New Jersey
Family Lawyer

Vol. 38, No. 2 — February 2018

Chair's Column

The Times They are a Changing

by Stephanie Frangos Hagan

As I look back on the months since I was installed as chair of the Family Law Section in May 2017, I can't help but think of the many changes that have occurred that affect the Family Law Section. The biggest change for me has been the planning of the section's annual retreat. As chair, I have the privilege of choosing the site and organizing the events for our annual retreat, which, of course, is no easy feat. From the moment I was installed as an officer back in May 2013, I have been repeatedly asked the question, "did you pick a place for your retreat"? Since that time, I have spent countless hours searching the internet and traveling to destinations near and far in search of what I viewed as the 'perfect' site for our retreat.

For me, it was important that the destination be warm and have a beach nearby. After what I consider an exhaustive search of places the section had never been to before, I chose the beautiful island of St. Thomas. By the time of my installation in May, the contract was signed and we were all set to go. Unfortunately, however, Mother Nature had other ideas and, in late August, I literally watched as all of my hard work was washed away by Hurricane Maria, which not only blew the roof off of our hotel, but decimated the beautiful island of St. Thomas. By early September, I was back to square one, and attempting to do in a few months what it had taken me years to do before. More importantly, I learned quickly I was not the only one who was busy scrambling and re-planning. Any group that had planned a retreat to the islands of St. Thomas, Puerto Rico or St. Maartin was doing the same thing as me, which only served to make my job even more difficult. After much searching, I was lucky enough to secure a contract at the Grand Hyatt at the Baha Mar Resort on Cable Beach in the Bahamas. The resort opened in April 2017, to rave reviews, and is the perfect place for our members to spend time enjoying the sun, networking and earning continuing legal education credits from March 21 to March 25. As my mother used to say, when one door closes, another one opens.

Some highlights of changes to our practice over the past several months have included the New Jersey Supreme Court decision on the standard to be used in relocation cases. In August, the New Jersey Supreme Court, in *Bisbing v. Bisbing*, did something it rarely does, reversed its prior decision. The Court found there was "special justification" to reverse the standard established in *Baures v. Lewis*,[1] after concluding the underlying data that led to their ruling in *Baures* was largely based upon social science and case law from other states, which had, over the past 16 years, been either challenged, disproven or reversed. The Supreme Court reversed the *Baures* "two-pronged test" of there having to be a "good-faith" reason for the removal in addition to the removal not being "inimical to the child," and concluded the proper standard to be used when a party is seeking to permanently relocate from the state of New Jersey with the minor child or children is a "best interest standard."

Indeed, we as a section have been fighting to change the standard to a best interest standard since 2015. In fact, the Family Law Section proposed new legislation to change the standard to a best interests standard in April 2015.

The Supreme Court noted in its decision that "the majority of states impose a best interests test when considering a relocation application filed by a custodial parent."

Relocation is not the only issue that will be affecting children in our practice, as there are two bills pending in the Legislature that will have a severe impact on how custody is determined in actions involving the care and custody of children. Specifically, S-3479 and A-5189 provide for a presumption that each parent is entitled to equal residential parenting time with a minor child or children. The presumption can be overcome upon a showing by either parent through "compelling" evidence that a presumption of equal custody is harmful to the child. If these bills pass, the current best interests standard will be replaced, taking away a great deal of discretion from the court. The Family Law Section and the New Jersey State Bar Association are working diligently to continue to oppose these bills and the presumption of 50/50 custody as a one size fits all standard. We are meeting with legislators and monitoring the bills, and will continue to do so in 2018.

Finally, I would be remise if I did not mention that in addition to changes in the standard to be used in relocation cases, there have been significant changes in the federal tax code that will affect how we settle cases involving alimony issues. On Dec. 22, President Donald Trump signed into law a tax reform bill that, among other things, eliminates the deduction for alimony payments under a divorce judgment or agreement entered after Dec. 31, 2018. Initially, it was reported that the deduction would be eliminated on Dec. 31 2017. Unfortunately, this caused a great deal of anxiety for many of us, as there was a rush to settle cases before the end of the year in order to take advantage of the tax deduction. The bill ultimately signed into law gives us a reprieve for another year.

It looks like 2018 will be another busy year for our section. Best wishes to everyone for a happy and healthy new year.

Endnote

1. 167 N.J. 91 (2001).

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Executive Editor's Column

Civility in the Practice of Law is Not a False Narrative

by Ronald G. Lieberman

As legal practitioners, all of us have felt a certain level of frustration with opposing counsel for any number of reasons. But, all of us reading this column have (hopefully) been able to keep civility and professionalism in the forefront when addressing those areas of frustration with opposing counsel. Not only do lawyers represent their clients, they serve as officers of the legal system, and are public citizens having special obligations for the quality of justice. In order to meet those various roles, attorneys must keep true to civility and professionalism as required in R.P.C. 3.2 (Expediting Litigation), which reads, in part, that "[a] lawyer… shall treat with courtesy and consideration all persons involved in the legal process."

Unfortunately, because of recent experiences this author has had with other attorneys, it appears that civility in the practice of law is on the down swing.

Civility is not the same as agreement, or the absence of criticism, or liking a person, or even good manners. Disagreement does not justify incivility, and our legal system recognizes that debate is needed to reach the truth of a matter. The duty to be civil to each other does not mean that each of us must be interested in having a meal with the other person; instead, it requires an obligation to show respect. Respecting another person may call for criticism; just as a partner in a law firm who fails to point out an error in a young associate's legal brief is not being civil, but instead is not doing their job. Good manners alone are not a mark of civility. Civility is a code of decency.

Recently, this author faced numerous instances of other attorneys ignoring professionalism or civility in various situations. This author needed postponements of matters because he was faced with a family member's serious illness. When requests for postponements or continuances were sought so that this author could be with that family member in the hospital, most attorneys immediately consented. Unfortunately, this author cannot say that all attorneys consented.

One adversary who was asked for consent even went so far as to demand proof of the illness facing the author's family member before deciding whether it was serious enough to warrant his consent. Just what happened to attorneys granting consent for postponements the first time it is sought, let alone when there is an illness facing a family member? Why would it be that an adversary felt it appropriate to try to take advantage of a situation and demand proof? Where was that adversary's civility or professionalism? It appeared that this adversary lost the balance between the desire to zealously advocate for a client and the duty to be civil at all times. Perhaps the attorney was caught up in the popular image of a lawyer being partisan and combative. But zeal never extends to treating people with discourtesy or disrespect, and this author believes that attorney's refusal to consent in the face of a family member's serious illness borders on unprofessional conduct.

This author had another unfortunate experience that demonstrated incivility by opposing counsel. This author asked for a postponement of a pre-judgment *pendente lite* support motion (filed for the first time over a year into a divorce case) so the author could go on a pre-planned, pre-paid vacation during the summer. No doubt, this exact scenario has been faced by every reader, whether going on vacation or being asked to consent to a postponement so that a vacation by the adversary could occur. Instead of offering consent, the opposing counsel demanded that the client meet no less than three pre-conditions before that opposing counsel would even consider offering consent. What was that opposing counsel thinking? Why did the adversary feel the need to try to demand pre-conditions before even discussing consent? Whatever happened to civility in the practice of law?

The most recent instance of the breakdown of civility in the practice of law faced by this author came when this author accepted representation of another attorney's client, weeks after the initial consult with that client and

after the client's attempts to fix the issues the client had with the first attorney failed. In response to receiving a call and a letter that the client was going to change attorneys, the discharged attorney felt it appropriate to say that this author had "created an enemy for life," was a "stupid, not so great attorney," and that this discharged attorney would make sure the next case between them would reflect that attorney's "ire" over discharge by the prior client.

This author's initial reaction to that other attorney's behavior was one of sadness, because such actions reflect poorly not only on that attorney but on all attorneys. How could a member of the consuming public tell the difference between a civil, professional attorney and one who calls others "stupid" or refuses common courtesies in the face of family illness or a family vacation? The truth is, a consuming member of the public could not tell until incivility in the practice of law rears its ugly head.

What causes professional rudeness and incivility? Perhaps pride, greed or a misunderstanding of our role as advocates in the practice of family law. Regarding pride, perhaps the other attorneys this author faced did not want to appear vulnerable. Pride is when attorneys serve their egos rather than their clients. Regarding greed, the expectation of financial reward for doing one's job is the optimal outcome, but it must be balanced against blurring the ideals upon which the practice of law was founded. Clients can question the real return on their investment if they think their attorneys are more interested in the bottom line than the outcomes.

Our attorneys' oath requires us to seek and to promote justice. The term "officer of the court" points to the fact that the law and legal profession are set in the larger context of life in our community. Incivility just feeds that negative image many non-lawyers have of our work. Every calling has a central value to promote. With law, it is the pursuit of justice.

In the practice of family law, attorneys, this author included, should remember that we are dealing with real people with real problems. The goals should be to bring a sense of order to troubled situations, to communicate directly about the legal and human difficulties involved, and to maintain full respect and civility for everyone with whom we deal. Civility is not inconsistent with a vigorous position taken on behalf of a client. It is not a mutually exclusive situation because we can be forthright advocates in the law while maintaining civility in legal practice. As a fellow of the American Academy of Matrimonial Lawyers, this author is reminded of our bounds of advocacy. The primary purpose of the bounds of advocacy is to guide matrimonial lawyers confronting moral and ethical problems.[1] They are worth reading, and this author invites all family law colleagues to review them as often as possible. ■

Endnote

1. http://aaml.org/library/publications/19/bounds-advocacy/1-competence-and-advice.

Commentary

AAML Resolution Opposing Proposed Legislation to Repeal the Alimony Tax Deduction

by Madeline Marzano-Lesnevich

On Nov. 15, 2017, the American Academy of Matrimonial Lawyers (AAML) announced that it approved a national resolution formally opposing Section 1309 of the House Ways and Means Committee's version of the Tax Cuts and Jobs Bill of 2017. The bill was reconciled with the Senate's version and ultimately signed into law on Dec. 22, 2017. The new law ends the income tax deduction for individuals who pay alimony and makes alimony tax-free to the recipient for divorce decrees executed after Dec. 31, 2018. Under the old law, alimony and separate maintenance payments were deductible from taxable income by the payor under I.R.C. § 215, and includable in the taxable income of the payee under I.R.C. § 71.

The AAML concluded that the repeal the alimony tax deduction will directly impact a wide array of divorce cases, particularly in middle-class and low-income situations, where there are limited liquid assets to adequately provide financial security to spouses upon divorce. As a result, financially dependent spouses may be discouraged or even unable to establish their own separate household, and could be trapped in domestic violence or an oppressive relationship because they cannot afford to leave without the financial benefit of alimony.

In addition, the repeal of the alimony tax deduction will eliminate a beneficial income-shifting effect. Currently, in most cases, the payor spouse is in a considerably higher tax bracket than the spouse receiving alimony. The difference between these tax brackets provides a benefit to the payor and a larger benefit to the payee.

For illustrative purposes, assume that a payor has a $3,000 monthly alimony obligation and is taxed at 33 percent. In effect, the deduction at tax time reduces each of those payments to $2,000. Also assume that the payee is in the 15 percent bracket. The $3,000 received by the payee each month is reduced by $450, leaving a net amount of $2,550. Essentially, the payee spouse is getting more in actual dollars than the amount paid by the payor. Under the new law, however, providing the payee with the same level of support would cost the payor $2,550 instead of $2,000.

The law rationalizes changing the alimony rules by attempting to correct the foregoing scenario (*i.e.*, one in which the government is funding the payee spouse to the extent of $550 a month):

> The provision would eliminate what is effectively a 'divorce subsidy' under current law, in that a divorced couple can often achieve a better tax result for payments between them than a married couple can.

Nevertheless, it is axiomatic that there are various tax advantages for married couples. The AAML has stated that alimony is not so much a "divorce subsidy" as it is a mechanism to offset the unfavorable tax rates for married couples filing separately and splitting tax deductions. The purpose of the alimony tax deduction is not to encourage spouses to divorce, but to recognize the needs of former dependent spouses. Moreover, the difference in tax rates has long been a factor both in negotiating matrimonial settlements and in bridging the gap between the parties' needs and their actual income. New Jersey courts typically take the tax deductibility and taxable income of alimony into account when ruling on contested matters. As alimony is no longer deductible, the courts will be hard pressed to make awards in a similar fashion to the way they had in the past. There is a finite amount of money in the marital pot, especially given other fixed expenses, such as child support payments and education expenses for children.

The previous tax structure helped lessen or ameliorate the burdens placed on a family during and after divorce. Heading into 2019, practitioners are faced with a new landscape—one in which it will be necessary to account for the loss of the deductibility/includability of alimony. ■

Madeline Marzano-Lesnevich is chair of the family law department of Lesnevich, Marzano-Lesnevich, Trigg, O'Cathain & O'Cathain, LLC.

Commentary

A Formula for Disaster?

by Megan S. Murray

Many practitioners become lawyers because they like to review the factual intricacies of individual situations and craft arguments based on a distinct set of circumstances. They enjoy finding the distinction that makes one set of facts very different from what another individual might see as an identical scenario. The practice of family law is specially formulated for this mentality—wherein each case presents itself with multiple dimensions, facts and scenarios that distinguish that case from any other case.

Family lawyers are driven to uncover and expound upon the nuances in each case. Experience confirms that even those cases that may seem nearly identical at first blush are, in fact, quite different on further inspection. For this reason, most family law practitioners cry outrage at the idea of utilizing a formulaic approach to resolve issues in dispute. This author is among those who have bemoaned the arguments of practitioners who suggest that matters might be resolved more efficiently for clients, and in a more cost-effective manner, if practitioners relied upon a formula-based (guidelines) approach to resolve hotly contested issues in divorce.

The current alimony law is codified at N.J.S.A. 2A:34-23(b). Pursuant to the current alimony statute, the court is authorized to make an award of alimony in any action for divorce. In fixing alimony, the court shall consider, but not be limited to, 14 factors, as follows:

1) The actual need and ability of the parties to pay;
2) The duration of the marriage or civil union;
3) The age and physical and emotional health of the parties;
4) The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other;
5) The earning capacities, educational levels, vocational skills, and employability of the parties;
6) The length of absence from the job market of the party seeking maintenance;
7) The parental responsibilities for the children;
8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;
9) The history of the financial or non-financial contributions to the marriage or civil union by each party, including contributions to the care and education of the children and interruption of personal careers or educational opportunities;
10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;
11) The income available to either party through investment of any assets held by that party;
12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;
13) The nature, amount, and length of *pendente lite* support paid, if any; and
14) Any other factors the court may deem relevant.

That's the law. Practitioners explain it to prospective clients during initial consultations. They explain it to clients who have retained them and want an understanding of what they may have to pay and what they may receive with regard to alimony. When they mediate cases, they explain that under New Jersey law, they do not subscribe to a cookie-cutter resolution for alimony.

No court rule, statute or case law[1] in New Jersey will provide a formula to apply with regard to the resolution of alimony. However, all practitioners know it's there—that huge elephant in the room—*the formula*. Whether

one wants to call it a sanity test, a back of the envelope approach, a rule of thumb or any other label, the formula exists. To be sure, the reality is that while most practitioners first explain vehemently to their clients that New Jersey rejects a formulaic approach to alimony, they often then pass on the secret to them: "Psst: alimony generally winds up being approximately a third of the difference in the parties' gross incomes."

Practitioners pass the secret along to their clients because, while New Jersey law does not provide for a formula,[2] this 'rule of thumb' is utilized by nearly every practitioner, mediator, arbitrator (and yes, even judges) across the state. During initial consultations, practitioners often calculate in their own minds (and sometimes share with the prospective client) the range of alimony awards the client may anticipate based on *the formula*. At early settlement panels, the vast majority of panel recommendations with regard to alimony come down to almost exactly a third of the difference between the respective gross incomes of the parties. In mediation sessions, recommendations of the mediator regarding the resolution of alimony frequently (and not surprisingly) reflect a figure that is approximately a third of the differential between the gross incomes of the parties. Indeed, the author was recently in a mediation where the mediator—immediately after professing to object to any formulaic approach to alimony—said, "But if you look at what they are offering, it's in the range of one third of the difference of the parties' incomes, so you can't say it's not fair or that it's not what a judge would order."

In short, while practitioners argue the factor-based statutory law with regard to alimony in theory, as a matter of practice *the formula* is frequently applied. This author believes to suggest that factors outweigh formula in the real world of alimony negotiations is as much a fiction as any suggestion that college students aren't drinking until the age of 21. In both cases, practitioners acknowledge the existence of the law, wink, and proceed in accordance with reality and common sense.

This author does not mean to suggest that a formulaic approach to alimony does not have problems, or that a more discretionary, factor-based approach does not have significant benefits. However, rigidly insisting on the factor-based approach being the only appropriate way to resolve alimony closes off possibilities regarding a new or modified approach to resolve alimony in certain cases that could have significant benefits. To be sure, while probing each and every nuance of every case is admirable in theory, it is not practical in every case. Many clients do not have the means to pay an attorney hundreds of dollars an hour to have a subjective debate over 14 separate factors. In those cases, a more objective approach to resolving alimony may provide a better option for the litigants.

Imagine that everyone agreed to a formula to be applied in certain cases, or some variation of the formula. What could the formula do for clients? At the very least, it could provide the following benefits:

Provide clients with guidance and predictability: Practitioners could freely acknowledge that there will be a mathematical calculation that will provide for a payor's obligation or a payee's award. With a better understanding of what he or she may be receiving or paying in the way of alimony, a client will be in a better position at the outset of his or her divorce to budget for his or her post-divorce life. Currently, without any guidance as to what a final award of alimony will be, many clients have little understanding of what type of lifestyle they will be able to afford after the divorce. Moreover, they may create a hypothetical post-divorce lifestyle in their mind, which is well in excess of what can actually be maintained based on a fair range of alimony. Every practitioner has explained to clients that upon divorce each party becomes solely responsible for 100 percent of certain expenses, which were shared when the marriage was intact. This results in two sets of expenses for things like rent, utility bills, health insurance and property taxes. As a result, the total combined expenses for both parties are now significantly greater, while the total combined income of the parties remains the same. This makes it virtually impossible for both parties to maintain the standard of living they both enjoyed during the marriage. By identifying the amount of the anticipated alimony award to be paid and received, parties will be encouraged to plan for a more realistic post-divorce lifestyle.

Assist in a more timely resolution of other issues in dispute: More predictability as to the issue of alimony allows clients to more readily resolve other issues in their divorce, including certain equitable distribution issues and child support. As a simple example, if the payee spouse knows that he or she will receive in the range of "X" dollars for alimony, he or she may be in a better position to decide early on in the case whether retaining the marital home is feasible. Resolution of this issue would expedite the listing of the home for sale where neither seeks to receive the home as part of a settlement. This would eliminate complications related to the marital

home that cannot be resolved until a decision is made as to whether the home will be sold.

Avoid attorney fees arising from debate and analysis of statutory factors: Especially in cases where the underlying facts are relatively simple, (*i.e.*, W-2 wage earners, or persons with incomes below a certain level) a formula or guidelines-based approach could be a more practical and economical way to fairly resolve the issue of alimony for both parties. In reality, practitioners see countless cases where the amount of money spent on attorneys' fees directly related to the issue of alimony is not recouped by the parties, even if a skillful attorney is able to increase, or reduce, the alimony award by a few dollars. This is particularly true in cases with low incomes and/or short-term marriages.

Allow practitioners to devote more time to relevant information gathering: This includes defining the total income for each party for purposes of calculating alimony and negotiating a fair term of alimony or equitable 'step-downs' with regard to the initial award of alimony over time.

Provide predictability in litigated outcomes: If alimony guidelines were utilized, it could prevent the current situation where alimony decisions could wildly differ in the same case depending on the judge who decides the case; or in factually similar cases tried before different judges. Removing this element of subjectivity could enhance the appearance of fairness in the judicial system—just as guidelines for sentencing criminal offenders eliminates unfair treatment of similarly situated persons.[3]

While one can argue that a formula-based approach ignores the needs of the parties and the marital lifestyle in a particular case, practitioners currently utilize child support guidelines (*i.e.*, a formula) to establish child support in cases where incomes are below a certain level. The child support guidelines allow for deviation when extraordinary circumstances would make application of them inequitable, or where good cause is shown to rebut the presumption that the guidelines should apply. The same could be true with regard to alimony guidelines. Moreover, child support guidelines do not apply in high-income cases. Rather, the guidelines are run only to establish a baseline of support, after which the actual needs of the child and other factors are considered. The same approach could be applied with regard to alimony in high-income cases.

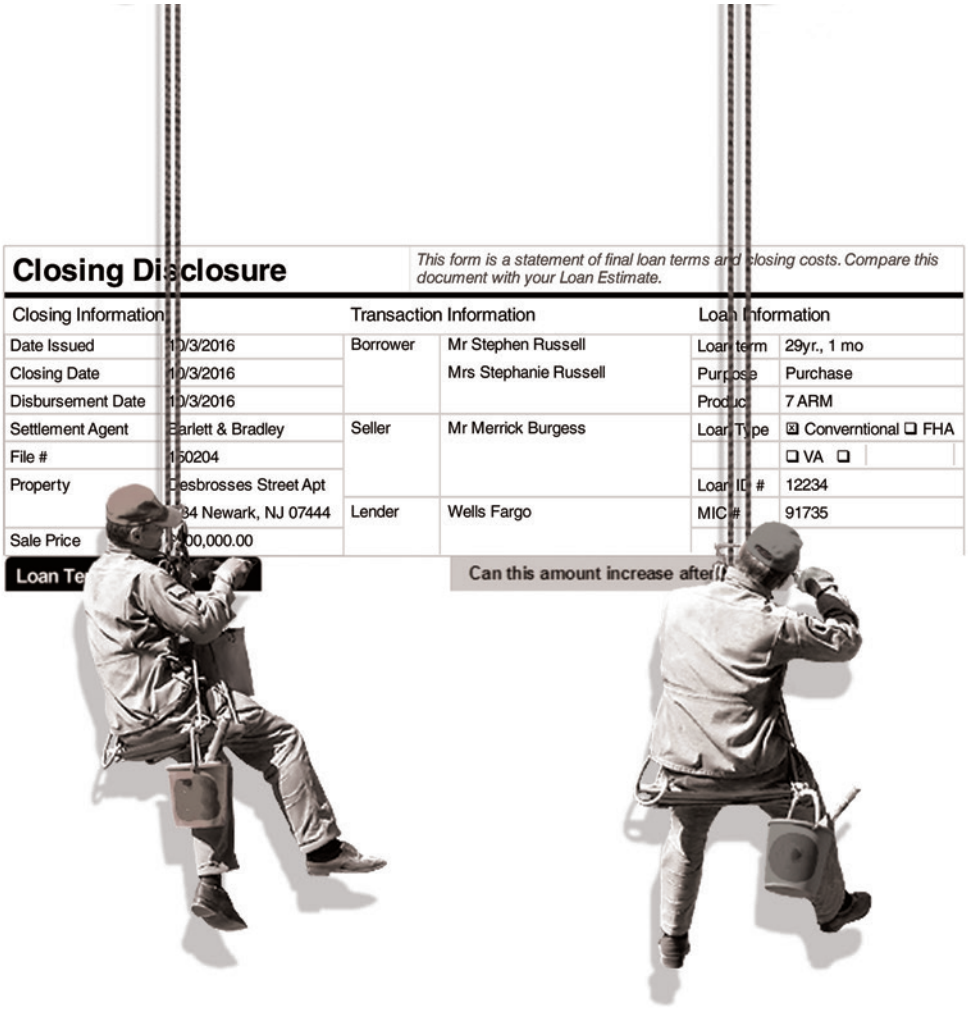
Many family law attorneys who strenuously oppose a formula-based approach to alimony argue that such an approach would take away practitioners' ability to be advocates (even though some of these same attorneys will use the formula approach when representing clients or acting as a mediator in a case.) This author has agreed with this argument and made the same argument for many years. However, a formula-based approach will not necessarily infringe upon the ability to advocate. Rather, it could simply change the nature of the argument. Where the argument over alimony currently focuses in great part on determining the amount to be paid, a formula-based approach would shift the argument to a more in-depth inquiry into what constitutes income for alimony purposes; whether step-downs are appropriate; and what the duration of alimony should be. Indeed, perhaps the current focus on arguing amount has wrongfully taken attention away from ensuring that full examination is given to the total extent of income available to each party in connection with calculating the appropriate amount of support. In short, the formula approach would still allow practitioners to advocate based on the specific facts of each case, while providing clients with clear guidance as to how the ultimate award of alimony will be calculated.

This author does not suggest that a formula-based approach to resolving the issue of alimony is perfect, or that it should be applied in all cases. In fact, the formula to be applied will need to be a bit more complicated than simply dividing the differential between gross incomes by three. This author suggests the quest to improve the practice of family law, become better advocates, and provide better outcomes for clients, should be ongoing. Hastily dismissing, across the board, the concept of a formula-based approach does the practice and clients a disservice. For many years, this author closed off any in-depth inquiry as to the benefits of a formula-based approach, focusing solely on championing a factor-based approach. However, this author believes a practitioner's obligation as an attorney should not be limited to advocating on behalf of individual clients. Practitioners are also obligated to advocate on behalf of the system to serve the greater good. Attorneys, more than individuals in any other profession, are trained to make arguments for both sides and to consider ideas and concepts from all perspectives. Everyone may stand to benefit from taking a few hours to pretend to defend *the formula*. Is it possible that a shift in thinking could convince practitioners of a whole new approach to alimony they never ventured to consider before? ■

Megan S. Murray is a partner at the Law Offices of Paone, Zaleski & Murray. The author wishes to thank Robert M. Zaleski, a partner in the firm, for his insight and assistance with this article.

Endnotes

1. Note, however, *Smith v. Grayson*, No. A-1072-10T4, 2011 WL 6304145, at *3 (N.J. Super. Ct. App. Div. Dec. 19, 2011), where the Appellate Division held that an expert had not issued a net opinion by relying upon a rule-of-thumb utilized by matrimonial practitioners with regard to the amount of alimony, wherein alimony would be calculated as one third of the difference in the parties' incomes.
2. "Although courts must consider the duration of the marriage when fixing alimony, the length of the marriage and the proper amount or duration of alimony do not correlate in any mathematical formula." *Gnall v. Gnall*, 432 N.J. Super. 129, 74 A.3d 58 (App. Div. 2013), *rev'd*, 222 N.J. 414, 119 A.3d 891 (2015).
3. That is not to say that any such rule or law allowing a formulaic approach would not also allow (if not require) a judge to deviate from the rule upon exceptional circumstances or other justifiable cause. This can be guided by a non-exhaustive list of deviation factors (perhaps similar to the factors for deviation of certain elements of alimony already contained in the statutory framework or the deviation factors in the child support guidelines). Practitioners can trust judges to do this.



Document creation shouldn't be arduous

Document creation shouldn't require additional labor. When you can quickly and accurately merge data into your legal documents, you'll save up to 7 hours per week per staff member. With the extra time, your firm is empowered to increase its productivity and profitability.

LEAP

www.leap.us

Relocating with the Children: The Pendulum Has Swung

by Mark Biel

Well over 30 years ago, New Jersey's courts initially required a custodial parent to make a threshold showing that there is a real advantage to the parent in relocating out of the state with the child. Years later, the Court eliminated that a real advantage be shown and granting a right to move as long as the move did not interfere with the best interest of the children or the visitation rights of a non-custodial parent. Thereafter, in 2001, *Baures*[1] merely required the custodial parent show that there is a good faith reason for the move and, thereafter, only that the move will not be inimical to the children's interest.

The New Jersey Supreme Court has just dramatically reversed the standard that now indicates that when both parties have legal custody, a best interest analysis establishes a new standard.[2] Initially there are diverse views caused by this decision, and it will certainly generate both a proliferation of articles and litigation. Some feel that this decision was a long time in coming, and Court reliance on flawed social science research retarded the establishment of the new standard. Conversely, others will feel the decision will make it all but impossible for someone to relocate the child out of the state. This author does not believe that to be true, but believes there are a myriad of factors addressed in this article that may on the one hand make it all but impossible to relocate in certain instances but on the other hand provide compelling arguments that justify relocation on a best interest analysis in other situations.

The Historical Law

The statutory provision at the center of relocation is set forth in N.J.S.A. 9:2-2, which provides:

> When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under the age without the consent of both parents, unless the Court, upon cause shown, shall otherwise order. The Court, upon application of any person [o]n behalf of such minors, may require such security and issue such writs and processes as shall be deemed proper to effect the purpose of this section.

The Legislature required a showing of "cause" for an out-of-state relocation under N.J.S.A. 9:2-2 in order "to preserve the rights of the non-custodial parent and the child to maintain and develop their familial relationship.[3]

In the seminal New Jersey Supreme Court case of *Cooper v. Cooper*, the Court held that in order to establish sufficient cause for removal when such application is challenged, the custodial parent must make a threshold showing that there is a "real advantage" to that parent in the move, and that the move is not inimical to the best interest of the children.[4] The purported advantage did not need to be substantial; rather, it needed only to be based "on a sincere and genuine desire of the custodial parent to move and a sensible good faith reason for the move." If the custodial parent made the requisite initial showing, then a court was compelled to take into account other factors in deciding the removal application. The first factor was the "...prospective advantages of the move in terms of its likely capacity for either maintaining or improving the general quality of life of both the custodial parent and the children."

Also instrumental in the court's decision were the *bona fides* "of the custodial parent's motives in seeking to move" and those of the non-custodial parent in objecting to them.[5] Finally, a court was to consider, in light of the facts of each case, whether a "realistic and reasonable visitation schedule can be reached if the move allowed."[6]

The *Cooper* standard was subsequently modified in *Holder v. Polanski*,[7] by eliminating the requirement that the custodial parent show a "real advantage" to the move. Under the *Holder* test,

> A custodial parent may move with the children of the marriage to another state as long as the move does not interfere with the best interests of the children or the visitation rights of the non-custodial parent.[8]

All the custodial parent needed to establish was that he or she had a "good faith reason" for making the move.[9] Once the Court found that the custodial parent wanted to move for a "good faith reason," it was to then consider: 1) whether the move would be inimical to the best interests of the children, or 2) adversely affect the visitation rights of the non-custodial parent. The standard was not whether there would be some effect upon those visitation rights, but whether the move would "substantially change" those rights.[10]

The third level of inquiry under *Holder* was only reached if the Court concluded that the move would require substantial changes in the visitation schedule. If this finding was made, proofs concerning the prospective advantages of the move, the integrity of the motives of the party, and the development of a reasonable visitation schedule remained important.[11] The emphasis, however, was not whether the children or the custodial parent would benefit from the move, but on whether the children would suffer from it.

Accordingly, under *Holder*, not only was the threshold showing diluted in favor of the parent seeking removal, but the burden of proof and persuasion lay with the party opposing the move. *Holder* did not change the *locus* of proof placed upon the non-custodial parent in *Cooper*, to wit:

> Since the non-custodial parent has the necessary information to demonstrate that an alternative visitation schedule is not feasible because of distance, time or financial restraints, we place the burden on that parent to come forward with evidence that a proposed alternative visitation schedule would be impossible or so burdensome as to affect unreasonably and adversely his or her right to preserve his or her relationship with the child. We emphasize that more than a showing of inconvenience by the non-custodial parent is required to overcome a custodial parent's right to remove the children after he or she has met the threshold showing that the move would be a real advantage to him or her, and would not be inimical to the best interests of the children.[12]

The *Baures* Paradigm

On April 23, 2001, Justice Virginia Long, writing for a unanimous Court, crafted *Baures* in an effort to clarify the legal standards that should apply in addressing a removal application and to define what role visitation plays in that determination. It provides a blueprint for litigating a removal case and is presently the most important case addressing the issues contained in this article.

The Court began its analysis with a review of social science research indicating that a child's quality of life and style of life are provided by the custodial parent; that the interests of the child are closely interwoven with those of the custodial parent; that in a divorce situation the role of the home parent seems most central; and that, in general, what is good for the custodial parent is good for the child.[13]

The Court discussed its prior holdings in *Cooper* and *Holder*, indicating that these decisions left a number of open questions. While indicating that cases that followed *Cooper* and *Holder* were clear about the custodial parent's burden of proving good faith, the Court concluded that they are unclear and at variance regarding the burden of going forward, the ultimate burden of proof, and the elements of the burden in determining whether the move would be inimical to the interest of the child. The Court found this to be particularly so when visitation was at the nub of the non-custodial parent's objection.[14]

In attempting to distill a clear paradigm for trying a removal case, the Court modified the tripartite analysis of *Holder* and clarified factorialy the type of proof that would be required and where the *locus* of those proofs will repose. Accordingly, the moving party initially bore a two-pronged burden of proving: 1) that there was a good faith reason for the move, and 2) that the move would not be inimical to the child's interest. The evidence produced must be *prima facie*, meaning that, if unrebutted, it would sustain a judgment in the proponent's favor. Imposed upon the parties seeking to move was the submission of a visitation proposal.

In indicating that the initial burden upon the moving party was not particularly onerous, the Court make it clear that if the custodial parent failed to produce evidence on these issues, the non-custodial parent had no duty to go forward, and the trial court should enter a judgment denying removal. However, once the *prima facie* case had been adduced, the burden of going forward devolves upon the non-custodial parent, who must now produce evidence opposing the move as either not in good faith or inimical to the child's interest.[15] After the non-custodial parent had gone forward, the moving party had to adduce additional evidence regarding the non-custodial parent's motives, the visitation scheme or any other matter bearing on the application.

The Court offered examples of what might provide a challenge to relocation, including a demonstration that the custodial parent's past actions reveal a desire to stymy the other party's relationship with the child; that the move would take the child away from a large extended family that is a mainstay in the child's life; that educational, avocational or healthcare services available in the new location are inadequate for the child's particular needs; or that because of a work schedule, neither relocation nor reasonable visitation is possible, and that those circumstances would cause the child to suffer.[16]

Thus the trial court was required to make factual findings as to each of the factors and correlate them with relevant legal conclusions in order to avoid a remand.[17]

The Court also cited examples of what it termed "powerful visitation related issues" that can defeat a removal application. Among those examples would be a non-custodial parent providing a needed safety net for a child having an emotional disorder or a non-custodial parent actively involved in coaching and assisting a child who has a particular talent or skill. Yet the Court further indicated:

> Where visitation is the issue, in order to defeat the custodial parent's proofs, the burden is on the non-custodial parent to produce evidence, not just that the visitation will change but that the change will negatively affect the child.[18]

The Court further indicated:

> ...A mere change, even a reduction, in the non-custodial parent's visitation is not an independent basis on which to deny removal. It is one important consideration relevant to whether a child's interest would be impaired, although not the only one. It is not the alteration in the visitation schedule that is the focus of the inquiry. Indeed, alterations in the visitation scheme when one party moves are inevitable and acceptable.[19]

In stressing the importance of mutual efforts by the parties to develop an alternative visitation scheme that can bridge the physical divide between the non-custodial parent and the child, the Court implicitly reinforced the thinking expressed in previous cases respecting the use of video conferencing and the Internet when it indicated that innovative technology should be considered where applicable, along with traditional visitation initiatives.[20]

In *Baures,* there were two exceptions where the underlying calculus of *Baures* did not apply. The first was when there had not been a determination of custody. Most notably that would occur when the parties were about to separate or had been separated for a short period of time. The initial custody decision was not based upon a *Baures* analysis but rather upon a best interest analysis. In such situations, a determination had been made pursuant to N.J.S.A. 9:2-4, and it was only after that decision was made that the Court could properly address the removal application.

The second type of case where the *Baures* calculus was inapplicable was one in which the parents shared physical custody either *de facto* or *de jure* or the other parent exercised the bulk of the custodian responsibilities due to incapacity of the custodial parent or by formal or informal agreement. In those situations, the removal application constituted a motion for change of custody and would be governed initially by a changed circumstances inquiry and ultimately by a best interest analysis.[21]

Welcome to *Bisbing*

Following their separation, Mr. and Mrs. Bisbing agreed on the terms of the marital settlement agreement (MSA) providing that "Wife would have primary residential custody and that, in part, neither party shall permit relocation with the Children from the State of New Jersey without the written consent of the other."[22]

The agreement included a provision addressing any future dispute regarding the relocation of the children:

> *Relocation.* The parties agree that each shall inform the other with respect to any change of

residence concerning himself or herself or the said minor children for the period of time wherein any provision contained in this Agreement remains unfulfilled. *The parties represent that they both will make every effort to remain in close proximity, within a fifteen (15) minute drive from the other. Neither party shall permanently relocate with the children from the State of new Jersey without the prior written consent of the other.* Neither parent shall relocate intrastate further than 20 miles from the other party. In the event either party relocates more than 20 miles from the other party, the parties agree to return to mediation to review the custody arrangement. In the event a job would necessitate a move, the parties agree to discuss this together neither will make a unilateral decision. Neither party shall travel with the minor children out of the United States without the prior written consent of the other party.

The parties hereby acknowledge that the children's quality of life and style of life are provided equally by Husband and Wife.

The parties hereby acknowledge a direct casual connection between the frequency and duration of the children's contact with both parties and the quality of the relationship of the children of each party.

The parties hereby acknowledge that any proposed move that relocate the children further away from either party may have a detrimental impact upon the frequency and duration of the contact between the children and the non-moving party.

Shortly thereafter, the trial court entered a judgment of divorce incorporating the terms of the agreement. While the wife took primary responsibility for the twin daughters age seven, the husband was also extensively involved in the children's lives, serving as their soccer coach, assisting with their ski team and overseeing their activities at church. Because the wife departed for her job in New York City early in the morning the husband went to her home several mornings each week to assist the children as they prepared for school. Approximately nine months after the entry of divorce, the plaintiff wife informed the defendant (ex-husband) that she intended to marry a Utah resident whom she began dating prior to the parties' divorce. The plaintiff asked the defendant to consent to the permanent relocation to Utah. He indicated she was free to move to Utah but the children must remain in New Jersey.

The plaintiff filed a motion seeking an order to permit her to permanently relocate the children to Utah. The defendant contended the plaintiff negotiated the agreement in bad faith and the securing of a consent to her designation as the parent of primary residence without informing him that she contemplated relocation.

The trial court did not require a plenary hearing, but simply applied the standard established in *Baures v. Lewis,* and granted her application to relocate, maintaining that she presented a good faith reason and that the move in the court's opinion would not be inimical to the children's interest. The plaintiff accordingly moved with the children and enrolled them in the elementary school.

The Appellate Division reversed and remanded for a plenary hearing.[23] The panel found there was a genuine issue of material fact as to whether the plaintiff negotiated the custody provision of the agreement in good faith, and ruled that if the trial court concluded she had acted in bad faith it should resolve the relocation motion using a "best interest" standard, not the more lenient standard of *Baures*. The panel also held that if the defendant failed to prove the plaintiff's bad faith, the trial court would then determine whether the plaintiff proved a substantial and unanticipated change in circumstances that would permit her to void the agreement's relocation provision.

Following the Appellate Division decision, the panel returned her children to New Jersey and the trial court denied their action for a stay and ordered the parties to abide by the residential provisions set forth in the matrimonial settlement agreement. The court also granted the plaintiff's petition for certification.

The Supreme Court, after consideration of the underlying predicates that for so long justified the underpinning of *Baures,* recognized for the first time a "special justification" to abandon that standard and in place of the *Baures* standard the court should now and in the future conduct a best interest analysis to determine "cause" under N.J.S.A. 9:2-2 in all relocation disputes in which the parents share legal custody.[24]

The Court in *Baures* had identified two developments in support of its modification of the governing standard for N.J.S.A. 9:2-2 relocation applications. First, the Court concluded that when a relocation benefits a "custodial parent" it will, as a general rule, similarly benefit the child. The Court opined that "social science research has uniformly confirmed the simple principles that, in general what is good for the custodial parent is good for the child.[25]

As has been discussed in numerous articles, the Court relied on essentially two studies, the basic studies authored by Judith S. Wallerstein and Tony J. Tanke. In *Baures,* the Court also cited social science research for the principle that although confidence that he or she is loved and supported by both parents is crucial to the child's wellbeing after a divorce, no particular visitation configuration is necessary to foster that belief.[26]

Second, the Court in *Baures* invoked the right to relocate the children and recognize the identity of interest of a custodial parent and child. In support of the custodial parents, "presumptive right" to move, the Court relied primarily on the *Burgess* case authored by the California Supreme Court. In that case the very same Judith Wallerstein appeared as *amicus curiae* to present her research.[27]

Thus, distilled to its essence because of the distinction made between an essentially equal shared custody arrangement or a lesser sharing of time and responsibilities between the parents caused the focus of the Court's initial inquiry far more than an analysis of the interest of the child, as the Court indicates in *Bisbing,* because the parties' custodial arrangement was potentially dispositive when a Court determined whether to authorize relocation.

In *Bisbing,* the Court determined to engage an analysis as to whether to retain the *Baures* standard as the benchmark for contested relocation determination to be decided pursuant to N.J.S.A. 9:2-2. The Court did not do so lightly, recognizing the longstanding jurisprudential doctrine of legal stability.[28]

Nonetheless, the Court did find justification for a departure from existing precedent, concluding that in *Baures* the Court never intended to diverge from the best interest of the child standard at the core of the custody statute, or to circumvent the legislative policy expressed in N.J.S.A. 9:2-4. Instead, the Court confronted a dispute that defied simple solutions by seeking guidance in social science research as to the best interest of the child, which at the time "tethered the best interest of the child to the custodial parent's well-being."[29]

As the Court indicates the Court had previously replaced the best interest of the child test in relocation applications brought by parents with primary custody in favor of its two-pronged "good faith" and "not…inimical to the child" test. In great measure, it relied on the Wallerstein social science research suggestion that the primary custodian's welfare is the paramount consideration. More contemporary social science research has called into question the impact of parental moves on the children of divorce.[30] Other research has underscored and supported the critical importance of a child's close relationship with his or her parent of alternate residence. The Court concluded that social scientists who have studied the impact of relocation on children following divorce have not reached a consensus, and that there remains vigorous scholarly debate that relocation may affect children in many different ways.

In 2000, well-respected researcher Dr. Richard Warshak then questioned:

> Why Wallerstein now interprets the same research result as supporting the view the Courts should foster continued in the child's relationship with the mother but not with the father is unclear but the scientific literature does not justify it.[31]

More recent studies were then conducted by Arizona State University professors Stanford L. Braver and Ira M. Ellman, who concluded that not one empirical single study could be found containing direct data on the effect of parental moves on the wellbeing of children of divorce. Distilled to its essence, the Braver study found there was harm associated with long-distance living arrangements between parents. While the study recognized the data could not establish with certainty that moves caused children harm, it concluded that there is no empirical basis on which to justify a legal presumption that a move by a custodial parent to benefit the parent's life would necessarily confer equivalent benefits on the child.[32] The Supreme Court discussed the underlying predicates with respect to these acknowledged research experts, and others as well.

Accordingly, while the Court agreed that in *Baures* "what is good for the custodial parent is good for the child" is no doubt correct with regard to some families following a divorce, social science literature now reflects that statement is not universally true. A relocation far away from a parent may have a significant effect on a child, and the progress in the law toward recognition of a parent of primary residence's presumptive right to relocate with children anticipated by the Court in *Baures* has not materialized.[33]

The Court was not unmindful that the threshold determination mandated by *Baures* continued the potential of engendering unnecessary disputes between parents over the designation of the parent of primary residence and accusation that the parent sought that designation in bad

faith in light of the presumption in favor of the primary parent's ability to relocate. Given the presumptive ease of relocation, the parties might be motivated to contest the designation even if one parent is clearly in a better position to serve that primary role that is contrary to the underlying predicate of N.J.S.A. 9:2-4 stressing the promotion of the child's best interests. Traditionally, the advantage afforded to the parent of primary residence in relocation conflict may continue to raise diverse accusations of bad faith after custody negotiations have been concluded.[34]

More succinctly stated, the Court no longer considers the *Baures* standard to be compelling by social science or grounded in legal authority today, as the Court anticipated it would be when it decided that case in 2001. In place of the *Baures* standard courts should now consider a best interest analysis to determine "cause" under N.J.S.A. 9:2-2 in all contested relocations disputes in which the parents share legal custody—whether the custody or arrangement designates a parent of primary residence and a parent of alternate residence or provides for equal shared custody.[35]

In a relocation case, the Court indicated as a starting point that N.J.S.A. 9:2-4 sets forth factors that will be relevant but that additional factors not set forth in the statute may also be considered in a given case. In a best interest analysis, the parent of primary residence may have important insights about the arrangement that will most effectively serve the child. The parent of alternate residence may similarly offer significant information about the child. Among other considerations might be the view of other adults who have close relationships with the child; other elements relating to the best interest of the child; interviews with the children at the court's discretion and expert testimony. That may include, on the court's own motion, a request of the litigant for an *in camera* interview with children pursuant to Rule 5:8-6 and the right of the court to appoint or permit the parties to select experts for assistance in such litigation.[36]

In remanding the plenary hearing to the trial court and a determination as to whether the custodial arrangement set forth in the parties' agreement should be modified to permit relocation, the Court concluded that the plaintiff's consent to the interstate relocation provision of the agreement did not constitute a waiver of her right to a judicial determination of her relocation application. However, while it did not constitute a waiver, the Court opined that the agreement was significant to the Court's determination on remand, and because of the signed agreement the plaintiff would be required to demonstrate changed circumstances to justify its modification.[37]

In the inquiry, "cause" should be determined by a best interest analysis after considering all relevant factors set forth in N.J.S.A. 9:2-4(c). One of those factors should be the actual agreement entered into by the parties. The Court would not be required to decide whether the plaintiff had negotiated the agreement in bad faith, but rather a consideration of the terms of the agreement itself placing the onus upon the plaintiff to demonstrate a change of circumstances in consideration of all other factors as to whether it would justify a modification.[38]

The Best Interest Analysis: What Will the Court Consider

Simply because the standard the court will apply in a relocation application does not mean that an abundance of relocation litigation will not continue. It will, and the courts will be compelled to consider every factor that is brought to their attention. Here are a myriad of factors to consider:

Time Allocation

- How many overnights do the children spend with each parent in the course of a month?
- What is the allocation of mid-week time, if any, between the parents, particularly during the school year?
- How long has the parenting plan been in existence?
- How did the parenting plan evolve? Was it foisted upon the more docile or submissive parent or was it the product of a negotiated court order or property settlement agreement?
- Has the non-custodial parent exercised all available parenting time in the past? If not, how much time was forfeited? Have there been late pickups and/or drop offs resulting in lost time?
- Conversely, has the primary custodial parent denied parenting time to the other parent in the past? Accordingly, once outside the jurisdiction, will that parent comply with an interstate parenting plan or attempt to manipulate it?

School-Related Issues

- Do the parties have a relationship with the children's teachers?
- Who transports the children to and from school?
- Do the parties attend school functions, including teacher conferences?
- Do the parties assist their children with homework?

- Have the parties assisted their children with required special projects?
- Do the parties review and discuss the children's report cards with the children? With each other?
- Are the children involved in extra-curricular activities with their school? If so, what is the involvement of each party in those activities?
- Have there been problems when the children have been under the watch of one or both of the parents, such as being late for school; excessive absenteeism relating to school; missing extracurricular activities; not getting homework properly completed; or not being ready for school tests?
- Does the child have learning problems? If so, is the child in a special program or uniquely involved with a teacher who has helped the child progress dramatically? Would this situation be difficult to replicate if relocation was granted?
- Could a child arguably benefit from the wholesale change in his or her school experience? Conversely, is the child an excellent student; well entrenched in AP courses; achieves well in successful competition for varsity sport positions; or other extracurricular activities?

Health Issues

- Which parent takes the children to the pediatrician, the dentist, and/or the psychologist?
- Which parent selects the healthcare providers and/or suggests any of the providers?
- Which parent provides medical coverage? Is it provided at that parent's own expense or paid for by the employer?
- Which parent administers prescriptive drugs to the children?
- Which parent has discovered medical/psychological problems of the child unnoticed or unattended to by the other parent? Did one parent resist taking the child to a psychologist or psychiatrist?
- Which parent provides life insurance for the benefit of the children?
- Does the child have medical problems? Is there an adequate opportunity to get treatment in the new area?
- Does a child with special needs have cognitive and emotion issues that could only benefit from having both parents involved? Is it important to consider providing respite for the parent of primary residence. (A child suffering from ADHD may well respond poorly to the changes and loss of structure associated with relocation.)
- What is the psychological health of both parents? The stress level experienced by a parent of primary residence can be a predictor of a child's inability to adequately cope with major life events, such as relocation. It may also affect the ability (or inability) of the custodial parent to truly promote a relationship with the other parent, which may become more difficult in the event relocation is permitted.

Religious Issues

- Are the parents of the same religious faith?
- In what religion are the children being raised?
- What is the importance of organized religion to each parent; do the respective parents attend a church or synagogue?
- Do either of the parents assist the children with religious instruction, such as CCD or Hebrew school?
- If the parents are of different faiths, are they nonetheless both committed to raising the children in one religious faith?
- Has either parent manifested religious intolerance?

Inter-Relationship with Children's' Extra-Curricular Activities

- Are the children engaged in sports activities? If so, has one of the parents taught the children to play a sport? Is a parent involved in the formal coaching of a sport (Little League, etc.)?
- Are either of the parents active in sports themselves, including the same sports the children play?
- Do the children play a musical instrument? Which parent has encouraged music?
- Does one of the parents play a musical instrument and, if so, has that parent instructed the child?
- Are any of the children interested in art? Does one of the parents assist the child with that activity?
- Are the children involved in a scouting program? If so, what is the involvement of each parent in that program (den mother or father; scout master, etc.)? Have the children been involved in volunteer or charitable work in the community? If so, to what degree has each parent been involved?
- What other activities does each parent do with the children, including taking them to cultural activities (museums, plays and concerts); spectator sports activities (professional, college and high school events); and recreational activities (the beach; the boardwalk; the zoo; carnivals and circuses)?

Household Functions

- Does each parent prepare meals for the child, or does one parent consistently dine out with the child?
- Do other children (friends) often visit the children at each parent's home, or only at one parent's home?
- What are the accommodations for the children at each home (sleeping arrangements; sharing of beds; sharing of bedrooms)?
- Does each parent go food shopping, including selecting food for the children? Do the children help each parent with the food shopping?
- Does each parent purchase clothing for the children, or does one parent rely on the other?
- Is there a complete wardrobe for each child at each parent's house? Conversely, are there only clothing kept at one house that are transported to the other house?
- Who takes the children for their haircuts (or does one parent give the children haircuts)?
- Do the children have specific chores to do at each household? If the chores are properly done, is there an allowance or other reward? If they are not done, are there repercussions?
- What about household rules? Are there specific times set aside for reading? For turning off the TV? For going to bed?

Special Events

- Which parent plans birthday parties for the children, or is it a cooperative effort?
- Does each party travel with the children? Are the trips child oriented or adult oriented?

Inter-Relationship Between Households

- Do the children have their own set of toys and games at each household?
- Does each parent maintain resource tools at their home (computers, reference books, etc.)?
- At which household (or both) are sports equipment, musical instruments, etc. kept?

Third Parties

- What is the relationship between the children and each parent's significant other or new spouse (if applicable)? Are there half-brothers/sisters or step-brothers/sisters involved on one side of the family? If so, where do they live, and what is their relationship with the children at issue?
- What is the relationship between the children and the extended family on each side (grandparents, cousins, nieces, nephews, etc.)?
- What is the relationship between each parent and other family members? (Just because the extended family may live in close geographical proximity doesn't necessarily mean there is a close relationship.)
- What positive influences (or negative influences) have been brought to the children by other family members?
- Is there a special relationship between a child or the children with friends, classmates or neighbors that is unique and may potentially result in a loss suffered by a child?

Personal Habits of the Parents

- Do either or both of the parents smoke? If so, is it done in the presence of the children?
- Is either parent an excessive drinker? Have there been incidences of driving while intoxicated? Loss of driving privileges?
- Have there been incidents of domestic violence, either toward a spouse or child, by either of the parents?
- Has either parent behaved inappropriately with a third party in the presence of a child?

Financial Resources

- What are the available finance resources if the relocation is a great distance? (In a lower-middle-class family the cost of transporting may make parenting time for the parent left behind all but impossible.
- Consideration should to be given to the non-custodian parent's work schedule and ability to take off substantial time from work to accommodate parenting time, both in terms of permissibility and economic impact.
- If the relocating parent cedes many weeks of summer parenting time to the parent remaining in New Jersey when that parent is a factory worker who not only has no ability to get blocks of time off or cannot afford to do so, how helpful is that?

Employment of the Relocating Parent

- Trial court level case precedent holds that a parent seeking to relocate need not have a job in the new state. But, would not a trial court want to know about the relocating parent's earnings as they relate to the ability to financially benefit the child?[39]

- How will an enhanced economic opportunity affect the child if the alternate parent has no meaningful income or conversely has a very substantial income?
- If the potential relocating parent assuming a job as an intern or a trial position, is that less significant than a person assuming a job with a guaranteed long-term contract?[40]

Age of Children/Bonding and Attachment Issues

- Social scientists like Joan Kelly and Michael Lamb have long discussed the importance of regular interaction with young children and their "attachment figures" in order to foster maintenance and strength in their relationships.[41] Such conclusions were also reached by Linda Nielsen in an article entitled "Shared Residential Custody: Review of the Research Part II of II."[42]
- It can be argued that extended separation from either parent with whom the child has formed a meaningful attachment is undesirable because they unduly stress development attachment relationships. Engaging experts having expertise in the issues of bonding and attachment as described in detail in the various journals of family psychology cited in this article may be helpful both with respect to the issue of whether relocation itself should be permitted and specifically based upon the ages of the children and the proximity distance of what specific parenting arrangements would be appropriate.[43]

Other Factors

- What is the health of each parent, both physically and emotionally? Is either parent under the continuous care of a physician or a psychologist/psychiatrist? If so, what is the diagnosis and what is the prognosis?
- Has either parent been guilty of negligent supervision of the children? Has that supervision resulted in injury to a child? Does each parent insist on seatbelts being worn, without exception?
- Do one or both parties engage in corporal punishment?
- Does one party believe the punishment has been excessive? In such instances, is it possible that relocation may, in fact, be consistent with the need for fewer transaction times for exchange of the child, less communication, and structured parenting time?
- If there is an existing child support order in place, is the paying parent current? Have there been arrears in the past?

Practical Suggestions

While these factors are not all-inclusive, they do provide a myriad of factors that may be relevant in a client's case. Relocation cases will remain extremely fact sensitive. Even though the legal standard has changed, many of the same factors will nonetheless have to be considered, with some taking on lesser significance when *Baures* was the law and others greater significance.

Below are some practical suggestions for family lawyers:

1. If a client consults with the practitioner in the intact family stage and discusses out-of-state relocation, be aware of the aforementioned factors and others, and advise the client as to what he or she must substantiate to be successful in a removal application or successful in opposing such an application.
2. If a client comes to the practitioner after the parties are already separated, advise the client as to what immediate changes in the parenting of the children he or she must make to be successful in either a removal application or in opposing the removal application. If the client plans to seek immediate removal, and the facts appear not to favor a successful result, the best advice is to tell the client to put his or her plans on hold and try to make some consensual adjustment, without attorney involvement, that will ultimately buttress the client's position.
3. From the day the client consults with the practitioner, instruct the client to keep a very detailed diary, not only as to time allocation but with respect to the other day-to-day factors enumerated in this article.
4. For purposes of trial, encourage the client to keep as many visual aids as possible. This includes videos of activities with the children, photographs of activities with the children, homework assignments and special projects worked on with the children, etc.
5. If the case is in the divorce litigation stage and the practitioner represents the client who fears a post-judgment removal application, contemplate the following:
   a. Establishing a provision in an agreement that prohibits either spouse from leaving the jurisdiction permanently with the children. While this is undoubtedly automatically unenforceable because the court will still ultimately look to the best interest of the children, it at least is another factor that the court will have to consider. It also might

have a chilling effect upon a parent making a post-judgment application. Moreover, if one parent is extremely resistant to such a provision, it may tip the hand and validate the client's fears.

b. Attempt to craft a provision that sets forth that it is in the best interest of the children for the parties to live within a certain geographical proximity of one another, which can be defined in the agreement. Don't leave the provision solely with this conclusory language, however. Set forth the specific factors as to why the parties believe it is in the best interest of the children.

c. Attempt to add language that indicates that since the parties uniquely believe it is in the best interest of the children for them to remain in close proximity with one another, any party seeking to move beyond that proximity would have the burden of proof in justifying that move, notwithstanding the case law extant in New Jersey.

6. If the practitioner represents a parent in the divorce proceeding who has stated he or she (as the primary custodial parent) wishes to relocate sometime after the case is over, try to limit the post-judgment litigation. Attempt to include a provision that would permit a primary custodial parent to relocate and provide for a modified visitation schedule in such event. Keep in mind that the standard for relocation is now more onerous.

7. Remember that removal for the parent of primary residence is now much more difficult in New Jersey, as in most states. If the practitioner represents the potential moving parent in the divorce litigation post-judgment stages he or she might consider making the following concessions:

a. Accept the bulk of transportation.[44]

b. If the proposed relocation is only several hours away, weekends should still be part of the visitation package, particularly all three- and four-day holiday weekend periods.

c. Craft a provision that allows the client, at his or her expense, to come to the custodial parent's locale and visit with the children several times a year, upon reasonable notice.

d. Negotiate openly and fairly regarding spring and winter breaks for the non-moving parent.

e. As for the non-moving parent, maximize the summer visitation and, if it is for a substantial period of time, provide that child support ceases during that period of visitation/parenting.

f. If the practitioner is the non-moving party, try to negotiate a reconsideration clause that provides that when a child attains a certain age, the parents will at least consider a custodial change.

g. Think about a provision that indicates that if a child reaches the age of 14 and wants to live with the non-custodial parent, the expression of such intent would automatically result in a custodial change. In arguing for this provision, cite *Kavrakis v. Kavrakis*,[45] indicating that if the child is of suitable age (defined as age 14) to signify consent to removal, and if the consent was informed and voluntary, the child has the right to remove from New Jersey without a hearing. Also cite *Palermo v. Palermo*,[46] that the opinions or expressed preferences of a child to live with one parent over another may properly be one of the factors that a trial judge may consider.

h. Negotiate the lines of communication. Make sure there are provisions regarding unfettered telephone access. Provide that the non-custodial parent, at his or her expense, can have a separate telephone line installed in the bedroom of the child.

i. Make sure to maximize daily contact through unlimited computer access, video imaging, and video conferencing, as expressed in *Baures*.[47] It is not a substitute for personal parenting time, but it is an important means of communication, nonetheless.

Just because the relocation standard has changed, doesn't mean that litigation won't remain risky and expensive. When parties go their separate ways, no one can predict the future and, accordingly, even with a change in the legal standard it behooves the parties with the effective assistance of counsel to negotiate fairly at the time of their dissolution and take out of play otherwise inevitable post-judgment litigation.

Mark Biel is the senior partner in Biel & Stiles, P.A., Northfield.

Endnotes

1. *Baures v. Lewis*, 167 N.J. 91 (2001). The prior cases of *Cooper v. Cooper* and *Holder v. Polanski* (see fn. 3) are discussed in detail by Mark Biel, *New Jersey Family Lawyer*, Vol. 29, No. 2, Nov. 2008; and Charles V. Vuotto Jr., Vol. 31, No. 3, Nov. 2010.
2. *Bisbing v. Bisbing*, 230 N.J. 309 (2017).
3. *Holder v. Polanski*, 111 N.J. 344, 350 (1988) (*citing Cooper v. Cooper,* 99 N.J. 42, 50) (1984).
4. *Id.* at 56.
5. *Id.* at 57.
6. *Id.* at 56-57.
7. 111 N.J. 344 1988.
8. *Id.* at 349.
9. *Id.* at 353.
10. *Ibid.*
11. *Id.* at 353.
12. *Ibid.*
13. *Id.* at 106.
14. *Id.* at 114.
15. *Id.* at 118.
16. *Id.* at 120.
17. *Cf. Heinl v. Heinl*, 287 N.J. Super. 337, 347 (App. Div.1996); *Ribner v. Ribner*, 290 N.J. Super. 66, 77 (App. Div. 1996); and R. 1:7-4.
18. *Baures* at 119.
19. *Id.* at 117.
20. *Id.* at 118.
21. Since under *Bisbing* a best interest analysis is require, the family law practitioner should review cases that discussed in some detail allegations of relatively equally shared custody, specifically, *Morgan v. Morgan*, 205 N.J. 505 (2011); *Barblock v. Barblock*, 383 N.J. Super. 114 (App. Div. 2006); *O'Connor v. O'Connor*, 349 N.J. Super. 381 (App. Div. 2002); and *Mamolen v. Mamolen,* 346 N.J. Super. 493 (App. Div. 2000); *Bisbing, supra*. at 326-327.
22. *Id.* at 314.
23. *Bisbing*, 445 N.J. Super. 207 (App. Div. 2016).
24. The "best interest" standard will be applied as long as the parents share legal custody. Equally shared physical custody is thus not a precondition for applying this standard. Of course, if a parenting plan is not yet established this may have to be litigated as part of the relocation trial.
25. *Baures supra.* at 106.
26. *Id.* at 107 (*citing* Frank F. Furnstenberg Jr. and Andrew J. Cherlin, Divided Families: What Happens to Children When Parents, Part 72 (1991).
27. *Cf. In Re Marriage of Burgess*, 913 P.2d. 473, 41 (Cal. 1996). *Bisbing, supra*. at 326.
28. *Cf. Pinto v. Spectrum Chems. & Lab Prods.*, 200 N.J. 580, 598 (2010) and *Olds v. Donnelly*, 150 N.J. 424, 440 (1997). *Bisbing, supra*. at 328.
29. *Id.*
30. Much of that contemporary research has previously been addressed in detail by editor in chief, Charles F. Vuotto Jr., and emeritus editor Mark Biel, in *New Jersey Family Lawyer*, Relocation: Is it time for a Legislative Response? Vol. 34, No. 2, Nov. 2013.
31. Richard A. Warshak, Ph.D. Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited, *Family Law Quarterly*, Vol. 34, No.1, Page 83 (2000).
32. Sanford Braver, *et. al.*, Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Conclusions, 17 *J. Fam. Psychol*, 206, 210 (2003); *Bisbing* at 330.
33. *Ibid. See also Baures supra.*, 167 N.J. at 109 (identifying growing trends at that time in case law against restricting custodial parent's right to relocate with children).
34. This was discussed initially in *Shea v. Shea*, 384 N.J. Super. at 273-274 and *Bisbing* at 327.
35. *Bisbing, supra*. at 338.
36. In making a best interest determination, courts often rely heavily on the expert psychologist and other mental health professionals. *See Kinsella v. Kinsella*, 150 N.J. 276, 318 (1976). The court's focus must be on the safety, happiness, physical, mental and moral welfare of the child. *Cf. Hand v. Hand*, 391 N.J. Super. 101, 105 (App. Div. 2007) (*citing Fantony v. Fantony*, 21 N.J. 525, 536 (1956).
37. *Bisbing* at 337. Of course custody modification will have to be considered in accordance with the procedural framework established in *Lepis v. Lepis*, 83 N.J. 139, 140 (1980). *See also Weishaus v. Weishaus*, 180 N.J. 131, 140-141 (2004) and *Shehan v. Shehan*, 51 N.J. Super. 276, 285 (App. Div., *cert. den.*, 28 N.J. 141 (1958); and *Faucett v. Vasquez*, 411 N.J. Super. 108, 219 (App. Div. 2009).

38. *Ibid*. at 338.
39. An excellent article was authored by Cheryl Connor discussing the trial court decision of *Benjamin v. Benjamin*, 430 N.J. Super. 301 (Ch. Div. 2012). Discussed in that are out-of-state cases which have been considered where a best interest analysis already applied.
40. How arguments will be made at trial will depend on whether the position offered is a training/trial position; whether there are opportunities projected for advancement; what benefits are available and what the waiting period is for the activation of those benefits and whether the new position involves a written contract.
41. J.B. Kelly and M.E. Lamb (2003), Developmental Issues in Relocation Cases Involving Young Children: When, Whether and How?, *Journal of Family Psychology*, Vol. 17, 193-205 (June 2003).
42. *American Journal of Family Law* (Vol. 27 No. 2, Summer 2013).
43. It is suggested that in certain instances the specific age of a child, or in differential age of children when multiple children are involved, will become significant in a best interest analysis. In addition to the Kelly and Lamb article referenced above, consider an article by Marsha Kline Pruett, *et als*, Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children, *Journal of Family Psychologists*, Vol. 17 No. 2, 169-180 (2003).
44. *See Santucci v. Santucci*, 221 N.J. Super. 525, 531 (App. Div. 1987); *see also O'Donnel v. Singleton*, 384 N.J. Super. 141 (App. Div. 2006).
45. 196 N.J. Super. 385 (Ch. Div.1984).
46. 164 N.J. Super. 492, 495 (App. Div. 1978).
47. *Baures, supra*. at 118.

The Interplay Between the Equitable Distribution Statute and the Elective Share Statute: When the 'Black Hole' Becomes a 'Loophole'

by J. Patrick McShane III

The purpose of this article is to describe the statutory problem giving rise to the Jan. 26, 2017, Appellate Division decision *In the Matter of the Estate of Arthur E. Brown, Deceased*,[1] which reflects the mischief that can be created by the use/misuse of the elective shares statute's divorce limitation. This article suggests that a bright line rule related to divorce complaint filing be used to differentiate between those cases in which an elective share applies and those cases in which equitable distribution is available. Stated quite simply, if there is no complaint, the elective share should apply. If there is a complaint filed and death intervenes before the entry of judgment of divorce, equitable distribution should apply. By using the filing of a complaint as the determination of whether the elective share does or does not apply, one can avoid the ambiguity that has existed in the cases that fall between the equitable distribution and divorce statutes, which has become known as the 'black hole.'

The Statutory 'Problem'

N.J.S.A.3B:8-1 entitles a surviving spouse to:

> …a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated, provided that at the time of death the decedent and the surviving spouse…had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as the result of a Judgment of Divorce from Bed and Board or under circumstances which would have given rise to a cause of action for divorce or nullity of marriage to a decedent prior to his death under the laws of this state.

This quoted language is described by the New Jersey Law Revision Commission as a "unique deviation from the Uniform Probate Code."[2]

In 2011, the New Jersey Law Revision Commission issued a report in response to the state Supreme Court's decision in *Kay v. Kay*,[3] and in which the commission sought to bridge the gap in the black hole that exists in the current statutes. In *Kay, supra,* the estate of the deceased spouse was permitted to file a complaint continuing the deceased spouse's divorce case claim of diversion of marital assets to the use of the surviving spouse and her daughter. Therein, the Supreme Court stated as follows:

> As we commented in *Carr*, our legislature has occasionally considered bills that had been designed to address some of the concerns that arise when the statutes governing divorce and equitable distribution and the statutes governing the matters pertinent to the decedents' estates appear to collide. *See Carr v. Carr*, 120 N.J. at 350 note 3 (Explaining then-recent efforts to create statutory clarity through altering definition of "surviving spouse") As this appeal highlights a further dimension of the way in which those statutory provisions may conflict, we invite such further considerations of the matter as our legislature deems appropriate.[4]

In *Carr v.* Carr,[5] the Supreme Court permitted relief from the black hole created by the fact that death before a divorce judgment is entered terminates a spouse's or that spouse's estate's claim to an equitable distribution of marital assets and, at the same time, the circumstances giving rise to a cause of action for divorce cuts off that spouse's or that spouse's estate's probate rights.

Footnote 3 of *Carr* states as follows:[6]

> We are mindful of the recent legislative attempts to clarify this area. On June 27, 1988,

the New Jersey Senate passed legislation amending the elective share stature to clarify who is a "surviving spouse." S.1001 203rd Legis., 2d Sess. (June 27, 1988). The bill recognized that a marriage's legal status is not severed until a final judgment of divorce is entered, and removed from the elective share statute the forfeiture provision when a surviving spouse living separate and apart has a cause of action for divorce. *Ibid.* A modified joint Senate and Assembly version of the bill, S.1001(1R) and A.4423, 203 Legis., 2d Sess. (June 15, 1989), provided that a surviving spouse remained entitled to an elective share pre-divorce judgment so long as he or she was not the deserting spouse. *Id.* at 2c(7). That bill also specifically provided that "nothing [herein] shall place a person in the position of being neither a surviving spouse nor a spouse entitled to equitable distribution, alimony, maintenance or child support in accordance with that person's rights under the law of divorce and annulment." *Id.* at 2(d). That proposed amendment, reintroduced in S.2170, 204 Legis., 1st Sess. (Jan. 9, 1990), confirms only that the legislature had not, by its current enactments, explicitly considered or addressed the gap created by these statutes.

Of note, is the earlier part of *Carr* describing the earlier draft of the elective share statute, which provided that "…disentitlement would only occur if the parties had been living separate and apart in different habitations *and* had obtained a judgment of divorce or ceased to cohabit as married under circumstances which would have given rise to a cause of action for divorce." (Emphasis supplied)[7] The Supreme Court described that version of the statute as more similar to that enacted in the Uniform Probate Code under which only a judgment of divorce results in disqualification of an elective share.

Thus, in 1990, the Supreme Court requested that the Legislature act. The Legislature did not do so. In 2010, in the *Kay* case, the Supreme Court asked the Legislature to act, but it did not. The New Jersey Law Reform Commission report has been stalled. The 2014 efforts between the Real Property, Trust and Estate Law Section of the New Jersey State Bar Association and the Family Law Section seeking to improve upon the New Jersey Law Reform Commission suggestion and seeking to define a bright line rule of divorce complaint filing as cutting off the elective share right have not resulted in action either. At a seminar at the 2017 NJSBA Annual Meeting, the bottom line request of representatives of both the Real Property Trust and Estate Law Section and Family Law Section was for a bright line rule based on what both sections viewed as inequities that can occur to spouses or estates caught in the black hole, as well as the 'loophole' that can cause damage to the public purse, as illustrated in the *Brown* case.

Brown and the Mischief That Can be Caused by Reliance on the Language of N.J.S.A. 3B:8-1

In the *Brown* case, the New Jersey Division of Medical Assistance and Health Services (DMAHS) filed a priority lien against the estate of Arthur Brown for reimbursement of $166,981.25 in Medicaid benefits he received from July 1, 2008, until the date of his death, on April 14, 2013. DMAHS claimed not only against Arthur Brown's estate, but argued that his estate should include the one-third elective share against the augmented estate of his wife, Mary Brown. Thomas Brown, the executor of the estate, on behalf of himself and his two siblings, filed a complaint to seek to discharge the lien. His principal argument was that his father had no right to an elective share of his mother's estate under N.J.S.A.3B:8-1. He also made arguments that the DMAHS could not make the claim against the estate because the right was personal, and that his father's elective share was zero.

The primary focus of this article is on the argument in the facts of his parent's case that either his parents lived separate and apart at the time of Mary's death or had ceased to cohabit under circumstances that would give rise to a cause of action for divorce under N.J.S.A. 2A:34-2(f), institutionalization for mental illness for a period of 24 or more consecutive months subsequent to marriage and next preceding the filing of the complaint.

The facts were, that the parties had been married for over 50 years, when, in April 2007, the then 78-year-old Arthur moved into an assisted living facility because he was suffering from Alzheimer's disease. Three months later, on July 18, 2007, his wife, Mary, executed a last will and testament naming the executor, Thomas, and his two siblings as her residual beneficiaries. Mary excluded her husband, Arthur, as a beneficiary under her will.

On Feb. 6, 2008, Arthur and Mary executed a deed transferring Arthur's interest in the condominium in which they had lived to Mary. On April 7, 2008, within two months of the deed, Arthur was admitted into a

nursing home. He then applied for institutional-level Medicaid benefits. There are a number of procedural and statutorily defined issues under Medicaid regulations, which are described in the *Brown* opinion, that are beyond the scope of this article.

Mary became ill in Nov. 2009, and died testate on Sept. 9, 2010. In Nov. 2010, Thomas notified the county welfare agency responsible for administering the Medicaid program for his father's benefit of his mother's death, and disclosed a few additional assets. When Thomas informed the county welfare agency of his mother's death, the county welfare agency asked whether his father, Arthur, was going to elect a spousal elective share against the mother's estate. Thomas claimed that the elective share did not apply or, alternatively, attempted to waive the claim on behalf of his father. The county welfare agency responded by asserting that Thomas's action on behalf of his father was a waiver by Arthur of an available asset that subjected Arthur to a period of Medicaid ineligibly.

What is noteworthy is the attempt by the executor of the father's estate to claim that after a 59-year marriage the placement of his father in a nursing facility was tantamount to circumstances giving rise to a cause of action for divorce to defeat the welfare/Medicaid recovery lien. The trial division rejected the argument that Arthur and Mary lived separate and apart under circumstances that would have given rise to a cause of action for divorce.

First, Arthur and Mary had never filed for divorce. There was never any indication of an intention to file for divorce. Rather, Arthur's Alzheimer's disease-related entry into an assisted living facility and then a nursing home inevitably separated him from his wife of 59 years. The trial judge, affirmed by the Appellate Division, concluded that such a separation does not prevent the surviving spouse from claiming an elective share. The trial judge and Appellate Division both rejected the argument that Arthur's move into a nursing home because of Alzheimer's disease constituted "institutionalization" under N.J.S.A. 2A:34-2(f). To do so could subject any couple to disqualification from an elective share where one spouse enters an assisted living facility, regardless of their intention to stay married.

In *Brown*, there was no institutionalization at a psychiatric facility, only care at a nursing home. In *Brown*, there was no guardianship application. In *Brown*, there was no judgment of capacity and no evidence of the father's level of incapacity prior to his wife's death. Most importantly, for the policy reason that Alzheimer's patients should not be deemed to be institutionalized under the meaning of the divorce statute, the claim by the executor was rejected.

The purpose of equitable distribution as set forth in *Carr* and *Kay* and the cases cited therein is recognition that marriages are joint enterprises. The distribution of assets is designed to secure the parties' future. The purpose of the elective share statute is to protect spouses from becoming impecunious or wards of the state, and to protect spouses in their older ages. The statutory schemes, when they collide, have been ameliorated by equitable remedies such as constructive trusts, quantum meruit and quasi contract. The theories are not based on the actual intent of the parties, but are imposed by the court to prevent an unjust enrichment.[8]

Suggested Remedy

In consultation with the Real Property, Estate and Trust Law Section and reviewing the New Jersey Law Review Commission Reports, the Family Law Section suggested amendments to N.J.S.A. 2A:34-23h and N.J.S.A. 3B:8-1. The suggested resolution includes, *inter alia,* a second sentence to N.J.S.A. 2A:34-23, as follows:

> The Courts' authority to effectuate an equitable distribution of the property does not abate with the death of either party provided that a valid complaint for divorce, dissolution of civil union or termination of domestic partnership is filed prior to the death of a party.

A new last sentence of N.J.S.A. 2A:34-23 was suggested, as follows:

> For the purposes of this subsection, "valid complaint" shall mean a duly filed complaint, that is not subject to dismissal for: The Court's lack of jurisdiction over the subject matter, the Court's lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process, or failure to state a claim upon which relief can be granted.

N.J.S.A. 3B:8-1 was suggested to be amended, as follows:

> If a married person, partner in a civil union, or person in a domestic partnership dies, domiciled in this State, the surviving spouse, partner

> in a civil union, or domestic partner has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated, provided that at the time of death neither the decedent nor their surviving spouse, partner in a civil union or domestic partner had filed a valid complaint for divorce, dissolution of civil union, termination of domestic partnership or divorce from bed and board.

For the purposes of this subsection, "valid complaint" shall mean a duly filed complaint that is not subject to dismissal for: The Court's lack of jurisdiction over the subject matter, the Court's lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process, or failure to state a claim upon which relief can be granted.

> The bright line accomplishes two things: First, when a valid complaint for divorce is filed, and a spouse dies, the death of one spouse does not abate the cause of action for equitable distribution, which can then proceed to judgment. Second, in the circumstance where no complaint is filed, a surviving spouse who is eliminated from his or her spouses' will has an elective share. It is the simple act of filing or not filing a valid complaint that determines which set of rights and obligations are imposed on a party and his or her estate—the right to an elective share of the augmented estate or the right to equitable distribution of marital assets.
>
> While this bright line rule may eliminate some of the planning opportunities available for Medicaid planning, it eliminates the loophole argument Thomas Brown tried to make that his mother and father were living separate and apart under circumstances that would have given rise to a cause of action for divorce.

As stated by the Appellate Division, describing the trial judge's decision:[9]

> The judge emphasized there was no evidence of marital discord; rather, through Medicaid planning, Arthur and Mary had worked together to protect each other by securing assets for their future use.

The judge concluded that the elective share was available to Arthur Brown even though he was residing in a nursing home.

A bright line rule can also avoid the uncertainty created by the black hole that exists when the elective share and equitable distribution statutes do not provide relief for the estate of the deceased spouse.

Conclusion

A reading of *Brown* indicates that legitimate planning opportunities remain available, beyond the argument that separation due to illness or infirmity equals 'divorce,' thus disqualifying a surviving infirmed or institutionalized spouse from an elective share. ■

J. Patrick McShane III is a sharehholder in the Cherry Hill firm of Forkin, McShane, Manos & Rotz, P.A. *The author would like to thank Sheryl J. Seiden, founding member of Seiden Family Law, LLC, in Cranford, for her assistance in reviewing this article.*

Endnotes

1. 448 N.J. Super. 252 (App. Div. 2017).
2. New Jersey Law Revision Commission, final report relating to equitable distribution and elective spousal share, Nov. 7, 2011, page 2.
3. 200 N.J. 551 (2010).
4. *Id.* at 554.
5. 120 N.J. 336 (1990).
6. *Id.* at 350.
7. *Id.* at 345.
8. *Carr, supra* 120 N.J. at 352.
9. *In Re Estate of Brown*, *Id.* at 448 N.J. Super. 265-266.

Stretching the Boundaries of Parental Rights and Responsibilities

by Dina M. Mikulka and Amy Kriegsman

It is well settled that parents have a constitutional right to raise their children.[1] Not only are parents entitled to bring up their children as they choose, but they are granted the freedom and the fundamental right to enjoy a relationship with their children. In *Stanley v. Illinois*,[2] the Supreme Court held:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man, "and "[r]ights far more precious...than property rights."[3]

The New Jersey Supreme Court has acknowledged that a parent has a constitutionally protected fundamental right to the companionship of their child, although that right is limited.[4] Parents have a constitutionally protected, fundamental liberty interest in raising their biological children, even when those children have been placed in the care of others.[5]

Family law attorneys are faced with the ever-evolving issue of what constitutes a family and who should be treated like a parent. This most frequently presents itself in the form of grandparents seeking custody of grandchildren and non-parent partners seeking access to children.

The Concept of Family Continues to Evolve

There are legally recognized means by which a non-parent can achieve the status of a parent. A psychological parent is a third party who has stepped in to assume the role of the legal parent. It is a concept rooted in case law, not statutory law. A psychological parent is one who is not a parent to the child based upon their "genetic contribution, gestational primacy, or adoption."[6] A psychological parent will not be found to exist, barring, "a showing of parental gross misconduct, abandonment, unfitness," or "exceptional circumstances."[7] In most of the cases undertaken by family law practitioners, the most common reason for claims of psychological parent status fall under exceptional circumstances.[8]

A psychological parent is a third party who has stepped in to assume the role of the legal parent. The status of psychological parent can be sought by a stepparent or partner to establish parenting time over the opposition of the legal parent, or can be used by a legal parent to establish support against the psychological parent.

In the case of *Sorentino v. Family and Children's Society of Elizabeth*,[9] a 16-year-old mother's surrender of her child to an adoption agency was found to be coerced, and the father of the child was not given the proper notification of the surrender, yet the child had been in the continued custody of the foster parents for 31 months. Although the surrender was found to be invalid, the court was required to have a hearing to determine whether transfer of custody to the natural parents would cause serious harm to the child, inasmuch as the foster parents had become psychological parents of the child.

In *J.R. v. L.R. v. S.G.*,[10] where a husband found out after more than 10 years of marriage that his 'daughter' was not his biological child, he was nonetheless found to be her psychological parent and charged with contributing to her support, although their relationship had broken down and J.R. withdrew his love and affection from the child.

The concept of psychological parent cuts both ways, in that it can be used by a non-parent to force visitation or even custody, and can be used by a parent to force a non-parent into support obligations for a child.

To be found to be a psychological parent, the moving party must establish four elements:

1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;[11]
2) that the petitioner and the child lived together in the same household;
3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the

child's care, education and development including contributing toward the child's support, without expectation of financial compensation (a petitioner's contribution to a child's support need not be monetary); and,

4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[12]

'Exceptional circumstances,' sometimes known as 'extraordinary circumstances,' have been recognized as an alternative basis for a third party to seek custody and visitation of another person's child.[13]

The exceptional circumstances category contemplates the intervention of the court in the exercise of its *parens patriae* power to protect a child.[14]

The exceptional circumstances test does not require proof that a legal parent is unfit. The court has explicitly stated that exceptional circumstances may rebut the presumption in favor of a parent seeking custody even if there is no basis for terminating parental rights on statutory grounds and, indeed, even if the parent is "deemed to be a fit parent...."[15] "'[E]xceptional circumstances' based on the probability of serious psychological harm to the child may deprive a parent of custody."[16]

If a psychological parent relationship is established, the psychological parent is considered on par with the natural parent(s).[17] Thereafter, custody and parenting time issues are determined as between the parent and the psychological parent based on the best interest of the child standard.[18]

In the recent case of *D.G. v. K.S.*,[19] the same-sex spouse of the natural father of a child sought to be deemed the psychological parent of the child. In *D.G.*, the biological parents were long-time friends who agreed, with S.H., D.G's same-sex partner, to conceive a child together, raise the child together and to create a "triparenting" relationship. They agreed to use D.G.'s sperm and K.S.'s egg, and agreed to give the child S.H.'s last name. Their agreement worked and inured to the benefit of the child for several years.

K.S. decided she wanted to relocate to California with the child. The court found that S.H. was a psychological parent to the child.[20] S.H. had lived with the child for the child's whole life and had undertaken financial obligations on the child's behalf. S.H.'s involvement with the child was with the consent and encouragement of both biological parents, since before the child's birth. S.H. had a bonded relationship with the child, who called him, "papa." The court found S.H. to be the psychological parent of the child. Once S.H. was established as the psychological parent, he had equal standing regarding the custody determination, and had an obligation to pay support for the child.

Where custody is sought by a third party, the court must conduct a two-step analysis. The first step is to determine whether the presumption in favor of the legal parent is overcome by either a showing of "unfitness" or "exceptional circumstances."[21] If the third party rebuts that presumption, then the court proceeds to the determination of whether awarding custody or other relief to the third party would promote the best interests of the child.[22]

The difference between a kinship legal guardianship (KLG) and a more typical psychological parent situation is that a KLG requires some abdication of parental responsibility or parental unfitness. A psychological parent relationship requires no unfitness. A stepparent or partner may become a psychological parent by way of their independent relationship with the child, often with the implicit or implied consent of the natural parent. Both, once found, will or may, result in a financial obligation of the KLG/psychological parent.

While there are significant positive aspects when a group of influential, appropriate and caring adults surround a child with love and support, there can be a downside to the involvement of so many other adults and family members invading the sphere of parental influence. The issue becomes how far the boundaries of parental rights and responsibilities should be stretched, especially in situation where parents are fit and appropriate.

Kinship Legal Guardianship

Most seasoned family law attorneys or attorneys who specialize in Department of Child Protection and Permanency (DCPP)[23] matters have come across situations involving parental incompetence where KLG might be appropriate, but this option is often overlooked as being something available only in DCPP litigation.

Most practitioners are familiar with the scenarios. A birth parent has serious substance abuse issues, mental health problems or, as in many cases, both. Grandparents often step in to seek custody to avoid protracted DCPP involvement and are left to sort out these relationships without DCPP assistance years later. In addition, there are occasions where unemancipated children have children they are too young or immature to parent. Grandparents

or close relatives step up to assume custody under a non-dissolution docket, while the parent continues to struggle with legal, medical and personal problems. During the biological parent's struggles, the child becomes enmeshed in the family of the relative caretaker. Once the child has been in the care of a relative for a significant period of time, there may need to be a balancing between best interests of the child, permanency and the right of a parent to raise his or her child. Although the KLG statute has been in existence since 2002, there appear to be few privately filed KLG applications, with most occurring by consent in the context of DCPP-initiated litigation.

The Underutilization of KLGs

Many situations in which a relative has legal or physical custody of a child are inappropriate for private adoption proceedings. For example, if a natural parent is struggling with substance dependency issues but still has a relationship with the child, termination of parental rights followed by adoption may not be realistic.[24] When the prospect of a private adoption proceeding is not appropriate for whatever reason, KLG is a little-explored alternative for family members seeking to establish a more secure form of custody. Custody is always modifiable; KLG is the more permanent option, only modifiable under limited circumstances.[25] KLG is intended to afford the custody arrangement permanency, unlike an award of legal or physical custody:

> The establishment of the status of "kinship legal guardians" answers a policy dilemma that haunted placement officials, judges and caregivers for many years. No longer must family relatives act without legal authority to provide care to children in cases in which termination proceedings were not appropriate or possible…. [w]hile kinship legal guardianship is intended to be permanent and self-sustaining, it is not as comprehensive as an adoption.[26]

In order to qualify to become a KLG caretaker, an individual must meet certain criteria:

> "Caregiver" means a person over 18 years of age, other than a child's parent, who has a kinship relationship with the child and has been providing care and support for the child, while the child has been residing in the caregiver's home, for either the last 12 consecutive months or 15 of the last 22 months.[27]

This may not be an onerous burden when considering a parent who suffers from serious addiction or mental health issues.

The subject child has to be less than 18 years old. ("Child means a person under 18 years...."[28]) Venue rests in the county where the caregiver resides ("A *motion* for kinship legal guardianship of a child pursuant to N.J.S.A. 3B:12A-1 to -6 shall be brought or the venue laid in the county where the caregiver resides." R. 5:9A-3(a).) The statute permits the application by motion.[29]

In making a determination regarding a relative's request to be appointed the KLG caretaker, the court "shall consider:"[30]

1. "if proper notice was provided to the child's parents;"
2. "the best interests of the child;"
3. "the kinship caregiver assessment;" which mirrors an adoption agency home study;
4. "in cases in which the division is involved with the child as provided in…[N.J.S.A.] (C. 30:4C-85), the recommendation of the division, including any parenting time or visitation restrictions;"
5. "*the potential kinship legal guardian's ability to provide a safe and permanent home for the child*;" (Emphasis added)
6. "the wishes of the child's parents, if known to the court;"
7. "the wishes of the child if the child is 12 years of age or older
8. "the suitability of the kinship caregiver and the caregiver's family to raise the child;"
9. "the ability of the kinship caregiver to assume full legal responsibility for the child;"
10. "the commitment of the kinship caregiver and the caregiver's family to raise the child to adulthood;"
11. "the results from the child abuse record check conducted pursuant to…([NJSA] C. 30:4c-86);"
12. "the results from the criminal history record background check and domestic violence check conducted pursuant to…[N.J.S.A.] 30:4C-86…"[31]

There has to be more than parental incapacity for the court to award KLG. KLG "shall not" be awarded "solely because of parental incapacity."[32] There must be relationship between the child and the kinship care provider at the time the application is made to the court. This relationship would exist if the person seeking KLG had been a caretaker for the child in question for the time frame

specified above. The evidentiary standard for a granting of a KLG is "clear and convincing."[33] To grant a KLG, the court must find that:

1. Each parent's incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child;
2. The parents' inability to perform those functions is unlikely to change in the foreseeable future;
3. (applicable to DCPP cases only); and
4. The awarding of kinship legal guardianship is in the child's best interests.[34]

The standard required must be proven by clear and convincing evidence, which is evidence upon which the trier of fact can rest "a firm belief or conviction as to the truth of the allegations sought to be established."[35] It must be "so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."[36]

KLG as a Permanent Custodial Arrangement

In New Jersey, KLG is "*intended to be permanent and self-sustaining…*"[37] The permanency of a KLG arrangement is well established in New Jersey law:

> Kinship Legal Guardianship means a caregiver who is willing to assume care of a child due to parental incapacity, with the intent to raise the child to adulthood, and who is appointed the kinship legal guardian of the child by the court…[a] kinship legal guardian shall be responsible for the care and protection of the child and for providing for the child's health, education and maintenance.[38]

A KLG caretaker has the same rights to the child as a parent would have, except the KLG caretaker cannot consent to an adoption. A KLG caretaker:

> shall have the same rights, responsibilities and authority related to the child as a birth parent, including but not limited to: making decisions concerning the child's care and well-being; consent to routine and emergency medical and mental health needs; arranging and consenting to educational plans for the child; applying for financial assistance and social services for which the child is eligible; applying for a motor vehicle operator's license; applying for admission to college; responsibility for activities necessary to ensure the child's safety, permanency and well-being; and ensuring the maintenance and protection of the child.[39]

The birth parent retains the "obligation to pay child support" and "the right to visitation or parenting time with the child, as determined by the court."[40] The KLG arrangement terminates by law when the child reaches the age of 18 or stops attending school full time.[41]

There are limited reasons for which a court might elect to vacate an order for KLG prior to the child reaching the age of majority:

> An order of judgment awarding kinship legal guardianship may be vacated by the court prior to the child's 18th birthday if the court finds that the kinship legal guardianship is no longer in the best interests of the child, *or in cases where there is an application to return the child to the parent, based on clear and convincing evidence, the court finds that the parental incapacity or inability to care for the child that led to the original award of kinship legal guardianship is no longer the case and termination of the kinship legal guardianship is in the child's best interests.*[42]

A KLG may also be vacated "if, based on clear and convincing evidence, the court finds that the guardian failed or is unable, unavailable or unwilling to provide proper care and custody for the child, or that the guardianship is no longer in the child's best interests."[43]

The few published cases addressing vacating KLGs have been as a result of DCPP-initiated litigation in the trial courts. The moving party has the burden of proof to justify the extreme relief of vacating the KLG.[44] The court hearing the application "may request that the Division be involved in the case or that Division may determine that it wishes to take a position in the case."[45]

The Supreme Court has noted that the trial court "may request that the Division be involved in the case or the Division may determine that it wishes to take a posi-

tion in the case."[46] The division's involvement in many of these cases may have been fleeting and limited to encouraging the relatives to seek custody under non-dissolution dockets before the division removes the child from an unfit parent or views the relative caretaker negatively for not seeking custody. These involved relatives are often placed in a catch 22, either they file for custody now and sort out the relationships years later or face negative consequences by being viewed as not adequately protective by the division.

The New Jersey Administrative Code provides the division guidance on whether to take a position on a motion to vacate a KLG order by setting forth nine very specific factors:

> The child's age; (2) the duration of the Division's involvement with the child, prior to the granting of the kinship legal guardianship; (3) the total length of time the child was in out-of-home placement; (4) the length of time the child has lived with the guardian, prior to and after the granting of the kinship legal guardianship; (5) when the kinship legal guardianship was granted; (6) what the original harm or risk of harm to the child was; (7) the parent's present fitness to care of the child; (8) any subsequent allegations of abuse or neglect received by the Division and their findings; (9) and what plan is proposed for the child if the guardianship is vacated.[47]

If the division is involved, it is responsible for preparing a parenting assessment addressing the appropriateness of vacating a KLG.[48] The division should be involved if they were involved with the petition for KLG in the first place, or if there is *prima facie* evidence to support vacating the KLG and the division wishes to take a position.[49]

Regardless of whether the division becomes involved, the burden is on the parent seeking to vacate the KLG to satisfy the two-pronged test by *clear and convincing evidence* that

> a change in [the parent's] life that would support a finding that she has regained the ability to care for her child; and (2) that termination of the kinship legal guardianship is in the best interests of the child.[50]

Both prongs must be proven by the parent by a clear and convincing standard. Simply providing proof of successful completion of substance abuse treatment, for example, is not sufficient to vacate the KLG.

Dina Mikulka is with Faith A. Ullmann & Associates.
Amy Kriegsman is with Daly & Associates.

Endnotes

1. *N.J. Div. of Youth & Family Servs. v. F.M.*, 211 N.J. 420, 447 (2012).
2. 405 U.S. 645, 92 S. Ct. 1208, 31 L.E.2d 551 (1972).
3. *Id.* at 651 (citations omitted).
4. *In re Baby M,* 109 N.J. 396, 450, 452 (1998).
5. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).
6. N.J.S.A. 9:17–39.
7. *V.C. v. M.J.B.*, 163 N.J. 200, 219 (2000).
8. *Ibid.*
9. 72 N.J. 127, 132 (1976).
10. 386 N.J. Super. 475 (2006).
11. Consent may be implicit or implied. *See K.A.F. v. D.L.M.*, 437 N.J. Super. 123,139 (2014).
12. *D.G. v. K.S.*, 444 N.J. Super. 423 (2015)(citations omitted).
13. *See Watkins v. Nelson,* 163 N.J. 235, 247–48, 748 A.2d 558 (2000).
14. *Sorentino v. Family & Children's Soc'y of Elizabeth,* 72 N.J. 127, 132 (1976); *Adoption of M.,* 317 N.J. Super. 531, 541 (Ch. Div.1998).

15. *Watkins, supra,* 163 N.J. at 246–48; *see also V.C., supra,* 163 N.J. at 219; *Sorentino*, *supra*, 72 N.J. at 131–32.
16. *Watkins, supra,* at 246–47 (*citing Sorentino*, *supra*, 72 N.J. at 131–32).
17. *V.C. v. M.J.B.,* 163 N.J. 200, (2000).
18. *Id.*
19. 444 N.J. Super. 423 (Ch. Div. 2015).
20. *Id.* at 46.
21. *Watkins, supra*, 163 N.J. at 247, 254.
22. *Id.* at 254; *P.B., supra*, 370 N.J. Super. at 594; *see also Moriarty, supra,* 177 N.J. at 117.
23. New Jersey Department of Child Protection and Permanency, formerly known as DYFS.
24. *See* N.J.S.A. 9:2-9 to 18; N.J.S.A. 9:3-37 to 56.
25. *See* N.J.S.A. 9:2-4; *see Dorfman v. Dorfman*, 315 N.J. Super. 511 (App. Div. 1998); *Faucett v. Vasquez*, 411 N.J. Super. 108 (App. Div. 2009); *Fawzy v. Fawzy*, 400 N.J. Super. 567 (App. Div. 2008); *Mastropole v. Mastropole*, 181 N.J. Super. 130 (App. Div. 1981); *Sheehan v. Sheehan*, 51 N.J. Super. 276 (App. Div. 1958).
26. Introductory Comment, N.J.S.A. 3B:12A-1, *et. seq.*
27. N.J.S.A. 3B:12A-2.
28. N.J.S.A. 3B:12A-2.
29. N.J.S.A. 3B:12A-4(b).
30. The italicized provisions are quoted from N.J.S.A. 3B:12A-6(a) and the content behind the quotation is the legal argument of counsel.
31. N.J.S.A. 30:4C-86 requires criminal history and domestic violence checks for the caregiver in a KLG application. It does not provide for similar checks for the biological parents. Although served with a discovery request specifically tailored to glean information regarding criminal background and substance abuse treatment records, the parents have both failed to respond.
32. N.J.S.A. 3B:12A-6(b).
33. N.J.S.A. 3B:12A-6(d).
34. N.J.S.A. 3B:12A-6(d).
35. *Matter of Purrazzella,* 134 N.J. 228, 240, (1993).
36. *Matter of Seaman,* 133 N.J. 67, 74, (1993); *In Re Registrant R.F.*, 317 N.J. Super. 379, 384 (App. Div. 1998).
37. N.J.S.A. 3B:12A.
38. N.J.S.A. 3B:12A-2.
39. N.J.S.A. 3B:12A-4(a)(1).
40. N.J.S.A. 3B:12A-4(a)(3) and (4).
41. N.J.S.A. 3B:12A-6.
42. N.J.S.A. 3B:12A-6(f), emphasis added.
43. N.J.S.A. 3B:12A-6(g).
44. *See D.Y.F.S. v. L.L.,* 201 N.J. 210 (2010).
45. *D.Y.F.S. v. L.L., supra*, 201 N.J. at 224, *citing* N.J.A.C. 10:132A-3.5(a), (b).
46. *D.Y.F.S. v. L.L., supra*, 201 N.J. at 224, *citing* N.J.A.C. 10:132A-3.5(a), *see also* N.J.A.C. 10:132A-3.6.
47. N.J.A.C. 10:132A-3.6
48. *D.Y.F.S. v. L.L., supra*, 201 N.J. at 224.
49. *Id.* at 224.
50. *D.Y.F.S. v. L.L., supra*, 201 N.J. at 225.

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

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

EJM (12/29/2017)

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

MAB, Esq. (10/5/2017)

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

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

Have a Happy, Healthy & Prosperous New Year!

Cindy Rossine
NMLS# 363612

Len Rossine
NMLS# 363617

732-930-1555
25A Vreeland Rd. Suite 104
Florham Park, NJ 07932
cindy.rossine@caliberhomeloans.com
len.rossine@caliberhomeloans.com
www.caliberhomeloans.com/crossine

CALIBER HOME LOANS

THE ROSSINE TEAM

EQUAL HOUSING LENDER