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Outgoing Chair's Column

Farewell Remarks

By Sheryl J. Seiden

It was an honor and a privilege to have led the Family Law Section for the last year as Chair. While the year certainly presented some challenges, to me, they were opportunities for our section to continue to grow stronger. When I was sworn in as Chair on May 16, 2019, I had great plans for our section, many of which I was able to achieve during my term. When I took the role of Chair, I encouraged all of you to get out of your comfort zone and do something that you had never done for the first time. Well, I certainly listened to my own advice. I never imagined that I would host our first virtual Family Law Executive Committee Meeting, participate in a virtual Annual Meeting and swearing in for our officers, or have to cancel our long-planned retreat to ensure the health and safety of our members. Having spent the last two months as Chair of our section having worked closely with our officers and members of the New Jersey State Bar Association leadership addressing issues affecting the FLS in light of COVID-19, I have learned that life provides us with many curveballs, and our ability to manage these curveballs during challenging times is what matters the most.

Professional Achievements

Notwithstanding these challenges, we had a very successful year.

First, as the child of divorce, one of my missions as Chair was to focus on the children of divorce. We need more resources to help guide children during these difficult times in their lives. We also need to find a way to assist the courts in making custody determinations, especially in these cases where parents cannot afford to pay for a full custody evaluation. Under the leadership of Amy Wechsler, we created a task force within the Children's Rights Committee to address these issues.

Second, having presented at the Family Law Symposium five years ago on interstate relocation, it was time to address the need for a consistent standard for intrastate relocation cases.

Similar to the study of the interstate relocation laws, which occurred during Jeralyn Lawrence's leadership of the FLS, during my year as Chair, we compiled a database of research summarizing how all 50 states, the District of Columbia, Canada, and Puerto Rico handle intrastate relocation cases. This research was analyzed and addressed at the Family Law Symposium, and Robert Epstein and Christine Fitzgerald prepared an extensive summary article. It is my hope that in the coming years we can use this research to create legislation or case law to establish a clear and uniform standard for addressing intrastate relocation. While the Appellate Division has provided us with some guidance on this issue in the case of A.J. v. R.J., 461 N.J. Super. 173 (App. Div. 2019), there is still significant work to be done in this area.

A third focus this year was mending the black hole that exists in the crossover between the elective share statute and the laws of equitable distribution. Under the leadership of Christine Fitzgerald, the Elective Share Committee presented proposed legislation approved by FLEC to NJSBA. This proposed legislation will be presented to the Board of Trustees for consideration and, if approved, we are hopeful that we can find a sponsor to support the legislation.

The fourth goal that we focused on this year was finding a way to assist the judiciary in moving their cases, which has become more difficult yet far more important in light of COVID-19. We started the year by directing our Bench Bar Family Law Seminar at the 2019 Annual Meeting on procedural issues affecting the bench and the bar and how those procedural issues affect the backlog and movement of cases. During the year, we also hosted two Bench Bar Conferences, which provided the bench and the bar with opportunities to brainstorm on ways to address means of moving cases within our court system. In the face of COVID-19, when Judge Glenn Grant ordered that Early Settlement Panels should continue virtually, our attorneys rose to the occasion by learning and conducting Zoom ESPs. Many of us are continuing to participate in the economic mediation program by video conference, a new mediation platform that very well may continue even after the COVID-19 pandemic subsides. With the backlog that courts are facing amid this pandemic, I am confident that the FLS will continue to be of assistance in addressing these issues in the future.

Young Lawyer Section

One of my main objectives this year was to spotlight and empower the Young Lawyer Subcommittee of the Family Law Section, as the young lawyers are the future of our section. As leaders of YLS, Rotem Perez and Elissa Perkins did an incredible job in achieving my vision for YLS. They assisted in organizing five social events and three educational seminars for YLS and a three-part breakfast series.

As part of our mission to support our young lawyers, we continued the mentoring program initiated by my predecessor, Michael Weinberg, and led by one of our officers, Derek Freed, whereby young lawyers were paired with a seasoned family lawyer. Each young lawyer was invited to attend at least one FLEC meeting with their mentor and encouraged to meet with their mentor to acquire practical advice. We also hosted two mentoring workshops.

In November, the Honorable Marie E. Lihotz, the Honorable Michael Casale and the Honorable David J. Issenman, three well-respected retired judges, conducted a seminar where they shared insightful hot tips for our young lawyers. In February, Cary Cheifetz, Karin Haber and Frank Louis, three talented lawyers who have served as mentors to me in my career, conducted another seminar whereby they provided additional practice tips to our young lawyers.

Moreover, under the direction of Dan Burton and Vito Colasurdo, Jr., YLS also educated family lawyers with technology tips and recent case law updates at each of our FLEC meetings.

For any lawyer who is under the age of 36 or practicing fewer than 10 years, I strongly encourage you to get involved with YLS and take advantage of the wonderful learning and mentoring opportunities that are available to you. It is and will be a privilege to continue to watch these young lawyers excel in their careers, and I am hopeful that these mentoring programs will help provide them with the foundation to do so.

Charitable Giving

During my year as Chair, we organized several charitable events to ensure that our section continued to give back to those in need.

Together with Derek Freed and Shari Lee Genser, in August 2019, we presented a seminar for the U.S. District Court, District of New Jersey, to educate the federal bar

about domestic violence issues and volunteer opportunities at Partners For Women and Justice and Womanspace.

In November 2019, with the assistance of YLS, the FLS volunteered their time at the Community Food Bank in Hillside.

We also ran the Instant Aid Project, collecting donations for clients of Lawyers Services of New Jersey.

Embodying the holiday spirit, under the direction of Shari Lee Genser and Katie Lapi, and with the help of all of you, the FLS raised more than $14,500 at our holiday party for Partners for Women and Justice to assist survivors of domestic violence.

Nashville – An Incredible Retreat That Never Happened

In July 2017, I found a great venue for our 2020 FLS retreat. After five trips to Nashville and two years of planning, we were ready to embrace the country spirit. I must thank Denise Gallo, Senior Managing Director at NJSBA, for her time, energy and patience with all of this planning. Thank you to all of the members of our retreat committee for their hard work in planning this event, and especially to Carrie Schultz for imparting us with her endless knowledge of Nashville and for staying with me every step of the way.

We had incredible events planned, including:

- a Diamond and Denim party at the Westin Rooftop bar;
- a Red, White and Luke's BBQ event at Bridge 32 (with tractors to have transported us to this event);
- an after-party sponsored by Freidman, LLP and hosted by YLS at Big Bang, a dueling Piano Bar;
- a private tour and sit down dinner at the Country Music Hall of Fame (with a special musical performance from my daughter);
- a tour and dinner at the Frist Art Museum accompanied by Dolly Parton, Tim McGraw and Reba McEntire (OK, I confess, they were just look-a-likes) who would have sang Happy Birthday to Cookie Vuotto and Megan Murray and shared some birthday cake with us at our event; and
- As a real treat, we purchased tickets for every guest to enjoy a live performance at the Grand Ole Opry.

With the help of Phyllis Klein, we were going to continue with our wellness program, including a yoga class, run/walk around Nashville and a barre class in the Gulch (#Jerseystrong). The retreat also included a scavenger hunt around the city, organized by Robert Epstein and Christine Fitzgerald, whereby each team selected a charity to support.

The retreat also offered several different excursions, including creating a recording at a record studio, a taste of Nashville tour and a backstage tour of the Ryman Auditorium and Grand Ole Opry.. Our seminars included a comparison of the laws of New Jersey, New York and Tennessee, an exploration of religion versus civil rights (thank you to Jeffrey Fiorello and Tom Prol who jumped in to assist with this seminar), an education of the whiskey industry (and tasting, yum!) as well as a young lawyer gameshow titled Nashville SquaresOf course, thanks to Mary Ann Bauer, we were assured that the winning team members of the scavenger hunt and our Wally Award winner would receive their appropriate medals and trophies, and she promised us vanity baskets made from cowboy hats in the ladies' room at each venue.

There were many recent challenges in proceeding with the retreat, which included concern over the destruction of Nashville after it was damaged by tornadoes on March 3, 2020. As many areas of Nashville were destroyed, we then incorporated #nashvillestrong into our retreat. Then, just as we thought it was safe to visit Nashville, the spread of COVID-19 continued, and in early March, the viability of the retreat was further questioned. Then, on or about March 13, in order to ensure the health and safety of our members, the difficult decision to postpone our Nashville retreat was inevitable. We were hopeful that we could proceed with the retreat in August 2020, but given the continued severity of COVID-19, it was determined that the retreat must be canceled. I remain hopeful that the FLS will venture to Nashville for a retreat in the near future. Until such time, I encourage you to all enjoy the spirit of Nashville by watching the live Saturday night performances at the Grand Ole Opry on Facebook. While New Jersey did not get the opportunity to visit Nashville, the country spirit will live on in our hearts forever.

Before the retreat was canceled, we had 335 people registered, including several first-time attendees. We would not have been able to commit to all of these great events without the support of our sponsors. I encourage you to please review the insert following this article which contains a sample of the signage created for all of the FLS Nashville retreat sponsors, and be sure to thank them.

While the retreat did not happen, I will be forever grateful to our sponsors, and to each of you for your support. I am confident that we will explore Nashville together in the future.

Special Acknowledgments and Additional Thank-You's

Each year the Family Law Section presents two awards: one to an attorney and one to a retired judge for recognition of their lifetime achievement. This year, we are honoring Patrick McShane with the Tichsler Award and the Honorable John Selser, retired, with the Serpentelli Award posthumously, both for their lifetime achievements and dedication to the practice of family law. We are hopeful that we can honor them in the months to come at future FLS events.

The success of the FLS can be attributed to its devoted members. It truly takes a village to run this section, and I am thankful to so many people who contributed to the success of my term as Chair of the Section. First, I must thank each of the members of the Family Law Executive Committee for participating in our meetings, our email votes, and for just reading my many emails throughout the year.

A special thank you to Albertina Webb for organizing the county liaisons and providing useful information about developments in each of the 21 counties throughout our state, especially during the COVID-19 pandemic when communication was essential to the continuation of our practices.

Thank you to Jeralyn Lawrence and her committee for guiding us on the ethics oversight committee, and to Amanda Trigg and the Bylaws Committee for assisting in making proposed changes to the bylaws to provide future guidance for our section.

I am also very appreciative of the efforts of Brian Schwartz and Debra Weisberg in organizing what was an incredible and successful golf outing at Cedar Hill Country Club last fall.

A special thank you to Cheryl Connors and Jeffrey Fiorello and their committee for guiding us on legislative issues affecting the FLS, and I am particularly appreciative that Jeffrey Fiorello volunteered to travel with me to Trenton to testify before the Assembly Legislative Committee on A5890 to voice how the child support statute has been misinterpreted by many practitioners.

I am very thankful to Evelyn Padin, Jeralyn Lawrence and Timothy McGoughran for their liaison with the NJSBA and their support during my year as Chair. Evelyn, congratulations on a great year as NJSBA President.

I must thank each one of my fellow officers, Michael Weinberg, Ron Lieberman, Robin Bogan, Derek Freed and Megan Murray for their hard work, dedication, and unyielding enthusiasm in supporting our section during this year.

I also must thank my office staff, Christine Fitzgerald, Donald Schumacher, Shari Lee Genser, Christine Tangredi and Kristen Reynolds, for helping to pinch hit when I was unavailable to do so.

To all of my friends and family who provided support for me during my year, and especially Jeralyn Lawrence, Stephanie Hagan, Christine Fitzgerald, Jodi Rosenberg and Carrie Schultz who served as my rocks during my year as Chair.

And, of course, I want to thank my family. When my husband, David Seiden, spoke for me at my installation, he agreed to lend me to the Family Law Section for the year. I am not sure how much of a loan he realized this would be. I thank him, Rachel, Seth and Rosa for their continued encouragement of me throughout this year.

As I leave my role as Chair, I can assure you that section is in great hands. Congratulations to Ron Lieberman and his family on what will sure to be a successful year.

And as I leave my role in our section, as Dr. Seuss says, "Don't cry because it's over, smile because it happened."

Stay healthy, stay safe and stay strong.

#njgonecountry.

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Inside this issue

Editor-in-Chief's Column

Cohabitation and the Relevance of a Payor's Financial Circumstances

By Charles F. Vuotto, Jr. and Robert A. Epstein

Since both before and after New Jersey's alimony statute was amended in 2014 to include, in part, a section devoted to terminating alimony based on a payee's cohabitation,[1] family law practitioners have questioned whether a payor who files a cohabitation application should be required to disclose at the time of filing their own financial circumstances through the provision of an updated Case Information Statement.[2] Practitioners have been met with inconsistent responses from family courts tasked with deciding whether a payor's financial circumstances are somehow relevant when the facts and circumstances upon which alimony is subject to change reside solely with the payee. Implementing a definitive standard on this issue either by legislative reform or case law would provide a necessary degree of certainty in an often-uncertain area of law.

At a fundamental level, a payor who files a motion to change alimony for any reason (whether the movant seeks to terminate, modify or suspend an obligation) is bound by the unambiguous dictates of Rule 5:5-4 of the New Jersey Rules of Court.[3] 5:5-4 provides under subsection (a)(4):

> Motion attachments for modification or termination of alimony or child support not based on retirement. When a motion or cross motion is filed for modification or termination of alimony or child support, other than an application based on retirement filed pursuant to N.J.S.A. 2A:34-23(j)(2) and (j)(3), *the movant shall append copies of the movant's current case information statement and the movant's case information statement previously executed or filed in connection with the order, judgment or agreement sought to be modified*. If the court concludes that the party seeking relief has demonstrated a *prima facie* showing of substantial change of circumstances or that there is other good cause, then the court shall order the opposing party to file a copy of a current case information statement.[4]

For the conduct-related rationale highlighted above, one can reasonably argue that this rule should not apply to cohabitation matters and that, in fact, such matters should constitute an express exception thereto. When moving to change alimony based on a payee's cohabitation (in both matters where the cohabitation statute does or does not apply), it is the authors' opinion that in attempting to present a *prima facie* case of cohabitation there be no requirement for a payor to produce proof of his or her own financial circumstances. Not only will doing so place the focus in cohabitation matters entirely where it should reside – on the payee's conduct, but also it will prevent a payee from taking advantage of this apparent legal loophole by using a payor's financial disclosures as a way by which to seek an alimony *increase*, or, at a less consequential level, distract the trial court from their own cohabitation-related conduct. Removing the requirement for the payor to produce proof of his or her financial circumstances will also eliminate a payor's hesitance to file such an application due to the need to release what that person may believe to be confidential or private information of not only the payor but perhaps their current spouse.

Seminal cohabitation case law only further supports this argument. For instance, in *Konzelman v. Konzelman*, the Supreme Court noted, "Where the court considers a motion for reduction of alimony based on a change of circumstances, the dependent spouse's finances and economic resources are ordinarily the court's only consideration."[5] In *Gayet v. Gayet*, the Supreme Court held that a modification of alimony is warranted in the event of cohabitation "only if one cohabitant supports or subsi-

dizes the other under circumstances sufficient to entitle the supporting spouse to relief."[6] The Appellate Division similarly opined in *Reese v. Weis*, "The cohabitation of a dependent spouse constitutes an event of changed circumstances, which requires further review of the economic consequences *of the new relationship and its impact on the previously imposed support obligation*."[7] In fact, the mechanism established by the Appellate Court in *Ozolins v. Ozolins*, whereby a payor's "showing of cohabitation creates a rebuttal presumption of changed circumstances shifting the burden to the dependent spouse to show that there is no actual economic benefit to the spouse or the cohabitant," has nothing at all to do with the payor other than that the payor is required to fulfill his or her *prima facie* burden in order for the burden shift to occur.[8]

Not surprisingly, as a result, the cohabitation section of the amended alimony statute similarly makes no mention of the payor's financial circumstances in directing what a court should consider when addressing a payor's cohabitation application. Specifically, in none of the 7 factors enumerated for a court's consideration is there any reference to payor (unless one can somehow argue that the "catch all" seventh factor can include consideration of the payor's finances).[9] The absence of the payor's financial circumstances under the legislative factors would seem to be a clear indication that the rule should be changed. One can even reasonably argue that if the statute eliminates a "modification" of alimony as an option in the event cohabitation is found by a trial court following a plenary hearing,[10] thereby limiting a trial court to either "suspending" or "terminating" alimony as the statute provides, a payor's financial information is of even less potential relevance than it was pre-statute (to the extent it is relevant at all).

The authors of this column were able to locate only 2 decisions, each unpublished (not precedential), specifically touching upon this issue. In *Fringo v. Fringo*,[11] the alimony payee argued on appeal, in part, that the trial court should not have considered the payor's application because he failed to file an updated Case Information Statement as required by rule 5:5-4. In addressing this point at the trial level, the payor noted that his "reason for [seeking a] termination of alimony had nothing to do with a changed circumstance on [his] part. [He was] not claiming an inability to pay alimony. [He was] claiming that [p]laintiff is not entitled to alimony."[12]

While the Appellate Division in *Fringo* noted that the information "required by Rule 5:5-4(a) can be especially critical" the failure to provide a CIS was deemed not a "fatal flaw" because the payor "conceded his ability to continue to pay support as previously ordered."[13] As a result, the Appellate Court concluded:

> As a result, [the payor's] income and expenses were not relevant to the court's determination of the extent to which plaintiff needed alimony to continue to maintain her standard of living while cohabitating with her boyfriend. She, not defendant, had the burden of proof to establish the amount of alimony she still required, after taking into consideration the amount of support she obtained from her boyfriend or the extent to which she provided him with financial support.[14]

As compared to its decision in *Fringo*, the Appellate Division in *Verga v. Verga* employed a stricter rule-based approach.[15] In rendering fatal the payor's cohabitation application based on his failure to file an updated Case Information Statement, the court noted, "[The payor's] argument that he was not required to submit his own financial information because it was [the payee's] circumstances that had changed has no basis in the Rule."[16] It further noted that the payor's CIS filing requirement is "not a mere technicality, as a current CIS is essential for the court 'to get a complete picture of the finances of the movants in a modification case. . . Although [the payor] submitted circumstantial evidence of cohabitation beginning earlier than August 2014, the failure to provide essential financial information gave the court an incomplete picture of the parties' finances.'"[17] If under the amended statutory scheme the payor's finances are not a relevant factor, it would be difficult to see how a court could draw that conclusion today.

It is the authors' opinion that the Appellate Division's approach and relevant holdings in *Fringo*, as opposed to those in *Verga*, reflect a sensible approach within the confines of cohabitation law that places the focus justifiably on what matters – namely, the payee's conduct. While the *Verga* Court correctly applied the strict letter of Rule 5:5-4(a) in affirming the trial court's decision, it ultimately provided no basis for why the payor's financial circumstances are relevant to its determination regarding the payee's cohabitation. The existence of a "complete" financial picture for both parties envisioned by the *Verga* Court could only potentially cloud a cohabitation determination

and is irrelevant unless, as noted in the endnotes to this column, the payor also claims an inability to afford the alimony payments or child support is an issue.

Unfortunately, without a rule change or published decision on this issue, practitioners are left taking their chances of having a cohabitation motion denied based solely on the CIS technicality. A subsequent motion for reconsideration attempting to rectify the issue with the filing of an updated CIS may then be denied because certainly it could be have been provided with the initial filing. The risk associated with not complying with the strict letter of 5:5-4(a)(4) is too great even if that means providing the very disclosures a payor client seeks to avoid.

Accordingly, the authors believe that unless either of those circumstances is also at issue (an inability to pay or child support), Rule 5:5-4 should be amended to expressly exclude cohabitation matters. Doing so would render consistent the fundamental purpose of addressing alimony based solely on the payee's conduct, prevent any focus on what could ultimately distract from the relevant facts and circumstances before the trial court, and streamline what a payor is required to present to fulfill the *prima facie* case.

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Endnotes

1 *N.J.S.A.* 2A:34-23n (2014).
2 The authors acknowledge that the exchange of financial information and Case Information Statements would be required and relevant if a payor sought to address alimony based on cohabitation while also arguing an inability to afford the payment obligation, or if child support was to be addressed upon an alimony modification/termination/suspension. For the purpose of this article, however, the issue of financial disclosures is strictly limited to that within the context of a cohabitation discussion where neither a payor's ability to pay nor child support is an issue.
3 *R.* 5:5-4(a)(4) (2019).
4 *Id.* (emphasis added).
5 158 N.J. 185, 198 (1999).
6 92 N.J. 149, 153-54 (1983) (emphasis added).
7 430 N.J. Super. 552, 570 (App. Div. 2013) (emphasis added).
8 308 N.J. Super. 243, 248 (App. Div. 1998).
9 *N.J.S.A.* 2A:34-23n (2014). The factors listed are: (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 R.S. 25:1-5; and (7) all other relevant evidence.
10 To date, only unpublished Appellate Division decisions support this statutory interpretation.
11 2015 N.J. Super. Unpub. LEXIS 712 (App. Div. Apr. 2, 2015).
12 *See id.* at 11 (alteration in original).
13 *See id.*
14 *See id.* (alteration in original).
15 2016 N.J. Super. Unpub. LEXIS 1913 (App. Div. Aug. 16, 2016).
16 *See id.* at *9 (alteration in original).
17 *Id.* at **9-10 (internal citations omitted) (alteration in original).

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

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

EJM (12/29/2017)

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

MAB, Esq. (10/5/2017)

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

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

Have a Happy, Healthy & Prosperous New Year!

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EQUAL HOUSING LENDER

Executive Editor's Column

COVID-19 and a Critique of How Non-Self Employed Individuals are Treated

By Ronald Lieberman

The coronavirus pandemic is the type of generational event that may dramatically change the practice of family law for years to come, not only in areas of custody and equitable distribution, but in support obligations. Few obligors have gone untouched by the dramatic retraction in the U.S. economy coupled with the never before seen increase in the rates of unemployment. If we as family law practitioners are unable or unwilling to deal with these likely changes, then they will be foisted upon us by well-intended legislators who may use bad information to create bad law. These changes may also come from our exceptional judiciary which may act in ways we consider to be contrary to fairness. One of those changes relates to N.J.S.A. 2A:34-23(k) which addresses how non-self-employed individuals can seek relief from support obligations.

As a quick refresher, N.J.S.A. 2A:34-23(k) precludes a non-self-employed individual from seeking a modification of his or her support application until he or she has suffered the income reduction or loss for 90 days. Specifically, the statute provides "… no application shall be filed until a party has been unemployed, or has not been able to return to or attain employment at prior income levels, or both, for a period of 90 days. The court shall have discretion to make any relief granted retroactive to the date of the loss of employment or reduction of income." A self-employed individual facing the same or similar reduction in income or employment is not met with a 90-day preclusionary period under N.J.S.A. 2A:34-23(l). So, the question then becomes –does the different treatment of individuals facing the same or similar issues (reduction or loss of income or employment) and having the same or similar obligations (payment of support) have an unconstitutional bend? Said another way, if similarly-situated individuals are being treated differently based on their employment status, can subsections (k) and (l) of N.J.S.A. 2A:34-23 withstand judicial scrutiny? But it does no good for a non-self-employed individual who may be struggling right away, let alone for 90 days, to be told relief could be made retroactive to filing of a motion.

There appear to be three problems with the 90-day preclusionary period: (1) violation of equal protection; (2) unconstitutional encroachment by the legislature into the sole purview of the Supreme Court's rule-making power; and (3) a barrier on access to the courts which should only be used sparingly.

Let us now look at applicable constitutional provisions and case law to find answers to those questions. Article One, Paragraph One of the New Jersey Constitution provides as follows regarding rights to our citizens in this state: *"[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.*" The alimony statute does affect a person's right to acquire and to possess property (income). So, let us look further to equal protection.

That same article and paragraph deals with equal protection.[1] New Jersey's equal protection clause has "even more demanding equal protection guarantees" than the U.S. Constitution 14th Amendment.[2] Even though Article One, Paragraph One of the New Jersey Constitution does not use the term "equal protection," that article and paragraph have been interpreted as conferring a right analogous to the equal protection rights available under the 14th Amendment to the U.S. Constitution.[3]

Numerous courts have defined "equal protection." A state must "provide equal protection of its laws not only in the acts of its legislature, but also in the decision of its courts."[4] Said another way, "that first paragraph to our State Constitution 'protect[s] against injustice and against the unequal treatment of those who should be treated alike.'"[5]

There are some counterarguments to the constitutional aspect of this column. For one, an attorney can say that the non-self-employed individual does have access to the courts after the 90th day, just with a different burden of proof to establish than the self-employed person. Thus, there is no violation of equal protection.

Another counterargument may be that N.J.S.A. 2A:34-23(k) is merely providing procedural issues, not substantive issues. But such an argument ignores that Article XI, Section IV, Paragraph Five of our state's constitution reads "[t]he Supreme Court shall make rules governing the administration and practice and procedure of the County Courts" meaning that the rulemaking power of the Supreme Court regarding the courts is "absolute and unrestricted."[6]

Did the legislature in adding a 90-day preclusionary period under N.J.S.A. 2A:34-23(k) cross a constitutional barrier by dictating the practice and procedure of the courts, which is undeniably the sole purview of the Supreme Court? It is not a constitutional accident that the Supreme Court decides how the courts will act and not the legislature in order to keep the necessary checks and balances between the different branches of government.[7] As if that finding was not enough, "the rule-making power of the Supreme Court is not subject to any overriding legislation."[8]

In a different context, whereby the Appellate Division affirmed a trial judge's ability to condition a serial filer's future motion practice, we find that restrictions on access to the courthouse is to be used sparingly. It was held in *Parish v. Parish* that "enjoining or conditioning a litigant's ability to present his or her claim to the court must be used sparingly; it is not a remedy of first or even second resort."[9] "Restraints on litigation are not favored as an everyday means of controlling calendars. Moreover, a court should not impose barriers that postpone review and determination of a claimed violation of its prior entered orders. Such delays tend to exacerbate rather than mitigate difficulties."[10]

So, given the cites from *Parish*, is not the 90-day preclusion under N.J.S.A. 2A:34-23 (k) just the type of postponed review and restraint on litigation to be used only sparingly and even then with the recognition that delays would "exacerbate rather than medicate difficulties"? The answer could easily be "yes." An attorney should not hesitate to raise these issues when given the opportunity. Please be mindful that any constitutional arguments under Rule 4:28-4(a)(1) need to supply the Attorney General's office with notice.

Only by being proactive in these uncertain times can we assure that the area of family law is one that we consider to be fair and just. COVID-19 is going to reshape our practice area for years to come. Some changes will be relatively easy; others will be controversial. Let us all endeavor to approach the current events with an open mind, and a desire to be fair.

Endnotes

1 *A.D.A. Financial Services Corp. v. State*, 174 N.J. Super. 337 (App. Div. 1979).
2 Id. at 347.
3 *Lewis v. Harris*, 188 N.J. 415, 423 (2006); Secure Heritage, Inc. v. City of Cape May, 361 N.J. Super. 281, 299 (App. Div. 2003).
4 Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum, 84 N.J. 137, 145 (1980).
5 *Lewis*, supra, 188 N.J. at 442, citing *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985).
6 *Winberry v. Salisbury*, 5 N.J. 240, 245 (1950).
7 Id. at 246.
8 Id. at 255.
9 412 N.J. Super. 39, 53-54 (App. Div. 2010).
10 Id. at 54.

How Does Medical Marijuana Use Impact Child Custody Cases in New Jersey?

By Meredith E. Allen and Pamela M. Copeland

"Marijuana is the most commonly used illicit drug in the United States."[1] The term "illicit" is used because under federal law, the purchase, sale and use of marijuana is illegal.[2] The United States Drug Enforcement Administration classifies marijuana as a Schedule 1 drug (along with other drugs such as heroin, methaqualone, etc.), meaning it has "no currently accepted medical use and a high potential for abuse."[3] Despite the federal government's policy on marijuana, 33 states (including New Jersey), the District of Columbia, Guam and Puerto Rico have enacted legislation permitting the use of marijuana for medical purposes.[4] In addition, as of this writing, 11 states and the District of Columbia have legalized marijuana for adult recreational use.[5]

In 2010, New Jersey enacted the New Jersey Compassionate Use Medical Marijuana Act, which permits its residents to use marijuana for medical purposes, provided they meet certain standards, as set forth in the statute.[6] Despite the USDEA's classification of marijuana as a Schedule 1 drug, NJCMMA specifically states that "[m]odern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating medical conditions, as found by the National Academy of Sciences' Institute of Medicine in March 1999."[7]

On July 2, 2019, Governor Phil Murphy signed into law Assembly Bill 20, which makes significant amendments to the NJCMMA, including renaming it the Jake Honig Compassionate Use Medical Cannabis Act. It establishes a Cannabis Regulatory Commission, revises the requirements for patients to participate in the program, revises permit and operational requirements for those in the cannabis business, authorizes delivery of medical cannabis and provides significant legal protections for patients and caregivers.[8]

Thus, while New Jersey has recognized the medical benefits of using marijuana in certain circumstances, and has enacted specific legislation to permit its use, New Jersey has not as yet enacted legislation to permit adult recreational use. In his 2019 State of the State address, Murphy reiterated his pledge for "legalizing adult-use marijuana,"[9] as has New York Governor Andrew Cuomo, but this goal has proved elusive. Despite massive efforts to accomplish it legislatively, those efforts failed in both states. In New Jersey it now is likely to be an issue for a ballot referendum. It will be interesting to see which state gets there first, if ever.

With medical marijuana use in full "bloom" in New Jersey, and with recreational use potentially on the horizon, family law practitioners, as well as our Courts, will be facing new circumstances that almost certainly will impact the custody and parenting time of minor children. How our Courts choose to deal with these scenarios remains to be seen.

In determining custody and parenting time within the context of divorced or separated parents, New Jersey recognizes that it is our public policy to assure minor children frequent and continuing contact with both parents.[10] When making an award of custody, Courts are to

> consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; **the safety of the child** and safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; **the fitness of the parents**; the geographical proximity of

the parent's homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. **A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.**[11]

"The paramount consideration in child custody cases is to foster the best interests of the child."[12] "This standard has been described as one that protects the 'safety, happiness, physical, mental and moral welfare of the child.'"[13] So where does legal medical marijuana use by a parent fall within the statutory factors Courts must evaluate when making custody decisions? Should a parent's use of medical marijuana on its own be a consideration for Courts when determining custody and parenting time? When New Jersey initially enacted the NJCMMA, there was no provision dealing with legal medical marijuana users and how such use might influence a custody/parenting time decision in the family law context. Most recently, the statute was amended to provide that "[a] person's status as a registered qualifying patient … shall not constitute the sole grounds for entering an order that restricts or denies custody of, or visitation with, a minor child of the person."[14] Since this portion of the statute is so new, there is no case law in New Jersey interpreting it. There is, however, guidance from other jurisdictions.

At least 10 other states have such specific statutory provisions which prevent Courts from making custody determinations based solely on a parent's status as a medical marijuana patient. Washington is one of those states: "A qualifying patient or designated provider may not have his or her parental rights or residential time with a child restricted solely due to his or her medical use of cannabis in compliance with the terms of this chapter absent written findings supported by evidence that such use has resulted in a long-term impairment that interferes with the performance of parenting functions..."[15] Similarly, New York's statute provides, "[t]he fact that a person is a certified patient and/or acting in accordance with this title, shall not be consideration in a proceeding pursuant to applicable sections of the domestic relations law, the social services law and the family court act."[16] Likewise, Maine's statute provides, "A person may not be denied parental rights and responsibilities with respect to or contact with a minor child as a result of acting in accordance with this chapter, unless the person's conduct is contrary to the bests interests of the minor child..."[17] New Hampshire's statute states, "A person otherwise entitled to custody of, or visitation or parenting time with, a minor shall not be denied such a right solely for conduct allowed under this chapter, and there shall be no presumption of neglect or child endangerment."[18] The common theme in these statutes is that legal medical marijuana use by a parent cannot, by itself, be the sole factor in denying or restricting that parent's rights to custody and/or parenting time. Some of these statutes have been evaluated by their courts.

In the state of Washington in 2008, a father who was a medical marijuana patient was ordered to have supervised parenting time with his children. The trial court, the parties and the children's Guardian Ad Litem all noted difficulties in fashioning an objective test to determine if he was impaired during his parenting time because of the inadequacy of the available tests. The trial court ordered supervised parenting time, and the Court of Appeals affirmed stating, "In the family law setting, the best interests of the child are of paramount importance."[19] Washington amended its law thereafter in 2011 to provide, as set forth above, "Parental rights or residential time - Not to be restricted . . . solely due to his or her medical use of cannabis . . . absent written findings . . . of impairment that interferes with . . . parenting functions. . . ."[20] One can only speculate if this case and perhaps others had an impact on the enactment of this amendment.

As noted above, Maine's Medical Use of Marijuana Act states, "A person may not be denied parental rights and responsibilities with respect to or contact with a minor child as a result of acting in accordance with this chapter, unless the person's conduct is contrary to the best interests of the minor child . . . ."[21] However, a trial court denied a father's request for primary custody of his young daughter, due in part to his use of medical marijuana. The trial court record showed that the father had large amounts of marijuana all over the home and had exposed the child to it. Dad appealed, and the Maine Supreme Judicial Court affirmed the trial court, stating that the best interests of the child includes a consideration of whether a parent's ability to care for his or her child is impaired, including by his or her marijuana use. The Supreme Judicial Court also relied on the trial court's finding that the father's thinking at trial "appeared slow" and "his eyes were pink and bloodshot."[22] It took more than just that father's use of medical marijuana to deny his request for primary custody

of his minor child; it was the effects of his use, and thus one of the factors in that decision:

> Determining what is in the best interest of the child necessarily involves considering whether a parent's ability to care for his or her child is impaired, including by his or her marijuana use. As with any medication or substance, the question of whether a parent's ingestion of marijuana is legal is only part of the equation. The more important question is whether that ingestion negatively affects, limits or impairs a parent's capacity to parents his or her child. Regardless of the cause, if a parent's capacity to meet the needs of his or her child is compromised, a court must consider that in assessing the best interest of the child.[23]

How judges in New Jersey will consider the new portion of our statute which states that legal medical marijuana use shall not, in and of itself, constitute grounds for denying or restricting custody/parenting time of a minor child, remains to be seen. Will New Jersey Courts look to other jurisdictions to see how they interpreted similar provisions when determining these issues? Despite the recent amendment to our statute which restricts courts from using legal medical marijuana use as a sole basis to deny or restrict custody and/or parenting time, given differing opinions on the use of marijuana, as practitioners we have to wonder how diverse decisions on these issues may be depending upon the personal beliefs of a particular judge.

If New Jersey permits its residents the legal use of medical marijuana, courts should not, at the same time, discriminate against them by denying a parent custody of their minor child/ren and/or limiting parenting time solely on the basis of that use. And that is precisely why the statute was recently amended to reflect same. The best interests of the child are always the paramount consideration, and courts should expect a parent who uses medical marijuana to use certain precautions if they have minor children.

While New Jersey does not yet have any case law related to medical marijuana use and custody/parenting time within the family law setting, we do have the case of Unger v. Unger which deals with a parent's use of cigarettes.[24] (There are cases which deal with a parent's drug/alcohol abuse brought by the New Jersey Division of Child Protection and Permanency—commonly referred to as "Title Nine" cases—brought by the division to protect children who are less than 18 years of age whose parent or guardian abuses or neglects them.[25] Title Nine cases are outside the scope of this article.)

In Unger, the family court ruled that smoking cigarettes is a permissible parental habit to consider when determining what is in the best interests of the children, because it may affect their health and safety.[26] But the Unger Court recognized the health risks of second hand smoke, an issue that should not be prevalent with proper medical marijuana use. Medical marijuana patients should not be smoking it in front of their child/ren, and if those options are available to them, those patients do not necessarily smoke it; they are vaping or consuming edibles. Interestingly, the court in Unger, while recognizing the child's best interests as the touchstone in determining custody, also noted that the "habits of the parent" could be considered.[27] But again, the analysis relates to whether those habits are detrimental to the best interests of the child. Assuming a parent uses medical marijuana appropriately, that use alone should not be a detriment to their parenting time or custody case.

As family law practitioners, we believe that we have an obligation to advise our medical marijuana patient clients with children how best to manage their marijuana use so that it does not negatively impact their case, particularly as it relates to custody and/or parenting time. Americans for Safe Access is a group founded in 2002 whose mission is to "ensure safe and legal access to cannabis (marijuana) for therapeutic use and research."[28] They publish a yearly report on medical marijuana access in the United States, and grade each state on a variety of factors, including "Patient Rights and Civil Protections" which encompasses "parental rights protections."[29] (Other areas they grade include access to medicine, ease of navigation, and functionality).[30] They have also put forth guidelines for medical marijuana patients facing child custody issues, which are worth considering. As the ASA notes, when involved in a child custody matter, "the best defense is to be very intentional and responsible about your medical marijuana use . . . with regards to your children."[31] Some of the ASA suggestions are:

1. When residing in a house with a child, possess or cultivate as little as your condition allows.
2. Keep all medical marijuana out of plain sight, ideally in clearly labeled medicinal jars and with other prescription medications, in a place that children cannot access.

3. If you cook with medical marijuana, clearly label any resultant food products as medicinal, and keep them far away from any children's food.
4. Use discretion when medicating, and do not do so when your child is present. Specifically, think about medicating when you have several hours open before any interaction with the child or after he/she is already in bed.
5. If your child can understand, specifically explain to her/him that the marijuana is your medicine and that it is not for her/him (much like any other prescription medication). Furthermore, let him/her know that your patient status and medicine is a private matter, just like any other medical condition and that he/she should not volunteer information about it to anyone.
6. In a dual-patient-parent household, try to work out a routine with your partner where one parent is always unmedicated in case any unexpected issues arise.
7. Never drive with your children in a car after medicating.
8. Consider keeping notes for yourself regarding the precautions you have taken, so that you are prepared to inform .... the Family Court judge about them if asked.

While these suggestions may seem obvious, we should never assume that they are obvious to our clients. It is our obligation as family law practitioners to advise our clients on what we think is the best course of action (and non-action) which benefits their family law case, particularly when the case involves minor children and custody/parenting time issues. If you are a family law attorney and have a client who is a medical marijuana patient, especially a parent with minor children, you should advise them to take certain precautions such as those listed above. While there are certainly privacy issues related to medical marijuana use, and some clients may not wish to disclose to the Court the fact that they are a medical marijuana patient, we as family law practitioners know that they may have to. Some litigants may attempt to use the other parent's medical marijuana use against them and try to paint a picture that its use is detrimental to the children. In our practice, if we think opposing counsel is going to try to use a certain fact against our client, we generally prefer to address it head on. So, in these instances, it may be prudent to advise the court from the get-go that the client is a medical marijuana patient, and is taking precautions to ensure the home environment is safe for their child/ren. If this issue can be disposed of early on in the case by having your client take appropriate precautions and advising the court of same, it's one less issue to deal with as the case progresses.

In the event that New Jersey enacts legislation to legalize adult recreational use of marijuana, it will be interesting to see how the courts address the issue as it relates to custody/parenting time and whether the court will address recreational use differently from medical use. What we know is that given the court's overriding concern for the best interests of the children, clients who use marijuana for medical purposes must be advised on how best to manage their use. How they manage, or fail to manage properly, their medical marijuana use could very well be the deciding factor in a custody/parenting time dispute.

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Endnotes

1. Office of National Drug Control Policy, whitehouse.gov/ondc/key-issues/marijuana [Last accessed Feb. 27, 2020].
2. 21 U.S.C. §801 et seq.
3. United States Drug Enforcement Administration, dea.gov/drug-scheduling.
4. National Conference of State Legislatures, ncsl.org/research/health/state-medicalmarijuana-laws.aspx.
5. National Conference of State Legislatures, nsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.
6. N.J.S.A. 24:61-1 et seq.
7. N.J.S.A. 24:61-2
8 N.J.S.A. 24:61-1

9. North Jersey Record, "Full Text of Phil Murphy's 2019 State of the State Address", northjersey.com/story/new-jersey/governor/2019/01/15/state-state-nj-full-text-phil-murphys-speech/2570134002.
10. N.J.S.A. 9:2-4.
11. N.J.S.A. 9:2-4(c), emphasis added
12. Beck v. Beck, 86 N.J. 480, 497 (1981)
13. Id., citing Fantony v. Fantony, 21 N.J. 525, 536 (1956)
14. N.J.S.A. 24:61-1
15 Wash. Rev. Code Ann. §§69.51A.120
16. NY Public Health Law §3360
17 ME. Rev. Stat. Ann. Tit. 22 § 2430-C(4)
18. N.H. Rev. Stat. Ann §§126-X:2(VI)
19. In Re Marriage of Wieldraayer (Court of Appeals Washington, Division One, 2008)
20. Wash. Rev. Code Ann. §§69.51A.120
21. ME. Rev. Stat. Ann. Tit. 22 § 2430-C(4)
22. Daggett v. Sternick, 2015 ME 6 (January 29, 2015)
23. Id.
24. Unger v. Unger, 274 N.J. Super. 532 (Ch. Div. 1994)
25. N.J.S.A. 9:6-8.21(c)
26. Unger, supra, at 538
27. Id., at 537, citing Clemens v. Clemens, 20 N.J. Super. 383, 392 (App. Div. 1952)
28. Americans for Safe Access, safeaccessnow.org/about_asa.
29. See Americans for Safe Access, "Medical Marijuana Access in the United States, A Patient-Focused Analysis of the Patchwork of State Laws" (2018 Annual Report).
30. Id.
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2020 and 2021 Amendments to the Rules Governing the Courts: A Digest for the Family Law Practitioner

By Lisa Parker

On Sept. 1, 2019, the Rules Governing the Courts of the State of New Jersey were amended. Based primarily on the Family Practice Committee's 2017-2019 Rules Cycle Report to the Supreme Court, many of the rules that pertain to the practice of family law were amended. Certain of the Rules were also amended effective Sept. 1, 2020. It is critically important that family law practitioners be familiar with our Rules of Court in terms of substance, procedural requirements and time limitations in order to effectively represent a client. While mastery of the revised rules is necessary, it is important, also, to review the Family Practice Committee's Report in order to understand the reasoning which led to the amendments.

There are several substantive amendments which family law practitioners should be aware of and are summarized in this article. While not an exhaustive list of all rule amendments made in 2019 and 2020, this articles provides an overview of amendments to both the Rules of General Application and the Rules Governing Practice in the Chancery Division, Family Part which impact the practice of family law.

RULE 1:38-1A
References to Court Decision to Information Contained in Records Otherwise Excluded From Public Access

Rule 1:38-1A was adopted to permit reference to information in court records even when the records are excluded from public access.

RULE 1:38-3
Public Access To Court Records And Administrative Records, Court Records Excluded From Public Access, Records Relating To Applications For Special Juvenile Status

Rule 1:38-3 limits public access to certain records. While our judicial system is one of transparency allowing court records to be open for public inspection, there are exceptions to the dissemination of certain sensitive records, particularly in matters raised in the Family Part. Subpart (d) to *R.* 1:38-3 addresses the exclusion of access to documents in the Family Part where there is a heightened level of sensitivity. Among the documents previously excluded under *R.* 1:38-3(d) are medical and psychological records and records of domestic violence and juvenile matters. The Supreme Court amended *R.* 1:38-3 to include among the exceptions to public access, records relating to Special Immigrant Juvenile Status (commonly known as "Special J" matters). To attain "Special J" status there are certain qualifiers which must be present such as incidences of sexual or physical abuse, neglect and abandonment. The Practice Committee found these matters to include personal information akin to records found in matters relating to Division of Child Protection and Permanency ("DCPP") proceedings and recommended that these records also be excluded from public access in order to protect the child.

RULE 4:25-8
Motions in Limine

This new rule defines and sets forth procedures for submitting, serving and responding to motions in limine which, to the extent practical, shall be limited to a single issue. The rule provides for time limitations, pages limits for briefs (5 pages), a requirement for timely rulings by the trial court and consequences for noncompliance. The purpose of the rule is to ensure that a motion in limine is not misused as a dispositive motion.

RULES 5:1-4 and 5:1-5
Differentiated Case Management In Civil Family Actions And Arbitration

Rule 5:1-4 provides for five differentiated case management tracks to which Family Part cases are categorically assigned. Those track assignments dictate case management and completion of discovery. Rule 5:1-4(a)(5) established an arbitration track in the Family Part for

matters in which arbitration has been mutually agreed upon by the parties pursuant to *R.* 5:1-5. In the Consent Order electing to pursue an arbitration track, parties must execute and file with the Court Appendices XXIX-A (Arbitration/Alternate Dispute Resolution Questionnaire Form) and XXIX-D (Arbitrator/Umpire Disclosure Form). The execution of these documents is important, *inter alia*, to ensure full disclosure by all parties regarding the arbitration process, as well as any potential conflicts in the selection of the arbitrator. The amendments to *R.* 5:1-4 and 5:1-5 provide for the mandatory inclusion of the Appendices XXIX-A and XXIX-D in Consent Orders filed with the court designating arbitration in a family court action.

RULE 5:3-5
Attorneys Fees And Retainer Agreements In Civil Family Actions

Due to the gatekeeping efforts of the Family Practice Committee, which are necessary and appreciated, *R.* 5:3-5 was amended to reflect an erroneous citation. Subpart (a)(9) was corrected to properly reference subpart (e) ("Withdrawal from Representation"). There was no substantive change to an attorney's right to withdraw from representation of a client if the client fails to comply with obligations under the terms of a retainer agreement.

RULE 5:4-4
Service Of Process In Family Part Summary Actions; Initial Complaints And Applications For Post-Dispositional Relief

The amendment to *R.* 5:4-4 shows the important work of the Family Practice Committee in overseeing and improving our practice rules. This rule amendment is technical in nature and corrects an erroneous citation to the substituted service rule, *R.* 4:4-5(a)(3).

RULE 5:5-4(a)(5)
Motions In Family Actions (Applications for the Termination of Alimony on the Basis of Retirement)

The Family Practice Committee reviewed *R.* 5:5-4 in light of the revised alimony statute which was passed in 2014, specifically *N.J.S.A.* 2A:34-23(j)(2) and (3). The Committee looked to amend *R.* 5:5-4 to comport with the updated statute as to applications for modification or termination of alimony on the basis of a retirement. In particular, the rule is now consistent with the statute and requires both the obligor and the obligee to append a copy of a current Case Information Statement, as well as any prior Case Information Statement(s) filed, to the application for the modification or termination of alimony filed on the basis of retirement and any opposition thereto. The rule was previously inconsistent with the amended statute as it required the court to conclude that the party seeking relief had demonstrated a prima facie showing of a substantial change in circumstances or other good cause before requiring the other party to file a Case Information Statement. Rule 5:5-4, as revised, is now consistent with *N.J.S.A.* 2A:34-23(j)(2) and (3). In addition, certain language of *R.* 5:5-4 was amended for purposes of clarity.

RULE 5:5-4(b)
Motions In Family Actions (Page Limits)

Rule 5:5-4(b) was amended to eliminate the prior page limit of 15 pages for the initial moving certification in support of a motion in the family part. As revised, the rule now provides "all certifications in support of a motion shall not exceed a total of twenty-five pages." The amended rule allows the movant to determine the allocation of pages between the moving certification and the reply certification. The page limitation of 25 pages for certifications in opposition to motion was not amended.

RULE 5:7A
Domestic Violence Restraining Orders

The rule governing the issuances of domestic violence restraining orders (*R.* 5:7A) was reorganized to follow the order of a domestic violence matter from the initial application for a temporary restraining order through the issuance of a final restraining order. Subpart (c) (formerly subpart(a)) requires that "an applicant for a temporary restraining order shall appear before a judge or a domestic violence hearing officer to personally testify on the record or by sworn complaint." In order to be eligible to obtain a temporary restraining order, the applicant must qualify as a "victim of domestic violence" as defined by *N.J.S.A.* 2C:25-19d. Subpart (e) (formerly subpart (d)) provides that a hearing for a final restraining order shall be held within ten (10) days of the filing of an application for a temporary restraining order. Subpart (f) was amended to incorporate the criminal justice reform modifications of *R.* 3:4-1.

RULE 5:7B
Sexual Assault Survivor Protection Act: Protective Orders

The Sexual Assault Survivor Protection Act ("SASPA") was enacted in 2015. Rule 5:7B was adopted in 2017 to outline procedures for obtaining relief under SASPA. Similar to *R.* 5:7A, the rule was amended to follow the order of an action under SASPA from the application for a temporary restraining order through entry of a final protective order. Like *R.* 5:7A, a party seeking a restraining order under SASPA must appear before the court or a hearing examiner and must qualify as a "victim of domestic violence" in order to seek relief. A hearing for a final protective order under SASPA shall be heard within ten (10) days of the filing of an application.

RULES 5:10-4(b)(3) and 5:10-5(a)(4)
Action For Adoption Of A Child, Surrogate Action And Post-Complaint Submissions

Rules 5:10-4(b)(3) and 5:10-5(a)(4) were amended to eliminate the requirement to provide notice to a birth parent who is consenting to the adoption. The rationale behind this rule amendment is that notice is not required since the consenting birth parent's parental rights are not being altered or terminated.

RULES 5:10-6
Action For Adoption Of A Child, Indian Child Welfare Act

Rule 5:10-6 was amended to add the definition of an "Indian Child" as found at 25 CFR 23.2 ("ICWA"). In applying for adoption of child under ICWA, counsel must provide the court with information sufficient to determine that a child to be adopted is an "Indian Child" as defined by ICWA. If the court is unable to make such a finding, an investigation shall be ordered which may include an inquiry to the appropriate tribe to determine if the child or one of the biological parents is a member.

RULE 5:10-7
Action For Adoption Of A Child, Judicial Surrender Of Parental Rights

In matters involving the judicial surrender of parenting rights of an Indian Child, as defined by 25 CFR 23.2, the specific requirements of ICWA apply for the voluntary termination of parental rights. Rule 5:10-7 requires that, in request for judicial surrender, there must be a good faith representation that the child is not a member of or eligible to be a member of a federally recognized Indian tribe. The rule was amended at subpart (e) to require that "if it is determined that the child is an Indian Child as defined by ICWA, the requirements of ICWA for voluntary terminations shall apply."

RULE 5:14-4
Proceedings To Determine Part-Child Relationship, Gestational Carrier Matters; Orders Of Parentage

Rule 5:14-4 was amended to comport with the New Jersey Gestational Carrier Agreement Act (*N.J.S.A.* 9:17-60 *et seq.*). The complaint filed must include all attachments required by *N.J.S.A.* 9:17-67(b). Under *R.* 5:14-4(b), service of the complaint must be made on the gestational carrier and her spouse or partner in a civil union or domestic partnership, if applicable, and any other party to the gestational agreement. Subparts (c) and (d) provide if no objection to the parentage order is received, the order shall be effective as of the date of execution and the names of the petitioner(s) shall be listed as the parent(s) of record on the child's birth certificate.

RULE 5:20-1
Juvenile Delinquency Actions, Complaint; Process

Rule 5:20-1 was amended to allow the court to divert a juvenile complaint charging a crime or disorderly persons complaint without consent of the prosecutor so long as the court gives notice and a hearing is held prior to rendering a diversion determination. Prior to this amendment to *R.* 5:20-1 required prosecutorial consent prior to ordering a diversion.

RULE 5:20-5
Juvenile Delinquency Action, Juvenile Delinquency Matters; Discovery And Inspection

Prior to the adoption of *R.* 5:20-5, no discovery rules existed specific to juvenile matters. By way of summary, the rule provides all available discovery shall be provided to the defense within 30 days unless the juvenile is being detained in which case the discovery must be produced within three days. The discovery must be reproduced to the defense unless good cause is shown for why it cannot be produced and, in such circumstances, shall be made available for inspection by the defense. The discovery shall include exculpatory information or material as well as relevant material. The rule allows for the production

of discovery in electronic form. The rule also includes language that no motion for discovery shall be filed unless the moving party certifies that the prosecutor or defense counsel have conferred and been unable to resolve the issue(s). The rule provides for the entry of a protective order limiting the dissemination of sensitive information. By and large, the newly adopted *R.* 5:20-5 follows the rules governing discovery in criminal matters with certain exceptions necesosary in addressing juvenile matters.

RULE 5:21A
Juvenile Plea Forms

Rule 5:21A was amended to conform with Administrative Directive 10-18 mandating the use of the Juvenile Plea Form whenever a plea is accepted.

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Incorporating Respite Care as a Child Support Expense for Children with Autism Spectrum Disorder

By Carmen Diaz-Duncan

The philosophical premise of the Child Support Guidelines has always been to ensure that the children of divorced, separated or non-formed families are provided with adequate and fair financial support. The goal is for these children to be afforded the same opportunities as children of intact families with parents of similar financial means as their own parents.[1]To achieve this goal, the Child Support Guidelines place considerable emphasis on specifically delineated numerical qualifiers, such as parental income, cost of health insurance and number of overnights as the basis upon which the presumed appropriate figure of financial support is calculated. The Child Support Guidelines, however, are based upon the presumed regular and anticipated needs of the average child in an intact family. The needs of a child with Autism Spectrum Disorder are seldom the same the average child upon which the Child Support Guidelines are based. As is often the case with children with special needs, there are frequently expenses not contemplated within a guidelines-based child support figure which are specific to the child.

While courts have the discretion to supplement a guideline-based child support award to include any expenses not contemplated within the guidelines, those considerations, again, are almost always based upon a numerical qualifier associated with a specific expense related to the child. Appendix IX-A of the Child Support Guidelines authorizes the incorporation of other expenses approved by the court which are incurred for a child with special needs that are not incurred by an average intact family. This authority, however, authorizes the incorporation of a quantifiable expense incurred for the child. What do we do if the quantifiable expense is not incurred directly for the benefit of the child with ASD, but rather, for the benefit of that child's primary caretaking parent? Specifically, when calculating a child support award for a child with ASD, how does one effectively incorporate the cost of respite care for the parent?

Respite care or respite services is a form of care intended to provide the primary caregiver temporary relief from the demands of caring for an individual with disabilities during the times when the caregiver would normally be available to provide care. The service relieves family members from care for short periods of time. Unlike work-related child care, which is an approved expense to be shared among parents, respite care is not intended to provide regular care such as during work hours. Rather, respite care is intended to provide temporary care for the child with special needs such that their parent can enjoy a reprieve from their regular caregiving responsibilities. Respite care is intended to enable the primary caretaker to have the ability to go to the movies, run an errand or even go on vacation. In other words, the object of respite care is to provide a direct benefit or service to the parent, rather than the child with ASD.

When described as above, practitioners and the courts alike instinctively fail to appreciate the special needs parent's request for respite care as a necessary expense to be shared between parents. The Child Support Guidelines expressly limit the incorporation or sharing of child care expenses to the cost of work-related child care. There is no provision within the guidelines authorizing courts to allocate non-work-related child care expenses between parents. One can see how a court could easily rebuff the request of the parent of a child with ASD for contribution toward respite care so that they could go away for the weekend. After all, don't all parents feel stressed and overwhelmed? Don't all parents at some point or another want a break from their parental responsibilities? While this point may be well-taken, respite care for the parent of a child with autism is not a frivolous luxury. Such a cavalier dismissal of the special need parent's need for respite not only disregards the

reality of the increased caregiving duties of the special needs parent, but ultimately amounts to the deprivation of a service which has a direct benefit on the health and welfare of both the parent and the child with ASD.

A 2020 study by Research in Autism Spectrum Disorders found that parents of children with ASD disproportionately experienced symptoms of post-traumatic stress disorder when compared against a sample group of parents of neurotypical children. The study specifically found that 18.6% of the sample parents met the criteria for a provisional diagnosis of PTSD.[2] Parents of children with ASD often report higher levels of stress and poorer psychological well-being than parents of children with other developmental disabilities.[3] Significant symptoms of depression and anxiety have also been found to be quite common among parents of children with ASD. The parents of children with ASD consistently report increased depressive symptoms and a higher prevalence of probable clinical depression or significant psychological distress when compared to parents of neurotypical children.[4] Parents of children with ASD consistently reported higher levels of depression, anxiety, emotional distress, and a variety of other psychopathological dimensions.

Empirical studies show that the parents of children with ASD experience very real effects on their physical and emotional health as a result of their caregiving duties in the form of depression, anxiety and emotional distress. Respite care has been shown to be positively associated with reduced levels of stress amongst the parents of children with ASD. Respite care has been further shown to reduce caregivers' stress, enable caregivers to complete daily tasks, facilitate the long-term caregiving in the home, provide parents with time to spend with their other children, and help families to live "a more ordinary life."[5]

While the express purpose of respite care is to benefit the caretaker, there is ample evidence to show that a parent's access to respite care provides notable benefits to the child with ASD. A 2012 study found that temporary respite relief for caregivers goes a long way toward keeping kids and young adults with ASD mentally healthy. They found that families with children with ASD who demonstrate challenging behaviors and did not have access to respite opportunities had an increased incidence of psychiatric hospitalizations.[6] However, for every $1,000 spent on respite care during the preceding 60 days, there was an 8% decrease in the odds of hospitalization in adjusted analysis.[7] The benefits of respite care expand beyond just to the primary caretaker and the child with ASD. The reduced levels of stress experienced by primary caretakers as a result of access to respite care has also been shown to have benefits to the neurotypical siblings of the child with ASD.[8]

While many may argue that a strict interpretation of the Child Support Guidelines necessarily excludes the cost of respite care from being incorporated into a guidelines-based support award, such an argument demonstrates a narrow understanding of not only the needs of the child with ASD, but also the needs of the parent. NJSA 2A:34-23 specifically provides that the health of a parent is factor to be considered by the when determining that amount of child support. If the toll of a parent's caretaking responsibility for a child with autism is such that their mental and emotional health is being impacted, should not the cost of any available interventions available be viewed as a necessary expenses related to the child? As practitioners, it is our duty to effectively communicate and advocate these our client's circumstances and needs. It is in the best interest for all children, not just children with autism, that they have parents or caregivers who are emotionally present and psychologically available to provide for their care. Where the child's specific disability places such a burden on the primary caretaker that their mental and emotional well-being is compromised, whatever interventions are available to ease the burden should be implemented for the benefit of the child. Thus, the cost of these interventions should be included in a child support guidelines calculation. We as practitioners need to be able to comprehensively understand and effectively articulate why these interventions are a necessity rather than a luxury.

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Endnotes

1. Rule 5:6A , Appendix IX-A (1).
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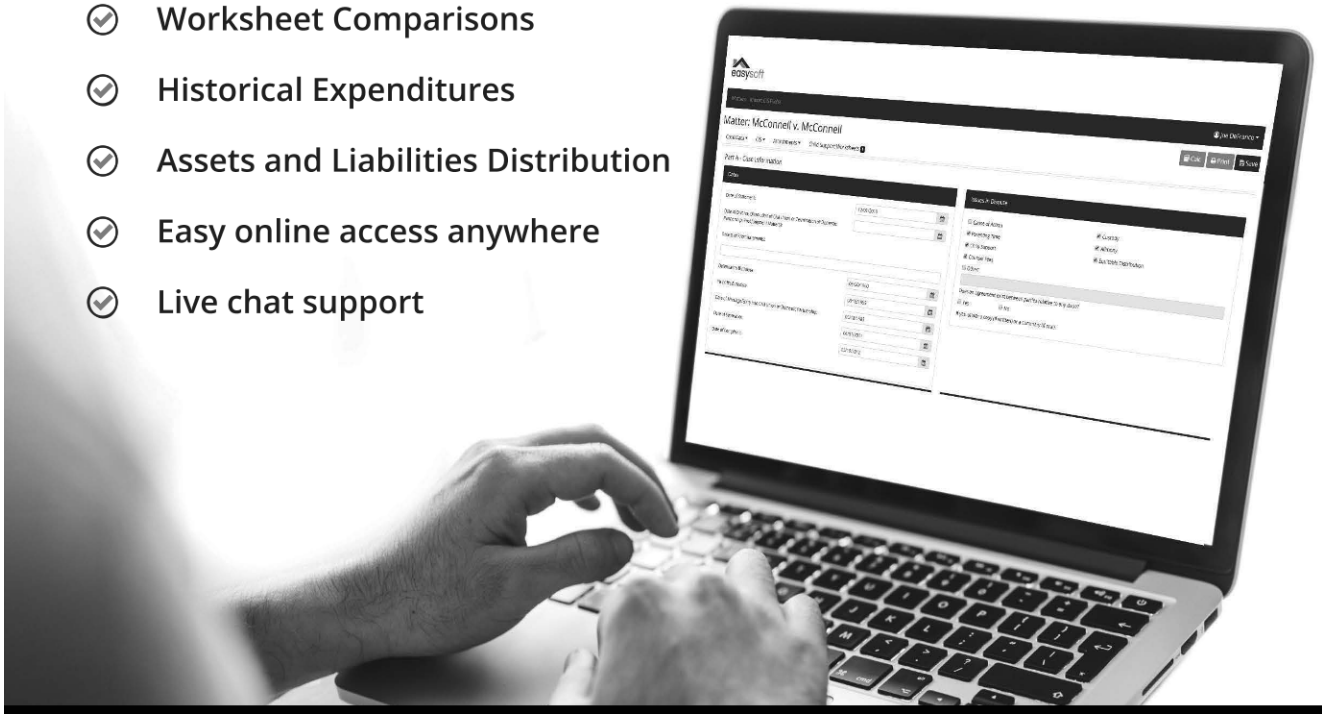

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Malhan v. Secretary United States Department of State: Better Defining Instances of Federal Jurisdiction Over State Court Family Matters

By Amanda S. Jemas

To the probable relief of many family law practitioners like myself who do not look back particularly fondly on their civil procedure courses, it is a relatively uncommon occurrence when family law and federal law intersect. However, it does happen from time to time. A recent decision from the U.S. Court of Appeals for the Third Circuit, *Malhan v. Secretary United States Department of State,*[1] arose from an ongoing divorce matter in Hudson County, providing a much-needed opportunity for clarification as to the applicability and scope of limitations on federal jurisdiction over state court family matters.

Indirectly, the Third Circuit's opinion brings to light the negative implications of a regrettable quandary divorce litigants sometimes find themselves in, namely *pendente lite* and financial "purgatory," which can drag on for years with no end seemingly in sight. Unfortunately, these instances of procedural limbo can have very real, very significant adverse impacts on litigants' lives, and yet courts are not necessarily compelled to readily grant remediation until a much later stage of the proceedings, despite having sound cause to do so.

The underlying matrimonial matter in *Malhan* is one such example. The case began in 2011, when Surender Malhan's ex-wife Alina Myronova filed for divorce in Hudson County. The family court initially awarded full custody of the parties' children to Myronova and ordered Malhan to pay $6,000 per month in child and spousal support. The court also ordered Malhan to give Myronova rental income from jointly-owned property to use toward mortgage payments for the marital home. In 2012, Malhan was awarded joint custody of the children and more than half the number of overnights, effectively making him the parent of primary residence. In 2013, the court found Myronova owed thousands of dollars to Malhan for rental income she had embezzled for personal use rather than pay the mortgage, and for spousal support she was ordered to return because she had been living with her boyfriend. By 2016, Myronova's income had increased from zero to $100,000, well over Malhan's income of approximately $60,000. Subsequently, Malhan briefly stopped paying child support and fell into arrears, and the court ordered his wages garnished. Although Malhan filed multiple motions to reduce his support obligations given these changes in circumstance, the family court inexplicably declined to make any reduction until a final judgment of divorce (which, as of the date of the Third Court's opinion in 2019, had still not issued).

Thus, unable to find any relief in family court, Malhan filed a complaint in federal court alleging that state officials violated his federal rights when they failed to reduce his support obligations. In relevant part, Malhan specifically (1) challenged the disclosure of his bank records and the administrative levy of his bank account, alleging violations of 42 U.S.C. § 669a, a provision of the Child Support Enforcement Amendments of 1984 (CSEA) to Title IV-D of the Social Security Act; (2) claimed his rights of due process of law were violated by state officials' refusal to permit counterclaims and offsets to his child and spousal support debt; and (3) alleged that the garnishment of his wages violated the CSEA and § 303 of the Consumer Credit Protection Act, 15 U.S.C. § 1673.

The District Court's Dismissal

The U.S. District Court for the District of New Jersey dismissed Malhan's claims on two jurisdictional grounds.[2] First, the court held it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine, which bars district court review of state court judgments.[3] The doctrine is intended to prevent federal courts (aside from the Supreme Court)[4] from becoming courts of appeals for state court decisions. Secondly, the District Court invoked the *Younger* abstention doctrine, requiring federal court abstention from ongoing state court proceedings

or where a plaintiff failed to exhaust all state remedies.[5] Malhan's appeal followed.

The Third Circuit's Opinion

A. The *Rooker-Feldman* Doctrine

As noted by the Third Circuit in *Malhan*, the Supreme Court has "warned" lower courts to stop extending the *Rooker-Feldman* doctrine "far beyond the contours of the *Rooker* and *Feldman* cases."[6] The court further noted that "beyond those contours, the doctrine 'overrid[es] Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and supersed[es] the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738 [the Full Faith and Credit Act]."[7] In *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, the Supreme Court reversed federal courts' historically expansive application of the doctrine, limiting same to:

(1) Cases brought by state-court losers;
(2) Complaining of injuries caused by state-court judgments;
(3) Rendered before the district court proceedings commenced; and
(4) Inviting district court review and rejection of those judgments[8].

Citing *Exxon*, the Third Circuit rejected the District Court's application of *Rooker-Feldman* to Mahlan's federal claims. The court held that there were no judgments in Malhan's case, and none of the interlocutory orders qualified as judgments. In addressing the interlocutory orders, the Third Circuit commented that "six of our sister circuits have…[held] that interlocutory orders are 'judgments' only when they are effectively final."[9] This "practical finality" approach was established by the First Circuit in *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, which outlines three situations in which there is a *Rooker-Feldman* "judgment" for purposes of barring federal jurisdiction:

(1) When "the highest state court in which review is available has affirmed the judgment below and nothing is left to be resolved";
(2) When "the state action has reached a point where neither party seeks further action"; and
(3) When a state proceeding has "finally resolved all the federal questions in the litigation," even though "state law or purely factual questions (whether great or small) remain to be litigated."[10]

In *Malhan*, the Third Circuit adopted the practical finality approach set forth in *Federacion*, holding that *Rooker-Feldman* does not apply when state proceedings have neither ended nor led to orders reviewable by the United State Supreme Court[11]. Malhan had several motions pending in the family court, discovery had not been completed, no trial was scheduled, and the family court expressly declined to modify Malhan's support obligations until a final divorce decree was entered. The family court had also vacated its garnishment order and did not issue another. Accordingly, the court held that Malhan's state proceedings were far from "ended"[12] and *Rooker-Feldman* did not deprive the District Court of jurisdiction.

B. *Younger* Abstention

To promote comity between federal and state courts, *Younger* requires federal courts to abstain from deciding cases that would interfere with certain ongoing state proceedings. In raising *Younger* abstention, the District Court in *Malhan* had considered three factors set forth by the Supreme Court in *Middlesex County Ethics Committee v. Garden State Bar Association*, namely whether:

(1) There are ongoing state proceedings that are judicial in nature;
(2) The state proceedings implicate important state interests; and
(3) The state proceedings afford an adequate opportunity to raise federal claims.[13]

However, in *Sprint Communs., Inc. v. Jacobs*,[14] the Supreme Court expressly restrained the Circuit Courts of Appeals' reliance on its previous decision in *Middlesex*. As a result, the *Middlesex* conditions are no longer the litmus test for *Younger* abstention. Instead, *Younger* applies to only three exceptional categories of proceedings:

(1) Ongoing state criminal prosecutions;
(2) Certain civil enforcement proceedings; and
(3) Pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions.[15]

Only after a court finds that one of the above-listed categories applies should *Middlesex*'s factors be additionally considered. Otherwise, "[d]ivorced from their quasi-criminal context, the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings."[16]

The Third Circuit found the family court proceeding underlying the *Malhan* case did not fall under any of the three categories delineated in *Sprint*. The matrimonial matter was not criminal in nature and was brought by Malhan's wife, not the state; nor was it a civil enforcement proceeding. The court additionally ruled that the underlying divorce matter did not fall into the category of "proceedings which further the state's ability to perform judicial functions." The court reasoned that Malhan's claims involved "executive actions" (bank levies) that have a layer of family court review…a tool for collecting non-final money judgments in disputes between private parties" and the interlocutory orders in the underlying matter were not "uniquely in furtherance of judicial functions."[17] Indeed, the court held that the fact Malhan's "garnishment proceeding was merely threatened not pending, makes abstention clearly erroneous."[18]

The Third Circuit also commented that "in New Jersey, child support orders and the mechanisms for monitoring, enforcing, and modifying them comprise a unique system in continual operation, [viewing] the system as a whole, rather than as individual, discrete hearings" and "*Sprint*'s exceptional categories does not include systems in continual operation."[19] Ultimately, the Third Circuit found that "the District Court had federal question jurisdiction and should have fulfilled its virtually unflagging obligation to exercise that jurisdiction[,]" remanding Malhan's federal claims to the District Court for proceedings on the merits.

Conclusion

Clearly, Malhan suffered significant setbacks in family court. His divorce matter began in 2011 and, as of the filing of his complaint in the District Court in 2018, it had still not been resolved. It remained unresolved when the Third Circuit issued its opinion in 2019, and perhaps is open still. In finding that the District Court misapplied *Rooker-Feldman* and *Younger* in dismissing Malhan's federal claims, the Third Circuit helped clarify what cases/circumstances fall under those doctrines, although there arguably remains gray areas warranting further clarification. The *Malhan* opinion, however, is unquestionably a step in the right direction, requiring federal courts to thoughtfully consider similar cases, instead of dismissing them out of hand because they stem from state court family matters.

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Endnotes

1. *Malhan v. Secretary United States Department of State*, 938 F.3d 453 (3d Circuit 2019).
2. There is a split among the Circuit Courts of Appeals as to whether the domestic relations exception applies only to cases brought under diversity jurisdiction or to any case that would otherwise have federal subject matter jurisdiction. The Third Circuit is among the federal courts that limit the domestic relations exception to diversity jurisdiction only. Since Malhan's appeal was brought under federal question jurisdiction, neither the District Court nor Third Circuit addressed the domestic relations exception in their respective analyses. The exception nevertheless warrants noting because, when applicable, it broadly "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).
3 [3] The doctrine originates from two United States Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983).
4. "A litigant seeking to appeal a state court judgment must seek review in the United State Supreme Court under 28 U.S.C. § 1257." *Malhan, supra*, 938 F.3d at 458 (internal citations omitted).
5 [5] *Younger v. Harris*, 401 U.S. 37 (1971).
6. *Malhan*, *supra*, 938 F.3d at 461.
7. *Id*. (internal citations omitted).

8. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005),
9. Malhan, supra, 938 F.3d at 459
10. *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17 (1st Cir. 2005).
11. *Malhan, supra*, 938 F.3d at 460.
12. *Id*. at 461.
13. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1983).
14. *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69 (2013).
15. *Malhan, supra*, 938 F.3d at 462 (internal citations omitted).
16. *Id*.
17. *Id*. at 463.
18. *Id*. at 463-464.
19. *Id*. at 462.

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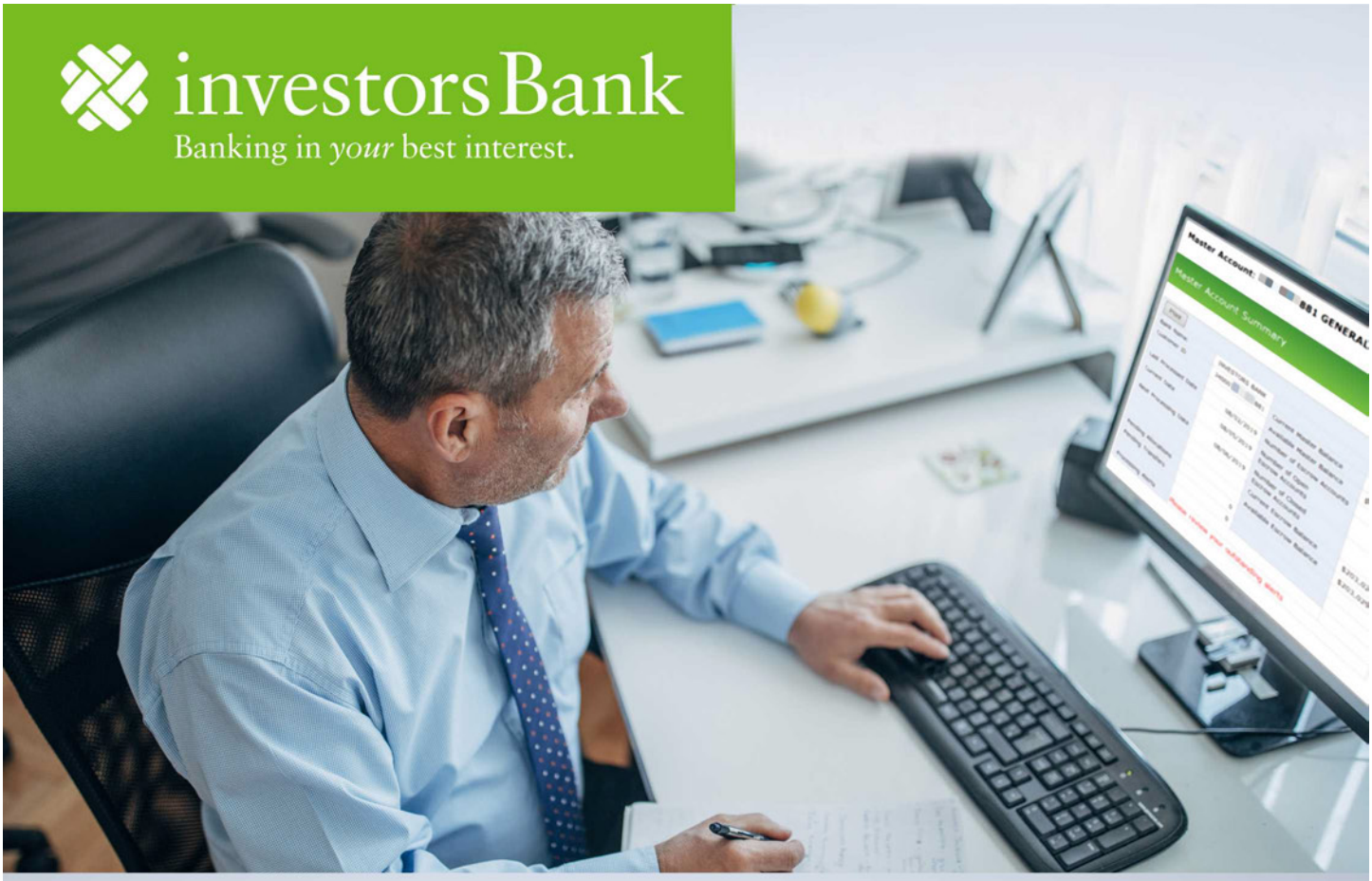

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