is inimical for the children. Studies performed here and abroad are equally divided on their findings of whether joint legal and physical custody is in the children's best interests. Counsel would be best served culling the custodial information from their initial consultation and plugging in the facts gleaned from further interviews, discovery, interrogatories and possibly depositions.

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Endnotes

1. See 1 W. Blackstone, Commentaries, 452-33
2. *Gates v. Renfroe*, 7 La. Ann. 569 (1852) (minors were subjected exclusively to the authority of their father).
3. *Hines v. Hines*, 185 N.W. 91 (Iowa 1921); Mercein v. People, 25 Wend. 64, 106 (NY 1840) (where mother was awarded custody of the child because "the law of nature has given her an attachment for her infant no other relative will be likely to possess in an equal degree"). *See also Fritz v. Fritz*, 148 N.W.2d 392 (Iowa 1967), which held that the tender years presumption was found to be based on the premise that the "fundamental attributes of gentleness, moral stability, honesty and sense of value in education, ambition and achievement are stronger and more pronounced in mothers than fathers."
4. See *Claffey v. Claffey*, 135 Conn. 374, 377 (1949).
5. Id. at 377.
6. 77 Misc.2d 178 (Fam. Ct. 1973)
7. U.S. Const. amend. XIV, § 2.
8. See *Wilke v. Culp*, 196 N.J. Super 487, 496 (App. Div. 1984).
9. N.J.S.A. 9:2-4.
10. *Grover v. Terlaje*, 379 N.J. Super. 400 (App. Div. 2005).
11. *Brzozowski v Brzozowski*, 265 N.J. Super. 141 (Ch. Div. 1993).
12. 140 N.J. 583 (1995).
13. *Rooney v. Wall*, 2014 N.J. Super. Unpub. LEXIS 3067 (Ch. Div. Sep. 19, 2014).
14. *Madison v. Davis*, 438 N.J. Super 20, 45-46 (Ch. Div. 2014).
15. 86 N.J. 480, 595-596 (1981).
16. Id. at 597, 598. Without much commentary, Lena Heinl was awarded sole legal custody of the children in *Heinl v. Heinl*, 287 N.J. Super 337 (App. Div. 1996); *Crespo v. Crespo*, 395 N.J. Super 190 (App. Div. 2007); *Mastropole v. Mastropole*, 181 N.J. Super. 130 (App. Div. 1981) (court reversed finding of joint legal custody as not in the child's best interests and modification not supported or warranted).
17. N.C. Gen. Stat. Sect. 50-13.2(b) enacted in 1975.
18. Rethinking Joint Custody, 45 Ohio State L.J. 455, 456 (1984).
19. N.J.S.A 9:2-4.


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Parenting Coordination in New Jersey: It's Time to Establish Uniform Standards and Qualifications

by Holly M. Friedland, Linda A. Schofel, and Amy Wechsler

Parenting Coordination is a child-focused dispute resolution process that addresses ongoing conflict between parents related to implementation of parenting plans. The goals of parenting coordination include improving the parties' ability to address disagreements on their own, resolving parenting time disputes, and reducing litigation. Judges and litigants in New Jersey have opted to try parenting coordination in numerous cases over the past 20 or more years; and although it has been widely used, it has also been widely criticized, in large measure, because New Jersey has not adopted a uniform definition or standards for the process or established professional qualifications for who can serve as a parenting coordinator. As a result, orders are entered that are vague, do not clearly set forth the scope and limitations of the role, and appoint unqualified individuals to serve as parenting coordinators, thereby creating unrealistic expectations that lead to confusion and disillusionment in the process. Several other states have adopted formal standards for parenting coordination and where that is the case, the reported research demonstrates that the process is effective in reducing litigation among parents who have ongoing conflict.

New Jersey has grappled with this issue for many years but has not yet found a means to address it. Prior attempts to adopt a rule and operate a pilot program were dropped without providing a road map for what to do next. The Supreme Court Family Practice Committee raised a number of concerns about parenting coordination, all of which can be addressed by establishing clear and uniform guidelines for the practice. Other states have accomplished this by adopting court rules or statutes that provide standardized definitions, clarify the scope of authority, and set forth professional standards and qualifications for those who serve as parenting coordinators.

There have also been inquiries as to whether a parenting coordinator should be available in cases involving domestic violence. Although the Administrative Office of the Courts has indicated that judges in New Jersey may not appoint parenting coordinators when temporary or final restraining orders are in effect,[1] there are questions nonetheless as to whether, in what circumstances, and with what protections, parenting coordination could be available in cases involving temporary or final restraining orders.

The New Jersey Supreme Court's Analysis of Parenting Coordination

After rejecting proposals for a Court rule addressing parenting coordination, in April 2007, the New Jersey Supreme Court established a pilot program in four vicinages to "test the parenting coordinator concept."[2][3] The guidelines and procedures for the pilot program provided a definition of parenting coordination.

> A parenting coordinator is a qualified neutral person appointed by the court, or agreed to by the parties, to facilitate the resolution of day to day parenting issues that frequently arise within the context of family life when parents are separated. The court may appoint a Parenting Coordinator at any time during a case involving minor children after a parenting plan been established when the parties cannot resolve these issues on their own. The Parenting Coordinator's goal is to aid parties in monitoring the existing parenting plan, reducing misunderstandings, clarifying priorities, exploring possibilities for compromise and developing methods of communication that promote collaboration in parenting. The Parenting Coordinator's role is to facilitate decision making between the parties or make such recommendations, as may be appropriate, when the parties are unable to do so. One primary goal of the Parenting Coordinator is to empower parents to develop and utilize effective parenting skills so that they can resume the parenting and decision making role without the need for outside intervention. The Parenting Coordinator should provide

guidance and direction to the parties with the primary focus on the best interests of the child by reducing conflict and fostering sound decisions that aid positive child development."

In November 2012, the AOC officially terminated the pilot program and announced that "family judges may continue to appoint parenting coordinators in specific cases."[4] The AOC Notice did not set forth any specific qualifications for who could be appointed as parenting coordinators, stating only that they should "be qualified to serve either by consent of the parties or appointment by the court in the same manner as other experts."[5] Included with the Notice were two model orders which were suggested for guidance and would not be mandatory. No standards or protocols were issued, no rules governing the process were issued, and as a result, like the process before the pilot program, parenting coordination continued to lack clear definition, guidelines, or qualifications as to who could be appointed.

Case law added to confusion on the question of who judges could appoint. Under the pilot program, only licensed mental health professionals could be court-appointed (as opposed to by consent of the parties). At around the time the pilot program ended, the Appellate Division held that attorneys could not be appointed to serve as parenting coordinators, specifically because the court was constrained at the time to follow the rules that were in place in the pilot program counties.[6] Many practitioners read this decision as prohibiting the appointment of attorneys as parenting coordinators unless the parties consented. That, however, is too broad a reading of the case. After the pilot program ended, there were no longer any rules or criteria limiting who judges could appoint. Thus, judges are free to appoint anyone—mental health professionals, attorneys, or lay persons—to serve as parenting coordinators, regardless of experience, knowledge, training or ability.

In another effort to address the role of the parenting coordinator, the New Jersey Supreme Court Family Law Practice Committee, in its Final Report for 2009-2011, raised a number of concerns about the unregulated nature of the process.[7] The practice committee cited several specific issues:

- There are no qualifications for who may serve;
- There are no formal limits to the issues parenting coordinators could consider;
- Parenting coordinators can "co-opt" their scope of authority through engagement letters that exceed what the court order of appointment provides;
- Engagement letters could require parents to accept services of third parties recommended by the parenting coordinator;
- The process is too costly for many couples;
- There are no limits on the duration of a parenting coordinator appointment;
- There are no limits on a parenting coordinator's ability to require parties to sign authorizations to speak with third parties;
- Clients have no opportunity to meet and select the person who will serve as their parenting coordinator.

Despite these concerns, neither the practice committee nor the AOC suggested that parenting coordination should be eliminated as a court-ordered option. To the contrary, as noted when the pilot program concluded, "family judges may continue to appoint parenting coordinators in specific cases."[8] What the practice committee's concerns and criticisms make clear is that judges, attorneys and parents need clear uniform standards for who can serve and for the process itself. The question at hand, then, is: How do we address these concerns and bring clarity, professionalism and definition to parenting coordination in New Jersey?

Parenting Coordination Is Here to Stay

We do not have to reinvent the wheel to answer this question. New Jersey is not the first state to grapple with these issues. Forty-six states have some form of parenting coordination practiced in their jurisdictions. Of those, 17 states have enacted statutes dealing specifically with parenting coordination, and 20 have adopted rules to govern parenting coordination. Most of these states fashioned their statutes and rules, at least in substantial part, on detailed and comprehensive guidelines published in 2012 by the Association of Family and Conciliation Courts.[9]

When done correctly, parenting coordination does work. Over the years, there have been numerous studies performed in various states, all of which showed a dramatic reduction in motion practice and court appearances once parenting coordination was implemented.

The earliest study of the effect of parenting coordination on litigation took place in Santa Clara County in California. Special masters were appointed to conduct a multi-year study of 166 cases participating in a parenting coordination program. The special masters found

that there were 993 appearances for these 166 cases in the one year prior to the appointment and only 37 court appearances in the one year after the appointment.[10]

In 2007, the Family Court Services Unit of the 11th Judicial Circuit of Florida, in coordination with the University of South Florida, conducted a two-year study of 49 families who had participated in parenting coordination. In the year prior to commencing parenting coordination, those 49 families filed 491 motions. Within a year of commencing parenting coordination, the number of motions dropped to 237, a 48% reduction in total. Of the couples participating in the study, more than 60% were able to reduce their motion practice by more than 70% and approximately a third of those couples were able to eliminate motion practice entirely.[11]

In 2011, the Superior Court of Pima County, Arizona, also conducted a study in connection with its pilot program for parenting coordination. Twenty-one families elected to participate in the pilot program. For those families, the average number of hearings per year, per case dropped 83%; the average number of documents filed per year dropped 56%; the average number of motions per year dropped 64.2%; and the number of outside agencies involved in the cases declined 70%.[12]

In 2016, the Institute for Court Management in Cuyahoga County, Ohio, studied 34 cases the court identified as being "high conflict." The study compared the court activity in the two years prior to and the two years following commencement of parenting coordination. Case records revealed that, for these families, motion practice decreased by 56%, court events decreased by 58%, and trials decreased by 32%. Perhaps the most significant change, however, was that referrals for custody evaluations decreased by 90%.[13]

The legal community is not the only profession studying the effectiveness of parenting coordination. In 2010, the American Psychological Association Parenting Coordination Project examined parenting coordination in the District of Columbia's Superior Court. The researchers collected data from 29 families as well as numerous representatives of the court, guardians *ad litem*, and experts. The study showed that the average length of involvement in the parenting coordination program was 18 months, less than half the average length of time spent before the court, and also showed that after entry into the program, the number of emergency hearings and court applications decreased by 65%, contempt filings decreased to 5% of cases compared to 37% before entering the program, and actual findings of contempt were eliminated completely.[14]

The empirical data, albeit limited, all leads to the same unavoidable conclusion. Parenting coordination utilizing formalized standards and guidelines reduces motion practice, reduces the involvement of outside agencies and personnel, such as DCPP and evaluators, and decreases the use of judicial resources. In each study, regardless of when it was conducted, the geographic location, or the survey size, the outcome was the same, namely motion practice was reduced by at least 48% and time spent before the court was significantly decreased. These reductions in motion practice and litigation time should, by their very nature, translate into cost savings on behalf of our clients. The next logical question is what steps should be taken to ensure the parenting coordination is performed by qualified individuals.

Professional Standards.

In 2019, after a two-year study and collaboration by a group of leading international legal and mental health forensic experts, AFCC issued updated detailed and comprehensive Guidelines for Parenting Coordination. The purpose of the guidelines was to address:

1. practice for PCs;
2. ethical obligations and conduct of PCs;
3. PC qualifications, including relevant education, training and experience;
4. assistance to courts, professional organizations, educational institutions, and professionals that are developing and implementing parenting coordination programs.[15]

Establishing a Roster of Qualified Professionals

The AFCC Guidelines provide that parenting coordinators "shall be qualified by education and training to undertake parenting coordination."[16] The AOC, in the notice terminating the parenting coordination pilot program, indicated that those selected to serve as parenting coordinators, should be qualified in the same manner as other experts[17]. The question, then, is how can New Jersey establish a way to ensure that those appointed as parenting coordinators are qualified to serve?

Parenting coordination requires specialized education, training and experience. One way to help ensure that parenting coordinators are qualified is to establish a statewide roster. There is precedence for this in the statewide roster of mediators for the economic aspects of

family law cases. Mediation itself is not regulated in New Jersey; however, to be on the statewide roster, professionals must meet certain criteria: they must have successfully completed a 40-hour basic mediation course and must be licensed in their profession. Attorneys must be admitted to the bar for at least seven years, and their practices must be substantially dedicated to matrimonial law. Non-attorneys must hold advanced degrees in their field (mental health, business, finance, accounting or CPA), and have at least seven years of experience in their field.

Other states have elected to establish rosters of qualified parenting coordinators.[18] A similar system could be established for parenting coordinators in New Jersey by Court rules. As with the mediation roster, a credentials committee comprised of representatives from the Supreme Court Committee on Complementary Dispute Resolution, or from the Supreme Court Committee on Family Practice, could be established to review and approve parenting coordinator applications. Those applications could be posted on the New Jersey Judiciary's website. Persons who meet established professional and training requirements would be added to a statewide roster of approved parenting coordinators. As with the mediation roster, the parenting coordination roster would be maintained by the AOC and would be posted on the Judiciary's website. Thereafter, to continue to be included on the roster, parenting coordinators would annually or bi-annually submit proof that they continue to be licensed and in good standing in their respective professions. The applicable court rule would provide that, absent good cause, judges could not appoint anyone to serve as a parenting coordinator who is not on the roster.

Viability in Cases Involving Intimate Partner Violence

Parenting coordination is not a panacea and is not appropriate in every case involving parental conflict. Many couples who experience intimate partner violence (IPV) are ill-suited to the process, while others can derive enormous benefits working with neutral third parties to resolve ongoing parenting disputes. This benefit has been recognized in the context of mediation, by requiring certain safeguards in how sessions are structured. Similar safeguards can be applied to parenting coordination, to give these parents opportunities to resolve their differences without court intervention.

Parenting coordination is designed to help couples in conflict, often described as "high conflict" couples. Extreme high conflict cases may involve allegations or proven histories of domestic violence. At present, New Jersey judges may not appoint or consent to the appointment of a parenting coordinator in any case with an active temporary or final restraining order issued pursuant to the Prevention of Domestic Violence Act. However, it can be argued that this prohibition unfairly denies certain parents the opportunity to have a third-party neutral help resolve parenting disputes that do not require judicial intervention.

Clearly, some cases, regardless of the existence of a temporary or final restraining order, are not appropriate for parenting coordination because of a history of violence in the family or an extreme power imbalance between the parties. The American Psychological Parenting Coordination Guidelines state that "parents who have a history of prior or current domestic violence, also referred to as intimate partner violence, may present significant safety risks or severe power imbalances, and may not be appropriate for parenting coordination because the concern about safety may outweigh other aspects of the parenting coordination process."[19] In some cases involving domestic violence, modifications to the process may be made to assure safe and efficient services. For instance, one such mechanism, in appropriate cases, is to enter a consent order that enumerates specific procedures that provide for protection and safety of the parties and the process.

Research in the area of domestic violence has defined various patterns of abusive behavior. It is quite possible that an isolated incident of violence based upon a situation, such as receiving an unexpected complaint for divorce, rather than a pattern of abusive behavior, may, nonetheless, result with the issuance of a restraining order. On the other hand, in another case, a restraining order may not have been entered because a specific incident may not have met the state's statutory definition of domestic violence but is intended to hold power, coercion, or control over the other parent. In the former case, a parenting coordinator may not be appointed with the current directive of the Administration of the Courts but in the latter case, a parenting coordinator may be appointed or selected, only for the parenting coordinator to later learn that the matter may not be appropriate for the parenting coordination process.

There are other instances that involve situational couple violence that may be infrequent and minor, and if stopped, may be amenable to parenting coordination,

with certain modifications, such as avoidance of face-to-face meetings. Or perhaps, a parent engaged in one violent act, acknowledged it, and sought help for this behavior. It must be recognized that regardless of the existence or non-existence of a restraining order, some parents, who engage in a history of violence, are not suitable for parenting coordination services. If parenting coordinators will ultimately be permitted to be appointed in certain cases with restraining orders, it is important to distinguish a case with an isolated violent act that resulted in a restraining order from one with a history of one parent exercising power, control and intimidation over the other parent. A parenting coordinator must be trained to differentiate patterns of abusive behavior from those that may be transitory or situational. However, in the event a parenting coordinator is assigned to a case in which there is a restraining order, the parenting coordinator must respect the finding of the court and be mindful of the restrictions in the restraining order. One of the overriding concepts in parenting coordination is to make sure all parties are safe and that there is no level of risk to anyone, including the parenting coordinator.

There are currently cases in which a determination of domestic violence has been found but the restraining order specifically allows the parties to communicate only about the children. This type of case would be suitable for parenting coordination. Special accommodations can be made, such as by having individual interviews and never meeting the parents together; if joint meetings are to be held, having the parents arrive and depart at separate times, escort a parent to and from their car, or hold sessions by Skype, Facetime, Zoom or by telephone.

If New Jersey is to permit parenting coordinators to work with certain families in which a restraining order has been entered, then parenting coordinators must have specialized training so that their interventions in cases of family violence, abuse and/or coercion are based on a thorough knowledge of the complex issues inherent in such cases. Jurisdictions should have a clearly delineated process to develop specialized protocols, screening, procedures, and training in intimate partner violence.

Conclusion

High conflict parents need another option to address their ongoing issues other than the traditional litigation process.

> The [litigation] process, which intrinsically endorses combat, encourages emotionally driven parties to be oppositional and is not conducive to resolving disputes practically and expeditiously…Cases can languish in the system, worsening the situation.[20]

Families have been participating in parenting coordination in New Jersey for decades and studies have shown that participating in the program dramatically reduces the likelihood that a family will resort to court intervention and reduces the time needed to resolve their assorted issues. The issue is how to ensure that the program is implemented effectively and in a way that allows access to the families that need it. For that, we should look to the lessons learned by the other states which have created their own statutes and regulations and create uniform standards and qualifications.

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Endnotes

1. Parenting Coordinators – Conclusion of the Pilot Program; Continuing Authority to Appoint in Specific Cases.
2. "Parenting Coordination Pilot Program, Program Guidelines and Related Material" Administrative Office of the Courts Notice to the Bar, April 2, 2007.
3. The Supreme Court Family Practice Committee had proposed a court rule regarding parenting coordination, which at least in part formed the basis for the pilot program guidelines.
4. "Parenting Coordinators – Conclusion of the Pilot Program; Continuing Authority to Appoint in Specific Cases," Administrative Office of the Courts Notice to the Bar, November 13, 2012.
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6. *Milne v. Goldenberg*, 428 N.J. Super. 184, 201 (App. Div. 2012).
7. "Concerns, Conclusions and Recommendations" of the New Jersey Supreme Court Family Law Practice Committee ("FLPC") as set forth in its Final Report for 2009-2011.
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Striking a Balance for Supervised Visitation in New Jersey

by Christopher Rade Musulin

Most family law practitioners are familiar with supervised visitation. The concept appears to be a function of common sense, the authority grounded in the broad equitable powers of the court and its parens patriae authority to protect children. In fact, supervised visitation in the state of New Jersey is governed by a little known, yet highly detailed, statutory enactment from 1984 governing administration of the program, separate and distinct from Title 9. There is an elaborate administrative labyrinth resulting from this statute administered by the Administrative Office of the Courts involving a mix of public as well as outsourced private entity programs. In addition, there is an enormous and diverse body of social science both supporting and criticizing supervised visitation, much of it dating back decades. A review of the New Jersey program not only provides an enhanced understanding of the strengths and weaknesses of the program but also permits attorneys to more effectively advocate for the use or exclusion of supervised parenting time in their cases.

Role of the Court

Historically, the judicial system has been required to address significant human conflicts, none of which is more important than proceedings involving the parent-child relationship. As adults' interpersonal relationships fail, leading to acrimony, separation and potential court proceedings, issues emerge regarding custody and the extent and frequency of contact with both parents. Allegations and concerns, real or imagined, commonly develop, including: lack of basic parenting skills; domestic violence; Division of Child Protection and Permanency/FN dockets; substance use or abuse; high adult conflict; mental illness; threats of abduction; long periods of no contact/reunification; or new relationships with one or both of the parents. When allegations suggesting a direct risk or danger to children emerge, courts have historically struggled with fashioning a remedy as it requires balancing two equally important fundamental rights – protecting children from harm versus the constitutional right to be a parent.

Title 9 Considerations

Any discussion of the role of the court in matters involving parents and children must begin with Title 9. The statute begins with the following declaration:

> The Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.[1]

The right to parent a child is a fundamental right guaranteed by the U.S. Constitution. In *Troxel v. Granville*, the U.S. Supreme Court established, unequivocally: "… it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[2] Faced with a similar question, the New Jersey Supreme Court followed suit in its decision of *Moriarty v. Bradt*:

> The right to rear one's children is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[3]

Balancing the Constitutional right to be a parent, there is an equally critical imperative of the judicial function: protecting children. In fact, Title 9 includes specific factors that directly address the protection of children, such as: the history of domestic violence, if any; the safety of the child and the safety of either parent from

physical abuse by the other parent; the stability of the home environment offered; and the fitness of the parents.

Protection of Domestic Violence Act

Additional statutory authority articulating concerns with the protection of children is contained in the New Jersey Prevention of Domestic Violence Act. This includes the following:

> b. …At the hearing the judge of the Family Part of the Chancery Division of the Superior Court may issue an order granting any or all of the following relief:
> . . .
> (3) An order providing for parenting time. The order shall protect the safety and well-being of the plaintiff and minor children and shall specify the place and frequency of parenting time. Parenting time arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the plaintiff and defendant. Orders for parenting time may include a designation of a place of parenting time away from the plaintiff, the participation of a third party, or supervised parenting time.
> (a) The court shall consider a request by a custodial parent who has been subjected to domestic violence by a person with parenting time rights to a child in the parent's custody for an investigation or evaluation by the appropriate agency to assess the risk of harm to the child prior to the entry of a parenting time order. Any denial of such a request must be on the record and shall only be made if the judge finds the request to be arbitrary or capricious.
> (b) The court shall consider suspension of the parenting time order and hold an emergency hearing upon an application made by the plaintiff certifying under oath that the defendant's access to the child pursuant to the parenting time order has threatened the safety and well-being of the child.[4]

These two fundamental statements of public policy – the Constitutional right to be a parent/the Title 9 imperative to ensure regular and frequent contact, versus protecting children from a risk of harm – created an intellectual conundrum eventually addressed by the enactment of the New Jersey Supervised Visitation statute.

New Jersey Supervised Visitation Statute

In 1984, the New Jersey State Legislature, in an attempt to balance the two competing concerns, adopted N.J.S.A. 2A:12-7 et seq., referred to as the "Supervised Visitation Program Act":

> The Legislature finds and declares that:
> a. In the area of child visitation a court often orders supervised visitation where there has been a history of child abuse, medical disabilities, psychiatric problems or other situations where the safety and welfare of the child may be jeopardized.
> b. Often court ordered supervised visitation never occurs due to the inability to locate volunteers willing to be present during the visitation and a facility in which the visitation may take place.
> c. The inability of a parent or guardian to spend time with a child poses serious psychological problems to both the parent and the child and prevents the growth of a normal, healthy relationship.
> d. The purpose of this act is to facilitate supervised visitation by making the facilities and members of local community organizations available to assist in court ordered supervised visitation.
> As used in this act:
> a. "Approved community organization" means a community organization which applies to the director for participation in the program and is approved for participation;
> b. "Director" means the Director of the Administrative Office of the Courts;
> c. "Program" means the Supervised Visitation Program created pursuant to this act.
> There is created a program to be known as the "Supervised Visitation Program" which shall be administered by the director.
> The purpose of the program shall be to promote court ordered supervised visitation by having approved community organizations throughout the State supply facilities and personnel to enable supervised visitation to take place.

The director shall:

a. Publicize the existence of the program;

b. Adopt rules for the program including among other things—

(1) Standards for approved community organizations,

(2) Standards for accounting and auditing, and

(3) The number of approved community organizations needed throughout each county;

c. Prepare uniform applications for community organizations to apply for participation in the program, which application shall request, among other things—

(1) The name, address, county and function of the community organization,

(2) The size and location of the facility where supervised visitation would take place,

(3) The average number of persons available in the facility at any given time who would be present during the supervised visitation,

(4) The community organization's fee for use of its personnel and facilities for the program,

(5) The number of persons the facility could accommodate at one time, and

(6) The general contents of the facility;

d. Select and approve those community organizations which comply with the director's standards and which would accept the lowest fee for participation in the program;

e. Prepare a printed list by county of approved community organizations available for participation in the program;

f. Distribute the list to each court within the State having jurisdiction over child visitation matters;

g. Prepare and submit budget estimates of State appropriations necessary for the operation of the program and make recommendations with respect thereto;

h. Report annually to the Legislature and the Chief Justice of the Supreme Court on the activities of the program and make recommendations with respect thereto; and

i. Do all other things necessary and proper to implement the purposes of this act.

Any court having jurisdiction over a child visitation matter, which orders supervised child visitation, may direct in the order that the visitation take place at an approved community organization.[5]

Administration of the Program

The Administrative Office of the Courts is responsible for the administration of the statute as the legislation specifically defines the duties and responsibilities of the program administrator. The statute creates a statewide coordinator of the SVP who is an employee of the Administrative Office of the Courts. That person ensures program compliance with the intent and purpose of the statute. The statewide coordinator is also responsible to interphase with the county court systems to ensure compliance with the statute.

Each county court system has a SVP county coordinator, similar to MESP coordinators. The county coordinator ensures that the program is properly managed in a given vicinage. Responsibilities include screening and review of all cases referred; coordinating and scheduling the actual supervision; and maintaining statistical information that is periodically delivered to the state coordinator. The county coordinators are also responsible for training and managing all of the supervisors, both public employees and privately outsourced individuals. A list of current county coordinators and program locations as prepared by the Administrative Office of the Court is contained in the appendix to the present article.

Community Involvement

The SVP model utilized by the State of New Jersey blends together court staff as well as volunteers. Members of the public can seek training and become part of the court program. The use of volunteers is critical because they can offer supervision on evenings, weekends and holidays when court staff is not available. Each county has a different protocol. The volunteers must complete a certified training course that is designed by the Administrative Office of the Courts and is generally taught by the county coordinators.

In addition to court staff and volunteers, there are also community sites. These facilities can either donate their facility or can be contracted for payment of negotiated fees. There is a process for approval of the sites through the Administrative Office of the Courts. The criteria require that the site be accessible, functional, comfortable and safe. The current supervised visitation

site list for each county is contained in the appendix to the present article.

Function of the Program

Typically, the program is initiated by the entry of an order with a referral to the SVP. The Order is then provided to the county coordinator. A prescreening interview takes place in dissolution, non-dissolution and domestic violence matters in the event the Court is concerned about the physical or emotional welfare of a child. Any domestic violence cases pending a Risk Assessment are always referred to the SVP. Where there is a real concern with risk, the prescreening interview is conducted by the county coordinator. The purpose of the interview is to assess the case's suitability for the program and to work out a schedule for the supervised visitations.

The court order is supposed to be highly detailed, i.e., the number of visits during a fixed time period, the length of the visits, the duration of the supervised visitation with a period for review, the authority of the supervisor, the names of anyone permitted to attend, and other pertinent details.

The supervisor can be the county coordinator, court staff, volunteer, or a private agency under contract with the county. Their role is to serve as a neutral observer to carefully monitor the visitation and, at their discretion, intervene on behalf of the child. This implicates a number of issues, such as safety, adequate security, proper training of the supervisor and, in this modern world, the use of electronics such as cell phones, iPads or computers during visitations. The supervisor has the authority, which should be memorialized in the court order, to terminate the visitation if any rules or protocols are violated, or if the supervisor determines that the visitation is simply too stressful to the child or presents some type of a risk to anyone involved.

Some of the supervised visitation programs have a session fee that varies depending upon the county, the private agency, the length of the session, etc. Additionally, the Federal Government periodically provides funding through different block grants to facilitate supervised visitation. For example, in 2012 the New Jersey judiciary received $210,145 through a program called the Federal Access and Visitation Grant. More recent funding statistics have not been made public.

Under the terms of the SVP, the supervisor is either directed to, or of their volition may choose to, prepare what is referred to as a "periodic report." There is significant literature as to the appropriateness and/or probative value of such report in contested litigation. From a litigator's perspective, the supervisor is a fact witness. Some literature criticizes the elevated probative value given to these reports simply because the supervisor is often a credentialed individual, giving the report the imprimatur of something weightier than it may deserve.

Models of Supervised Visitation

There are different models of supervised visitation. The most common is the court-sponsored model offered at the courthouse or some other state, county or municipal facility. Another model is to outsource the program, which is initially accomplished through a competitive bidding process. Some of the private entities are religiously based organizations, and others are advocacy based organizations. Literature on this topic expresses concern about the bias or agenda of the private entities and the impact it may have on the intent and purpose of the program.

A third model involves utilization of a trusted third party, such as a friend or family member, who serves as a supervisor. It is commonplace for discussions to occur between the court, counsel or the parties at the courthouse resulting in the appointment of an agreed-upon third party. The most common criticism or concern with this type of arrangement is the accountability of the supervisor – the inference of potential bias and the question of whether the friend or family member can communicate an objective report to the court. The limitation of using a friend or family member is that they rarely have adequate training to appropriately serve as a supervisor. From the perspective of the supervisor, they may already experience trepidation about involvement in this dynamic, only to find out they may be called upon to write a report or testify in court concerning the supervised parenting time.

A fourth model involves the use of a mental health professional, with or without therapeutic overtones. Litigants can agree to use a psychologist, psychiatrist, or Master of Social Work to serve as a supervisor. In high-risk situations, this is the safest way to effectuate supervised visitation. For example, where DCPP has become involved with substantiated abuse of a child, a mental health professional is best equipped to monitor interactions between parent and child.

Another option involves group settings in which several parents and children are scheduled together, allaying the intensity of one-on-one interaction. There is

some perceived benefit among mental health professionals with this model, similar to that of group therapy, as it gives a greater sense of safety in numbers.

Virtual supervised visitation is also available, which can be implemented as a function of distance or to create absolute safety, especially where there has been direct abuse of a child. As a model, virtual contact by FaceTime or video call is considered as a potential initial step toward personal supervised contact.

With all models of supervised visitation, there are critical safety concerns for both the children and the adults, and there must be safe exchange points or meeting places. Each county coordinator is expected to coordinate with the sheriff's department to ensure officer availability, tailored to the needs of the particular court facility. If the SVP is outsourced to private entities, consideration must be given to security concerns, particularly where there is a history of domestic violence, abuse or stalking.

Case Law Authority

There are approximately 250 New Jersey cases addressing supervised visitation. The vast majority of cases are unreported and involve DCPP proceedings.[6] In fact, only a dozen of the 250 cases involve proceedings under FM, FD or FV dockets.

None of the cases contain a comprehensive discussion of the concept of supervised visitation, the history of the statute or any reference to social science. However, they detail fact patterns justifying the imposition of supervised visitation that are useful to review.

In *Bricker v. Kobrin*,[7] a highly litigious FD matter, the trial court ordered supervised visitation as a result of defendant's "difficulty in complying with Court Orders, including those relative to the child." Defendant's parenting time with the parties' 3-year-old child was supervised by Catholic Charities with the plaintiff paying the $50 per hour supervision fee. In subsequent proceedings, the plaintiff was granted sole custody while the defendant received two hours per week unsupervised parenting time, with an additional four hours supervised, because her conduct had become "increasingly contumacious and unpredictable over the years of litigation."

Following a trial, the court found:

> [D]efendant was 'not fit to have legal or physical custody [of the child]' and was not a credible witness. In support of that conclusion, among other things, the court referenced defendant's alteration of the child's medical records using hand-written notations 'intended to fool the recipient into believing they were written by a medical professional.' At one point during the trial, defendant staged a demonstration during which she carried a poster bearing the child's picture while she stood outside the courthouse. The poster asked if anyone was willing to provide her with pro bono legal services to protect her 'disabled silent child.'

The trial court ordered the defendant to fully reimburse the plaintiff the cost of all supervised visitation through Catholic Charities.

On appeal, the defendant alleged that the trial court abused its discretion by ordering her to reimburse the cost of the supervised visitation. In affirming the trial court decision, the Appellate Division approved the trial court's use of Rule 5:3-5(c) and the Williams[8] factors in assessing responsibility for the cost of supervised visitation. The Appellate Division found persuasive the trial court findings of fact pertaining to the defendant's repeated bad faith, unreasonable positions, and behaviors that posed a potential for harm to the child:

> In this case, to require defendant to pay for the costs of the supervision of her parenting time seems eminently reasonable; not even a sanction. There is nothing in the record which should relieve defendant of that obligation. It was defendant's conduct which led to the supervision. In any event, plaintiff and defendant do not have a relationship which legally obligates him to subsidize the cost of past supervised parenting time. The court's decision appears to be an unassailable exercise of her discretion and we see no reason to disturb it.

In *Crawford v. Minch*,[9] approximately six months after the entry of a Final Judgment of Divorce and execution of a Marital Settlement Agreement which contained provisions for reasonable and liberal parenting, the defendant, who was the parent of alternate residence, moved for a fixed parenting time schedule. The plaintiff opposed, alleging substance abuse. The court ordered supervised visitation in the Union County outsourced supervised visitation program, called Cooperative Counseling Servic-

es, directing the parties to split the cost. The defendant was ordered to undergo a forensic substance use evaluation, account for weapons in his possession and submit to a home inspection. The home inspection was satisfactory. The defendant submitted a certification to the court indicating that he sold his guns. The substance use evaluation revealed use of anabolic steroids and alcohol.

Following two unsuccessful mediation sessions, the parties returned to court to review the report of the visitation supervisor. The supervisor recommended continued supervision. During a subsequent Case Management Conference, the court ordered the defendant to pay for another forensic evaluation. At yet another Case Management Conference, the defendant informed the court that he could not pay for any forensic evaluations. The court then ordered him to remain in supervised visitation at his own expense.

Shortly thereafter, defendant withdrew his request for unsupervised visitation. The court entered an order for defendant to undergo yet another forensic substance use evaluation and to pay attorney's fees to the plaintiff of $26,715.62, incurred from the inception of the matter. The defendant appealed that order, arguing it was an abuse of discretion. The Appellate Division affirmed the trial court, ruling that the trial court was correct in applying Rule 5:3-5(c) to the attorney fee award. When addressing the third factor of the Court Rule, the good faith and reasonableness of the parties, the court specifically addressed the supervised visitation issue:

> Defendant has disregarded [c]ourt [o]rders set specifically to allow him to exercise parenting time with his daughter, which was his original request in June 2017. Defendant did not comply with [c]ourt [o]rders to certify he no longer had weapons and that [the] same were secured, etc. The [c]ourt has absolutely no way to determine whether the weapons were actually sold based on the information [d]efendant provided, as he provided no receipts for the sale of the weapons. Although [d]efendant has complied with some provisions of [c]ourt [o]rders such as undergoing substance abuse evaluations, urine screens, a [Division of Child Protection and Permanency] investigation, and psychological evaluation, [d]efendant unilaterally stopped going to the [c]ourt [o]rdered supervised parenting time and did not schedule the psychiatric and best interest evaluation set forth in the [c]ourt's January 10, 2018 [o]rder. It was only after nearly seven months that [d]efendant decided to amend his motion and seek only supervised parenting time, rather than joint custody and a visitation schedule with overnights. Defendant is also not up to date on his child support. All of these actions caused [p]laintiff extensive and unnecessary counsel fees. Thus, the [c]ourt concludes [d]efendant has not acted entirely reasonable nor in good faith.

In *Entress v. Entress*,[10] the plaintiff sought reversal of an order of the trial court imposing restrictions on her contact with two minor children. The Appellate Division discerned no merit to her contentions and affirmed the trial court decision.

The parties entered into an agreement concerning custody and parenting time following the testimony of a court-appointed forensic psychologist. The agreement was based on the expert's findings and recommendations. The defendant/father became the parent of primary residence and plaintiff/mother had supervised parenting time upon the completion of certain conditions, which would eventually transition to unsupervised if she was compliant.

The plaintiff subsequently completed a psychological evaluation that recommended unsupervised parenting time. A family therapist who had served as a therapeutic parenting time supervisor cautiously supported the recommendation. Following motion practice, the plaintiff was granted four hours of unsupervised parenting time bi-weekly on the condition that the children continue meeting with the court-appointed therapist and she continue her personal counseling.

Sometime thereafter, there was an acrimonious explosion of litigation—municipal court, DCPP involvement and post-judgment FM motions. Under the FM docket, the court suspended the unsupervised parenting time and ordered supervised parenting time as plaintiff failed to participate in her personal psychotherapy. Pursuant to additional motion practice, plaintiff's contact with the children was further limited due to her ongoing non-compliance. The plaintiff appealed these orders, alleging that the children wanted to see her and that the trial court abused its discretion.

In rejecting her appeal, the Appellate Division noted:

> The parties relied on Dr. Gruen's testimony

when fashioning their September 29, 2005 consent order. Dr. Gruen expressed plaintiff exhibited a 'pattern of vindictive and alienating behavior of significant proportions'; '[h]er insincerity, jealousy and narcissism…caused her to demonstrate raw aggression and vengeance' toward defendant; and she had 'manipulated the children and made them feel guilty about not being with her' in the presence of the psychologist, while ignoring the children's attempts to express their positive feelings about residing with their father.

Conclusions from Case Law Authority

Two primary principles emerge from these decisions. The first principle is the application of Rule 5:3-5(c) and consideration of good and bad faith when assessing responsibility for supervision fees. The second principle is a recognition that the authority of the court to order supervised visitation is not only grounded in statute, but also under its parens patriae authority pursuant to Title 9.

Articles

There are hundreds of articles addressing every imaginable aspect of supervised visitation. This includes each step from initial determination and screening, to appropriate training for supervisors, to the adequacy of security, to the lack of funding and beyond. Some of the more interesting articles are discussed below. An expansive selected bibliography is included in the appendix to the present article.

A common basis for referral to the SVP is an allegation of "parental alienation" premised on an assumption that supervised visitation is either a starting point or, more naively, a panacea. Janet Johnson, Ph.D., has written a popular and well-conceived article specifically addressing allegations of "parental alienation" and the use of the SVP.[11] The American Psychological Association does not recognize "parental alienation syndrome," despite the popular use of the phrase in connection with family law matters. Johnson argues that a more apropos expression is "alienated child syndrome." She explains a child who persistently expresses unreasonable negative feelings about a parent, significantly disproportional to the child's actual experience with the parent, is properly categorized as an alienated child. In such instances, supervised visitation is not effective. Rather, there should be therapeutic intervention to address the behavior that caused the estrangement.

The absence of adequate funding for the SVP is the subject of dozens of scholarly articles for a number of reasons, not the least of which pertains to relationship between insufficient funds and insufficient security. An article by Wendy Crook, Ph.D., memorializes the results of a study involving 47 supervised visitation programs in the state of Florida in 2007.[12] The core finding of the study was that programs which operate on minimal budgets result in limited or restricted hours and poor or non-existent security representing a failure of the SVP.

One study examined the use of indefinite supervised visitation, which can result through mere inadvertence or the entry of an order without a specific review period.[13] Additionally, many custodial parents, including victims of domestic violence or low income individuals, often lack the emotional wherewithal or sufficient funds to return to court. If the best interests of the children is the guiding paradigm, orders for indefinite supervised visitation should be discouraged.

Another study has reviewed significant literature related to the behavioral and emotional outcomes of children engaged in supervised visitation.[14] The authors conclude that there is a striking lack of research, empirical in nature and peer-reviewed, assessing the effectiveness of supervised visitation or the long-term impact on familial relationships. Studies claiming to affirm positive or negative impacts of supervised visitation are fraught with ambiguous empirical results.

Four practitioners working for the Queensland Children's Contact Service (an Australian supervised visitation model) participated in a study and provided extensive data to the authors concerning strategies to most effectively implement positive and safe supervised visitation.[15] Three major strategies emerged from the study: (1) to meaningfully engage all individuals involved in the program, which includes education and pre- and post-visitation debriefing of parent, child and supervisor; (2) to consistently encourage positive parent-child interactions; and, of particular importance, (3) to emphasize the autonomy of the child – give the child a voice.

Judges deciding whether to impose supervised visitation must distinguish between high parental conflict situations versus domestic violence, abuse or other situations which pose a risk of harm to children. Cases involving the threat of risk merit supervised visitation, while high conflict situations belong in a therapeutic setting.[16]

Conclusions

In the battle of fundamental privileges, the constitutional right to be a parent is secondary to the protection of a child, justifying the utilization of SVP in appropriate situations.

Action needs to be taken to standardize education and training at the initial screening step. Properly screening a case for consideration in the SVP program is tantamount to a condensed Risk Assessment. Proper education is needed to distinguish between referrals based on substantiated abuse or domestic violence as opposed to situations of high adult conflict which are generally not appropriate for the SVP. Education and training can also help address the perception of cultural insensitivity of the staff at the SVP facilities. With regard to the judiciary, greater focus needs to be placed on incorporating detail in the order reaching beyond the frequency and location of the parenting time. Other critical details such as a review date for the SVP and what constitutes appropriate or inappropriate behaviors during visits – e.g., not discussing the adult conflict with the child, whether electronic devices are permitted, whether other friends or family members can also attend, etc. – should be included in the order. Consideration should be given to creating a statewide uniform form of order for the program.

It is also the case that there is a lack of sufficient funding for the SVP, especially to facilitate outsourcing for parenting time opportunities on evenings, weekends and holidays. There should be consideration for fee waivers for lower income parents who cannot afford to pay the fee for the SVP, resulting in loss of time with children. Absent adequate funding, there is limited or no security at the outsourced facilities. This leads to a statistical increase in incidents of stalking and violations of Restraining Orders. With sufficient funding, staff can be trained in this area. Increased funding would also enable the county supervisors to perform random site visits to ensure that the programs are in compliance with standards as a condition of continuing the contract for outsourcing. There are federal, state and private sources of funding for the programs. While many statewide legal organizations donate funds to CASA, the SVP should be considered as another worthy program for such charitable expressions.

For a number of reasons, there is wide concurrence in the literature as to the limited probative value of supervisor reports. Even where the supervisor is a credentialed individual, such as a psychologist or MSW, the supervisor is not acting in a forensic capacity – they are fact witnesses. The supervisor is acting as an adult chaperone, not acting in compliance with the standards established by the American Psychological Association for forensic evaluations. Control also needs to be exercised over the contact and disclosure between the county SVP coordinators, the parties, the supervisors and the court as a matter of due process. There is a concern among the Bar that various ex parte communications may take place which impact the court's perceptions and decision-making.

Adults and children need to be adequately prepared for supervised visitation. Perhaps this can be addressed as part of the parent education program curriculum for the adults as an introduction to the concept. There should also be a debriefing of both the adults and the children to gauge the reaction of the participants and assess the impact of supervised visitation. A mechanism is needed for review of the success of the program. In relation to this, much of the social science indicates that the children need to have greater autonomy and a voice to object or agree, particularly in cases from the FN and FV dockets where they have been directly subjected to abuse or witnessed egregious adult behavior. A guardian ad litem may be needed in such situations to give the children a voice. One of the core findings of the social science research is that not all children are the same and not all children maintain the exact same coping mechanisms, potentially compromising their sense of safety and security.

The New Jersey Supervised Visitation Program strikes a reasonable balance between protecting children and the constitutional right to be a parent. Similar to all aspects of family law, a thorough examination, discussion and review of social science can only lead to improvements in this vital program. ■

Chris Musulin is a member of the Musulin Law Firm in Mt. Holly. He is a Fellow of the American Academy of Matrimonial Lawyers and a proud new grandfather.

Endnotes

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3. *Moriarty v. Bradt*, 177 N.J. 84, 101 (2003).
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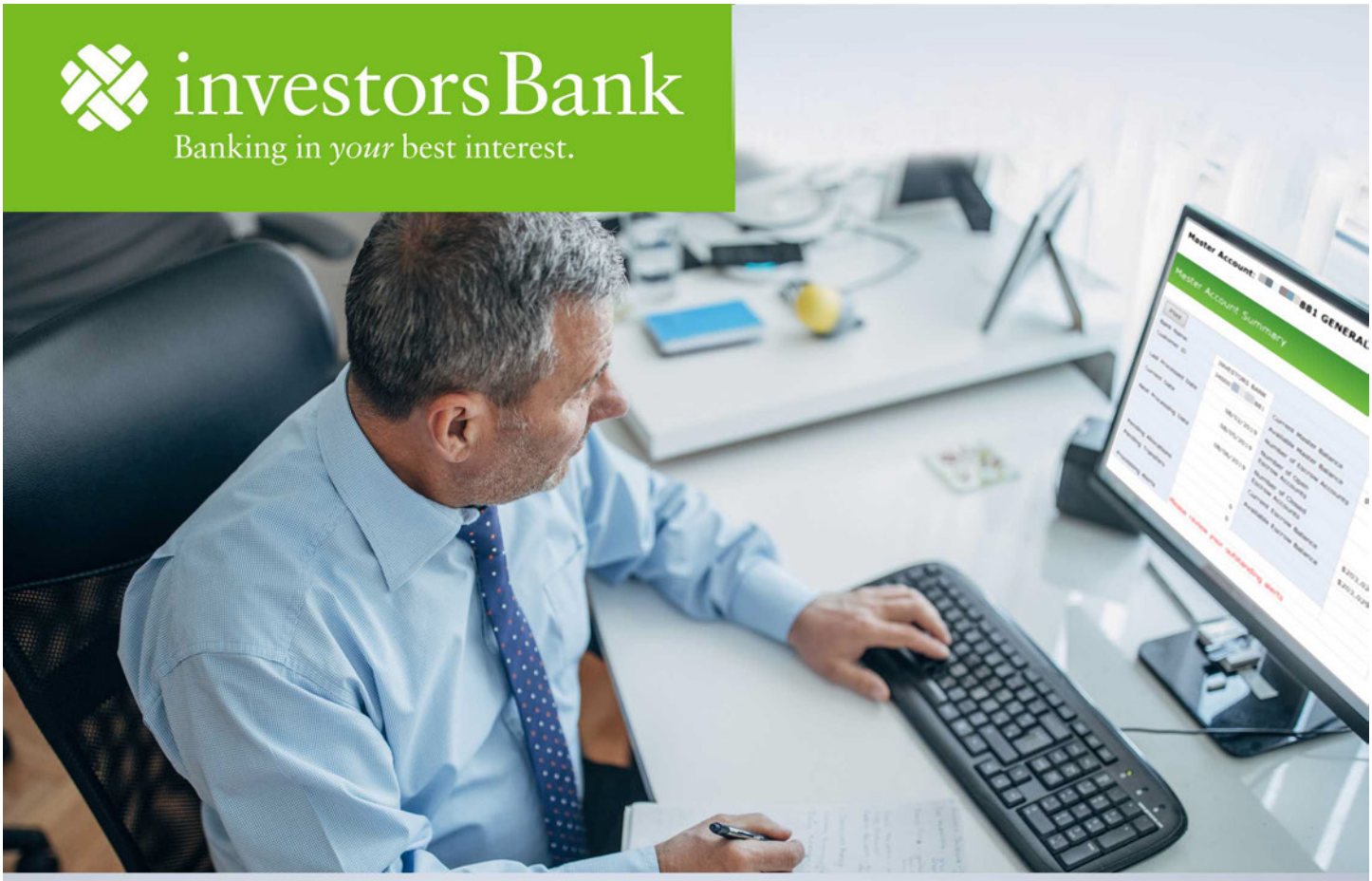

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The Divorced Parents' Guide to Avoiding Summer Madness

by William J. Rudnik and Diana N. Fredericks

Children's well-being and the relationship with their parents are arguably the most important issues addressed in divorce cases. Custody and parenting time related issues may overwhelm the parties and result in unnecessary stress for the children. While parents tend to significantly focus on the parenting schedule that will be in place during the school year (often referred to as the "regular parenting time schedule"), the summer parenting time schedule is often overlooked, but equally important. During the summer months, many children are out of school and have more time to spend with parents. As a result, there is more of an emphasis for the children to spend significant quality time with each parent. However, since summer months are typically less structured than the school year, parents may find themselves at a cross-roads when determining how to allocate quality time between each parent and their children, while at the same time keeping their children busy with age-appropriate activities (which, preferably, does not involve Netflix binging, TikToking or playing video games).

Accordingly, when parents discuss the summer parenting time schedule in the context of a global custody and parenting time agreement, there are certain variables that inevitably should be taken into consideration, such as: each parent's employment responsibilities, summer camps, extra-curricular activities, vacations and, even a child's employment. In considering these issues, parents often ask the following, non-exhaustive, list of questions: Will the schedule be different from the regular school year parenting schedule, or will it be the same? Will the schedule during the summer months be the reverse schedule from the school schedule, where the parent of alternate residence has most of the parenting time? Will each parent be responsible for childcare during their respective parenting time, or will the parties need to reach an agreement as to childcare during the summer? Will the children attend summer camp? Who will be responsible to pay for it and how will the costs be allocated? How much vacation time will each parent have during the summer and when will the vacations take place so everyone can plan appropriately? Will a child be able to work during the summer or be required to work during the summer? These are just some of the questions that should be discussed while working out a summer parenting schedule. It is our duty as advocates to advise our clients of these issues and attempt to specifically address these issues when reaching a resolution.

Summer Parenting Schedule

N.J.S.A. 9:2-4(c) and caselaw provide that the overriding principle in determining custody and parenting time is the best interest of the child. Indeed, N.J.S.A. 9:2-4(c) provides, in relevant part: "the legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."[1]

Since the best interests of the child are the guiding force in determining custody and parenting time, both "regular" and "summer" parenting time are analyzed pursuant to the factors set forth in N.J.S.A. 9:2-4(c) as follows:

1. The parents' ability to agree, communicate and cooperate in matters relating to the child;
2. The parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;
3. The interaction and relationship of the child with its parents and siblings;
4. History of domestic violence, if any;
5. The safety of the child and the safety of either parent from physical abuse by the other parent;
6. The preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;
7. The needs of the child;
8. The stability of the home environment offered;

9. The quality and continuity of the child's education;
10. The fitness of the parents;
11. The geographical proximity of the parents' homes;
12. The extent and quality of the time spent with the child prior to or subsequent to the separation;
13. The parents' employment responsibilities; and
14. The age and number of the children.

All but one of these factors (quality and continuity of the child's education) should be considered in determining the summer parenting schedule. Since each case is unique, New Jersey courts determine both the "regular" and "summer" parenting time schedule on a case-by-case basis. By way of example, in *Hallberg v. Hallberg*, the Appellate Division determined that a father exercising two weeks of parenting time with the children during the summer months was reasonable, unless it could be shown that it was not in the children's best interests.[2] More recently, in *Rosenthal v. Whyte,* the Appellate Division affirmed a trial judge's denial of a mother's request to modify the father's five continuous weeks of parenting time with a 3-year-old child that was set forth in the parties' Proterty Settlement Agreement.[3]

In *Cipriana v. Fontana*, the Appellate Division addressed summer parenting time for a young child, who was also 3 years old.[4] However, unlike *Rosenthal*, the parties did not have a settlement agreement which set forth the summer parenting time schedule. After the trial court permitted the child's father to have an eight-week block of parenting time during the summer, the mother filed an appeal.[5] During the appeal, the mother filed a motion seeking a remand to conduct a hearing on the issue of summer parenting time.[6] The Appellate Division granted the motion for a remand for that limited purpose. On remand, a different judge determined the father could exercise six weeks of summer parenting time in three blocks of two consecutive weeks.[7] On appeal, the original award of eight consecutive weeks of parenting time was found to have been a mistaken exercise of discretion. The Appellate Division noted that while the remand was pending, the parties should continue to utilize the summer parenting schedule where the father had three blocks of two consecutive weeks.[8]

Depending on the age of the child, parents may consider input from the child as to a summer parenting time schedule. For example, the preference of the child may be relevant, not only for the summer parenting schedule, but also whether the child wants to attend a specific camp or activity or wants to work during the summer.

If custody is a contested issue, courts are authorized, *sua sponte* "…or at the request of a litigant, to conduct an in-camera interview with the child(ren). In the absence of good cause, the decision to conduct an interview shall be made before trial. If the court elects not to conduct an interview, it shall place its reasons on the record." [9] In *DA v. RC,*[10] the Appellate Division noted that the decision whether to interview a child is left in the discretion of the trial judge and must be guided by the best interest of the child.[11] When courts consider whether to interview the child(ren), they must consider the child's "feelings and desires concerning where and with whom he should live..."[12]

Since the parties cannot predict with certainty how a court will decide any issue, including summer parenting time, the goal is for parents to settle and resolve their summer parenting time schedule without having the court decide. When engaging in discussions or negotiations regarding a summer parenting time schedule, parents should discuss, and agree on, any foreseeable matters which are specifically tailored to their family, including but not limited to summer camp, vacations, employment, work-related child care, and so on.

Summer Camp

One of the common decisions parents must reach when determining a summer parenting time schedule is whether the children will attend summer camp. The two basic questions relating to summer camp that should be addressed are:

1. Will the child(ren) attend summer camp?
2. How will the camp be paid?

First, whether the child attends the camp will likely depend on whether they attended similar camps prior to the divorce, whether the child has a need to attend the camp because of a certain activity they participate in during the school year, and how the camp will impact the summer parenting time schedule. As is set forth above, depending upon the age of the child, the child's input may be relevant on this specific issue. If appropriate, the court may even interview the child.

Should a parent oppose a specific summer camp for their child, it is often for one of two reasons: 1) the camp will adversely impact their parenting time; or 2) they do not want to contribute to the cost of the camp. There are several factors that may impact how this opposition is addressed. For example, the duration of camp attendance. Because many camps are only one week, it is often

difficult for the parent opposing the camp to claim that it will adversely impact their parenting time. However, in extreme situations, or in situations where the parent who wants to have the child attend camp has limited parenting time, that parent has been forced to use their own vacation time for the given week of camp, to ensure the child can attend. The more common scenario, however, is where the parent objecting to the camp does so because they do not want to pay the costs.

If both parents work full time, the child often must attend some type of camp or other work-related childcare arrangement during the summer months if neither parent is available to care for the child. The New Jersey Court Rules provide that work-related childcare costs are supplemental costs to child support, and therefore may be considered an expense added to basic child support.[13] Although the New Jersey Child Support Guidelines expressly permit the cost of summer camp to be treated as a form of work-related daycare for child support purposes, if the actual costs are not known when child support is calculated, the parties may agree to each pay camp expenses directly to the provider. If the camp expenses are paid directly, unless the parties agree to a different arrangement, they should be paid in proportion to each party's respective incomes as set forth on line 7 of the New Jersey Child Support Guidelines. That is the amount each party would pay if the costs of summer camp were added to the Child Support Guideline calculation.

The payment for a child's attendance at summer camp may be considered differently, *e.g.*, as entertainment or activity, if the camp is not work-related childcare. The allocation of cost of the camp relates to whether it is considered an extraordinary activity expense that should be paid by both parties separate from basic child support. The Appendix of the Child Support Guidelines specifically provides that "entertainment," which is included in child support, to include "[f]ees, membership and admissions to sports, recreation or social events, lessons or instructions, movie rentals, televisions, mobile devices, sound equipment, pets hobbies, toys, playground equipment, photographic equipment, file processing, video games and recreational, exercise or sports equipment."[14] There is an argument to be made, depending on the specific circumstances, that some summer camps may fall under entertainment and are included in basic child support. Certain courts have concluded that camp expenses are included in child support.[15]

The parents should first discuss the different camp options and the costs for the camp. Generally, there are three camp options to consider: half-day, full day/extended day, or overnight/sleep away camp, which can be from a few days to as long as eight weeks. Depending on the type of camp, the cost can widely range from a few hundred dollars to tens of thousands of dollars. If the summer camp is not work-related childcare, the parties may agree to each pay camp expenses directly to the provider in proportion to each party's respective incomes as set forth on Line 7 of the New Jersey Child Support Guidelines or based on some alternative sharing of these expenses.

The Appendix to the New Jersey Child Support Guidelines provides for certain expenses to be added to basic child support or considered extraordinary expenses. This includes special needs of gifted children.[16] Certainly, depending on the type of camp it may be considered "special" or extraordinary in the event a child is considered gifted. By way of example, for a child who has an extraordinary talent in a sport, a specialized sports camp may be appropriate and both parties should contribute. For a child who is considered gifted in a specific academic field, an enrichment camp in that academic field may be considered an extraordinary expense and both parties should contribute.

In summary, when addressing the cost of the camp, the first step is to determine whether the camp would be work-related childcare. If it is not, the next step is to determine if it is included in the basic child support amount. If the argument is that it is not included in the child support amount, the next step is to determine whether it is a special or extraordinary expense and whether the camp is necessary for the child. The court's analysis of this would be based on whether the child previously attended or participated in a specific activity or camp (or whether a sibling or parent did so), or if there is need for the child to attend, and whether the parents can afford to pay for these expenses.

The best way to handle summer camp is to address it in as much detail as possible in the settlement agreement. If the matter cannot be settled, and as is the case with most decisions affecting children, the court will decide these issues on a case-by-case basis and in the child's best interests. If you represent the parent who wants the child to attend the camp, discuss whether they are willing to pay for the camp, whether they are willing to schedule it on their own time, or whether it will impact the other parent's time and whether they are looking to share the cost.

Summer Employment for Teenagers and Parenting Time

As practitioners, we address (or at least we should) events, such as college, that may occur in the distant future, even if only to set forth a manner for calculation and resolution to be reserved for future consideration. Rhetorically, why not address summer employment? It may be hard to imagine a 3-year-old having a job some day, but the lack of specificity in an agreement or order now, may detrimentally impact parents (your client) in the future. It will benefit your client to answer as many as possible in the agreement and to provide a mechanism for resolving future issues that have not been addressed. Some considerations include but not are limited to the following: Where will a child find the funds to do so if they are not permitted to work and moreover, should the parent preventing the child from employment then be required to pay more toward college or expenses? Should teenagers (who are eligible)[17] work during the summer? What about during the school year? Should we consider the amount of the child's schoolwork or their other activities in regard to whether they should be required or allowed to work? Should we consider whether the parents worked as teenagers or what the family would have done if it were intact (similar to part of the analysis for college contribution)?[18]

Clearly, there are endless potential varying factual scenarios and countless questions. The answers to many, if not all, of the questions may be unknown at the time of the divorce. However, the unknown should not preclude discussions about potential, future scenarios that we should have with our clients.

Drafting Agreements and Resolving Disputes

When drafting settlement agreements that (should) address summer parenting time, vacations, and whether a child will have employment, the following non-exhaustive list of issues should be addressed:

- Summer schedules of parenting time, with specifics and clarity
- Is child support stagnant or modified
- Set forth dates for the exchange of vacation dates and have a method for who has first choice each year, or a tiebreak in the event parents select the same week.
- Recognize deadlines for registration for camps and activities, certain camps require registration as far in advance as one year before attendance.
- Do the parents want/need/agree to restrictions on travel? International? Hague Convention? Contiguous 48 states, and so on. Are there different parameters depending on the travel?
- Can a parent object to a locale and if so, how does that get resolved? What is the definition of a dispute and can vacation time be vetoed?
- Can a parent obtain a passport for a child?

By addressing the above examples of potential issues that may arise, you may circumvent a last-minute summer parenting time dispute, especially when the dispute does not arise until immediately before the summer parenting time schedule commences. At that point, it may be too late to file a motion, (depending on the county), as it will be heard after the vacation is supposed to take place. Due to the time sensitivity of summer parenting time and the limited duration to resolve disputes, we should be cognizant of options and inform our clients accordingly.

Parties may consider the following language when parents are unable to agree (not only as to summer parenting time or employment) and want to provide a method of resolution:

- Whenever possible the parents shall discuss the issues and attempt to reach an agreement based on what is best for the child/ren at that time.
- If the parents are unable to reach an agreement on an important issue about the child/ren after discussing it with the other parent, either parent may initiate dispute resolution by:
  - Arranging for the parents to meet with a counselor to discuss and try to reach agreement.
  - Arranging for the parents to meet with a mediator to try to reach an agreement.
  - Notification of a desire to institute dispute resolution processes shall be made in writing by certified mail. ... The parents shall share the cost of the mediation or counseling service equally. ... If the dispute cannot be resolved within ____ days, either parent may initiate legal action to seek judicial resolution. These provisions shall not be applicable if immediate court action is necessary in an emergency situation to protect the child/ren or one of the parents. (Name) has agreed to be an arbitrator and after each of the parents presents what he/she thinks is best for the child/ren the arbitrator.[19]

In sum, many potential disputes involving the summertime and children can be easily resolved if attorneys alert their clients to these issues in advance, rather than punting those issues only to deal with them in the

future. In the event that the parties are not able to agree on what should happen during the summer at the time they are negotiating the agreement, either because of the ages of the children or simple divorce exhaustion, the least we can do is propose language as to how the dispute will be resolved and set forth an appropriate mechanism for a decision to be reached. Even if dissatisfied with the ultimate result, the clarity in understanding how and when to handle a dispute will be appreciated.

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Endnotes

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11. *Id.*
12. *Id. at 458.*
13. *Ibid.*
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Natural Parent – An Outdated Term

by Lynne Strober

Some Judges still use the term "natural" when describing parents. A recent Superior Court order unnecessarily described the parents as natural parents. There was no necessity in adding that term. This must stop. It is common knowledge that words are retired regularly when they are no longer useful, appropriate, or non-judgmental. Words are periodically removed from use to avoid a negative or derogatory impact. Every reader can readily think of such words. Natural parent is a term that must be put in that discard pile. The goal must be to avoid separating children based on how they were made part of a family. The use of the term "natural" as describing children is archaic.

A natural parent is defined as the biological parent of a child. Thus, logic dictates that non-biological parents would not be natural parents. By deduction, a non-biological parent would therefore be an "unnatural parent." Further deduction dictates that the children of "unnatural parents" would be "unnatural children." Clearly, the inference that the lack of a biological correlation between a parent and a child by definition render one or both individual "unnatural" is not a message that should ever be advanced by the courts, particularly with reference to children.

As we all realize, parents are parents, no matter how their family was created. Children, of course, must not be labeled as coming from a particular type of family or becoming part of a family in a non-biological way. It is discriminatory.

It is submitted that the label "natural" should never be used in a judicial context when referencing parents or children. Judges must always be sensitive to this issue and leave out distinguishing or identifying terms that attach a label or inferiority to any parent, or more importantly, any child.

Obviously, there are many ways that children become part of a family; by adoption, surrogacy, egg donor, foster parents, psychological parents, etc. It is invasive to describe how a parent became a parent if it is not an issue. The use of the term "natural parent" is derogatory to those who are share a biological tie to their children. In an article on Showhope.org dated Jan. 7, 2016 entitled "Every Parent is a Real Parent," the term real or natural parent is defined as less appropriate. The appropriate term is urged to be birth parent or biological parent, because real or natural implies that the adoptive parents are fake or unnatural. The substitution of the word biological for natural when necessary achieves the same result. However, the need to label a child as to by how they came into the world is not necessary, except in very unusual circumstances.

We must remove hurtful words from our permissible language and modify labels to be sure society in general, and the law in particular, is inclusive and supportive. We can all think of words that have been deleted from use because they were harmful or deemed to be objectionable.

The law is to treat people equally. If a label is deemed offensive and there is better word or no word to replace it, that is what should be done. This manner of distinguishing between a biological and non-biological parent is a differentiation that should not be made. In an article "Parents By The Numbers,"[1] it was pointed out that Canada recently replaced in federal law the use of the term natural parent with the term legal parent. It is proposed that the term "parent" without further description be used in orders when the parenthood is confirmed. Only in extraordinary circumstances should the term biological or psychological parent be used, and then only until a custody order is entered, if essential.

In some occasions it may be necessary to distinguish between parents. If for example, a court case involved a dispute between a biological parent and a purported psychological parent, it may be necessary to use qualifiers to support factual findings. The use of the word "biological" when addressing children should be definitional and not judgmental or discriminatory. At that time, the term legal parent should be used and the description of how the parent came to be the parent should no longer be used. ■

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Endnote

1. 37 *Hofstra L. Rev.* 11, Hofstra Law Review (Fall 2008).