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Chair's Column

In Memoriam: Alan M. Grosman

By Derek M. Freed

Alan Marc Grosman, a chair of the Family Law Section of the New Jersey State Bar Association from 1987-88 died on May 25, 2022, at the age of 87. Mr. Grosman attended Wesleyan University, where he graduated Phi Beta Kappa. He received a master's degree from Yale University and his *juris doctorate* from New York Law School, where he served on the Law Review.[1] He practiced family law for approximately 40 years with the firm of Grosman & Grosman.[2] He also served as the Millburn Township Court Prosecutor for over two decades, as well as an Essex County Assistant Prosecutor.[3]

In addition to serving as the Chair of the Family Law Section of the New Jersey State Bar Association, Mr. Grosman won the prestigious Saul Tischler Award in 2001, which is awarded on an annual basis to an attorney who "has been actively engaged in the practice of family law, and shall reflect outstanding lifetime achievement."[4]

Mr. Grosman impacted the practice of family law in New Jersey in numerous ways, including authoring *New Jersey Family Law*, a textbook addressing issues and legal concepts in family law.[5] Among the many cases that he handled, Mr. Grosman was the attorney in *Whitfield v. Whitfield*, which resulted in then-Judge Long addressing whether a pension that is "earned during coverture but which is neither vested nor matured is subject to equitable distribution."[6] He was also involved in the first surrogacy case, the *Baby M* case.[7]

Upon his passing, many of Mr. Grosman's colleagues offered remembrances. This included Cary B. Cheifetz, who co-authored the second edition of *New Jersey Family Law* with Mr. Grosman. Mr. Cheifetz stated that Mr. Grosman was a "lawyer's lawyer when it came to the study of family law as an intellectual endeavor." With respect to the *New Jersey Family Law* textbook, Mr. Grosman always wanted to "keep the book to one volume so [one] could take it to court or home, as well as to keep the book practical and readable for the less-experienced attorney." Mr. Cheifetz remarked that an attorney can open *New Jersey Family*

Law "to any page and see Mr. Grosman's handiwork and thought process." Indeed, Mr. Cheifetz stated that "to this day, lawyers and judges have told me how useful the book is in helping them navigate the practice. This will forever be one of Mr. Grosman's vast legacies to the Family Bar, along with his contributions to the *New Jersey Family Lawyer*, his participation in the *Baby M* case and his work in *Whitfield v Whitfield*."

Jeffrey P. Weinstein stated that he enjoyed his relationship with Mr. Grosman, who was an "able adversary and a respected attorney," who, "behind his 'sleepy eyes,' had a tremendous amount of intelligence, warmth, and loyalty." Mr. Weinstein said that Mr. Grosman "was devoted to the practice of Family Law. His actions, his writings and his professionalism helped elevate the practice of Family Law in New Jersey."

John DeBartolo commented that Mr. Grosman was a "knowledgeable attorney who always advocated for his clients. He was universally recognized as a gentleman by the bar, bench, and court staff."

These comments are emblematic of the many tributes that this author received regarding Mr. Grosman and his legal acumen, his intelligence, and his contributions to the practice of Family Law in New Jersey.

Mr. Grosman's interests were broad. He "was a world traveler and a scholar of world history who spoke Spanish, Portuguese, and French, and studied German, Romanian, Catalan, and Landino."[8] He was known to be a "talented photographer."[9] He also "enjoyed playing the piano,"[10] which, per Mr. Cheifetz, he also used in the practice of law. Mr. Cheifetz recounted that during one tense negotiation in a meeting that was occurring at Mr. Grosman's office, instead of ending the meeting and declaring an impasse, Mr. Grosman "walked out of the conference room and started playing the piano that he maintained in his office space. This ultimately resulted in singing, a bit of levity, and when we were done, we resumed our meeting. While we didn't settle the case that day, it probably averted thousands of dollars of litigation. Until that day I never understood what a piano was doing in his law office."

Upon his death, Mr. Grosman was survived by Bette Grosman, who was his wife for 55 years, as well as two daughters, and their spouses, along with several grandchildren. On behalf of the Family Law Section of the New Jersey State Bar Association, we offer Mr. Grosman our gratitude and appreciation for his tremendous and long-standing contributions to the practice of Family Law in New Jersey. ■

Endnotes

1. obits.nj.com/us/obituaries/starledger/name/alan-grosman-obituary?id=35019319
2. *Ibid.*
3. *Ibid.*
4. *See* By-Laws of the Family Law Section of the New Jersey State Bar Association.
5. *Ibid.*
6. *Whitfield v. Whitfield*, 222 *N.J. Super.* 36, 39 (App. Div. 1987).
7. obits.nj.com/us/obituaries/starledger/name/alan-grosman-obituary?id=35019319
8. obits.nj.com/us/obituaries/starledger/name/alan-grosman-obituary?id=35019319
9. *Ibid.*
10. *Ibid.*

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Outgoing Chair's Column

The Three Who Impressed Me the Most

By Robin Bogan

This past year, I had the opportunity to watch the best and brightest family law attorneys in New Jersey. Those that were most impressive to me were the attorneys who took an active role in effectuating changes in the law and our profession. What also struck me about the three people who inspired me most was a common thread — humility, vision, commitment to excellence, and their leadership that motivated others to get the job done. The three attorneys who moved me during my year as Chair of the Family Law Section were the following:

Deb Guston

On June 29, 2022, Deb Guston received the Saul Tischler Award, the highest award given to New Jersey family law attorneys. Deb is a partner at Guston & Guston in Glen Rock. Lizanne Cecconi, who introduced Deb at the Tischler Award dinner, artfully noted that while most past Tischler recipients were honored for their work in dissolving marriages, Deb was "honored for her work in creating marriages (through marriage equality), and creating families (through adoption, reproduction rights and even her work in animal rights)." InsiderNJ in 2021 said the following: "Deb Guston is one of the brightest lights on NJ's legal candelabra….On family law and criminal justice reform, you're hard pressed to find a more influential attorney in the State of NJ than Deb Guston."

I had the opportunity to witness Deb in action on several Zoom calls concerning pending legislation potentially effecting our family law practice. From my vantage point, you always want Deb's input and sound advice. She is analytical, thoughtful and a problem solver. She thinks before she speaks and when she does, everyone stops to listen. What impressed me most was Deb's passion and enthusiasm. It made me wish that there was a way to bottle it.

Brian Paul

Brian Paul is the co-managing partner at Szaferman Lakind in Lawrenceville. Brian is the Co-Vice Chair of the New Jersey State Bar Association's Amicus Committee which reviews requests that the NJSBA become involved as an *amicus* party in matters pending before New Jersey and federal Courts. He is also the Co-Chair of the Family Law Executive Committee's Amicus Committee. Brian has either argued on behalf of a party or as *amicus curiae* on behalf of the NJSBA or been involved in writing the brief on cases such as *S.W. v. G.M., Bisbing v. Bisbing, Major v. Maguire, In the Matter of the Adoption of a Child by J.E.V. & D.G.V.,* and *Lombardi v. Lombardi*, and the list goes on.[1]

I worked with Brian on the *amicus* brief the NJSBA filed with the state Supreme Court in *Kathleen M. Moynihan v. Edward J. Lynch*[2] and in preparing for oral argument. The brief focused on the enforceability of written palimony agreements where a notarized agreement was unenforceable because the parties had not sought legal advice as required under the 2010 Amendment to the Statue of Frauds, *N.J.S.A.* 25:1-5(h). In their decision issued on March 8, 2022, the Supreme Court found that the statute's provision compelling parties to seek the advice of counsel before signing a palimony agreement violated the substantive due process guarantee of the New Jersey State Constitution.

Brian was instrumental in assuring that the NJSBA's appearance before the Supreme Court of New Jersey was impactful. He ensured that our legal arguments were clearly presented and supported. In anticipation of oral argument, I enjoyed discussing various approaches with Brian and reviewing the possible questions that I might be asked. He is a family law attorney with the highest intellect. What I most appreciated about Brian was that he never made me feel like any question I asked was silly or unimportant. He was also incredibly responsive and even spoke with me over the phone as I was driving to Trenton for the oral argument. Working with Brian was an absolute pleasure and now that my term is over, I now need to see how I can enlist his help with my golf game.

Amy Wechsler

Amy Wechsler has been practicing law since 1985 and is with Lawrence Law in Watchung. Amy led the Parenting Coordination Task Force which issued recommendations in connection with appointing parenting coordinators in Family Law matters. This task force, which included family lawyers and psychologists, met over two years, researched parenting coordination programs in other states, examined the comments and criticisms of the parenting coordination pilot process contained in the 2009-2011 Supreme Court Family Practice Report and engaged in discussion and debate on the issue.

Amy's initiative was vetted and endorsed by the NJSBA Board of Trustees. On July 29, 2021, President Dominick Carmagnola forwarded to Chief Justice Stuart Rabner a report and proposed court rule on Parenting Coordination from the Family Law Section for his consideration. This thorough report is being considered by the Supreme Court Family Practice Committee.

Once this report was on its way, Amy did not stop there. She reached out to me to discuss assembling another task force to study the Guardian Ad Litem role and whether there should be any rule changes. Amy assembled a team of attorneys and mental health professionals to study this area of our practice. Amy will also be assisting with President Jeralyn Lawrence's "Putting Lawyers First Task Force," subcommittee that will be examining how we can improve lawyers' ability to attend to mental health issues and physical health issues.

Successful leaders surround themselves with people who have the strengths that they do not possess. Amy, as a talented family law attorney in her own right, knows how to assemble the right combination of people, with varied skill sets to permit healthy debate and effectuate positive changes in family law. Similar to a Broadway play director who galvanizes actors resulting in a grand performance, Amy is a master collaborator who knows how to hone the strengths of her team to present an incredible work product. Amy is committed to taking affirmative steps that are designed to improve family law. We are lucky to have Amy at the helm of any initiative.

Passing the Baton

Now that I have passed the baton to our new Chair, Derek Freed, you should all have great hope for the future of the Family Law Section. You are in great hands not only due to Derek's leadership style, character, and intellect, but due to the collective efforts of our whole membership. Deb, Brian and Amy are only three examples of what a combination of initiative, hard work, and brain power is able to achieve.

Our mission is to serve as the statewide leader in the field of family law and to be involved and instrumental in any decision that impacts family law issues in New Jersey. What is unique about the newly installed officers, which include Derek Freed, Megan Murray, Jeff Fiorello, Cheryl Connors and Christine Fitzgerald, is that they understand that this organization's mission is larger than any one member. They also know that they achieve more working together moving in the same direction, than they could ever accomplish alone on separate paths. Thank you to everyone who contributed to our Section having such an incredible year. I look forward to the next chapter of this vibrant and inspiring organization and witnessing all it is destined to achieve.

Endnotes

1. *S.W. v. G.M.*, 462 *N.J. Super.* 522 (App. Div. 2020).
   Bisbing v. Bisbing, 230 N.J. 309 (2017).
   Major v. Maguire, 224 N.J. 1 (2016).
   In the Matter of the Adoption of a Child by J.E.V. & D.G.V., 226 N.J. 90 (2016).
   Lombardi v. Lombardi, 447 N.J. Super 26 (App. Div., 2016); *certif. denied*, 228 N.J. 445 (2016).
2. 250 N.J. 60 (2022).

Early Settlement Panel – In-Person, Virtual or Hybrid

By Jeralyn L. Lawrence and Charles F. Vuotto Jr.

Since the worldwide pandemic began in early 2020, the New Jersey court system has worked diligently to modify its approach to the administration of justice to take into account the health crisis. Part of that adjustment included a remote or virtual approach to various forms of court appearances, including but not limited to, trials, plenary hearings, motions, case management conferences, and Mandatory Early Settlement Panels (MESP). From discussing this issue with colleagues and being engaged in multiple bar groups where this issue has been addressed, it appears to be the majority opinion among the organized bar that certain court events should continue in the virtual setting including MESP's. In fact, that the New Jersey State Bar Association in its *Pandemic Task Force Practice of Law Subcommittee Final Report* to the Honorable Glenn A. Grant asserted this position.[1] This column focuses on the MESP. It is the authors' understanding that a few counties are considering or have changed the all-virtual format to require litigants, their attorneys, and panelists to appear in person. Not only is this contrary to the desire of the vast majority of MESP panelists across the state, but it is also simply not fair or necessary. Further, it is contrary to Chief Justice Stuart Rabner's Nov. 18, 2021 Notice to the Bar and Public regarding the Future of Court Operations. Specifically, Paragraph 8 of the Notice indicated that MESP's are to continue virtually.

Opinions vary as to whether virtual MESP's have been less effective than when they were in-person. An argument can be made that the litigants need the motivation of being physically present in court to assist them in reaching the resolution of their case. There is no question that litigants benefit from the judge's comments (when they are provided) and that the added solemnity of being in an actual courthouse, as well as the investment of time spent actively participating in their own divorce, motivates litigants to make necessary compromises so that their case can be resolved. However, if that is true, it is the authors' opinion that the in-person attendees should be limited to those who actually have a stake in the case, i.e., the litigants and their attorneys. There is absolutely no additional benefit to that process when panelists are present in court.

We must remember that the anecdotal comment that "stuff happens" when people are in court is not a sufficiently scientific basis to overcome the clear advantages to a fully virtual or hybrid arrangement. Litigants have many opportunities to experience the solemnity and possibly imposing nature of the court if their case does not settle (i.e., case management conferences, motion practice and intensive settlement conferences, just to name a few). There is no need to unnecessarily inconvenience volunteers to make the MESP one of those experiences. Every alleged advantage raised by the very small minority of attorneys who believe MESP's should be fully in person can be achieved without the panelists physically in court. Further, there are negatives in any approach, not just fully remote MESP's. A litigant not giving full attention during a Zoom MESP is no different than a litigant doing the same thing when physically present in court. These issues can and are routinely addressed by MESP panelists. Lastly, some question the effectiveness of MESP's in general, whether remote or not. If MESP's have become a "check-the-box" event, then why inconvenience panelists to appear in person for such an event?

In fact, as just two examples, numbers have actually improved slightly in Atlantic and Ocean counties during the pandemic after they switched to an all-remote format in lieu of in-person appearances. In Atlantic County, the court and panelists have spent the last year revamping their MESP process to provide guidelines and protocols for the virtual format. Since then, and with the addition of a judge's colloquy to the litigants via Zoom (that they are required to attend on the morning of the MESP), they have seen some improvement in statistics. In a March 11 letter to the Administrative Office of the Court from chair of the Ocean County Bar Association's Family Law Committee, statistics were provided that reflected the improved numbers during virtual MESP's.[2] The letter went on to state that, "I should also note, ESPs in Ocean County are conducted with one panelist on the panel. The panelist will ordinarily have one or two panels during

their panel day. The panelist meets with both counsel and the parties. Prior to the pandemic, the panelist would be assigned a case the morning of the ESP date and would receive the court's file at that time. If the parties prepared ESP Statements, the panelist would receive it that morning as well. However, since the pandemic and the initiation of remote ESPs, the panelist is assigned the case at least a week in advance. The panelist is provided ESP Statements, CIS's, Orders, etc. by counsel or the self-represented parties in advance. I have personally found this to be immensely helpful in settling cases because I have been afforded more time to prepare."

In Bergen County, according to the MESP chairperson, since the panels have gone totally remote there have been few calls from panelists requesting help to find a substitute. In addition, there are many issues that have been eliminated by staying remote. For the 2022-2023 year in Bergen County, there are 55 panels with three volunteer panelists per panel. Panelists, litigants, court personnel and judges have all worked together to make this a successful program. They wish to remain remote in Bergen County.

Although it is generally acknowledged that nothing can fully replace the in-person experience for the litigant, it is believed that if an MESP panelist is required to appear in-person, participation will plummet and could bring the process to a standstill. It should be noted that it remains the majority opinion of the statewide panelists that MESP's should remain fully remote.

The authors suggest that in the event of a mandate for MESPs to return in person in any county, the courthouse should be able to arrange for a laptop or other technology to be placed in a panel room so that panelists may appear virtually while the litigants and their attorneys are physically present. Alternatively, if the court cannot accommodate a computer, the panelists can appear via telephone with some conference-call technology. There is no real need for the litigants or their attorneys to see the panelists. However, these alternatives are only secondary. The authors strongly urge that MESP's remain entirely remote for all involved.

There was a recent push by the Early Settlement Panel Chairs Statewide Organization to provide various benefits to panelists in consideration for their substantial contribution, including but not limited to, *Madden* exemptions or other pro bono credits and/or continuing legal education (CLE) credits.3 All these proposals were rejected by the Administrative Offices of the Court (AOC) and the New Jersey Supreme Court. At the very minimum, if a certain county court insists upon a return to in-person MESP's, the accommodation of a hybrid approach to MESP's should be the rule statewide. By now, all of us have mastered the Zoom process (at least when wearing our panelist hats rather than our litigator hats) have seen how much more convenient life can be when paneling cases from the comfort of our own offices. The overwhelming majority of MESP panelists across the state believe that, and at a minimum, panelists should not have to attend any MESPs in person. An MESP panelist has already spent a great deal of time reading memos, discussing the matter with co-panelists and otherwise preparing in advance of the MESP. There is no reason to further burden volunteers by requiring their physical presence in the courthouse when there is absolutely no benefit to it.

Despite the impact of the global pandemic, a silver lining emerged in that lawyers in this profession were given the opportunity to learn more efficient ways to meet tasks in the practice of law. We must ask ourselves what is worth returning to when it comes to in-person appearances. Blind adherence to tradition and doing things the way we used to do them is no basis to continue old ways when we've learned of a better way. It is respectfully submitted that MESPs are not one of those appearances necessitating an in-person presence. The burden both in time and cost is not something that should be borne by the client, the attorneys, or the panelists. ■

Charles F. Vuotto Jr. is the Editor in Chief of the New Jersey Family Lawyer and Of Counsel with Starr, Gern, Davison & Rubin in Roseland. Jeralyn L. Lawrence is President of the New Jersey State Bar Association and Founding Member of Lawrence Law in Watchung. Special thanks is given to the following individuals contributing to this column: Lisa M. Radell of Cape May Court House; Stephanie Albrecht-Pedrick of the Law Offices of Stephanie Albrecht-Pedrick in Pleasantville; Gregory B. Thomlinson of the Law Office of Matthew R. Abatemarco in Manasquan; and Linda H. Schwager, Chairperson of the Bergen County MESP.

Endnotes

1. See Pandemic Task Force Practice of Law Subcommittee Final Report. Specifically, recommendations pertaining to family law are found on pages 9 through 11 as to Early Settlement Panels, the report states, "*Early Settlement Panels are successfully conducted via video conferencing and should remain as such. They are efficient, work well and save clients time and money. Panelists are able to stagger the panels scheduled for the day, receive submissions electronically and coordinate several virtual rooms for clients and attorneys.*"
2. The pertinent part of the letter stated, "The data supports the concerns outlined herein. For example, in 2019, prior to the pandemic, the Ocean County MESP program resulted in the settlement of 116 out of 372 MESPs (31.18% settlement rate). However, in 2020, the settlement rate increased to 36.26% (99 out of 273 MESPs resulted in settlement). This percentage is even more apparent when comparing the 2020 in-person MESP settlement rate of 35.14% (26 out of 74 in person MESPs settled) with the 2020 remote MESP settlement rate of 36.69% (73 out of 199 remote MESPs settled). The settlement rate continued to increase in 2021 to 36.80% (124 out of 337 remote MESPs settled)."
   In 2022, for the month of January, the settlement rate is 42.11% (8 out of 19 remote MESPs settled)."
3. See Editor-in-Chief's Column "*MESP Panelists Should Receive Pro Bono for Exemption*" by Charles F. Vuotto, Jr. (38 NJFL 4 (June 2018)

Get Dressed and Get Back to Court

By Brian Schwartz and Christopher R. Musulin

There can be no dispute that the "pandemic years" of 2020 and 2021 caused everyone to take pause and reevaluate life, work, relationships, and the benefits of handwashing. The practice of law was no exception. When the court system was effectively shut down in March 2020, we were challenged to find creative ways to continue moving matters forward, despite the many obstacles which existed. For sure, in 2020, the Family Part had no "e-filing" system in place, most court fees were paid by hard copy check, and the email addresses for judicial personnel were heavily guarded secrets. Thanks in large part to the grand efforts of the Administrative Office of the Courts, the Judiciary, and the bar at large, the Family Part was able to adapt and function. We now have JEDS (Judiciary Electronic Document Submission), online court fee payments, and more commonplace electronic access to and communication with judicial personnel. Additionally, counsel more frequently exchanges correspondence, documents, and information electronically. This relative electronic revolution, with the incorporation of remote proceedings, allowed Family Part cases to move forward, while many other court divisions were closed for business. For this, all participants, including litigants, in the family law process remain grateful.

But as the impact from the pandemic (hopefully) lessens, some in the practice are confusing the modest improvements described above as a basis for the wholesale change in the way the court does business and the way we practice family law. One of the targets for permanent change is the Early Settlement Panel (ESP); specifically, there is a movement to make the ESP an exclusively virtual event, not requiring any physical appearances for the program. The authors respectfully disagree with permanently changing the ESP appearances to an exclusively virtual event and believe it is important to return to the traditional in-person model of the Early Settlement Panel.

Let us first acknowledge some important facts. The ESP program asks lawyers to volunteer their time as panelists a few mornings each year to assist the court in resolving matters. Respect must be shown to each panelist's time given. Next, it is clearly "more convenient" for the panelists to appear remotely since they can perform their task from remote locations near and far that do not require travel to the courthouse. Moreover, most panelists are not provided with any "perks" – we pay for gas, tolls, parking, and coffee. We also cannot ignore that it is more convenient for the litigants to remain in their homes or at their offices or in the school drop-off line, rather than coming to court.

With those acknowledgements, the benefits of in-person ESP far exceed those just listed, most of which are limited exclusively to convenience, not effectiveness. First and foremost, stuff happens when people come to court. In fact, the most obvious benefit of in-person ESP is the potential for greater productivity simply because people have had to initially exert far greater energy by meeting face to face in a more formal setting at the courthouse. It traditionally was a commitment shared among litigants and professionals to organize their schedules and even child care and drive to the courthouse for a several hour or half-day event, to meet at the same table, to problem solve and resolve a matter. The ESP has now morphed into a 20-minute video event, where the only exertion required is perhaps changing into a presentable shirt and clicking on a Zoom link on one's computer screen or phone.

There is a solemnity to in-person proceedings that cannot be replicated with remote proceedings. The litigants sit in a courtroom – some for the first time in their lives – witnessing the symbolism of justice. They are addressed by a real live Judge, a rather imposing figure who is sitting before them on the bench. The Judge sets the tone for the proceedings to follow – explaining the program, introducing the panelists, describing the financial and emotional consequences which flow from leaving the court without a settlement, and the benefits which flow from settling their matter (a judgment of divorce on that day!).

While at the courthouse, litigants experience a plethora of emotions from the moment they walk through security. There is the awkward moment of sharing the

same physical space with their spouse or former spouse, perhaps for the first time in months. There is the introduction to the attorney representing their spouse or former spouse – the face behind the sometimes hurtful correspondence. There is the moment when a litigant walks into the waiting room or gallery at the courthouse and maybe sees other members from their community, which perhaps causes them some discomfort or embarrassment. All of these experiences can help move a matter toward resolution – if only to avoid it from ever occurring again.

There are advantages for counsel, too. It is often the first time the attorney has an opportunity to observe and size up the other litigant – the face behind the multiple emails and phone calls from one's client. In many cases, this is the first time that counsel for the parties are seeing each other while representing these particular litigants. During a typical ESP day in court, there is generally more than one case scheduled. Unless one's matter is first, the time waiting can be used effectively. Oftentimes while stuck in the confines of the courthouse – in a common area on one floor, waiting to be called – the natural tendency should be to take advantage of the waiting period and talk about the case, problem-solve the issues, and address outstanding discovery matters. It is not uncommon that counsel is even able to narrow the issues during this time. All of this can be done before one even meets with the panel. These discussions may also lead counsel back to their clients for a "heart-to-heart" regarding the positions taken and issues on which the client may be willing to move – again, before speaking with the panelists. Then, once it is one's turn to meet with the panelists, counsel can provide the more limited scope of issues to the panelists, who in turn can provide more meaningful suggestions for resolution. In other words, a lot of stuff can happen – in person. None of this takes place with the virtual ESP.

It also cannot be ignored that the panelists have more flexibility as well if all of the various cases are presented in person. As just one example, the panelists can provide suggestions for resolution to case number one and allow those attorneys to discuss the panel's suggestions with their clients while the panel brings in the attorneys on case number two. Often, because the panelists are "there," counsel for the parties will ask to see the panelists again as maybe most, but not all, of the issues are resolved, and oftentimes returning to the panelists can help the parties reach the finish line. In other words, the attorneys and litigants are not limited to a "window" of time to present the case. Frankly, more opportunities for settlement arise simply due to the fact that the litigants and their attorneys can continue to speak after the panel recommendation, including sua sponte four-way meetings at the courthouse, for instance, in the coffee shop.

In some cases, by the time the parties reach ESP, they have much of the matter resolved with only a few narrow issues remaining. Perhaps optimistic counsel has even drafted a proposed form of Marital Settlement Agreement in advance of the ESP, hoping that with just the right recommendation, the matter will be resolved. The parties can then use the ESP recommendation as a launching point for in-person negotiations after the ESP to complete the form of agreement and, yes, get the clients divorced that day. In other words, because everyone is already together in the courthouse and has set aside the morning to focus on this case alone (no distractions), more attention is given to settling that case right then and there.

Another, and perhaps the most significant, benefit of in-person ESP is the opportunity to see the Judge assigned to your matter immediately after the ESP. In many counties, that Judge is interested in assisting, if possible, in the settlement process while the negotiations are fresh in everyone's mind. How many times have we all returned to our clients after meeting in chambers to communicate the following thought: the Judge said such-and-such? Or perhaps the Judge will address the parties, on or off the record, from the bench, providing encouragement or suggestions or, when needed, a scolding. This provides the litigants a real-time opportunity to have a Judge weigh in on the one or few issues that remain.

The financial cost of attending in-person ESP should not be ignored as a factor potentially facilitating settlement. While the reduced cost of virtual ESP is advanced as egalitarian evidence of fairness to litigants of modest means, the authors believe that the financial impact of actually attending in-person cannot be ignored. When the litigants see the amount of "sitting around and waiting" involved – at their financial expense – the parties may be incentivized to use the time wisely. Similarly, the litigants do not fully appreciate the time and effort employed by the volunteer panelists when they spend literally minutes with them on a screen. The impact upon the litigants of seeing these panelists help not just them, but those in other cases, giving up their time for the entire morning of billing solely to volunteer their time to help the litigants is tremendous. The litigants seeing

two (or three) lawyers investing their time and energy in their matter, for free, causes the litigants to want to more meaningfully participate.

Lest we not forget that there are other benefits to in-person ESP, even for panelists. Remember that adversary whom you have been meaning to call, but have not had the chance? There she is sitting in the courtroom! What about the attorney with whom you have had terse interactions? Walking into the elevator and seeing them compels you to break the ice and communicate. But most importantly, the panelists receive the recognition and gratitude from the Judge for a job well done – perhaps the most important "perk."

Now, compare all of the above to the virtual experience. All of the attorneys and litigants are in different places, waiting in the purgatory known as the "Zoom waiting room." There is no communication between counsel during this time; there is no communication between counsel and client; there is just a blank screen. There is no presentation from a Judge – except, perhaps, a pre-recorded video of a Judge giving "the speech." Then, assuming there is no occurrence of "broadband issues," which is not always a safe assumption, everyone is joined on the screen. The screen reveals the client who is still in bed, or driving in the car, or hiding in a closet so the children do not hear what is happening (or worse, the screen fails to disclose the children present in the room with the nefarious litigant). The panelists may provide their own watered-down version of "the speech." The attorneys participate half-heartedly, glancing at their phones or other screens, or clicking away on their computer, exhibiting ZADD – Zoom Attention Deficit Disorder. The panelists are anxious to move on to the next case, which is scheduled in 10 minutes, or move on to their next paying matter, or move on to some personal matter. After the virtual narratives from counsel, the litigants are brought into the mix, are told the recommendation and the ESP is concluded. With the virtual setting, there is no opportunity for discussion, no opportunity to continue the negotiations, no interaction amongst the participants – no momentum. Everyone just moves on with their day until the next "event."

The argument for remote ESP holds that the ESP is just as efficient when conducted remotely as it is in person. Candidly, if that is true (and many Judges and attorneys believe it is *not* true), it is just as likely a reflection of the state of the ESP program generally than it is in-person versus remote. When the ESP program was piloted in 1977 and subsequently codified in 1981, it was a highly effective program to facilitate settlement, as it was generally the only step prior to trial, and it occurred just weeks before the trial date. In the ensuing years, the bench and bar created divorce mediation, post-MESP economic mediation, blue ribbon panels, intensive settlement conferences, blitz weeks, and other models of mandatory dispute resolution events that may have now rendered the ESP obsolete.

In other words, accordingly, many now view ESP as a "check-the-box" event, something one must accomplish in order to move on to the following tasks – mandatory mediation, intensive settlement conferences, blue ribbon panels, blitz weeks, and so on. This attitude toward ESP is what in large part buoys the "efficiency" and "permanent remote" arguments. That noted, the anecdotal information does not even support the argument that there is no difference in settlement rates, as many Judges report that the success rate is far less for remote ESP than it was in person. Rather, the more accurate statement for the proponents of remote ESP would be that the ESP program is not successful enough to require panelists, attorneys, and litigants to appear in person – to be inconvenienced. Again, perhaps this reflects the program itself.

The perceived convenience of virtual ESP is no substitute for the traditional ESP experience. If we are going to do it, then let's do it right. It is time for all of us to get dressed and get back to court. ■

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Executive Editor's Column

Divorcing While Pregnant: Issues to Consider

By Ronald Lieberman

The recent decision by the United States Supreme Court to overturn *Roe v. Wade* has placed into the spotlight what it means to be pregnant and how that affects many aspects of a woman's life. This column will not address those issues but instead focus on what issues are involved when a woman is pregnant and going through a divorce.

Perhaps most readers do not know, but there are four states, Arizona, Arkansas, Missouri, Texas, that will not allow couples to finalize a divorce until after the child's birth.[1] Fortunately, New Jersey does not have that type of a restriction. But what happens when the child is yet to be born and there is a divorce?

How to Establish Paternity

There are potential legal complications when a divorce proceeding commences, and a mother is pregnant. The purpose of this article is not to discuss what happens if there are allegations of adultery under *N.J.S.A.* 2A:34-2 and any impact on paternity.

A Certificate of Parentage determines the existence or non-existence of a parent and child relationship.[2] A Judgment of Paternity or Judgment of Adoption declares a man to be the child's father. That is because there is a presumption in the law that parents who were married within 300 days of the child's birth presume that the husband is the father.[3]

Existence of Parenting Plan

The child custody statute, *N.J.S.A.* 9:2-4, uses the word "child" and not "fetus" so there cannot be a custody determination without an actual birth. Assuming both parties are biological parents or there was a prior legal arrangement providing both spouses with parental rights in cases of adoption, artificial insemination, or gay and lesbian couples, there is the issue that no parenting plan can be put in place in New Jersey until the child is born.[4] As a result, a child needs to be born in order for there to be a parenting plan. So, there will need to be a waiting period before the parenting plan can be put in place.

So, after determining and establishing paternity being fatherhood whether by a voluntary acknowledgement or the presumption in the law, it is reminded that a Judge can even exclude the punitive father from being present at the delivery and being listed on the birth certificate.[5] Parties can seek their names be listed on the birth certificate prior to the birth.[6] If the mother disagrees to listing the father on the birth certificate, a Judge can exclude the father from being listed without a finding of parentage because a father cannot be presumed to be the father pre-birth.[7]

If during the divorce while the mother is pregnant the father believes that the mother has behavioral issues that will jeopardize the health of the unborn child, the father should either seek intervention in Court or seek intervention through the Division of Child Protection and Permanency because prenatal drug and alcohol exposure could harm a child and it could provide the father with custody of the child once the child is born.

Child Support for the Unborn

There is nothing in New Jersey law that permits the entry of child support until the child is born, however. That having been said, the fetus is not going to be treated any differently than the child already born during the marriage. Child support will be entered, following birth. The husband can very well be ordered to pay birthing expenses and prenatal expenses.[8]

Other Potential Issues

Undoubtedly, the wife's pregnancy will add yet another layer of stress to what will very likely be one of the most stressful events in that woman's life. But the complex legal issues as set forth in this article requires special attention. There is no requirement the mother have the father's approval to end the birth. In fact, in *Planned Parenthood v. Danforth*[9] the U.S. Supreme Court determined it was unconstitutional for a father to veto

a woman's choice to terminate a pregnancy. So, a father will still need to pay child support even if the mother has the child over his objection.

There may be many hard-to-define problems as well, including the lost time from work that a woman would face, the fact that employers can exclude benefits related to pregnancy,[10] the worries that come from having a fetus to care for, not to mention any negative effects on the mother's health, and then the fear that once this child is born that the mother may be raising this child on her own if the father is not involved.

No one is looking for special treatment or for gender inequality. A practitioner needs to think as deeply about a pregnancy during divorce as the practitioner would think about custody of child already born. ■

Endnotes

1 *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). American Pregnancy Association.
2. *N.J.S.A.*, 9:17-53A
3. *N.J.S.A.*, 9:17-43A
4. Child is defined in N.J.S.A. 2C:24-4 endangerment of a child, to mean "any person under 18 years of age."
5. *Plotnick v. DeLuccia*, Docket Number FD-16-8-14 (Ch. Div. 2013)
6. *In re T.J.S.*, 212 N.J. 334 (2012)
7. *N.J.S.A.*, 9:17-39B
8. *N.J.S.A.*, 9:17-53 Subsection 3
9. 428 U.S. 52 1976
10. *Gedulgid v. Aiello* 417 U.S. 498, n.20 (1974)

Meet the Officers

Derek M. Freed, Chair

Derek M. Freed is the Chair of the Executive Committee of the Family Law Section of the New Jersey State Bar Association for the 2022-23 term. Derek is the managing member of the law firm of Ulrichsen Rosen & Freed in Pennington. He concentrates his practice in matrimonial and family law.

Derek has served as a member of the Executive Committee from 2009 to the present.

He has lectured for the Institute for Continuing Legal Education, the New Jersey State Bar Association, the New Jersey Association for Justice, and the Mercer County Bar Association on family law-related matters. He was a co-author of the New Jersey State Bar Association's *amicus curiae* brief to the New Jersey Supreme Court for *Gnall v. Gnall* and *Bisbing v. Bisbing*.

He is an associate managing editor of *New Jersey Family Lawyer* and has had several articles published in the publication. Derek received his J.D. with honors from Rutgers University and his B.A. from the College of William & Mary in Virginia.

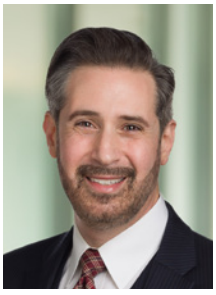
Megan S. Murray, Chair Elect

Megan S. Murray is the founding partner of The Family Law Offices of Megan S. Murray. She is also a Fellow of the American Academy of Matrimonial Lawyers and an affiliate of the Matrimonial Lawyer's Alliance, whose membership is limited to 50 family law practitioners in New Jersey. Megan is certified by the Supreme Court of New Jersey as a Matrimonial Attorney. Megan has been named a Super Lawyer by *New Jersey Monthly*. Since 2019, Megan has also been selected each year for inclusion in Best Lawyers of America, ranking her among the top 5% of practitioners in the nation.

Megan is the Chair Elect of the Family Law Section of the New Jersey State Bar Association. Before becoming an officer of the Family Law Section, Megan served as the Co-Chair of the Legislative Subcommittee of the Family Law Section. Megan is a member of the Middlesex County Bar Association and the Monmouth County Bar Association. She previously served, for a period of two years, as Co-Chair for the Monmouth County Family Law Committee. In 2012, she received the Martin Goldin Award for her dedication to the practice of family law.

Megan co-authored the book titled *Divorce in New Jersey*. She has also been published in the *New Jersey Law Journal, Middlesex Advocate, New Jersey Lawyer,* and *New Jersey Family Lawyer*, of which she is a managing editor. She has also spoken at numerous seminars across the state on issues relating to the practice of family law.

Jeffrey Fiorello, Vice Chair



Jeffrey Fiorello has been practicing law since 1997 and concentrates his practice in the area of family law mediation and arbitration, assisting parties in the amicable resolution of their issues concerning custody, parenting time, spousal support, child support, college contributions, distribution of assets and debts and related issues. In the past he has handled family law litigation, domestic violence, civil litigation and appeals.

Jeffrey is the vice chair of the Family Law Section Executive Committee of the New Jersey State Bar Association, and is the immediate Past Chair of the NJSBA's LGBTQ Rights Section. He previously served on the Board of Trustees of the NJSBA. Jeffrey also serves as the Chair of

the Legislative Committee of the NJSBA. He is active with the Passaic County Bar Association, where he previously served as President from 2011-2012. He continues to serve as a Trustee of that Association and for years served as the Chairperson of its Family Law Section, the Chairperson of its Continuing Legal Education Section and as the Chairperson of the Activities and Social Committee. He is a court-qualified family law mediator.

Jeffrey has lectured extensively at seminars and continuing education programs on family law matters, mediation, and LGBTQ rights and has authored many articles on those issues. He served as a Judicial Law Clerk to the Hon. Carole Weaver McCracken and the Hon. Ralph L. DeLuccia from 1997-1998.

Cheryl E. Connors, Treasurer

Cheryl E. Connors is a partner with Tonneman & Connors with offices in Eatontown and East Brunswick. Cheryl is Treasurer of the Family Law Section and is a member of the Solo and Small-Firm Section of the New Jersey State Bar Association. She served on the New Jersey Supreme Court Family Practice Committee for the 2017-2019 and 2019-2021 terms and is currently serving on the committee for the 2021-2023 term.

In 2016, Cheryl appeared before the New Jersey Supreme Court on behalf of the New Jersey State Bar Association in the matter of *In re Adoption of a Child by J.E.V.* She is also a member of the Monmouth Bar Association, Middlesex County Bar Association, and Collaborative Divorce Professionals of New Jersey. Cheryl is a Matrimonial Early Settlement Panelist in Middlesex County, an Intensive Settlement Panelist in Monmouth County and an associate managing editor for *New Jersey Family Lawyer.* She is a frequent author and lecturer on the topic of family law.

Cheryl was selected for inclusion in the New Jersey Super Lawyers®-Rising Stars list in 2011-2019 and New Jersey Super Lawyers® list in 2020-2022 and received the Martin S. Goldin Family Law Award in 2013 from the Middlesex County Bar Association. From 2005-2006, Cheryl served as a judicial clerk for the Hon. Barry T. Albin, Associate Justice of the Supreme Court of New Jersey. She graduated from Cornell University with her Bachelor of Arts degree, with distinction in all subjects, and from Seton Hall University School of Law, *magna cum laude*.

Christine C. Fitzgerald, Secretary

Christine C. Fitzgerald, a partner at Seiden Family Law, is certified as a matrimonial law attorney by the Supreme Court of New Jersey. She is a fellow in the American Academy of Matrimonial Lawyers (AAML) and is on the Board of Managers for its New Jersey Chapter.

Christine serves as an active member of the legal community. She has been a member of the Family Law Executive Committee of the New Jersey State Bar Association since 2011, serving on various subcommittees, including being Chair of the Elective Share subcommittee, and Co-Chair of the Legislative subcommittee and Young Lawyers subcommittee. She is also currently serving on the *Amicus* committee, the Ethics Diversionary Program and the Putting Lawyers First Task Force for NJSBA.

In addition to her roles in NJSBA, Christine is also active in Hudson County and is currently the Treasurer of the Hudson County Bar Association and Co-Chair of its Family Law Committee. Previously, Christine served as a member and Chair of the District VI Ethics Committee. Christine continues to serve as an Early Settlement Panelist in Bergen County.

Prior to entering private practice, Christine received her B.A. from Seton Hall University, her J.D. from New York Law School, and served as the law clerk to Hon. Thomas P. Zampino,

J.S.C. (Ret.). She is also the graduate of the National Institute of Trial Advocacy and American Bar Association's Family Law Trial Advocacy Program.

Christine has been recognized by her peers by being selected as a Super Lawyer, Super Lawyer Rising Star, "Best Lawyer in America," and was chosen as the 2018 Family Lawyer of the Year by HCBA and the Hudson County Bar Foundation. She lectures frequently for the New Jersey Institute of Continuing Legal Education, NJSBA, and the HCBA.

Robin C. Bogan, Immediate Past Chair

Robin C. Bogan is a partner at Pallarino & Bogan in Morristown. She has devoted her practice to family law and related matters for over 24 years. Robin is certified by the Supreme Court of New Jersey as a matrimonial law attorney. She is also actively involved in the legal community.

She is the Immediate Past-Chair of the Family Law Section of the New Jersey State Bar Association and has served as a member of the Executive Committee since 2005. She is a Past President for the Morris County Bar Association and Morris County Bar Foundation. Robin volunteers as an Early Settlement Panelist for the Superior Court in Morris County. She is a barrister for the Barry Croland Family Law Inn of Court. She served as an investigator for the Ethics Committee for Morris and Sussex counties from 2006 – 2009.

Robin received the 2022 Family Practice Award from the Morris County Bar Association. She received the 2013 Professional Lawyer of the Year Award for Morris County from the New Jersey Commission on Professionalism in the Law. She has lectured on family law issues for the New Jersey Institute of Continuing Legal Education, New York Practising Law Institute, the Barry Croland Family Law Inn of Court, and for the Morris County Bar Association. Her articles on family law issues have appeared in several professional publications.

Robin received her J.D. from Seton Hall University School of Law. She received her B.A. from the University of Richmond. Robin served as a judicial law clerk for the Hon. Thomas H. Dilts, the Presiding Judge of the Family Part of the Superior Court of New Jersey in Somerset County from 1996 to 1997. ■

The 10 Steps for Cross-Examining the Adverse Expert

By John P. Paone Jr. and John P. Paone III

If you engage in complex matrimonial litigation, you will need to know how to cross-examine expert witnesses. The ability of family law practitioners to cross-examine experts effectively is not simply a matter of trial skill. While trial skill is needed, a large part of being able to successfully confront an expert is the result of extensive pretrial preparation. This article will serve as a road map for successfully challenging an adverse expert at trial.

Step 1: Assessing the Potential for Expert Involvement

Commencing with the initial consultation, the family law practitioner must identify any and all issues which may require involvement of experts. There are many areas of family law which may require experts, including health care professionals who render opinions on parenting time and child custody; forensic accountants who determine the cash flow and fair value of a business; occupational experts who assess the potential employability of a party and opine on that party's ability to earn; medical experts who determine whether a party is disabled and cannot be employed for health reasons; and a vast array of appraisers who may value real estate, pensions, jewelry, artwork, wine, coins, stamps, guns, sports memorabilia, antique furniture, exotic vehicles, boats, planes, and a whole host of marital property.[1]

Complex divorce matters are cases most likely to result in trial and at trial cross-examination is the "greatest legal engine ever invented for the discovery of the truth." *California v. Green,* 399 *U.S.* 149, 158 (1970). Knowing the facts of your case and identifying the underlying issues will enable you to anticipate and understand the expert testimony likely to be presented. Once you identify the potential experts likely to be involved in your matter, you can begin the process of preparing for the day when you will confront these experts on cross-examination.

Step 2: Utilizing Your Discovery Tools

There is no excuse for being caught off guard by the testimony of an expert witness. The rules of discovery provide ample avenues to identify experts and to familiarize yourself with their opinions. Interrogatories are essential to finding out whether the adverse party has retained an expert and whether that expert may be called as a witness at trial. Pursuant to *R.* 4:10-2(d)(1), a party through interrogatories can require the adverse party to disclose the names and addresses of the experts expected to be called at trial.[2] Interrogatories may also require experts to furnish a copy of their reports. *R.* 4:17-4(a).[3] Expert reports must contain a complete statement of the expert's opinions and the rationale for those opinions, the facts and data considered in forming the opinions, the qualifications of the expert (including a list of all publications authored within the preceding 10 years), and terms of compensation for the report and testimony. *R.* 4:17-4(e).

Step 3: Know the Type of Expert You Will be Confronting

Will you be confronting a single joint expert, the court's expert, or the expert retained by the adverse party? In many cases, the expert is either selected jointly by the parties or appointed by the court. The benefits of having a common expert include reducing fees, since the parties will likely share the cost of the joint or court expert rather than spending money on two experts to address the same issues. There is also the thought that having a joint or court expert will expedite a resolution. This is because the parties are receiving one opinion rather than being confronted with conflicting expert opinions which may invite further litigation.

However, the reality is that a joint or court expert is not appropriate in every case. Furthermore, even when hiring a joint expert makes sense, this does not preclude a dissatisfied client from challenging that expert's opinions at trial or from hiring their own expert. *R.* 5:3-3(h). Practitioners should be aware that pursuant to

R. 5:3-3(g), the court appointed expert "shall be subject to the same examination as a privately retained expert and the court shall not entertain any presumption in favor of the appointed expert's findings." By analogy, the same principle should pertain to the testimony of a joint expert, especially if the parties did not agree in advance to be bound by the opinion of the joint expert.[4] In short, don't let your guard down thinking that you may not be called upon to challenge or defend the expert's opinion simply because the expert was jointly retained or appointed by the court.

Step 4: Investigating the Expert's Curriculum Vitae

Does the expert possess the appropriate credentials that qualify him to render an opinion on the issue in dispute? Does the expert maintain the appropriate state license or certification to provide expert testimony in a given field? By way of example, the State Real Estate Appraiser Board licenses a Certified Residential Real Estate Appraiser to appraise residential units and vacant land used for family purposes. A Certified General Real Property Appraiser, on the other hand, may appraise all types of property. The point being, all expert credentials and licensures must be explored by the practitioner.

Has the expert's license ever been suspended or has the expert been sanctioned by a disciplinary authority? Efforts to obtain such information can be made by contacting the appropriate licensing bodies. Even assuming that the expert possesses the requisite qualifications and credentials to testify, counsel must question whether it is appropriate for the expert to do so? Often, we see parties designate their personal business accountant or personal therapist as a testifying expert. Such experts come fraught with issues of bias and conflict ripe for cross-examination. In some cases, the expert's code of ethical conduct may bar his involvement in the case. For example, in a child custody case, a mental health professional who is a member of the American Mental Health Counselors Association may be serving in a clinical role by providing treatment to a party and child in family counseling. Under this fact pattern, it would be inappropriate for this mental health professional to act as a forensic expert. To do so would violate the counselor's code of conduct prohibiting counselors from evaluating, for forensic purposes, individuals they are currently counseling or have counseled in the past. Section I.D. 4(g), AMHCA Code of Ethics (2015). The attorney should be prepared to address issues of bias and ethical impropriety when individuals with apparent conflicts are offered as expert witnesses.

Step 5: Hiring a Consulting Expert

Consider hiring a consulting expert to review, critique, and discuss the adverse expert's report. Consulting experts can assist you in understanding both the subject matter and the significance of the opinions offered by the adverse expert. The consulting expert will be able to point out weaknesses in the adverse expert's report, and assist you with preparing effective cross-examination questions at trial.

In general, confidential communications offered by and delivered to a consulting expert will be protected. The adverse party may not discover facts known or opinions held by a consulting expert absent "exceptional circumstances" that would allow for discovery of that expert's identity and opinion. *R.* 4:10-2(d)(3); *Graham v. Gielchinsky*, 126 *N.J.* 361 (1991). Whether it be for reasons of cost or convenience, family law practitioners often eschew hiring a consulting expert and use their testifying expert to critique and review the report of the adverse expert. Keep in mind that when the testifying expert takes on dual roles as both a testifying and consulting expert, the role of the expert becomes blurred and privileges against non-disclosure may be lost.[5]

Step 6: Determining Whether an Expert is Truly an Expert

To determine whether the adverse expert is indeed an expert, the Rules of Evidence require that the opinions must be based on "scientific, technical, or other specialized knowledge" which will assist the trier of fact in understanding the evidence or deciding a fact in consequence. *N.J.R.E.* 702. In furtherance of this point, the three criteria for admitting expert testimony are as follows: "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror [or layperson]; (2) the field testified to must be of a state of the art that such an expert's testimony could be sufficiently reliable; (3) the witness must have sufficient expertise to offer the intended testimony." *DeHanes v. Rothman*, 158 *N.J.* 90, 100 (1999) (quoting *State v. Kelly*, 97 *N.J.* 178, 208 (1984)).

It is important to remember that trial judges are responsible to act as gatekeepers for the purpose of excluding unreliable expert testimony. This typically

involves an analysis by the trial court as to whether the expert's theory or technique has been tested objectively. Expert testimony which is found to be merely subjective or conclusory should be held inadmissible because its reliability cannot be assessed. The trial court will also want to know whether the expert's data or research has been published and subjected to peer review. The trial court may also wish to know the known rate of error of the technique or theory when applied. The expert's theory or technique should not be based on arbitrary information but should be supported by standards and controls which have been tested and are generally accepted in the scientific community. If a witness lacks the requisite qualifications of an expert, it may serve as a basis for a motion *in limine* to bar the expert's testimony.[6] In the alternative, this information may be useful for *voir dire* and cross-examination of the purported expert.

Step 7: Exploring What is Behind the Expert's Report

Cross-examination of an expert is often a crucial element in determining the accuracy, reliability, and probative value of the expert's findings and opinions. To determine the credibility, weight, and probative value of an expert's opinion, the practitioner must question the facts and reasoning on which it is based. What has the expert relied upon and where did he get the facts and data in order to render his opinion? Practitioners should consider obtaining the expert's notes and communications with the attorney who has retained the expert.[7] New Jersey discovery rules and procedures are "liberally construed to compel production of all relevant, unprivileged information which may lead to the discovery of relevant evidence." *Franklin v. Milner*, 150 *N.J. Super.* 456, 465 (App. Div. 1977). With regard to communications between the attorney and their expert, this evidence is only protected under the attorney work product privilege where such disclosure would reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney." *R.* 4:10-2(c). However, where the attorney has provided facts and data considered by the expert in rendering the report, the communications are not protected by the attorney work product privilege and are fair game in discovery under *R.* 4:10-2(d)(1).[8]

If it can be demonstrated to the trial court that the facts upon which the expert has relied are faulty, then the expert's opinion can be challenged as faulty. Sometimes the expert will rely upon information provided by the trial attorney, but if the expert has not taken any steps to independently verify this information, the expert's testimony may be impeached. On occasion, experts rely on research, articles, and learned treatises which may form the bases for their opinion. In preparation for trial, each and every one of these materials should be reviewed in order to determine whether the research cited categorically supports the opinion of the expert and whether the research has been criticized in professional quarters.

Do not forget that experts are not fact witnesses. In that regard, they may rely on hearsay and other information not admissible in evidence if that expert would reasonably rely on those kinds of facts and data in forming an opinion on the subject. *N.J.R.E.* 703; *Blanks v. Murphy,* 268 *N.J. Super.* 152, 163-164 (App. Div. 1993). For example, in a custody evaluation, the expert may rely on statements made by relatives and friends which may otherwise be considered hearsay if they are presented in court by a fact witness. If third-party sources have made statements that the expert has reasonably relied upon in his report, you should consider taking the deposition of these third-party witnesses in order to ascertain their credibility and the veracity of any statements which were made to the expert.

Finally, you must also be mindful of *N.J.R.E.* 703 which provides that the expert's opinion must be based on the facts or data. The corollary to this rule is an expert that offers an opinion not based on facts or evidence has rendered a "net opinion." Courts will bar opinions made without support of any factual evidence or data, textbook treatise, standard custom recognized practice, or anything other than the personal view of the expert, unfounded speculation, and unquantified possibilities. *Townsend v. Pierre,* 221 *N.J.* 36 (2015). Put another way, the expert must "give the why and wherefore that supports the opinion, rather than mere conclusion." *Borough of Saddle River v. 66 E. Allendale, LLC,* 216 *N.J.* 115, 144 (2013). The family law practitioner should move to bar an expert from testifying when his report lacks evidentiary support and is a "net opinion."

Step 8: To Depose, or Not to Depose, That is the Question

Upon receiving the expert's report, consideration must be given as to whether it is prudent strategy to depose the adverse expert before trial. *R.* 5:3-3(f). If the expert is deposed, will that assist in locking in his testimony at trial and obtaining concessions on important

points? Or, will proceeding with a deposition tip off the adverse expert to your trial strategy and questions that may have otherwise been posed for the first time during cross-examination at trial? The deposition may also alert the adverse expert of the need to correct deficiencies in his report. In the end, the determination of whether to depose the expert must be made on a case-by-case basis.[9]

Step 9: Impeaching the Expert

After all relevant documentation and information about the adverse expert has been obtained in the course of discovery, the practitioner must then decide how to best utilize it at trial. Although there are a number of avenues in which the qualifications and opinions of an expert can be challenged effectively, it is up to counsel to develop a plan for cross-examination. An effective cross-examination of the adverse expert will present a theme to the trial judge as to why the expert's opinion is not credible and should not be relied upon. Perhaps the expert is honest but mistaken, or purposely exaggerating or shading his testimony, or even relying on faulty factual information. The possible reasons for why an expert's testimony may not be reliable are virtually limitless.

In some instances, experts may attempt to testify about issues or subjects which are either inconsistent with or go beyond the scope of their report. *Skibinski v. Smith*, 206 *N.J. Super.* 349 (App. Div. 1985). A trial court has the discretion to exclude expert testimony that deviates from the pretrial expert report if the court finds "the presence of surprise and prejudice to the objecting party." *Velazquez ex rel. Velazquez v. Portadin*, 321 *N.J. Super.* 558, 576 (App. Div. 1999), *rev'd on other grounds*, 163 *N.J.* 677 (2000). "It is well settled that a trial judge has the discretion to preclude expert testimony on a subject not covered in the written reports furnished in discovery." *Ratner v. General Motors Corp.*, 241 *N.J. Super.* 197, 202 (App. Div. 1990). To properly evaluate whether parts of an expert's testimony must be stricken based on testimony about subjects and issues outside the purview of their report, the court must consider the following: "(1) the absence of a design to mislead; (2) absence of the element of surprise if the evidence is admitted; and (3) absence of prejudice which would result from the admission of the evidence." *Westphal v. Guarino*, 163 *N.J. Super.* 139, 145-146 (App. Div.), *aff'd*, 78 *N.J.* 308 (1978). [10]

Experts may also make statements at trial which are contradictory to testimony which they may have given at a deposition or other proceeding. Under *N.J.R.E.* 613(b), extrinsic evidence of a prior inconsistent statement, such as a deposition transcript, may be introduced after the witness is afforded an opportunity to explain or deny the statement. Prior inconsistent statements may be used not only for impeachment purposes, but also for substantive value provided that the witness is available for cross-examination. *State v. Gross*, 121 *N.J.* 1 (1990); *State v. Hacker*, 177 *N.J. Super.* 533, 537 n. 2 (App. Div. 1981), *certif. denied*, 87 *N.J.* 364 (1981).

Other forms of extrinsic evidence which may come into play to cross-examine the adverse expert are prior reports of the expert in other cases on the same subject. Similarly, published works by the adverse expert which undermine the opinions rendered in his present report can be used on cross-examination. To find out whether the expert has published contradictory works or issued reports at odds with his present position, the practitioner should review the expert's website to see what materials may be posted and speak with colleagues who have had prior experiences with the expert.

Finally, counsel must consider the question of whether the adverse expert's report should be admitted into evidence. While parts of an expert's report used for impeachment purposes on cross-examination may be admitted, an expert's report generally is not admissible since it is hearsay falling under no exception enumerated in *N.J.R.E.* 803. *Corcoran v. Sears Roebuck & Co.*, 312 *N.J. Super.* 117, 126 (App. Div. 1998). Practitioners should object to an adversary attempting to admit into evidence an expert report, especially when it is intended to bolster the inadequate trial testimony of the expert. Having said the above, it is not uncommon for family law attorneys to consent to admit into evidence the expert reports from both sides as it may be of assistance to the trial judge. *Little Egg Harbor Twp. v. Bonsangue*, 316 *N.J. Super.* 271, 280 (App. Div. 1998). Before agreeing to such an exchange, keep in mind some experts write their reports better than others, while some experts do not testify as well as their reports are written. In the end, the family law attorney will have to decide if it helps or hurts the case to have all reports come into evidence.[11]

Step 10: Keep it Simple and Short

It cannot be emphasized enough that it is unlikely that you will completely "destroy" the adverse expert at trial. Experts are smart and will have far more experience in a particular subject matter than the trial attorney. Many experts appear regularly in the Family Part and

come before the tribunal with an imprimatur of experience, competency and credibility. Therefore, it is imperative that counsel follow the cardinal rule of cross-examination and only ask leading questions requiring yes or no responses. *N.J.R.E.* 611 (c). Open-ended questions will allow the expert to display their expertise on a subject, thereby helping to score points with the trial judge.

When cross-examining experts, focus on the area where the opinion is most vulnerable. Establish your point, and then move on. In addition to boring the judge, a long cross-examination risks allowing the expert to rehabilitate himself by explaining away any inconsistencies and reconciling any areas of weakness in his testimony and report. Furthermore, the cross-examination should focus the court's attention on the deficiencies you are looking to emphasize. If the cross-examination is confusing or unclear, the attorney risks burying the most important points in the questioning. If the cross-examination is not tight and becomes meandering, don't be surprised if the trial court exercises its discretion to permit the expert to answer freely and to not be harnessed by the usual restrictions under the Rules of Evidence.

Finally, a copy of the transcript of the direct examination of the adverse expert should be obtained when possible, especially if there are significant breaks in trial days. That transcript may assist you in impeaching the expert on cross-examination if the expert attempts to deviate from his direct testimony. Be prepared to address a particular issue that comes up on direct examination that may not have been anticipated in preparing for trial. What you learn during direct examination may serve as the impetus for revising or supplementing your cross-examination.

Conclusion

The cross-examination of an expert witness is one of the hardest skills for a family law attorney to master. While areas of cross-examination will vary from case to case based on the type of expert who is testifying and the issues which are in dispute, there is no substitute for preparation. Following these 10 steps will put you in the position of being able to successfully cross-examine an adverse expert at trial.

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Endnotes

1. The Appellate Division recently made clear that expert analysis can be relied upon in the determination of the marital lifestyle in alimony cases. *S.W. v. G.M.*, 462 *N.J. Super.* 522 (App. Div. 2020).
2. It is well settled that failure to furnish names of witnesses to be used at trial may result in the sanction of excluding the witnesses from testifying. *Burke v. Central Railroad Co. of N.J.*, 42 *N.J. Super.* 387, 394-95 (App. Div. 1956).
3. "The court at trial may exclude the testimony of a treating physician or of any other expert whose report is not furnished pursuant to *R.* 4:17-4(a) to the party demanding the same." *R.* 4:23-5(b). On the other hand, an expert witness may testify without providing a report where no request for a report was made. *Kiss v. Jacob*, 268 *N.J. Super.* 235, 241 (App. Div. 1993).
4. *See Levine v. Wiss & Co.*, 97 *N.J.* 242 (1984) holding that accountants jointly selected by the parties can be held liable for negligence. In making this holding, the New Jersey Supreme Court observed that "there is no special significance to be attached to the fact that the (experts) were appointed by the parties pursuant to court order."
5. *See Franklin v. Milner,* 150 *N.J. Super.* 456 (App. Div. 1977). While discovery from the consulting expert is prohibited absent a showing of "exceptional circumstances," discovery from a testifying expert can be had as to all communications between attorney and expert regarding the facts and data considered by the expert in rendering the report. *R.* 4:10-2(d)(1).
6. Practitioners should be aware of the new rule concerning motions *in limine*. *R.* 4:25-8 which went into effect Sept. 1, 2020, would preclude a motion *in limine* to bar an expert's testimony if such action would have a dispositive impact on a litigant's case. In such cases, practitioners should be filing a summary judgment motion in connection with moving to bar an expert's testimony.

7. Generally, all preliminary or draft reports are deemed trial preparation materials and are not discoverable under *R.* 4:10-2(d)(1).
8. Be mindful that in addition to the work product privilege, the attorney-client privilege may also be claimed with the expert acting as the agent of the attorney to whom confidential information has been imparted. The attorney-client privilege has been held to extend to third parties whose advice is necessary to the legal representation. *O'Boyle v. Borough of Longport*, 218 *N.J.* 168 (2014).
9. A completely different analysis on deposing the adverse expert must be made when an adverse party elects to withdraw or to not proceed with an expert previously identified to be called at trial. *Fitzgerald v. Stanley Roberts, Inc.,* 186 *N.J.* 286 (2006).
10. Practitioners will also have to decide whether to move to sequester expert witnesses at the commencement of trial. Expert witnesses are subject to sequestration in the same manner as lay witnesses. *State v. Lanzel*, 253 *N.J. Super.* 168 (Law Div. 1991). *N.J.R.E.* 615 gives the court the discretion of sequestration and makes no exception for expert witnesses. Most courts will not sequester expert witnesses as, unlike fact witnesses, expert testimony is constrained by the contents of the expert's report. *State v. Popovich*, 405 *N.J. Super.* 324 (App. Div. 2009)
11. Under *R.* 5:3-3(g), the report by an "expert appointed by the court may be entered into evidence upon the court's own motion or the motion of any party in a manner consistent with the Rules of Evidence." Also, some reports may be admissible at trial under the "business records exception" to the hearsay rule if they were prepared and maintained in the ordinary course of business by a forensic expert, were made within a short period of time of the events described in it, and the trustworthiness of the report is undisputed. *N.J.R.E.* 803(c)(6); *State v. Kuropchak*, 221 *N.J.* 368, 388 (2015); *State v. Matulewicz*, 101 *N.J.* 27, 29 (1985) (citation omitted). New Jersey Division of Child Protection and Permanency (DCPP) reports are admissible in custody cases under the business records exception. *R.* 5:12-4(d).

‘Our Lips are Sealed’: A Review of Confidentiality and Privilege in the Mediation Process

By Hon. Katherine R. Dupuis and Nicole A. Kobis

Imagine you attended a mediation in a hotly contested matter which turns out to be a total waste of time because your adversary was late, unfamiliar with the file or unwilling to entertain settlement discussions. Is it permissible to tell the trial judge about your adversary’s failure to act in good faith? What if you are able to reach an agreement but one side later refuses to acknowledge that agreement? Is there any recourse?

Imagine you participate in a mediation which is unsuccessful. Your adversary files a motion wherein it is disclosed that your client was willing to waive alimony at mediation. You, of course, are furious at this misrepresentation because that is only part of the story. What has been omitted is that your client was only willing to waive alimony in exchange for receiving 100% of the property in equitable distribution. How do you respond?

The General Rule

Attorneys frequently opine that all discussions in mediation are confidential. However, the reality is more nuanced. There are both exceptions and exclusions. The Mediation Privilege comes from Rule 1:40-4(c) and the Uniform Mediation Act (UMA).[1] This privilege is further incorporated into Rule 519 of the New Jersey Rules of Evidence.

Rule 1:40-4(c) provides, “[a] mediation communication is not subject to discovery or admissible in evidence in any subsequent proceeding except as provided by the New Jersey Uniform Mediation Act, N.J.S.A. 2A:23C-1 to -13. A party may, however, establish the substance of the mediation communication in any such proceeding by independent evidence.”

The UMA states that a mediation communication is “a statement, whether verbal or nonverbal or in a record, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.”[2]

This would cover the communications made during the mediation itself and also communications relating to scheduling and logistics surrounding the mediation. The parties and the mediator are bound by the privilege. In addition to the participating parties, there may be nonparty participants such as accountants or other experts who are similarly bound by the privilege.[3]

As a general rule, mediation communications are privileged and not subject to discovery or admissible in evidence in a proceeding unless waived by all the parties to a mediation, as well as the mediator and the third-party participants.[4] Each of those individuals has the right to raise the privilege so as to not be forced to reveal communications that occurred during mediation. Similarly, the privilege may be raised to preclude others from disclosing what was said in the mediation.

The privilege can also be waived by the action of a party. If a party discloses a mediation communication the party waives the mediation privilege, but only to the extent necessary for the person prejudiced by the disclosure to respond.[5]

Communications Not Protected by Privilege

The UMA provides that there is no privilege for a mediation communication under certain circumstances. These are not exceptions to the privilege, but rather communications that are not covered by the privilege.[6] The privilege does not apply to the following:

1. An agreement evidenced by a record signed by all parties to the agreement.
2. Communications made during a session of mediation that is required to be or is open to the public.
3. A threat or statement of a plan to inflict bodily injury.
4. A communication that is intentionally used to plan a crime, attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity.
5. Communications offered to prove or disprove a claim or complaint filed against the mediator arising out of mediation.

6. Communications sought or offered to prove or disprove a claim or complaint of professional misconduct to malpractice filed against a mediating party, nonparty participant or representative of a party based on conduct occurring during the mediation.
7. Communications offered to prove or disprove a child abuse or neglect in a proceeding involving DCP&P unless DCP&P participates in the mediation.[7]

The UMA also provides that a privilege does not exist if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

> (1) a court proceeding involving a crime as defined in the "New Jersey Code of Criminal Justice," N.J.S.2C:1-1 et seq.; or
>
> (2) except as otherwise provided in subsection c., a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.[8]

Privilege and Constitutional Rights

In *State v. Williams*,[9] the New Jersey Supreme Court was faced with the clash between the mediator privilege and the defendant's constitutional rights. The parties had attended mediation at the municipal court level. The matter did not settle and an indictment for third degree assault, possession of a weapon and fourth degree unlawful possession of a weapon. Williams alleged that at the time of the mediation the alleged victim admitted he had first picked up a shovel, supporting his claim of self-defense. The case came before the Supreme Court solely on the issue of the admissibility of the mediator's testimony. The defendant argued that the *R.* 1:40-4(c) prohibition against a mediator testifying should be relaxed in order "to secure a just determination...and fairness in administration" pursuant to *R.* 1:1-2. The Court balanced the Fourteenth Amendment guarantee that every criminal defendant is entitled to a fair trial, including the right to cross examine and impeach the state's witnesses as well as the defendant's right to cross examine and impeach the state's witnesses against the mediation privilege.

The Supreme Court noted the language in the UMA that the privilege yields if "there is a need for the evidence that substantially outweighs the intent in protecting confidentiality and the proponent of the evidence shows the evidence is not otherwise available."[10] The Court found there was a need for the evidence. However, the Court determined the interest in maintaining confidentially outweighed the defendant's interests. The Court discussed the need for confidentiality in the mediation process and emphasized that mediation is not conducted under oath. It does not follow the rules of evidence, nor is mediation limited to admissible facts.

The Supreme Court also refers to New Jersey Rule of Evidence 408 which provides statements made by parties in settlement negotiations are generally inadmissible in subsequent proceedings. The Court determined the mediator's testimony was not sufficiently probative. It also concluded that the defendant did not demonstrate that the victim's statement that he picked up a shovel was "not otherwise available" since there was other evidence such as the police report used in cross examination as well as the defendant's own testimony.

Privilege and Divorce

In *Lehr v. Afflitto*,[11] the husband alleged a settlement had not been reached in mediation. The trial court conducted a Harrington hearing[12] after a remand from the Appellate Division. During the Harrington hearing, the mediator utilized by the parties was called to testify on behalf of the husband. Upon appeal the Court found that the trial judge had erred in permitting the mediator to testify.[13] The Court also found that the testimony did not support the trial court's conclusion that the parties had reached a settlement and remanded the matter for trial. [14]

The trial court stated that any question asked of the mediator and any responses are deemed to be a waiver by the husband of any objections to matters at mediation being brought into court.[15]

The Appellate Court found that the mediation confidentiality provision had not been waived, noting that the plaintiff's counsel cited to *R.* 1:40-4(c) at the onset of the hearing.[16] The Court found both defense counsel's act of subpoenaing the mediator and the procedures employed by the court troubling, noting that the issue of confidentiality is of great public and systematic importance.

The Court relied on *R.* 1:40-4(c) language that no mediator may participate in any subsequent hearing or trial of a mediated matter or appear as witness or counsel for any person in the same or related matter.[17]

The Court referred to the *Williams* case determining that the Courts have "long-recognized that public policy favors settlement of legal disputes."[18] The Court emphasized the importance of confidentiality in the mediation process and noted the risks of allowing mediation as a fact-finding process. Specifically, the Court stressed, "Underpinning the success of mediation in our court system is the assurance that what is said and done during the mediation process will remain confidential. The mediation process was not designed to create another layer of litigation in an already over-burdened system."[19]

In *Addesa v. Addesa*,[20] the wife moved to set aside a property settlement agreement reached during mediation. The first trial judge set aside the property settlement agreement after a hearing in which the mediator was called as a witness. The Appellate Court found that the portions of the lower court's order permitting the mediator to testify and allowing the inspection of his file were inappropriate.[21] The Court also emphasized that in addition, the mediation agreement of the parties contained language stating the mediator and his records would not be subject to subpoenas.[22]

The Disclosure of Privileged Communications by an Adversary

In *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.,* 215 N.J. 242 (2013) the parties agreed to non-binding mediation. The mortgagor moved to enforce the purported oral agreement reached during mediation and in doing so, supported its application with a certification of the mediator and counsel including privileged communications.[23] Instead of moving to bar the privileged statements, the plaintiff litigated the validity of the agreement and further disclosed additional privileged communications.[24] The Court discussed two exceptions to the privilege which were pertinent in this matter. The first, a signed writing which "allows a settlement agreement reduced to writing and properly adopted by the parties to be admitted into evidence to prove the validity of the agreement."[25] The second exception discussed by the Court was waiver and the need for waivers of privilege to be express and deliberate in order to avoid an inadvertent mistaken disclosure.[26] The Court affirmed the Appellate Division's finding of the existence of an oral settlement agreement, but clarified that "going forward, a settlement that is reached at mediation but not reduced to a signed written agreement will not be enforceable."[27] The Supreme Court also cautioned and reminded litigants that, "a party seeking the protection of a privilege must timely invoke the privilege. A party that not only expressly waives the mediation-communication privilege, but also discloses privileged communications, cannot later complain that it has lost the benefit of the privilege it has breached."[28]

Penalties and Consequences for Wrongful Disclosure

There is no specific penalty outlined by statue or court rule that addresses non-exempt disclosures. The only time a consequence is mentioned is in the provision that states if one violates the privilege the adversary can disclose information to counter the disclosed information.

When faced with an inadvertent disclosure, courts generally remedy the issue by striking the privileged communication from the record. However, the striking of the privileged communication does not unring the bell. Once a communication is made it cannot be unheard or forgotten. While counsel may be familiar with a court's ability to ignore something it has read, litigants are not at all convinced that the court can "unsee" what has been placed before it.

Final Thoughts and Takeaways

With the prevalence of Alternative Dispute Resolution on the rise in the wake of the COVID-19 epidemic and judicial vacancy crisis, how do practitioners ensure that the communications made during mediation truly remain protected? First, it would be best practice to have a signed mediation agreement signed by the parties, third parties and the mediator that clearly reflects that all mediation communications are confidential. The privilege applies not just to the mediation itself, but to all statements made for the purpose of considering, conducting, participating in, initiating or reconvening a mediation. Second, restate the rules before each mediation session to make sure everyone has the same understanding about the confidentiality of the meetings. ■

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Endnotes

1. N.J.S.A. 2A:23C-1 to -13
2. N.J.S.A. 2A:23C-2
3. See N.J.S.A. 2A:23C-2; N.J.S.A. 2A:23C-4
4. N.J.S.A. 2A:23C-4
5. N.J.S.A. 2A:23C-5
6. N.J.S.A. 2A:23C-6
7. N.J.S.A. 2A:23(c)-6
8. N.J.S.A. 2A:23C-6
9. 184 N.J. 432 (2005)
10. The UMA was not in effect when the trial court initially excluded the mediator's testimony
11. 382 N.J. Super. 376, (2006)
12. *Harrington v. Harrington*, 281 N.J. Super. 39 (1995))
13. *Lehr v. Afflitto*, 382 N.J. Super. 376, 395 (App. Div. 2006)
14. *Id.*
15. *Lehr v. Afflitto*, 382 N.J. Super. 376, 387 (App. Div. 2006)
16. *Lehr v. Afflitto*, 382 N.J. Super. 376, 391(App. Div. 2006)
17. The UMA was not in effect when the Harrington hearing was held by trial court in this matter nor when this matter was decided
18. *Lehr v. Afflitto*, 382 N.J. Super. 376, 394, 889 A.2d 462, 474 (App. Div. 2006)
19. *Lehr v. Afflitto*, 382 N.J. Super. 376, 391, 889 A.2d 462, 472 (App. Div. 2006)
20. 392 N.J. Super. 58 (N.J. Super. 2007)
21. *Addesa v. Addesa*, 392 N.J. Super. 58, 65, 919 A.2d 885, 889 (App. Div. 2007)
22. The Court noted that the UMA had not been enacted when the parties signed the agreement, but noted that if it had been passed earlier, it would control if it had been in effect.
23. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 245 (2013)
24. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 245 (2013)
25. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 256 (2013)
26. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 257 (2013)
27. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 263 (2013)
28. *Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C.*, 215 N.J. 242, 263, (2013)

Divorced Parents Who Disagree About Their Child's College Choice: Who Pays?

By Raquel Vallejo and Bari Z. Weinberger

In many states, child support ends by the time a child graduates from high school. However, divorced parents in New Jersey may be obligated to provide ongoing support to children who pursue post-secondary studies, including child support as well as college related expenses such as tuition, room and board, and miscellaneous school expenses. The parent's respective contributions toward post-secondary studies are not calculated by a formula. Several issues and questions arise as a result. How then can parents get an idea of their potential obligation? Does the child get to decide what kind of degree to pursue and which school to choose? To what extent will courts uphold agreements between parents?

The Issue of Emancipation

In evaluating a parent's responsibility for contributions to post-secondary education, emancipation is a threshold question.[1] Once a child is emancipated under the law in New Jersey, the divorced parents no longer have an obligation to pay child support or post-secondary studies. There is a rebuttable presumption in New Jersey that children are emancipated at 18.[2] Under the child support termination statute, N.J.S.A. §2A:17-56.67, most child support collection through the Probation Department end by operation of law by the time a child turns 19. If a child is enrolled full-time in a post-secondary program, however, a custodial parent can submit a written request for continuation in advance, including supporting documentation and a proposed future date of termination.[3] Often, the parties will have language regarding terms of emancipation in property settlement agreements. The statute provides for the submission of the agreement, along with proof that the child is in college. If the court orders ongoing support and the parent responsible for paying support disagrees with this decision, that parent can file a motion seeking relief.[4]

Most children who enroll in post-secondary education immediately or soon after finishing high school remain financially dependent on their parents. However, ongoing financial dependence coupled with a child's decision to continue schooling are not the only factors a court must consider when determining whether a child is emancipated or not emancipated.[5] As noted in *Ricci v. Ricci*, "the child's right to support and the parents' obligation to provide payment are inextricably linked to the child's acceptance and the parents' measured exercise of guidance and influence. Conversely, a finding of emancipation is a recognition of a child's independence from a parental influence."[6]

The degree to which a child must accept guidance from a paying parent may vary according to circumstances, but at a minimum, the child is required to provide certain information to the parent. In *Van Brunt v. Van Brunt*, the court determined that regardless of the Family Educational Rights and Privacy Act (FERPA), a child could not expect a parent to contribute to college expenses unless the child was also willing to provide that parent with access to enrollment information, course credits, and grades.[7] The custodial parent and the dependent student share responsibility for providing such information to a paying non-custodial parent on request.[8]

Evolution of New Jersey Law on Parental Contributions

Early New Jersey cases rejected the idea that parents had any obligation to contribute to a child's post-secondary educational expenses. However, in the 1950s, the New Jersey courts began to explore the concept of obligating divorced parents to contribute toward a child's post-secondary educational expenses. In the 1950 case of *Cohen v. Cohen,* the Court raised the idea that the appropriateness of such contributions should depend on a family's circumstances, stating that "in a family where a college education would seem normal, and where the child shows scholastic aptitude and one or other of the parents is well able financially to pay the expense of such an education, we have no doubt the court could

order the payment."[9] In 1953, *Jonitz v. Jonitz*, expanded on this dicta, specifically ordering the father to continue support to a son who had reached the age of majority but was about to enter college.[10] There was no order in either *Cohen* or *Jonitz*, however, that directed a parent to contribute directly to post-secondary expenses.

For several years, a court's power to order a divorced parent to make direct contributions to post-secondary school expenses remained in question. The 1968 case of *Nebel v. Nebel* answered the question unequivocally.[11] The *Nebel* court ordered the father to pay the equivalent of the cost of attendance at Rutgers University, which amounted to approximately one-half the cost of the private college at which the son was currently enrolled,[12] finding "no valid legal distinction between ordering defendant to pay college expenses directly and ordering him to do so indirectly under the guise of increased support."[13] Relying on language in *Cohen* and *Jonitz*, the Court pointed out that "[t]remendous changes have occurred in our educational needs and patterns since 1899."[14] In the 1971 case of *Khalaf v. Khalaf*, the New Jersey Supreme Court aligned with *Nebel*, both regarding the trend towards greater education and the inclusion of college expenses in child support where appropriate.[15]

Nebel has often been cited as establishing the so-called "Rutgers rule," limiting a parent's obligation to a share of the cost of a quality state university. Notably, the Court never stated this as an absolute rule and instead called the limitation reasonable in that case in light of the father's "adequate" but "modest" income and assets.[16] The Court took judicial notice of the high-quality education available at Rutgers, further stating that the limitation in contribution would apply "unless and until it is shown that [the child] cannot get at Rutgers a reasonably adequate education in his chosen field."[17]

Taken as a whole, these early cases establish that in New Jersey, a divorced parent's obligation to contribute to a child's higher education expenses depends on each family's circumstances. In the 1982 case of *Newburgh v. Arrigo*, the New Jersey Supreme Court set out a 12-factor test for evaluating such circumstances. [18]

The Newburgh Factors

In *Newburgh*, the Court determined that the decedent's son from a previous marriage, who was 19 when his father died, might be entitled to a distributive share of a wrongful death settlement if he was not emancipated while pursuing his college and law school education.[19] The case was remanded for a determination of whether the son had proved the likelihood and amount of his father's contributions to such education.[20] The Court stated that "[i]n general, financially capable parents should contribute to the higher education of children who are qualified students,"[21] and then set out the following nonexclusive factors to be considered in evaluating contribution claims:

(1) whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education;
(2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education;
(3) the amount of the contribution sought by the child for the cost of higher education;
(4) the ability of the parent to pay that cost;
(5) the relationship of the requested contribution to the kind of school or course of study sought by the child;
(6) the financial resources of both parents;
(7) the commitment to and aptitude of the child for the requested education;
(8) the financial resources of the child, including assets owned individually or held in custodianship or trust;
(9) the ability of the child to earn income during the school year or on vacation;
(10) the availability of financial aid in the form of college grants and loans;
(11) the child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and
(12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.[22]

No one factor is dispositive, and close scrutiny reveals they are all intertwined. For purposes of more in-depth analysis, they can be grouped into a few distinct categories. Subsequent case law helps elucidate how a court might apply the factors.

Analyzing the Newburgh Factors

Likelihood of Contribution had the Family Remained Intact; Parent's Background, Values and Goals; and Reasonableness of the Child's Expectations

The first two *Newburgh* factors are closely related. Insofar as it may not be possible to determine exactly what a parent would have done if still living with the child, evidence showing the parent's background, values

and goals might support a particular inference. That inference will generally dovetail with the reasonableness of a child's expectations, but this is not always true. For example, even if both parents attended private colleges themselves, the much higher cost of higher education today could well mean that even had the divorce not occurred, the parents would not have chosen to fund private college for their children.

An application for contribution should set out both parents' educational backgrounds in detail, as well as the impact of such backgrounds on their respective careers, earnings, and current lifestyle. Any previous discussions between the parents will be relevant to intentions, as will any steps already taken, such as setting up accounts for college contributions, either before or after divorce. Conversations between either or both parents and the child are relevant to the child's expectations. The overall lifestyle of the family is relevant to both intentions and expectations.

Contribution Sought by the Child, Available Parental Resources, and Ability to Pay

Newburgh factors three, four, and six all generally concern the question of a parent's ability to pay. *Newburgh* makes no mention of any Rutgers rule, and in 2000, *Finger v. Zenn* specifically denounced this rule.[23] The parents in *Finger* had a limited agreement to share costs.[24] After the son was rejected from Penn State University and accepted by George Washington University, the father objected to the cost and asked the court to limit his financial contribution to half the cost of Rutgers.[25] The Court rejected his request, noting that the son had discussed his plans with the father and the father had suggested Lafayette College, which was also a private school, but had never suggested Rutgers.[26]

Finger establishes that in some cases, financially capable parents may be compelled to contribute to the cost of a private or out-of-state school. This is not a given. For example, in a dispute over whether a parent's contribution should be limited to a state school cost, a court would take into consideration evidence that a parent expressed in early discussions an unwillingness to fund private school, and admission availability for a quality education at a state school.

Nor need a court make any decision regarding the appropriateness of any particular school, whether public or private. In *Black v. Black,* the son was enrolled in Rutgers but wanted to transfer to the significantly more expensive University of Miami to pursue a degree in marine biology.[27] The Court observed that neither parent was as wealthy as the parents in *Finger* and stated that "no parent should be expected to pay more than he or she could reasonably afford."[28] The *Black* Court also considered the needs of younger children. Rather than order the parents to pay a percentage of the son's tuition and fees for either Rutgers or the University of Miami, the court ordered each of them to set aside a specific amount of money to be divided among all three children.[29]

Factor six makes clear that in addressing ability to pay, a court should consider all financial resources of both parents. An accurate assessment will require submission of family law case information statements and appropriate attachments detailing all income and assets and all debts and other obligations which might compete with paying for college. A court can consider not only the needs of other children, but also the resources of a new spouse. The current spouse is not obligated to support the child, but the spouse's income can be considered to the extent is assists the parent in paying for current living expenses or long-term financial obligations.[30]

The Child's Commitment, Aptitude, Prior Training and Overall Goals

Newburgh factors five and seven concern the relationship of the requested contribution to the type of school or course of study sought by the child and the commitment to and aptitude of the child for the requested education. A parent seeking contribution to a private school, or a specialized program of some kind, will certainly want to provide comparisons with other schools and detailed reasons why the preferred school should be funded.

Factor 12 requires consideration of the relationship of the education requested to any prior training and to the overall long-range goals of the child. If the child already has a skill or talent that the preferred school will uniquely foster, information regarding the persistence and success of the child in honing such skill or talent will be helpful. College prep test scores, grades and other credentials are generally important. Still, all of these things may take a back seat to the more pressing issue of affordability.

The court in *Black* gave short shrift to the claims of the parties' son that the University of Miami had a superior marine biology program, in spite of the fact that the son was a good student. This does not mean the relative quality of programs was irrelevant, but that it may not have weighed as heavily in the balance with other factors,

most notably, that regardless of the son's abilities and goals, the parents simply could not afford to pay for this school.[31] While a court may strongly consider a child's strong aptitude toward a particular course of study, the ability of the parents to pay must always be on the forefront of the court's consideration.

Contributions by the Child

Factors eight, nine, and 10 require examination of the child's own financial resources, the child's ability to earn income during the school year or on vacations, and the availability of financial aid in the form of college grants and loans. An application for contribution should detail any financial resources in the child's name, including assets held individually or in custodianship or trust, and include copies of financial documents.

The degree to which a child is expected to incur loans or to work is inextricably intertwined with the availability of other resources, both the parents' and the child's. Notably, the court in *Finger* stated that the child in that case, whose parents had ample resources, should not be expected to incur any loans for which the child would be responsible in the future, at least for the first two years of schooling.[32] Similarly, a court might not expect a child to have to work as much during school, particularly the first two years of school, if it was not necessary due to a parent's ample resources. If a child does work, the non-custodial parent is entitled to information about the income earned.[33]

The Parent-Child Relationship

Factor 11 requires consideration of the extent to which the child shares affection and goals with the paying parent and is responsive to parental advice and guidance. In cases where a child has a relationship with one parent and not the other parent, the court cannot emancipate one child from one parent and not the other for purposes of child support and related post-secondary education expenses. As discussed above, a child is not entitled to a contribution from a parent unless the child is willing to accept some degree of advice and guidance from that parent, but this requires neither mutual affection nor shared goals. In fostering a relationship that includes the latter, the non-custodial parent must be seen as bearing some responsibility.[34] If, the parent has attempted to continue or repair a positive relationship with the child, the child's refusal to reciprocate, without good cause, may be an issue.

In the 2006 case of *Gac v. Gac*, the father had not had a relationship with his daughter since she was five years old, but he had attempted to reestablish the relationship and consistently paid child support.[35] The daughter did not seek his input in the college application process.[36] The trial court's order for the father to help her repay loans was reversed on appeal but rather than focus on the lack of a relationship, the Court stated that the contributions were barred by the late timing of the request.[37]

The relationship factor was addressed more squarely in *Moss v. Nedas*.[38] The parents in *Moss* had an agreement to share the costs of college for their daughter, but her father objected to her enrollment at Sarah Lawrence College, an expensive private school.[39] The trial court initially ordered the father to contribute, as the daughter, who had a visual disability, was thriving in the small college community.[40] The Court reversed this decision when she chose to transfer to another private school without informing her father.[41] The appellate court affirmed, noting that the father was never consulted, his opinion was never sought, and he was not provided with any information concerning his daughter's progress at school despite the Family Part's prior orders and clear requirements over three separate court appearances.[42]

In *Black v. Black*, the son did not have a post-divorce relationship with his father, despite the father's credible representations that he desired to change this.[43] The judge made the father's contribution obligations expressly contingent on father and son participating in a minimum of five family counseling sessions.[44]

When Does the Obligation End?

The *Newburgh* Court suggested that under certain circumstances, parents might be required to contribute not only to a child's undergraduate education, but also to professional or graduate education. This idea was not new. In *Ross v. Ross*, the Court directed a father to continue weekly support payments for his 23-year-old daughter until she completed law school. [45] However, in 2017, the child support termination statute clarified that a New Jersey court cannot order any form of child support after a child's 23rd birthday.[46] This does not mean that parents cannot enter into binding agreements to pay a child's educational expenses for longer, but any agreements relating to adult children over age 23 will be interpreted only under contract law, and not under the state child support statutes or formulas.[47]

Agreements Between Parents

A well-drafted agreement covering contributions to a child's post-secondary education can help parents avoid many of the disputes discussed above. Courts generally uphold such agreements. Precise language is critical. Admittedly, it can be challenging for divorcing parents to predict their ability to pay at what may be a date in the future, especially if the parents are divorcing with young children. However, an agreement to simply divide costs based on respective abilities to pay when the time comes, might prove to have limited value if a full-blown discovery process is eventually required to determine exactly what this means and how it will be effectuated.

Even an agreement to share expenses 50/50, or by some other percentage split, can leave open questions, such as the existence of a ceiling on total expenses. A parent who is not willing to be on the hook for half the expenses of any college the child might choose would be wise to specify some limitations such as veto power over a particular course of study or choice of school or a promise to contribute only up to the cost of a specified state school. Again, the language must be specific. In *Finger v. Zenn*, for example, an agreement granting a father "joint decisional authority," did not give him the authority to select the college his child would attend or limit his contribution to a portion of the cost of a state university or college. [48]In addition, agreeing to a 50/50 share of college expenses when the children are young could also prove a challenge if the parties' respective incomes substantially change by the time the children are in college and one parent no longer has the ability to contribute 50% of the costs.

Also important is a definition of expenses. Does this include only tuition and fees? What about room and board? Study abroad? Who pays for books and other supplies? Do the parents want to provide payment for test prep classes or other pre-college programs? Answering these questions requires thinking about a range of possibilities, and to the extent possible, providing for different contingencies. Another sticking point can be the child's responsibility to work or apply for loans. The parties should also be clear regarding the length of time their agreement covers. Is it for up to four years of college, or could it extend to graduate school? Will it still apply if the child takes a gap year or two after high school?

Where there is no agreement, or an agreement is too vague to be enforceable, one parent may need to file an application for contribution from the other. Both parent and child have standing to enforce the obligation.[49] It is important to request contribution as early as possible, certainly no later than the time a student has received an offer or declination of financial aid. In *Gac v. Gac*, the Court blocked the daughter's request for contributions from her father due to her delay in filing the request, stating that it should have been made as soon as practical, and at a minimum, before incurring the expenses. [50]

In New Jersey, the law has evolved whereby divorced parents may be obligated to provide ongoing support to children who pursue post-secondary education. This obligation is fact sensitive and determined on a case-by-case basis applying the statute and present case law. Divorcing parents are encouraged to include terms in their marital settlement agreements addressing their respective obligations for post-secondary education. Counsel is urged to be specific and detailed in addressing the scope, terms, and duration of the obligation of the parents and child to ensure enforcement by the court of these terms.

Endnotes

1. *Ricci v. Ricci*, 448 N.J. Super. 546, 576 (App. Div. 2017).
2. N.J.S.A. §9:17B-3; *Newburgh v. Arrigo*, 88 N.J. 529, 543 (1982).
3. N.J.S.A. §§2A:17-56.67.1.a.(2) and b.(1)(b).
4. N.J.S.A. §2A:17-56.67.1. c.
5. *Ricci*, 448 N.J. Super. at 577-78.
6. *Id.* at 576.
7. *Van Brunt v. Van Brunt*, 419 N.J. Super. 327 (Ch. Div. 2010).
8. *Id.* at 333-36.
9. *Cohen v. Cohen*, 6 N.J. Super. 26, 30 (App. Div. 1950).

10. *Jonitz v. Jonitz*, 25 N.J. Super. 544 (App. Div. 1953).
11. *Nebel v. Nebel*, 99 N.J. Super. 256 (Ch. Div. 1968), as affirmed in 103 N.J. Super. 216 (App. Div. 1968).
12. *Nebel*, 99 N.J. Super. at 264-65.
13. *Id.* at 259.
14. *Id.* at 260.
15. *Khalaf v. Khalaf,* 58 N.J. 63, 72 (1971).
16. *Nebel*, 99 N.J. Super. at 264.
17. *Id.* at 265.
18. *Newburgh v. Arrigo*, 88 N.J. 529 (1982).
19. *Id.* at 542-43.
20. *Id.* at 545-46.
21. *Id.* at 544-45.
22. *Id.* at 545.
23. *Finger v. Zenn*, 335 N.J. Super. 438, 445 (App. Div. 2000).
24. *Id.* at 440-41.
25. *Id.* at 441-42.
26. *Id.* at 441-44.
27. *Black v. Black*, 436 N.J. Super. 130, 138 (Ch. Div. 2013).
28. *Id.* at 150.
29. *Id.* at 152-160.
30. *Hudson v. Hudson*, 315 N.J. Super. 577, 583-84 (App. Div. 1998).
31. *Black*, 436 N.J. Super. at 152.
32. *Finger*, 335 N.J. Super. at 442.
33. *Tretola v. Tretola*, 389 N.J. Super. 15 (App. Div. 2006).
34. *See Black*, 436 N.J. Super. at 142-148.
35. *Gac v. Gac*, 186 N.J. 535, 545-46 (2006).
36. *Id.* at 546.
37. *Id.* at 547.
38. *Moss v. Nedas*, 289 N.J. Super. 352 (App. Div. 1996).
39. *Id.* at 354.
40. *Id.* at 354-58.
41. *Id.*
42. *Id.* at 359-60.
43. Black, 436 N.J. Super. at 136-39.
44. *Id.* at 147-48.
45. *Ross v. Ross*, 167 N.J. Super. 441, 444-46 (Ch. Div. 1979).
46. N.J.S.A. §2A:17-56.67.1.e.
47. N.J.S.A. §2A:17-56.67.1.e.(1).
48. *Finger*, 335 N.J. Super. at 444 (App. Div. 2000).
49. *Ricci*, 448 N.J. Super. at 574.
50. *Gac*, 186 N.J. at 547.

The Lasting (or not so) Impact of *Moriarty*: How Practitioners Might Allege Harm in a Complaint for Grandparent Visitation

By Hon. Marcia L. Silva and Lauren A. Miceli

It has been nearly 20 years since *Moriarty v. Brandt* was decided by our Supreme Court.[1] In that time, courts and practitioners have struggled to define "harm to the child." The Legislature has not amended the Grandparent Visitation Statute since *Moriarty* was decided to provide direction or factors to consider.[2] Similarly, published case law from the appellate court has been sparse.

So, what is one to do when faced with a case where the grandparents have been an integral part of a child's life and now because of a divorce, separation, or death, the other custodial parent is refusing to allow the relationship to continue? This article seeks to answer this question for practitioners drafting pleadings which must establish "harm" on its face and for judges reviewing those complaints to determine whether discovery should be exchanged, and a hearing scheduled.

A grandparent's right to visit with their grandchild does not arise from common law, but rather, from the Grandparent Visitation Statute. Enacted in 1972, and amended most recently in 1993, the Grandparent Visitation Statute provides:

1.

a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.
b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:
   (1) The relationship between the child and the applicant;
   (2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;
   (3) The time which has elapsed since the child last had contact with the applicant;
   (4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
   (5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;
   (6) The good faith of the applicant in filing the application;
   (7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and
   (8) Any other factor relevant to the best interests of the child.
c. With regard to any application made pursuant to this section, it shall be prima facie evidence that visitation is in the child's best interest if the applicant had, in the past, been a full-time caretaker for the child.[3]

It is important to note this is not a custody statute, but rather a visitation statute. As a practice tip, there may be circumstances where it is appropriate for grandparents to not only seek visitation but to also seek custody of their grandchildren. It is important to provide the court with all available avenues for granting the relief sought by your clients. It may be appropriate in some circumstances to consider pleading requests as a psychological parent, certainly where in multigenerational households, grandparents have been far more involved in child rearing than a grandparent who lives across the country.[4]

The *Moriarty*[5] Court was first charged with examining the constitutionality of the grandparent statute considering the United States Supreme Court's holding in *Troxel v. Granville*,[6] where a similar Washington state statute was struck down as unconstitutionally infringing upon a parent's right to raise their child under the Due Process Clause.

Justice Long, writing for the Court, began her analysis of whether the New Jersey statute could stand after *Troxel*[7] by examining *Watkins v. Nelson*.[8] In *Watkins*, the maternal grandparents were seeking custody of their granddaughter. The child's mother was deceased, and the child's father was alive and seeking custody. Ultimately, the Supreme Court reversed the lower court's ruling and found that the application of a best interests standard violated the biological father's fundamental right to raise his child. Justice Coleman, writing for the Court stated: "The principle that a showing of gross misconduct, unfitness, neglect or exceptional circumstances affecting the welfare of the child will overcome this presumption, is a recognition that a parent's right to custody is not absolute. That parental right must, at times, give way to the State's *parens patriae* obligation to ensure that children will be properly protected from serious physical or psychological harm." Accordingly, parental autonomy in decisions regarding the "care, custody, and control of their children" is a fundamental right that will only yield to a compelling state interest.[9]

The *Moriarty* Court found a fit parent's wishes should only be disregarded by the state when it is necessary to avoid "harm" to a child. When there is no harm threatening a child's welfare the state cannot infringe upon a parent's fundamental right to parent their child. This fundamental right includes a parent's right to allow or restrict grandparent visitation. However, if harm to the child is proven, then, and only then, the trial court must engage in a best interest analysis.

The next difficult question for practitioners and courts alike is addressing the question of what constitutes "harm" and how do grandparents assert same in their pleadings. In *Mizrahi v. Cannon*, the appellate division held "to withstand judicial scrutiny, grandparents seeking visitation under the statute [N.J.S.A. 9:2-7.1] must prove by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child."[10] In order to survive a motion to dismiss at the first appearance, grandparents must do more than simply set forth "[c]onclusory, generic items, such as 'loss of potentially happy memories'" as proof of harm.[11] In a grandparent's complaint seeking visitation, they must first make "a clear and specific allegation of concrete harm to the children."[12] Indeed, grandparents must "establish that denying visitation would wreak a particular identifiable harm, specific to the child, to justify interference with a parent's fundamental due process right to raise a child free from judicial interference and supervision."[13] The purpose behind the heightened pleading requirement is "to avoid imposing an unnecessary and unconstitutional burden on fit parents who are exercising their judgment concerning the raising of their children."[14] Otherwise, "any grandparent could impose the economic and emotional burden of litigation on fit parents, and on the children themselves, merely by alleging an ordinary grandparent-child relationship and its unwanted termination."[15]

By way of example, in *Mizrahi*, the plaintiff alleged 18 different types of harms:

1. Loss of unconditional love, affection and caring;
2. Loss of heritage and heredity;
3. Probability of guilt and feeling of inadequacy caused by perceived desertion of Father/Mother and Father's/Mother's parents;
4. Loss of contact and relationship with cousins/extended family;
5. Confusion over the fact that the Maternal Grandmother is very much in the child's life whereas the Paternal Grandmother and Grandfather are not;
6. Loss of ongoing companionship and the special relationship which often arises between the child and her Paternal/Maternal Grandparents;
7. Potential loss of economic assistance;
8. Loss of opportunity to learn from loving Grandparents;
9. Loss of potentially happy memories of good times, which might have been spent with the Grandparents;
10. Loss of opportunity to better understand religious traditions, if the child is being raised a different religion
11. There will be no one to fill the void in the child's life to talk to her about her deceased parent and the decedent's side of the family, since the child's surviving parent/custodian does not discuss those subjects with the child;
12. Loss of potential confidants;
13. Potential loss of sources of heredity and medical history;
14. Potential perquisites, such as gifts, trips, vacations, etc.;
15. Loss of Grandparental guidance in child rearing;
16. Loss of benefits which will devolve upon the child from a relationship with her Grandparents, which she cannot derive [from] any other relationship;
17. The continuous love and affection of the child's Grandparents may very well mitigate the feelings

of guilt or rejection, which the child may feel at the death of her parent and/or due to the separation from her parent and ease the painful transition therefrom;

18. Loss of sources of unconditional love and acceptance, which compliment rather than conflict with the roles of the child's parent(s).

All these allegations of harm, viewed together and individually, were insufficient. In the end, the court did not grant the grandparent's petition for visitation with the child because they were insufficient to trump the parent's parental autonomy. It is worth note, the facts of *Mizrahi* were unique. In *Mizrahi* the defendants were the child's maternal aunt and uncle who had adopted the child after the biological mother's death. The plaintiffs were the child's maternal grandparents whose son had no contact with the child. Accordingly, the type of harm alleged in grandparent visitation pleadings must be an articulated harm to the child and not simply harm to the grandparents if visitation between them is denied.

Turning back to *Moriarty*, the harm alleged was supported by a mental health provider's finding of alienation between the grandparents and the child. The surviving parent, the child's biological father, was found to have engaged in alienation against the grandparents. There was concern that the alienating conduct would continue and result in emotional and psychological harm to the child.

There are few published, or even unpublished cases, which address harm and provide guidance to practitioners on this issue.

In *Rente v. Rente*, the appellate court found a grandparent's assertion that they babysat for their grandchild during the first two years of the child's life was insufficient to establish that the denial of visitation would result in harm to the child.[16]

In *Daniels v. Daniels*, the court denied grandparent visitation to children ages 6 and 3 despite the grandmother having "significant visitation with the minor children" and having a "strong and loving relationship" with them. The court held "[w]hile we do not denigrate the value of a loving relationship with grandparents, the denial of which might result in some harm to any child, we conclude that the type of harm to which *Moriarty* referred must be something more substantial."[17]

In *Watkins v. Nelson*, a grandparent was able to demonstrate "exceptional circumstances," since the court was "deciding a custody dispute between a biological parent and a third party following the death of the custodial parent."[18]

At least one state, Tennessee, has a statute, which sets forth circumstances for harm to be found:

> A finding of substantial harm may be based upon the cessation of the relationship between the minor child and grandparent if the court determines that:
>
> **A.** The child had such a significant existing relationship with the grandparent that loss of the relationship is likely to occasion severe emotional harm to the child;
>
> **B.** The grandparent functioned as a primary caregiver such that cessation of the relationship could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm; or
>
> **C.** The child had a significant existing relationship with the grandparent and loss of the relationship presents the danger of other direct and substantial harm to the child.[19]

The harm discussed in Tennessee's statute seems instructive and may provide a framework for pleading harm in our jurisdiction. This is the closest articulation to harm available to practitioners besides a "know it when I see it" analysis, which unfortunately most practitioners and judges are left with based on the published and available case law.

For a procedural analysis of "harm" under the visitation statute, and what happens after harm is established, the New Jersey Supreme Court, in *Major v. Maguire*, supplemented the decision of *Moriarity*.[20] The unanimous Court opined, evidence of harm may be expert or factual. The *Major* Court provided grandparents may rely on the "death of a parent or the breakup of the child's home through divorce or separation. ... In addition, the termination of a long-standing relationship between the grandparents and the child, with expert testimony assessing the effect of those circumstances, could form the basis for a finding of harm."[21] This is the closest articulation from the appellate courts which articulates circumstances when harm may be found.

From a practitioner's standpoint, upon receipt and review of any complaint for grandparent visitation, if there is no harm alleged, one of the few circumstances in *Major* do not exist, or there are no factual similarities

to one of the other few published cases on visitation, a motion to dismiss should be immediately made. The *Major* Court made clear, "absent a showing that the child will suffer harm if grandparent visitation is denied, a trial court may not mandate visitation pursuant to the best-interest factors of *N.J.S.A.* 9:2-7.1, and should dismiss the complaint." Those motions should be granted to avoid protracted and intrusive discovery and litigation when parental autonomy will prevail.

Only after establishing the almost insurmountable feat of articulating potential harm to the child, could or would a court consider a visitation schedule with the grandparents.[22] The objecting parent(s) must then offer a visitation schedule and if the grandparents do not agree, then it is up to the court to set up using the factors set forth in N.J.S.A. 9:2-7.1.[23] However, if the grandparents agree to the schedule, "that will be the end of the inquiry."[24] If the parties are unable to agree on a visitation schedule, the trial court approves a schedule "that it finds is in the child's best interest, based on the application of the statutory factors."[25]

As a practitioner's note, because grandparent visitation cases are addressed under the non-dissolution docket, in order to signal the complexity of the issues presented in the complaint, attorneys should ask for a track assignment and for all applications to be subject to motion filing deadlines per R. 5:5-4. Rule 5:5-7 permits assignment of Non-Dissolution cases to different tracks, and pursuant to Major, Absent a clear reason to deny such a request, for designation as complex, this request should be granted.[26]

The next issue practitioners and courts may be face is what happens after grandparent visitation is granted either by consent or by trial? In the case where visitation is occurring, but the grandparents feel it is insufficient, the grandparents have the burden of showing the current schedule is inadequate to avoid harm to the child. Also, in the case where there is a consent order between parents and grandparents for grandparent visitation, a parent cannot unilaterally terminate the consent order. Rather, a parent must make a *prima facie* showing of a change of circumstances as would warrant relief, then discovery (if necessary) and a hearing. The parent, not grandparent, bears the burden of proving there has been a change of circumstances and that modifying the order would not cause harm to the child.[27]

In conclusion, proving harm after *Moriarty* may require expert testimony depending on the facts of the case. The challenging cases will be those where both parents are still alive and objecting to the visitation. Certainly, in those cases, functioning as the child's primary caregiver would be persuasive, almost akin to a psychological parent analysis. Where a parent is deceased, the most compelling factor seems to be keeping the deceased parent's memory alive and minimizing the child's feelings of guilt in being able to express their feelings of sadness to the surviving parent who may not have the same feelings for the decedent.

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Endnotes

1. 177 N.J. 82 (2003).
2. *N.J.S.A.* 9:2-7.1.
3. *Id.*
4. See generally, V.C. v. M.J.B. 163 N.J. 200 (2000).
5. 177 N.J. 82 (2003).
6. 530 U.S. 57 (2000).
7. *Id.*
8. 163 N.J.235 (2000).
9. *Moriarty*, 177 N.J. at 103-04.

10. 375 N.J. Super. 221, 231-32 (App. Div. 2005).
11. *Id.* at 234.
12. *Daniels v. Daniels*, 381 N.J. Super. 286, 294 (App. Div. 2005).
13. 375 N.J. Super. 221, 231-32 (App. Div. 2005).
14. *Daniels, supra*. at 294.
15. *Id.* At 293.
16. 390 N.J. Super. 487, 494-96 (App. Div. 2007).
17. *Daniels, supra*. at 288.
18. 163 N.J. 235 (2000).
19. Tenn. Code Ann. § 36-6-306(b)(1)(A)-(C).
20. 224 N.J. 1 (2016).
21. *Id.*
22. *Moriarty*, 177 N.J. at 117; *accord R.K. v. D.L.,* 434 N.J. Super. 113, 150 (App. Div. 2014).
23. *Watkin v. Nelson*, 163 N.J. 235 (2000).
24. *Id.* at 117, 827 A.2d 203 (cited from Major)
25. *Ibid.* (citing *N.J.S.A.* 9:2-7.1).
26. "While Non-Dissolution actions are presumed to be summary and non-complex, at the first hearing following the filing of a Non-Dissolution application, the court, on oral application by a party or an attorney for a party shall determine whether the case should be placed on a complex track. The court, in its discretion, also may make such a determination without an application from the parties."
27. *Slawinski v. Nicholas* 448 N.J. Super. 25 (App. Div. 2016).

50 (or more) Ways to Show They're More Than a Lover: Facts to Prove Cohabitation

By Jeralyn Lawrence and Hon. Marie E. Lihotz

For more than 45 years, New Jersey courts have addressed the impact cohabitation has on a recipient's receipt of alimony.[1] The Appellate Division reconciled the divergent approaches taken by the trial judges in these two cases, accepting that cohabitation could result in modification of alimony.[2]

The New Jersey Supreme Court included cohabitation as a judicially recognized change of circumstances warranting review of an alimony award in *Lepis v. Lepis*.[3] The Court once again addressed the issue in *Gayet v. Gayet*,[4] holding that cohabitation by a divorced spouse constitutes changed circumstances justifying discovery and a hearing. The Court further opined that the test for a modification of alimony remained whether the relationship reduced the financial needs of the dependent former spouse.[5]

In 2014, the Legislature amended N.J.S.A. 2A:34:23, adding subsection (n), designed to provide clarity and certainty to the impact of cohabitation on existing alimony awards. The statute now defines cohabitation, identifies the factors signifying the defined relationship, and includes remedies available upon proof of cohabitation. Mirroring the Supreme Court's definition set forth in *Konzelman*, the statute provides:

> Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.

Further, subsection (n) lists factors "a court shall consider" to discern "whether cohabitation is occurring," including:

(1) intertwined finances such as joint bank accounts and other joint holdings or liabilities;

(2) sharing or joint responsibility for living expenses;

(3) recognition of the relationship in the couple's social and family circle;

(4) living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive, intimate personal relationship;

(5) sharing household chores;

(6) whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of [N.J.S.A.] 25:1-5; and

(7) all other relevant evidence.

Many of these factors are emotional markers while others are financial in nature. The definition of cohabitation and many of the factors are extracted from case precedent.[6] The statute clearly reflects that each factor does not need to be satisfied. Moreover, the statute does not elevate a couple's financial entanglements above the facts supporting a marital-like relationship. Yet, as with other sections of N.J.S.A. 2A:34-23, the weight given to any single factor or combination of factors rests solely in the discretion of the trial judge.

In the Appellate Division's ruling in *Landau v. Landau*,[7] the Court held that the 2014 amendments to 2A: 24-23(n) did not change the fact that a party seeking to terminate an alimony obligation must demonstrate a prima facie case of cohabitation before discovery can be pursued. The *Landau* Court did not expand on what evidence is sufficient to establish a prima facie case of cohabitation. One appellate panel recognized "the difficulties of developing proofs of things such as intertwined finances, joint bank accounts, shared living expenses and household chores, and recognition of the relationship in the couple's social and family circle, without either invading a former spouse's privacy or taking some discovery on the issue."[8] Thus, lawyers face the challenge of deciding how to best present sufficient and convincing proof to vault *Landau's* prima facie evidence of cohabitation allowing a court to enter an order for discovery.

Indeed, the finding of cohabitation requires a fact

sensitive determination, and all facts matter. But exactly what evidence shows the examined relationship is more than dating? Here are some suggestions.

Factor 1: Intertwined Finances

Since 2014, many unpublished Appellate Division cases affirmed a trial court's denial of a post-judgment motion for review based on cohabitation, reciting a lack of evidence of intertwined finances.[9] Admittedly, this is one of the most difficult factors to prove without discovery. However, if you meet your initial burden and seek discovery, look for some of these:

1. Shared bank accounts
2. Authorized signer or on bank accounts
3. ATM withdrawals
4. Shared investments
5. Shared credit cards or authorized use of another's credit card
6. Lending of money
7. Payment of credit card bills
8. Co-signing a lease
9. Co-signing vacation rental leases
10. Listed as household member on lease
11. Co-signing for loan
12. Personal guarantees for loans or leases
13. Borrowing money from the other's relatives
14. Included as authorized driver on car insurance
15. Payment of traffic or parking tickets
16. Authorized use on Amazon Prime, Netflix, news, entertainment, or music streaming services
17. Listed on family gym membership
18. Owner or beneficiary of life insurance policy
19. Beneficiary on IRA
20. Beneficiary in will

Factor 2: Sharing Living Expenses

As is the case with intertwined finances, evidence of shared living expenses may rest solely with the putative cohabiting spouse and cohabitor. You need to examine not only whether there are actual shared payments for obvious expenses, but also whether one party is bearing responsibility for the other's costs when the parties are together. Indicia of such proofs of shared living expenses include:

1. Change in usage of utility bills. This may be evident by a change in usage of utility costs like electricity, cable or internet subscriptions. If the parties suggest they have separate residences, also check for a change in usage in both homes (up and down) over period of alleged cohabitation.
2. Payment for elaborate vacations. Who bears the costs for travel, hotel, meals, other enhancements? Are the parties' children included and paid for by the cohabitor?
3. Are there other emoluments purchased by the cohabitor that enhance the lifestyle of the former spouse's household, such as entertainment, dining out, and the like?
4. Payments through Venmo, PayPal, Zelle and similar cash transfer services.
5. Look at what is purchased. For example, are groceries bought for the entire household?
6. Is there a newspaper or magazine subscription delivered to the former spouse's residence?
7. Shared use of vehicles or E-ZPass
8. Shared pets
9. Buying things for the household. Whether it's dishes, or a TV, furniture or a kitchen appliance. Also, making home improvements large (new carpet) or small (installing a new mailbox or basketball hoop).

Factor 3: Recognition of the relationship in the couples' social and family circle

This factor is essential in assessing whether the relationship rises to the level of a mutually supportive, intimate personal relationship and whether it is one of stability and permanence. Here are some things to look for:

1. Having a child(ren) together
2. Being engaged
3. Being present at family events including weddings, baptisms, christenings, bar and bat mitzvahs, family or school reunions, birthday parties, holiday gatherings, or funerals
4. Being present at children's events, including: sporting events or other extracurricular activities; school events; trips or plays; Halloween parades or holiday concerts; field days; parent teacher organizational events; parent teacher conferences; back-to-school nights; or graduations
5. Presence on social media and how the relationship is characterized on Facebook, Instagram, Twitter, Snapchat, TikTok, or Tumblr. Are there shared mutual friends, friends with each other's family and friends, "likes" or comments on their family and friends' posts, pages, or comments or "likes" on each other's posts?
6. Travel/vacation together
7. Photographs together
8. Dining out together

9. Public displays of affection
10. The relationship is known by neighbors
11. Exchanging or owning jewelry symbolizing commitment
12. Meaningful or mutual tattoos
13. A special identification or label in each other's phone
14. Promotion of the other's business on social media
15. Attendance at work events or commitments, retreats or conventions
16. Exercising together
17. Belonging to same club or recreational events such as photography, painting, hiking clubs, and gym memberships
18. Attending sporting events together and adopting an allegiance to the other's alma mater or favorite team

Factor 4: Living together, the frequency of contact, the duration of the relationship and other indicia of a mutually supportive intimate personal relationship

Prior to the 2014 amendment of the statute, many believed counting overnights was the only way to prove cohabitation. While overnights are relevant, there are many other things to look for in assessing this factor and cohabitation as a whole.

1. Possess keys or the garage code to the other's residence
2. Present at residence when the other is not home
3. Leaves personal belongings at the other's house
4. Owns or shares a pet together or takes care of the other's pet
5. Shares a car, car insurance or cell phone plan, and listed as a driver on car insurance policy.
6. Renovate or improve the home or living space
7. Runs errands such as grocery store, dry cleaners, drug store
8. Transports children to school or activities
9. Stays alone with the other's children
10. Attends classes together such as CPR class, classes at the gym, or other recreational events including studying a foreign language together
11. Cell phone records showing frequent calls or text messages. Cellular records showing both phones in the same place at frequent and various time-periods, especially overnight
12. Listed as an emergency contact with children's school or medical providers
13. Plays an active role in the children's schooling or medical care. Communicates with teachers, day care professionals or medical providers
14. Attends medical appointments for each other and their children
15. Attends IEP or 504 meetings for the children
16. Volunteers together for a worthy cause
17. Receives bills/mail at the other's residence
18. Listed as mail recipient or authorized person to discuss issues regarding the other's bills
19. Shares intimate holiday or greeting cards
20. Switches to places of business local to the other's home (e.g., gas stations, grocery stores, restaurants, pharmacy, dry cleaners, hairdresser)

Factor 5: Sharing Household Chores

Some of these can be observed, while others, which occur within a home, may not be readily ascertainable but examined in discovery.

1. Shoveling snow, raking leaves, sweeping steps, power washing, cleaning the garage porch, or washing the car, taking cars to a car wash
2. Repairing the home or car or waiting for a repair person to arrive
3. Transporting household members (parties' children, former spouse's parents or siblings) to events or activities
4. Walking the dog or taking pets to the vet
5. Cleaning the home or hiring and paying a housekeeper
6. Performing everyday chores, like cooking, dishes, cleaning, or laundry

Factor 6: Enforceable Promise pursuant to subsection h of the Statute of Frauds, N.J.S.A. 25:1-5

This factor relates to promises of support or palimony, which now requires a written agreement. The provision states:

> A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.

This factor is very circumscribed and self-explanatory.

Factor 7: All other relevant evidence

This factor was included to provide the practitioner wide berth in crafting arguments and obtaining proof of cohabitation. While factors one through six are guideposts as to the analysis, they certainly are not all inclusive. The sole analysis in assessing cohabitation is whether the couple is engaged in a mutually supportive, intimate, personal relationship. While the first six factors are considered in evaluating whether this threshold is met, any and all other relevant evidence in each and every particular case must also be considered.

Although not labeled as such, the closing provisions of subsection (n) add two important considerations when evaluating whether cohabitation is occurring and whether alimony should be suspended to terminated. First, the length of the relationship. This suggests it may take some time to gather proofs of the type of "mutually supportive, intimate personal relationship in which the couple has undertaken duties and privileges that are commonly associated with marriage or civil union. . . ."[10]

Second, and one of the most important changes to the statute, is found in the last sentence of section (n). It provides: "a court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis." This provision was inserted as a direct result of the gamesmanship that was occurring with couples who obtained separate or sham residences in an attempt to thwart a cohabitation application by claiming they do not live together evidenced by their maintenance of separate residences. To combat this abuse, the Legislature essentially obliterated the importance of whether a couple is living together. As such, cohabitation can still be found even when a couple is not living together full time.

The case law and treatises written about cohabitation reveal it is a term of art. It is no longer synonymous with living together or counting overnights. It is a holistic review of a couple's relationship. The facts must demonstrate that the couple engaged not only in "a mutually supportive, intimate personal relationship," but undertook the "duties and privileges that are commonly associated with marriage or civil union." Although the threshold is high, collecting a plethora of facts to show the statutory factors will aid your argument that the threshold is met. ■

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Endnotes

1. *See Garlinger v. Garlinger* 129 N.J. Super. 47 (Ch. Div. 1974); *Grossman v. Grossman*, 128 N.J. Super. 193 (Ch. Div. 1974).
2. *Garlinger v. Garlinger*,137 N.J. Super 56 (App. Div. 1975). *See also Wertlake v. Wertlake*, 137 N.J. Super. 476 (App. Div. 1975); *Eames v. Eames,* 153 N.J. Super. 99 (Ch. Div. 1976).
3. 83 N.J. 139, 145, 151 (1980)
4. 92 N.J. 149 (1983)
5. *See also Konzelman v. Konzelman*, 158 N.J. 185 (1999) (enforcing marital settlement agreement terminating alimony upon proof of former spouse's cohabitation). *See also Quinn v. Quinn*, 225 N.J. 34 (2016).
6. *See e.g., Quinn; Konzelman* (defining cohabitation as "serious and lasting;" *Gayet; Reese v. Weis*. 430 *N.J. Super.* 552, 570 (App. Div. 2013) ("Cohabitation involves 'an intimate[,]' 'close and enduring' relationship, requiring 'more than a common residence' or mere sexual liaison.").
7. 461 N.J. Super. 107 (App. Div. 2019)
8. *Wajda v. Wajda*, No. A-3461, (App. Div. 2020).
9. *See e.g., M.M. v. J.Y.,* No. A-3910-17 (App. Div. 2019); *Mennen v. Mennen*, No. A-4345-17 (App. Div. 2019); *Robinski v. Robinski*, No. A-2818-14 (App Div. 2016).
10. *See e.g., Mennen* (finding couple together 32 of 38 surveillance events "simply wasn't enough" to show cohabitation as opposed to a romantic relationship); *see also Salvatore v. Salvatore* No. A-5565-16 (App. Div. 2018) (reversing denial of spouse's motion to terminate alimony in 2017 because cohabitation continued, even though parties agreed to reduce alimony because of cohabitation in 2011).

The Impact on Family Court Matters of Convicted Sex Offenders and Custody and Parenting Time

By Jessica Sciara and Michael J. Hanifan Sr.

Sex offenders are often perceived as the most despised offenders within the criminal justice system. Throughout the 1990s, numerous sex offender laws were enacted in the United States to address the threat of sex offenders.[1] Approximately 49 states and the District of Columbia have enacted legislation regarding the parental rights of perpetrators of sexual assault.[2] Several states have more than one statute addressing the issue, depending on the context, including provisions for both the termination of parental rights (TPR) and restrictions on custody and visitation. Indeed, 32 states allow for the termination of parental rights of perpetrators of sexual assault who conceive a child as a result.[3] There are 20 states, which include New Jersey, that allow for some form of restriction on the parental rights of perpetrators of sexual assault.[4]

New Jersey expanded its protections of children against the threat of sex offenders by enacting laws to include protection for children whose parent is a convicted sex offender as well as protection for a sexual assault victim who becomes pregnant as a result of the assault. Pursuant to N.J.S.A. 9:2-4.1(a), a person convicted of sexual assault will not be awarded custody or visitation rights to any minor child, including a minor child who was born as a result of an assault, or was the victim of sexual assault.[5]

Additionally, N.J.S.A. 9:2-4.1(b) affords protection to the victims of sexual assault who subsequently become pregnant and to children whose parent has been convicted of sexual contact or endangering the welfare of a child.

However, the protections afforded by N.J.S.A. 9:2-4.1 for these victims and children are not absolute. A convicted sex offender parent may be afforded custody or visitation rights if the sex offender parent proves by clear and convincing evidence that it is in the child's best interest for the sex offender parent to exercise custody or parenting time (referred to as "visitation" in the statute.)

This article examines the heightened standard that a sex offender parent must meet for a court to even consider custody or parenting time as well as the effect of N.J.S.A. 9:2-4.1 on families involved in various family part matters, including dissolution, non-dissolution, and children in the courts. It also examines how courts have balanced its *parens patriae* responsibility to protect children, including ensuring that no child should be exposed to the dangers of abuse or neglect at the hands of a parent, with the notion that no parent should lose custody of a child without just cause.[6]

What is the Clear and Convincing Standard Applied in These Matters?

There are three standards of proof recognized under New Jersey law: a preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt.[7] The heightened standard of clear and convincing evidence is not commonly utilized in family court, although it is required in termination of parental rights cases[8]. Approximately 100 years ago, the New Jersey court in *Roberts v. Horsfield v Gedicks*, identified the "clear and convincing standard" (also identified as "clear and unequivocal standard") and distinguished the standard from the "preponderance of the evidence" ordinarily applied in civil actions. [9]Since then, New Jersey courts have defined the clear and convincing as "a standard of proof falling somewhere between the ordinary civil and criminal standards."[10] It has been further defined as "deemed to be evidence that produces in one's mind a firm belief or conviction that the allegations sought to be proved by the evidence are true."[11] To meet this standard, the evidence must be so clear, direct, and weighty in terms of quality and convincing as to cause one to come to a clear conviction of the truth of the precise facts in issue.[12] This requires that the result not be reached by a mere balancing of doubts or probabilities, but by clear evidence causing one to be convinced that the allegations sought to be proved are true.[13]

N.J.S.A. 9:2-4.1 thus combines the best interest factors and the standard for clear and convincing evidence for a parent convicted under the statute to have custody or visitation with the minor child. This heightened standard helps protect victims of rape and children

born to parents convicted of aggravated sexual assault or aggravated sexual contact on minors. The statute is rarely used in litigation, making it difficult for practitioners to utilize and argue during custody litigation.

Knowledge of Spouse's Sex Offender Status or Visitation of a Child in a Dissolution or Non-Dissolution Matter When a Parent is a Sex Offender

While the goal of N.J.S.A. 9:2-4.1(a) is to protect victims from further contact with their perpetrators of sexual assault, the statute does not automatically terminate the parental rights of the sex offender parent. Instead, it requires the sex offender parent to demonstrate through a heightened burden of persuasion that it is in the child's best interests for the sex offender parent to have custody or visitation.

In the context of a divorce proceeding, if a parent who has been convicted of or plead guilty to sexual offenses under N.J.S.A. 2C:14-2 or N.J.S.A. 2C:14-3 seeks visitation or custody of their child, the court must hold a best interest hearing with the sex offender parent required to demonstrate with "clear and convincing" evidence that it is in the child's best interests for that parent to have custody or visitation with the child. There is only one published decision in New Jersey that addresses N.J.S.A. 9:2-4.1, which is *New Jersey Div. of Youth and Family Services v. H.B. and L.M.B.* discussed further below. Due to the lack of published decisions, how courts have handled these issues in unpublished decisions is worth review.

In *M.C. v. J.U.,* defendant-father filed a motion seeking visitation with his two sons while incarcerated.[14] The father pled guilty to first-degree sexual assault of his then 11-year-old stepdaughter. In support of his motion, he failed to submit a certification or any supporting documentation. The trial court denied his application and noted that, while incarceration does not automatically sever the right of visitation, the father failed to make a showing of changed circumstances to alter the current ban on his visitation.[15]

The father filed an appeal of the trial court's decision, which the Appellate Division affirmed. The Appellate Division noted that father's request for visitation was governed by N.J.S.A. 9:2-4.1(a). The Appellate Court found that the father did not furnish any proofs with his application, let alone proofs that would satisfy the "clear and convincing" standard set forth in N.J.S.A. 9:2-4.1. Specifically, the Appellate Division provided information that could have been considered in support of the relief sought by the father, such as proof of his therapy sessions from therapists or himself, proof that plaintiff-mother supported his application, or proof that visitation with the sons would be a positive development for the children.[16] The father failed to furnish proof of the children's emotional state and their understanding of his criminal acts, his whereabouts, or their preference, as well as the impact visitation would have on them after years had passed without contact.[17] The Court affirmed the trial court's ruling denying visitation.[18]

Notably, the *M.C. v. J.U.* court distinguished its analysis with the facts and circumstances in *Fusco v. Fusco*, where the ex-husband, who was serving a 32-year prison sentence for first-degree murder, sought consistent visitation with the parties' 5-year-old daughter. The Fusco court focused on the impact on the young child visiting her father in prison as well as the impact it would have on the mother, whereas the *M.C.* court focused entirely on protecting the children from abuse or harm as well as the sexual offender parent's failure to provide evidence that satisfied the "clear and convincing standard."

The Appellate Division reached a similar outcome in a recent unpublished decision involving a dissolution matter, *N.P. v. A.O.*[19] N.P. was a mother of two children, one of whom was born of her marriage with A.O. Her other child was from a relationship the mother had before her marriage to A.O. A.O. had been a father figure for since the child was 5 years old.[20] N.P. and A.O. divorced, but continued to reside together to co-parent N.P.'s daughter and the parties' biological daughter.[21] While residing together, N.P. discovered A.O. was sexually abusing her daughter from a prior relationship.[22] N.P. immediately reported the abuse to authorities and eventually A.O. admitted and plead guilty to charges of aggravated sexual assault.[23] Initially, A.O. sought visitation with the parties' daughter despite his guilty plea for aggravated sexual assault. Over N.P.'s adamant objection, the trial court permitted A.O. to exercise visitation with the parties' daughter without applying N.J.S.A. 9:2-4.1 and without holding a best interest hearing.[24]

N.P. argued on appeal that, even though A.O. had not been sentenced at the time of the trial, Court's decision, N.J.S.A. 9:2-4.1 applied because A.O. had pled guilty to the crimes. The Appellate Division agreed with N.P. and determined that a guilty plea triggers the N.J.S.A. 9:2-4.1 analysis, even without the formality of a sentence and

judgment.[25] The Appellate Division also vacated the trial court's order and remanded the matter to the trial court to schedule a hearing and directed the trial court to apply N.J.S.A. 9:2-4.1 and require A.O. to demonstrate by "clear and convincing evidence" that it was in their child's best interests for him to exercise custody or visitation.

It is important for litigants and their attorneys to be aware of the statute and bring any convictions under N.J.S.A. 2C:14-2 or (3) to the court's attention during a custody dispute.

New Jersey courts have also denied requests for visitation for sexual offenders who are not the biological parent of the child for whom visitation is sought. In the unpublished decision of *Vogel v. Balkus*, the plaintiff sought visitation of a child, Eddie, who had no biological ties to him but for whom he claimed he was a psychological parent, as defined in *V.C. v. M.J.B.*[26] The child, Eddie, was placed in the care of the plaintiff and his former wife, Geraldine, because the child's biological mother became disabled and unable to care for Eddie.[27] Geraldine was named the primary guardian while the plaintiff was named contingent guardian.[28]

Thereafter, Geraldine's biological daughter, J.S., who was the plaintiff's step-daughter, accused the plaintiff of sexually abusing her for a 10-year period beginning when she was 13 years old, which led to the entry of a final restraining order and criminal charges against the plaintiff.[29] The plaintiff pleaded guilty to fourth-degree criminal sexual contact under N.J.S.A. 2C:14-3b for sexually assaulting J.S.[30] After he was sentenced and released from jail, he filed an application with the Court, seeking visitation with Eddie.

The trial court analyzed the plaintiff's request pursuant to *V.C. v. M.J.B.* and N.J.S.A. 9:2-4.1.[31] The trial court determined that the plaintiff failed to demonstrate by clear and convincing evidence that visitation or custody was in Eddie's best interest, which was affirmed by the Appellate Division.[32] The trial court also considered the plaintiff's admission at the plea hearing that the purpose of his sexual contact with J.S. was either to humiliate her or to sexually arouse or gratify himself, which led to the trial court reaching the conclusion that this admission demonstrated a potential risk of harm to Eddie.

Given New Jersey's limited examination of N.J.S.A. 9:2-4.1 in the state's published case law, it appears the purpose of the statute – to protect victim's and children from perpetrators of sexual abuse – is working. Unlike in a standard custody dispute, minimal proof relating to the child's best interests is not enough to meet the clear and convincing standard, and perhaps certain mental health evaluations and treatments must be done for the perpetrating parent if they are going to meet the clear and convincing burden.

Sex Offender and Children in the Court Matters

New Jersey courts who handle child abuse or termination of parental rights matters are the most likely to encounter a matter that requires the application of N.J.S.A. 9:2-4.1.

In order for the court to terminate parental rights, the Division of Child Protection and Permanency (DCPP) must satisfy each factor of a four-prong test, which includes examining the child's best interests pursuant to the heightened clear and convincing evidence standard.[33] This four-prong test is comparable to the standard of proof required under N.J.S.A. 9:2-4.1.

In *New Jersey Div. of Youth and Family Services v. B.R.W.,* B.R.W. appealed from an order terminating litigation because the children were returned to the care of their mother, B.K.[34] B.R.W. was convicted of criminal sexual contact with B.K.'s daughter. The trial court analyzed B.R.W.'s request pursuant to N.J.S.A. 9:2-4.1 and determined that B.R.W. was precluded at that time from exercising custody or visitation with B.R.W. and B.K.'s son.[35] B.R.W. was ordered to have no contact with the children, but he was permitted to file an application to change custody or for visitation "as circumstances develop."[36]

In *New Jersey Div. of Youth and Family Services v. H.B. and L.M.B.*, the Appellate Division declined to apply N.J.S.A. 9:2-4.1 in a matter where the sexual offender parent was not a party to a custody matter or seeking visitation with a child. The defendant L.M.B. was the then 13-year-old-daughter's biological mother, who was married to Lawrence. Lawrence was previously convicted of sexually assaulting a minor. [37]L.M.B. was aware of the sexual assault conviction when she married Lawrence.[38] L.M.B's daughter confided in a friend that Lawrence sexually assaulted her. The friend's mother overheard the allegation and notified the Division.[39] L.M.B. was advised Lawrence could not reside in the home with L.M.B.'s daughter pending the investigation, yet L.M.B. allowed Lawrence back into the residence after the child recanted her allegations.[40] The Division argued that N.J.S.A. 9:2-4.1 was applicable because Lawrence was convicted of sexual offenses as identified in the statute, which the Appellate Division rejected.[41]

N.J.S.A. 9:2-4.1 is only applicable where a person convicted of any crime enumerated within the statute is seeking custody or visitation. In the DCPP context, N.J.S.A. 9:2-4.1 is most frequently analyzed in the context of a termination of parental rights trial. When analyzing N.J.S.A. 9:2-4.1 the important factual distinction that can be drawn in DCPP cases from typical non-dissolution or divorce custody disputes is that the convicted party must be actively seeking custody or visitation with the child(ren) for N.J.S.A. 9:2-4.1 to apply.

When a Sex Offender Who Has Been Convicted of Sexual Assault of the Other Parent Seeks Custody or Visitation of the Child Conceived from the Assault

While approximately 49 states and the District of Columbia have enacted legislation to either terminate or limit the parental rights of sexual offenders for a child conceived as a result of sexual assault,[42] there are at least 30 states that allow for the complete termination of the sexual offender's parental rights. There are 20 states, including New Jersey, that provide restriction on the sexual offender's parental rights but do not provide for automatic termination of parental rights.

N.J.S.A. 9:2-4.1(b) provides:

> A person convicted of sexual contact under N.J.S. 2C:14-3 or endangering the welfare of a child under N.J.S.A. 2C:24-4 shall not be awarded the custody of or visitation rights to any minor child, except upon a showing by clear and convincing evidence that it is in the best interest of the child for such custody or visitation rights to be awarded.

A person convicted under either N.J.S. 2C:14-3 or N.J.S.A. 2C:24-4 means that the person was found or pled guilty to criminal sexual contact with any victim under the circumstances identified in detail in the respective statutes. Accordingly, N.J.S.A. 9:2-4.1(b) requires perpetrators found or who plead guilty to aggravated criminal sexual contact with any victim under any of the circumstances as identified in the statue N.J.S. 2C:14-2(a)(2)-(7), which include a person impregnated by a sexual offender as a result of sexual assault, to prove by clear and convincing evidence that custody and visitation with the perpetrator is in the child's best interests.

Currently, no caselaw exists in New Jersey which examines a mother seeking sole custody of a child conceived by rape or a convicted perpetrator challenging his victim for custody or visitation of the child conceived as a result of rape. However, if the other cases analyzing N.J.S.A. 9:2-4.1 provide any guidance, it is that courts tend to heavily lean more in favor of protecting a child from potential abuse or harm as opposed to protecting the rights of a sexual offender parent.

New Jersey further extended protection to victims whose child(ren) are conceived as a result of sexual assault to include that a victim is not required to appear in any proceeding for establishment or enforcement of a support obligation to be paid by the sex offender parent/obligor. The statute requires that the victim and child's whereabouts shall be kept confidential.

Conclusion

In theory, N.J.S.A. 9:2-4.1 should protect parents who have been victimized by sexual violence from their abusers and children from parents who have been convicted of aggravated sexual assault or aggravated sexual contact. However, the protections are not absolute. While there is a rebuttable presumption that a sexual offender should not be provided custody or visitation of a child, the absence of an automatic termination of the sexual offender's parental rights provides the sexual offender parent the opportunity to present evidence to a court as to the reasons that parent should have custody or visitation.

Attorneys who handle family court matters should be aware of N.J.S.A. 9:2-4.1 and how it can impact custody, parenting time, or other cases involving child abuse or termination of parental rights. If a party has been convicted of aggravated sexual assault or aggravated sexual contact as identified in N.J.S.A. 9:2-4.1, the attorney representing the non-sexual offender or victim parent should argue that the burden is on the sexual offender parent to demonstrate by clear and convincing evidence that custody or visitation with them is in the child's best interests and order discovery and a plenary hearing before a court should even entertain a custody or parenting time request. Conversely, if an attorney represents a client in a family part matter involving custody of a child who has been convicted of a sexual offense, there is no question that the sexual offender parent should be prepared to present compelling evidence that supports the position that it is in the best interest of the child for that parent to exercise custody or parenting time. ■

Endnotes

1. It is also important to note that the Rape Survivor Child Custody Act (RSCCA), a federal law passed in 2015, incentivized states to pass laws regarding the termination of parental rights of rapists upon showing clear and convincing evidence. See, U.S.C. 2772
2. ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx
3. csl.org/research/human-services/parental-rights-and-sexual-assault.aspx
4. ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx
5. A person convicted under N.J.S. 2C:14-3 is a person found guilty of aggravated criminal sexual contact because they have had sexual contact with any victim under any of the circumstances set forth in N.J.S. 2C:14-2(a)(2)-(7).
6. New Jersey Division of Youth and Family Services v. H.B., *375 N.J. Super, 148, 175 (App. Div. 2005).*
7. N.J.R.E. 101(b)(1)
8. See N.J.S.A. 30:4C-15.1.
9. *Roberts-Horsfield v. Gedicks*, 94 N.J.Eq. 82, 84, 118 A. 275 (Ch.1922), affirmed 96 N.J.Eq. 384, 124 A. 925 (E. & A.1924)
10. *Aiello v. Knoll Golf Club, 64 N.J. Super 156, 162 (App. Div. 1960), citing,*
11. *Matter of Purrazella*, 134 N.J. 228 (1993).
12. *Matter of Seaman*, 133 N.J. 67 (1993); *In Re Registrant R.F.,* 317 *N.J. Super.* 379 (App. Div. 1998).
13. *Id.*
14. *M.C. v. J.U.*, No. A-3952-12TA, 2014 WL 1875347 (Ap. Div. May 12, 2014.)
15. *Id.* at * 2.
16. *Id.* at * 3.
17. *Id.*
18. *Id.*
19. *N.P. v. A.O.,* No. A-00016-20, 2021 WL 2069489 (Ap. Div. May 24, 2021.)
20. *Id.* at * 1.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at * 5.
25. *Id.* at * 4.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Vogel v. Balkus*, 2006 WL 1512010 * 1 (June 2, 2006.)
31. *Id.* at * 5.
32. *Id.* at * 5.
33. N.J.S.A. 30:4C-15.1
34. *New Jersey Div. of Youth and Family Services v. B.R.W.*,2007 WL 2827562 * 1 (Oct. 2, 2007).
35. *Id.* at * 2.
36. *Id.*
37. *New Jersey Div. of Youth and Family Services v. H.B. & L.B.M.*, 375 N.J. Super. 148, 155 (App. Div. 2005.)
38. *Id.*
39. *Id.* at 168.
40. *Id.* at 163-64.
41. *Id.* at 172.
42. Silver, Moriah, "The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights." *Family Law Quarterly*, Vol. 48, no. 3 (2014), 515-37., e.g., Alaska, Florida, Illinois, Louisiana, Oklahoma, Kansas, Pennsylvania and Wisconsin permit courts to terminate all parental rights of sexual offender without a conviction when the child was conceived through a rape.

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