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Chair's Column:
The Keys to Being a Good Family Law Attorney

by Sheryl J. Seiden

As family law attorneys, half of our job is to counsel clients through difficult times. What I love about working with individuals, rather than corporations, is that I really do get a sense of helping people. I often tell clients that, despite popular belief, family lawyers are not in the business of breaking up families, but rather we help rebuild them when the family structure is broken. How do we rebuild families? We do so one layer at a time. The relationship with the client begins the moment the client walks through our office door for that initial consultation, and, hopefully, never really terminates as you continue to hear from the client through the years. As we know in New Jersey, cases are often subject to review based on a change in circumstances, so being a good lawyer allows us to retain a relationship with a client for many years.

The ability to be a good family lawyer starts with the initial consult. When first meeting a client, it is very important to take control of the consult and begin to manage the expectations of the client. I typically spend more than an hour with a prospective new divorce client. I will start with an intake to gather information about the client, their children, assets, debts, highest level of education and earnings/earning potential, as well as the highest level of education and earnings/earning potential of the other party, and information regarding their child care responsibilities. Just like when a client visits a doctor, before the doctor can diagnose the problem, the doctor will take a full medical history. My initial consult is a full history of the parties' lives. After gathering all of this information, I will then inquire as to why the client is in my office. While fault is generally not a factor in family law cases, it is important to understand the dynamic of what brings the client to our offices. One of the hardest parts of our job is telling the aggrieved spouse that, barring exceptional circumstances, fault is not going to influence the case. Yes, the client still will have to pay alimony, and no, the client will not receive more of the assets because of the fault (barring dissipation, of course). It is important to relay this information to

the client from the outset so that the client can begin to understand that fault may play an insignificant role in the case.

Here are a few key tips to consider to achieve your goal of being a good family lawyer:

- **Don't Make Promises:** We can never guarantee how a case will be resolved or adjudicated by the court. Too often, I hear about lawyers making promises to potential clients in the initial consult in order to secure the case. Not only is such a promise not reliable and not genuine, but it makes it more difficult for the lawyer to resolve the case when the settlement proposals fall very short of this promise. When providing a client with advice, a lawyer should provide realistic ranges, so the client's expectations are appropriately managed from the beginning of the case. While the purpose of the consultation is for the potential client to interview the lawyer and determine if they are the right selection, the consultation also provides a means for the lawyer to ensure the client is someone they want to represent. If the client has unrealistic goals, then the lawyer's job should be to add a sense of reality to the consultation, attempt to refocus the client, and, if unsuccessful, strongly consider whether this is a client that the lawyer wants to represent. Remember, a good lawyer has a great reputation and should not be jeopardizing that reputation for one client, who insists on taking very unreasonable positions.
- **Initiation of the Divorce Proceedings:** Once a client decides to proceed with the divorce, the next question is how should the spouse be informed. Barring exceptional circumstances or an emergency, it is often appropriate for the client to advise the spouse of the divorce in the first instance. Thereafter, I will often send a letter advising the spouse that my firm has been retained to represent the spouse and assuring the other spouse of my client's desire to resolve the matter amicably. This letter may also speak to any urgent issues that need to be addressed more immediately. I will then ask that the spouse retain counsel within a 10-day period so we can discuss how best to proceed. Too often, I represent a spouse who was served with a divorce complaint in the presence of the parties' children, without any warning that a divorce was imminent. This surprise not only causes tension from the commencement of the case, but it sets a very negative tone for litigation, often making settlement difficult or impossible. While there are cases, of course, where filing a divorce complaint prior to notifying the other party is necessary, I ask that we collectively consider whether there is a more humane means to commencing a matter that takes a more amicable approach to the litigation from the start. A good lawyer will consider how the actions taken early in the case will impact the ability to resolve the case in the future.
- **Termination Date:** The filing of a complaint for divorce is necessary to formally terminate the marital partnership. That filing is what tolls the length of the marriage and accumulation of marital assets and debts. It is important to draw a line in the sand as to what is and what is not marital in family law cases. It therefore is important to discuss the need for a termination date at the initial consultation. Before filing a complaint for divorce, consider the advantages of not filing a complaint immediately, and agreeing to a termination date instead. In order to do so, it is advantageous to have two reasonable attorneys and clients who share the goal of trying to resolve the case without unnecessary litigation. By agreeing to a termination date, the parties can avoid the need to commence the litigation, which can help reduce legal fees. The parties also can better control the schedule of their case, avoiding the need to have to appear in court based on deadlines established by the court. A good lawyer recognizes the benefit of keeping costs down and avoiding unnecessary court appearances where possible.
- **Review ADR Options:** Rule 5:4-2(h) requires we provide clients with the document entitled "Divorce – Dispute Resolution Alternatives To Conventional Litigation," and detail the alternatives to litigation. Of course, we all comply with our obligations to provide this information to the client, but do you really spend the time to educate the client about what this all means? Each of these options should be discussed and explored with the client in depth, not only at the initial consultation, but also throughout the course of the case when it is ripe for mediation or arbitration. While a client may not be ready to commit to alternative dispute resolution the moment the matter commences, after engaging in discovery and outlining the issues in dispute the client may begin to understand the benefit of these resources. Informing a client of Rule 5:4-2(h) alternative dispute

resolution options will satisfy the obligation under the rules of court, but that does not make you a good lawyer. Exploring these options and truly explaining their emotional and financial values to the client is what makes you one.

- **Start to Build a Plan:** At the initial consultation and thereafter, it is important to begin to build a plan for the future for your client. A good lawyer recognizes that, while their primary job is to divorce a client, there is also a bigger picture that needs to be examined, and that is the rebuilding of the family unit. In order to rebuild, we need to first understand the dynamics of the case. That should start with trying to understand the client's goals. Then, begin to break down these goals into what is realistic and what is not. For example, if the client's goal is to retain the marital residence post-divorce, we need to explore with our client whether the client can afford to keep the house, whether they can afford to buy out the other spouse's interest, and/or whether a refinance of the current mortgage, if any, is a viable option. Clients should consult with a mortgage broker to determine whether refinancing is an option and under what circumstances. Obtain this information early in the case. While these questions may not be answered at the initial consultation, we need to begin to explore how to answer them. Obtaining an understanding of the financial landscape of the parties will be a necessary step to determining the answers to these questions. For this reason, I will provide the client with a blank case information statement (CIS) at the initial consultation and ask them to complete same. A good lawyer helps the client begin to build for the future.
- **Involvement of Client:** Involving the client in the process is critical to ensuring they are engaged in the process. I often remind clients that my job is to provide the options and advise on the decisions that need to be made, but it is the client that must make the actual decisions. For example, before filing a motion with the court, the client should understand why we suggest filing a motion, any alternatives to filing the motion, the likelihood of success on the motion, if known, and the cost. A good lawyer provides the options and empowers the client to make the decisions.
- **Financial Exploration with Client:** When a client retains your firm, they will pay a retainer. They will be billed monthly against the retainer. The client may quickly learn the retainer does not last long if they continuously call or email you with questions daily. In such a case, I will often ask a client to prepare a list of their questions and then schedule a call or meeting to address these questions. This is a much more efficient means of providing legal advice than to respond to email after email from the client. Also, before proceeding to a step that will incur significant counsel fees, such as a four-way meeting or a mediation, the client should understand the cost of the process. Not only does this avoid the call from the angry client later, but it also helps the client understand the cost of the divorce at each step of the way. Collection of fees is not always my favorite part of my job, but a good lawyer manages the expectation of the client with regard to costs to minimize surprises.
- **Work with Client on Preparing the Case Information Statement:** The CIS is a very overwhelming document. I welcome each of you to complete your own CIS to understand just how mindboggling this document is to complete. A lawyer will require the client to prepare the CIS, have their staff complete it, and then submit it for filing and service on the adversary. A *good* lawyer will ask the client to prepare the CIS and then meet with the client to review each section of it, explaining the purpose and importance of the information as it is compiled. Never once in my career have I submitted a CIS prepared by a client without substantial involvement by me or another lawyer in my office in preparing the final document.
- **Preparing the Client:** Before each step in the process, we need to take the time to educate our client as to what to expect. A good lawyer will make sure the client is prepared before entering a four-way meeting, mediation session, arbitration proceeding, motion hearing, trial, and the uncontested hearing. As simple as it may seem, once a case is settled, take the time to review the uncontested questions with the client. For the client, sitting at counsel table and being sworn in by the court clerk, maybe for the first time in the proceeding, can be very intimidating. When appearing for a four-way meeting, we and our client should have a game plan as to the range of settlement proposals and an understanding of what the client would be willing to accept to resolve the matter. A good lawyer makes sure the client understands what to expect in the proceedings.

- **Don't Abandon the Client at the Uncontested Hearing:** Once a case is settled and the marital settlement agreement signed, the hardest part is done. Let's face it, the uncontested hearing is often just a formality and may not require our participation. While it is very tempting to send a junior associate to the uncontested hearing, remember that this hearing is a very emotional step in the process for the client. If the client is not familiar with the junior associate, the uncontested hearing is not the time to introduce a new lawyer into the matter. A good lawyer will be at the uncontested hearing to provide emotional and legal support at the conclusion of the process. This step is just as important as the initial consultation. After all, we should want the client to leave the courthouse with a good feeling about us and our firms, as that client can be a source of future referrals.

I believe many of the lawyers in our practice are good (if not great) family lawyers. Many of the foregoing suggestions are ingrained in the practice of our colleagues, and of course there are many other suggestions that can be added to this ever-expanding list. When you witness a colleague taking a step evidencing characteristic of a good lawyer, tell your colleagues, tell your client, and most importantly, tell that lawyer.

While there are always going to be a few bad apples, it is my hope the good lawyers will continue to overshadow the bad and serve as examples for the other lawyers who are still learning. Every day in this practice I learn something new. Every time I walk into a courtroom, I feel that adrenaline of nervous energy and wonder what I will learn from that experience. Every case presents another set of facts that I need to consider and construct to help rebuild a family. One of my mentors in this business, Eleanor Alter, once told me that the day that you walk into a courtroom and are not nervous, or the day you feel that you have nothing left to learn, is the day that you recognize that it is time to retire. For me, I know that I will not be retiring from the practice of law anytime soon. ■

Inside this issue

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Meet the Officers

The following individuals were named officers of the Family Law Section of the New Jersey State Bar Association for the 2019-2020 term:

Chair – Sheryl J. Seiden

Sheryl J. Seiden is the founding partner of Seiden Family Law, LLC in Cranford, where she practices family law exclusively. She is the chair of the Family Law Section's Executive Committee of the New Jersey State Bar Association. Prior to becoming the chair of the Family Law Section, she served on its Executive Committee since 2008. She is both a former co-chair of the Legislative Sub-Committee, and a former co-chair of the Young Lawyers Family Law Sub-Committee of the Family Law Section. Seiden is also a fellow of the American Academy of Matrimonial Lawyers – New Jersey Chapter. Since 2015, Seiden has been recognized by *Best Lawyers in America* and has been selected by her peers as a Super Lawyer. In 2018, and 2019, Seiden was recognized by *Super Lawyers* as one of the "Top 50 Female Attorneys in New Jersey" and one of the "Top 100 Lawyers in New Jersey." Seiden graduated *magna cum laude* from New York Law School, where she served as the managing editor of the *New York Law School Law Review*. She received her B.A. in justice from the American University in Washington, D.C.. in 1993, where she graduated *cum laude*. She is licensed to practice law in New Jersey and New York. Seiden is co-authoring a book on marriage, divorce and dissolution that is scheduled to be released by Gann Publishing in 2019. She is a member of the Union and Essex county bar associations. She has also volunteered for Partners for Women and Justice and has lectured for the New Jersey Institute of Continuing Legal Education on many occasions, and the Union County Bar Association on family law issues, including lecturing at the NJICLE Family Law Symposium on several occasions. In November 2014, Seiden argued for the American Academy of Matrimonial Lawyers *amicus curiae* in *Gnall v. Gnall*, before the Supreme Court of New Jersey.

Chair-Elect – Ronald G. Lieberman

Ronald G. Lieberman is the chair of the family law practice group of the firm of Cooper Levenson, PA in Cherry Hill. He is certified by the Supreme Court of New Jersey as a matrimonial law attorney, and is a fellow with the American Academy of Matrimonial Lawyers. His practice is limited to family law issues, including matrimonial law, divorce, child custody, child support, parenting time, domestic violence, and appellate work. Admitted to practice in New Jersey, New York and Pennsylvania, Lieberman is president of the Camden County Bar Association and co-chair of its family law committee. He is the secretary of the New Jersey Chapter of the AAML. He is also a years-long member of the Supreme Court's Family Law Practice Committee. He is a member of the District IV Ethics Committee. A former master of the Thomas S. Forkin Family Law American Inns of Court, Lieberman has lectured on family law topics for the New Jersey Institute for Continuing Legal Education, the New Jersey Association for Justice, Sterling Educational Services, the National Business Institute, the New Jersey State Bar Association and Burlington and Camden county bar associations. He is executive editor of the *New Jersey Family Lawyer*, has authored articles that have appeared in the publication, and has been quoted in the *Courier Post, U.S. News and World Report, The New York Times* and appeared on CBS 3 Philadelphia. He has been recognized as a "Best Lawyer in America" since 2016. Lieberman received his B.A. from University of Delaware and his J.D. from New York Law School. He was law clerk to the Honorable F. Lee Forrester, P.J.F.P. (ret.).

Vice Chair – Robin C. Bogan

Robin C. Bogan is a partner at the law firm of Pallarino & Bogan, L.L.P., in Morristown. She has devoted her practice to family law and related matters for over twenty-two years. Bogan is certified by the Supreme Court of New Jersey as a matrimonial law attorney. She is also actively involved in the legal community. Bogan is currently the vice-chair of the Family Law Section's executive committee of the New Jersey State Bar Association. She has served as a member of the executive committee since 2005. She is a past president of the Morris County Bar Association and the Morris County Bar Foundation. Bogan volunteers as an early settlement panelist for the Superior Court in Morris County. She is also a barrister for the American Inns of Court. She served as an investigator for the ethics committee for Morris and Sussex counties from 2006 to 2009. Bogan received the 2013 Professional Lawyer of the Year Award for Morris County from the New Jersey Commission on Professionalism in the Law. *New Jersey Monthly* magazine honored Bogan as one of the "Top 50 Women Lawyers in New Jersey" and one of the "Top 100 Lawyers in New Jersey" in 2017, 2018 and 2019. Bogan has lectured on family law issues for the New Jersey Institute of Continuing Legal Education, New York Practicing Law Institute, Barry Croland Family Law Inn of Court, and Morris County Bar Association. Her articles on family law issues have appeared in several professional publications. Bogan received her J.D. in June 1996 from Seton Hall University School of Law. She received her B.A. from the University of Richmond in May 1993. She served as a judicial law clerk for the Honorable Thomas H. Dilts, the presiding judge of the family part of the Superior Court in Somerset County from 1996 to 1997.

Treasurer – Derek M. Freed

Derek M. Freed is a member of the law firm of Ulrichsen Rosen & Freed LLC in Pennington. He concentrates his practice in matrimonial and family law. He is a matrimonial early settlement panelist in Mercer and Somerset counties. Freed has served as a member of the executive committee for the Family Law Section of the New Jersey State Bar Association from 2009-2010 and again from 2011 to the present. He has lectured for the New Jersey Institute for Continuing Legal Education, the New Jersey State Bar Association, the New Jersey Association for Justice, and the Mercer County Bar Association with respect to 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 on the matters of *Gnall v. Gnall* and *Bisbing v. Bisbing*. He is presently an associate managing editor of the *New Jersey Family Lawyer* and has had several articles published in the publication. Freed received his J.D. with honors from Rutgers, the State University of New Jersey, and his B.A. from the College of William & Mary in Virginia.

Secretary – Megan S. Murray

Megan S. Murray is the founding partner of the Family Law Offices of Megan S. Murray. She is certified by the Supreme Court of New Jersey as a matrimonial law attorney. 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. In 2019, she was selected for inclusion in *Best Lawyers of America*, ranking her among the top five percent of practitioners in the nation. In 2019, she was also selected as a Super Lawyer by *New Jersey Monthly*. Before becoming an officer, Murray served as the chair of the legislative subcommittee of the Family Law Section. Murray is a member of the Middlesex and Monmouth county bar associations. She previously served, for a period of two years, as co-chair of the Monmouth County Family Law Committee. She is a managing editor for the *New Jersey Family Lawyer* publication. She has also been selected by *New Jersey Monthly*, Super Lawyers Edition, as a Super Lawyer. In 2012, she received the Martin Goldin Award for her dedication to the practice of family law. In 2013, she was selected to receive the Young Attorney of the Year Award in Middlesex County. In 2015, Murray was named as a "New Leader of the Bar" by the *New Jersey Law Journal*. Murray co-authored the book entitled *Divorce in New Jersey*. She has also been published with regard to matrimonial matters in multiple publications, including but not limited to, the *New Jersey Law Journal*, *Middlesex Advocate*, *New Jersey Lawyer*, and the *New Jersey Family Lawyer*. She has also spoken at numerous seminars across the state on issues relating to the practice of family law, including speaking on multiple occasions at the annual Family Law Symposium and the New Jersey State Bar Association's Annual Meeting and Convention. Moreover, Murray has appeared as a guest speaker on the *Inside the Law* radio show on several occasions.

Immediate Past Chair – Michael A. Weinberg

Michael A. Weinberg is a partner at the law firm of Weinberg, Kaplan & Smith, P.A. He concentrates is practice in matrimonial and family law. He is the co-chair of the Camden County Bar Association Family Law Committee and the immediate past chair of the New Jersey State Bar Association Family Law Executive Committee. He is a matrimonial early settlement panelist for Burlington, Camden and Gloucester counties and is also is certified by the Supreme Court of New Jersey as a matrimonial law attorney. A master in the Thomas S. Forkin Inns of Court, Weinberg is a former chair of the membership committee. He has lectured for the New Jersey Institute for Continuing Legal Education, the American Academy of Matrimonial Lawyers, American Trial Lawyers Association, and the National Business Institute, and has appeared on the television programs "Legal Lines" and "Legally Speaking." He has been recognized as a "Best Lawyer in America" since 2016. A former adjunct professor in Burlington County College, Weinberg assisted with the bankruptcy and divorce chapter in the *New Jersey Family Law Practice* 2002 and 2006 editions. He received his B.S. from Bentley College and his J.D., *magna cum laude*, from Capital University Law School, where he was published in the law review and was a selected member of the 1993 National Moot Court Team. He was a law clerk to the Honorable Charles A. Little.

Editor-in-Chief's Column:
Alimony Waivers and Modifiability

by Charles F. Vuotto, Jr.

The recent published case of *Fattore v. Fattore*[1] is raising some concern for practitioners that have included alimony waivers in their divorce settlement agreements and advised their clients that such waivers are immutable. The perception of immutability of the waiver is buttressed by statements commonly made by almost every judge at an uncontested hearing that is advised of the waiver. Judges will typically inform the party or parties giving the waiver that they can never come back for alimony.

In *Fattore*, the parties had been married for 35 years, and both parties were 55 years of age at the time of their divorce. Their six-page consent dual final judgment of divorce (JOD) included all of the terms of their divorce, including the following mutual waiver of alimony: "Plaintiff and defendant each hereby waive alimony as to the other party now and in the future." Among the remaining provisions in their JOD was equitable distribution of the husband's military pension. Specifically, the parties agreed that the plaintiff-wife "shall be entitled to receive fifty percent ... of defendant's military pension which was accumulated during the marriage ... via a [q]ualified [d]omestic [r]elations [o]rder [QDRO] to be prepared by attorneys for plaintiff."[2]

The husband was serving full time in the Army National Guard when the parties were divorced. Approximately two years after their divorce, while the husband was still serving in the Army National Guard, the QDRO for the husband's military pension was completed. The husband's service in the Army National Guard ended approximately three years later, when the husband became disabled. Initially, the husband was able to collect his pension and disability benefits without any impact upon the pension payout, and was receiving social security benefits; however, some time later, he elected to receive tax-free disability benefits, resulting in a reduction in the portion of his pension that may be distributable via QDRO.[3]

In 2010, several years after the husband became disabled, the wife contacted the Army to inquire why she had not yet begun receiving her share of the husband's pension benefit. She was informed that the husband's election to receive disability benefits effectively rendered her ineligible to share in the husband's payments, because the disability portion cannot be divided under the Uniformed Services Former Spouses Protection Act (USFSPA) and "when the disability amount is deducted from his gross pay along with the survivor benefit portion, there's nothing left for the community property."[4]

In 2016, the wife filed a motion seeking compensation from the husband for her share of his military pension, which the husband opposed. Following a two-day plenary hearing, the judge appointed a pension appraiser to determine the value of the wife's coverture interest in the pension as of the time of the parties' divorce, and pending that determination, directed the husband to pay to the wife the full amount of his monthly Social Security benefits. The judge denied the wife's request to deem the payments alimony, noting that "[a]limony is not compensation for equitable distribution," and citing the parties' mutual waiver of alimony.[5]

On appeal, the husband asserted that the trial court erred in essentially providing indemnification, arguing such remedy was preempted by the United States Supreme Court in *Howell v. Howell,*[6] (decided three months after entry of the trial court's decision in *Fattore*). The wife cross-appealed, arguing that in the event the trial court's decision was preempted by *Howell*, the denial of alimony must be reversed based upon a substantial change in circumstances and the current circumstances of the parties.[7]

The New Jersey Appellate Division provided a detailed analysis of *Howell* and *Mansell v. Mansell*, another United State Supreme Court decision, in which the Supreme Court held the USFSPA preempted state court orders that permitted equitable distribution of disability benefits.[8] Ultimately, the Appellate Division reversed the trial court's denial of alimony, despite the mutual waiver of alimony contained in the parties' JOD, holding that *Howell* preempted its decision for the husband to indemnify the wife.[9]

It is well known that "alimony and support orders define only the present obligations of the former spouses," and that such "duties are always subject to review and modification on a showing of 'changed circumstances.'"[10] This authority is largely derived from New Jersey statute, specifically N.J.S.A. 2A:34-23, which provides, in relevant part, that "[o]rders so made [as to the alimony or maintenance of the parties] may be revised and altered by the court from time to time as circumstances may require."[11]

As part of the give and take of negotiations, parties may agree to prevent such modification by including provisions commonly known as "anti-*Lepis* clauses" in their settlement agreements. The Appellate Division has deemed such provisions enforceable. In *Morris v. Morris*, the Appellate Division held that while "parties cannot bargain away the court's equitable powers[,] … parties can establish their own standards, and that these standards, *where not unwarranted under the circumstances*, will be enforced by the court irrespective of the need-based guidelines of *Lepis,* which are applied when there are no such standards."[12] However, this comes with a caveat: "[i]f circumstances have made the parties' standards unreasonable, they can in extreme cases be modified."[13] In *Morris*, alimony was to be paid in the amount of $35,000 per year to wife for a specified term, at the conclusion of which there was to be a single final alimony payment of $150,000. The court held this provision enforceable, despite husband's present decrease in income.[14] The court explained that husband bargained for this result when wife sacrificed her claim to equitable distribution and substantially greater alimony in exchange for a "guaranteed," non-modifiable sum.[15] An excellent overview of additional law related to the enforceability of "anti-*Lepis* clauses" (as of March of 2000) was previously published in the *New Jersey Family Lawyer.*[16]

Fattore sheds light on an apparent gray area in the law and a seeming disconnect between the law and litigants' general understanding of the finality of their agreements. It should be no surprise that parties believe a waiver is a waiver. In other words, parties will expect that the waiver is complete and final, not subject to modification irrespective of any future circumstances. It is this author's experience that judges routinely give warnings to this effect during uncontested hearings when advised that the parties' settlement agreement includes a waiver of alimony, whether mutual or applicable to only one of the parties. In these common instances, a litigant waiving alimony is forewarned that they would be barred from later returning to court seeking alimony, no matter what the reason, i.e. whether they later became ill or lost their job, or their former spouse won the lottery. Judges' colloquy to this effect typically comes without the judges' review of the parties' settlement agreement to determine whether an anti-*Lepis* provision is included.

One could argue this stems from a belief that waivers differ from established support awards, in that the latter is subject to modification under *Lepis* and the former is not. Yet, in *Fattore*, the Appellate Division incorporated *Lepis*-like terminology in refusing to uphold the parties' mutual waiver of alimony, noting that "the unforeseeable loss of the bargained for pension benefit was *a substantial and permanent change in circumstances*."[17] On the other hand, within that same sentence, the Appellate Division seems to more expressly rely on principles of contract in rendering its decision. After noting that for "*[a] waiver[] to be operative, [it] must be supported by an agreement founded on a valuable consideration*,"[18] the court concluded as follows: "there was valuable consideration given by plaintiff in exchange for the alimony waiver, and the unforeseeable loss of the bargained for pension benefit … invalidated the waiver."[19] This contract approach supports the fairness-based result in *Fattore.*

While the Appellate Division in *Fattore* appears to have carefully avoided an ordinary modification under *Lepis*, its mere reference to *Lepis* and use of associated language nevertheless calls into question the circumstances under which a waiver of alimony would be subject to modification, notwithstanding the absence of an anti-*Lepis* provision. In that regard, it is significant that otherwise enforceable waivers of alimony are supported by valuable consideration, distinguishing such provisions from typical support provisions or awards based upon such factors as the parties' marital lifestyle, need for support, and ability to pay support, as opposed to any *quid-pro-quo.* Accordingly, waivers of alimony should be treated as more in the nature of a contractual claim, which often entails a bargained-for exchange, than in the nature of support.[20]

As such, it is this author's opinion that absent the deprivation of such consideration as in the case of *Fattore*, the equitable authority of courts to reform or modify waivers of alimony in settlement agreements should be limited to such grounds as "unconscionability, fraud, or overreaching in the negotiations of the settlement."[21] This standard is consistent with the balance New Jersey courts, such as in *Fattore*, *Lepis*, *Morris*, and *Miller*, have

strove to achieve between promoting the stability of settlement agreements and preserving courts' equitable powers in the realm of domestic relations. Nevertheless, as a practice pointer, this author suggests that clients entering into agreements with anti-*Lepis* clauses be advised that courts may use their equitable authority to modify alimony waivers in the event of certain limited circumstances. ■

The author wishes to thank Rotem Peretz of LaRocca Hornik Rosen Greenberg & Crupi, LLC in Freehold for his contribution to this column.

Endnotes

1 *Fattore v. Fattore*, 458 N.J. Super. 75 (App. Div. 2019).
2 *Id.* at 80.
3 *Ibid.*
4 *Id.* at 81
5 *Id.* at 81-83.
6 *Howell v. Howell*, ___ U.S. ___, 137 S. Ct. 1400 (2017).
7 *Fattore, 458 N.J. Super. at 84.*
8 *Mansell v. Mansell*, 490 U.S. 581 (1989).
9 *Fattore*, 458 N.J. Super. at 84-89.
10 *Lepis v. Lepis*, 83 N.J. 139, 146 (1980).
11 *Id.* at 145-46.
12 *Morris v. Morris*, 263 N.J. Super. 237, 245-46 (App. Div. 1993) (emphasis added).
13 *Id.* at 246.
14 *Id.*
15 *Id*. at 240.
16 Console, Agreement to Terminate Alimony: When Is an Anti-Lepis Clause Enforceable?, 20 *New Jersey Family Lawyer*, 7 (Feb./Mar.), 2000.
17 *Fattore*, 458 N.J. Super. at 89 (emphasis added).
18 *Id.* at 88 (emphasis added).
19 *Id.* at 89. The complete sentence, including both the *Lepis*-type phraseology and the principles of contract, reads as follows: "Thus, there was valuable consideration given by plaintiff in exchange for the alimony waiver, and the unforeseeable loss of the bargained for pension benefit was a substantial and permanent change in circumstances, which invalidated the waiver." *Ibid.*
20 *See also Gordon v. Rozenwald*, 380 N.J. Super. 55, 68-69 (App. Div. 2005), wherein the Appellate Division, in suggesting different standards of modification for different types of support, stated as follows:

> The premise for a term of limited duration alimony under *N.J.S.A.* 2A:34–23c is primarily historical not predictive and it is not based upon estimates about financial circumstances at the time of termination. Thus, the end date of a term of limited duration alimony is the equivalent of an arrangement to terminate support at a predetermined time or event, regardless of need. The statutory standard that precludes modification of the length of a term of limited duration alimony—"except in unusual circumstances"—is the equivalent of the standard applied to analogous arrangements for termination of support under prior decisional law—"not ordinarily equitable and fair." *Compare N.J.S.A.* 2A:34–23c *with Lepis, supra,* 83 *N.J.* at 153–54, 416 *A.*2d 45. Because the statutory standard for modification of limited duration alimony is the equivalent of the standard utilized in prior judicial decisions addressing analogous arrangements, trial courts applying the "unusual circumstances" standard in *N.J.S.A.* 2A:34–23c should consider decisions addressing modification of such specific provisions under the "not ordinarily fair and equitable" standard of prior decisional law. *See, e.g., ibid.; Morris v. Morris,* 263 *N.J. Super.* 237, 241–42, 622 *A.*2d 909 (App. Div. 1993) (enforcing provision foreclosing modification based on changed circumstances despite economic hardship, and noting that a different result might be required in a case involving disability); *cf. Peskin v. Peskin,* 271 *N.J. Super.* 261, 275–76, 638 *A.*2d 849 (App. Div. 1994) (settlement agreements must be voluntary not the result of coercion, deception, fraud or undue pressure).

21 *See Miller v. Miller*, 160 N.J. 408, 419 (1999).

Executive Editor's Column:
Digital Domestic Abuse Needs to Be Addressed

by Ronald G. Lieberman

Domestic violence focuses on the actions between current and former intimate partners or those with children in common without actually addressing abuse through digital means. Although cyberstalking is now cognizable under the Prevention of Domestic Violence Act as an act of domestic violence, the focus on technology–facilitated abuse is unfortunately lacking. That missing link needs to be addressed without delay.

Given that the civil complaint and restraining order forms do not mention technology–facilitated abuse, there is a yawning gap in the law. Such abuse must be considered a form of domestic violence accomplished by perpetrators using computers, smartphones, tracking devices, and home-based technology to control their victims, often from a distance. This abuse creates a sense of omnipresence and erodes the victim's feeling of safety.[1] For example, smartphones have all forms of tracking features on them including those that come with iPhones such as "Find My Friend" or "Find My iPhone." Those apps allow individuals to track each other's location through their phones. When a temporary restraining order is entered, do practitioners ever witness a judge telling the defendant to remove those devices? This author does not.

How about other forms of technology including internet-connected locks, speakers, thermostats, lights, and cameras? All those devices are convenient when being used appropriately, however, when used by a perpetrator of domestic violence, those devices can further a pattern of domestic abuse, especially if the defendant uses them to monitor and control the victim.

Practitioners know that smartphones have apps that are connected to internet-enabled devices, that allow people to view the interior and exterior of their homes, control their lights, control the temperature in the homes, control their locks, and listen in on what is going on in the home. Those devices include Echo speakers, Alexa, and the Nest thermostat, all of which are helpful companions in the home. However, the devices can be used in abuse situations whereby the defendants alter the temperature in the home or view the exterior and, more troublingly, the interior of the home while a restraining order is active, and are able to listen in. This is to say nothing of the ability to control Wi-Fi enabled doors, speakers, thermostats, lights, and cameras to access and abuse the spouse from afar.

So, it is this author's view that the civil complaint and temporary restraining order, as well as the final restraining order form, should be amended to require the defendant to delete all apps that control home alarms, and any other smart home product, whether connected to the internet or not. That way, smart home technology will not be used to further abuse. After all, why would a defendant need a home alarm app to view interior cameras? If someone has a smart doorbell such as a Ring, why should the abuser know when anyone is coming or going? Moreover, there is no rational reason why the abuser should have any access to control over the lights or the thermostats.

Victims should not feel as if they have lost control of their homes. Allowing the defendant to take charge of the technology, especially if he or she knows how it works, as well as all of the passwords, gives thatdefendant the power to turn the technology against the victim.

The defendant could readily access those smart home devices unbeknownst to anyone. In fact, it is doubtful that the victim would ever know that he or she is being viewed by cameras or facing other invasions on his or her privacy in the home until it is too late.

So, the easiest plan of action would be for the civil complaint and temporary and final restraining order forms to be amended to require judges, when entering those orders, to instruct the defendant to delete all apps accessing any such smart home technology from his or her phones or other electronic devices. Certainly, at time of the entry of a rinal restraining order, a judge could demand that the defendant delete those apps before the court under the penalty of contempt of court.

Cyber violence should not be taken lightly. The ubiquity of smart technology devices and the obvious ability for defendants to misuse those technologies should not be brushed aside.

Although this column is not focused on tracking or spyware software, their use would never be permitted by a court.

It is hoped that this column will spark a discussion in the court system and among practitioners to stop technological tools of domestic abuse. ■

Endnotes

1. Woodlock, "The Abuse of Technology in Domestic Violence and Stalking" (2017), 23 *Violence Against Women* 584, 598.

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!

Cindy Rossine
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In Memoriam:
Hon. Herbert S. Glickman, J.S.C. (ret.) (1930-2019)

by Hon. Thomas Zampino, J.S.C. (ret.)

Editor's note: This memoriam is adapted from the eulogy Judge Zampino delivered.

When giving a eulogy, the person speaking usually embellishes the accomplishments of the deceased. Not so here today.

One of Herb's favorite lines when facing a crowd was: "I guess you are wondering why I called you here today," and then he would tell a joke pretending it was a real-life story. He often repeated the same jokes and we would give them numbers. We would yell out, "number 18, Herb!" He would then just say numbers, like "number seven," and we would say, "Herb, work on your delivery." Ted Einhorn served as his straight man for many years, and the continuing joke was Ted saying "Herb, I heard you went bear hunting over the weekend." Herb would reply, "yes, but we came to a sign that read 'bear left,' so we went home."

When you were driving in a car with Herb and he was sitting next to you or in the back seat, he would call you on your cell phone while you were driving, asking if we were there yet, or claiming he had to get to the bathroom. He would also take family pictures from my chambers and we would go to a restaurant and the pictures would be hanging on the walls.

Once, after the Christmas holidays, Herb and I threw out an old artificial tree, placing it in the hallway of the courthouse. Yet, when I entered the parking garage, the tree was sitting on the hood of my car. When I discarded it again, it showed up on my bench in the courtroom. Again, I placed it in the garbage can, but then weeks later a large package arrived - Herb had mailed it back to me.

In 2001, right after Sept. 11, the Yankees were playing in the World Series and Herb knew I was going with a friend. He said to me, "I have never been to a World Series." Well, as fate would have it, my friend was unable to go, and he told me to give the ticket to whomever I wanted, so I took Herb. The seats were in the eighth row, behind home plate, and we were surrounded by luminaries: Jack Nicholson and Rosie O'Donnell among them. It was an exciting and emotional evening. The next day, I visited him in his chambers, expecting him to say again how much he enjoyed the night. He looked up at me and said: "you know, I haven't gone to a Super Bowl."

When Herb married Sandy a few decades ago, he had three judges perform the ceremony in their home: Bill Walls, Steve Mochary, and myself. We alternated the words "do you take?" and then we went to a restaurant where they had invited 50 of their friends. When we arrived, Herb unveiled a T-shirt under his shirt with a picture of him and Sandy that read: "just married." My wife, Sandy and I, along with the other guests, were all given similar T-shirts that day. That is how they announced their marriage after living together for over a decade.

When we were on the bench, Judge Hayden, Judge Camp, Herb and I were known as the "Cardinals." We even had Cardinals football jerseys with our names on the back. Herb was the leader of the pack. He was our mentor.

The next story is a sad-but-funny. Barry Croland was dying, and there were only windows of time left when you could see him at home lying in his hospital bed. Herb, Gary and I received an invitation from his wife, Joan, to come at 11 a.m. on a Friday. The call came only hours before. We arrived and Barry was fully aware. We retold old stories for over an hour, laughing and crying

out loud. When we left, the three of us broke into tears, crying uncontrollably before even getting to the car. Barry died just days later. Herb decided we should do something for Barry and conceived of the idea that we should name the Family Inns of Court for him. He called Frank Donohue, the founder, and found out that he has already embraced the same thought. Now, in the same thoughtful manner to carry Herb's name forward, I have bought a goldfish and named him Herb. I would ask each of you to do the same.

Herb once had a baby-naming case, and he told the lawyer that if the parents could not agree, he was naming the child Herbert.

This last story is one of both pride and humor. Bill Walls was appointed to the U.S. District Court for the District of New Jersey. An amazing honor. Herb accompanied him to Washington D.C., for the Senate confirmation hearing, and was asked by Bill to speak at his swearing-in ceremony. Herb's favorite line was "Bill is now where he belongs, he always made a federal case out of everything." ■

In Memoriam:
Hon. John Selser, J.S.C. (ret.) (1948-2019)

by Hon. Michael K. Diamond, J.S.C. (ret.)

John Selser passed away suddenly on July 18. He had a distinguished career as an accomplished attorney and as a state Superior Court Judge. His passing was a shock to everyone who knew John.

I was privileged to have known John for over 30 years. We often were adversaries in family matters in our private practice, and even on occasion would refer matters to each other. We developed a friendship as young attorneys, which became even closer when he joined me on the bench in Passaic County in 2001.

I remember the phone call I received from John when he told me he was being considered for a judgeship. I was almost as excited as he was. We would constantly talk throughout the nomination and confirmation process and I gave him as much assistance as I could to get him through it. A nervous time came when it was getting close to the Christmas holiday and then the new legislative session, and the appointment was still waiting. But just in time, all finally was straightened out and the appointment was made and confirmed.

John joined me in the family division, and when I became the presiding judge in family, I immediately asked John to be my assistant - to be available whenever I was out so that he could lead the division if I was unavailable. There were very few days John and I would not meet in one another's chambers, catch up at for lunch, or even get together after-hours to discuss issues in the division or in cases were handling. He was a great sounding board.

There were times we didn't agree on matters, which was good as we each respected the others opinion. John was known to often say: "you may not get the answer you want, but it doesn't make it wrong." How true that is. One of his other favorite lines to say, particularly to his children, was: "don't go away mad, just go away."

When listening to the comments of the many people who attended John's wake and funeral service, the most common were that he was fair and a gentleman. Everyone who worked with him in private practice or during his tenure on the bench knew he was fair in all his dealings with the attorneys he worked with, as well as the litigants who appeared before him. As the state Appellate Division said in one of its decisions, while they may not have agreed with the conclusion, it was fair and what more could they ask for. That was John.

A native of Nutley, John lived with his wife, Joann, and their children in Wayne for many years. He graduated from Marietta College in Ohio and obtained his *juris doctorate* from Seton Hall. He practiced law for 28 years before becoming a judge. He served as president of the Bergen County Bar Association, a trustee of the New Jersey State Bar Association, and a member of a state ethics committee. He also taught professionalism for the New Jersey Institute for Continuing Legal Education skills and methods program for 11 years. For many years John was a member of the Barry Croland Family Law Inn of Court, and would present at least once a year at one of its monthly sessions.

John began his legal career as a law clerk to state Superior Court Judge Ben Lucci in Bergen County. After the clerkship, he became an associate at Leibowitz, Krafte and Leibowitz. In 1977, he formed the partnership of Picinich and Selser, and stayed there until he began his solo practice in 1989. In 1994, John became a partner at Selser and Onorato, and then in 1998 he joined the firm of Aronsohn and Weiner in Hackensack. John and Richard Weiner became very close friends from that time on. After retiring from the bench, John began doing family

law mediation andarbitration with the Epstein Law firm in Rochelle Park, where he remained until his passing.

The number of people in attendance at the wake and funeral service for John was a tribute to how well he was regarded, loved and respected, not only in the legal community, but also in life.

John had four children, whom he loved and adored: Christopher, Alison, John and Brian. Whenever we got together in these last few years John could not wait to talk about how proud he was of them and their accomplishments. His proudest moments were when he showed the pictures of his grandchildren (over and over again). John also loved the fishing trips he took with his boys, and especially those to the hinterlands of Ontario. Of course, when the fishing season stared in New Jersey he was out the first day.

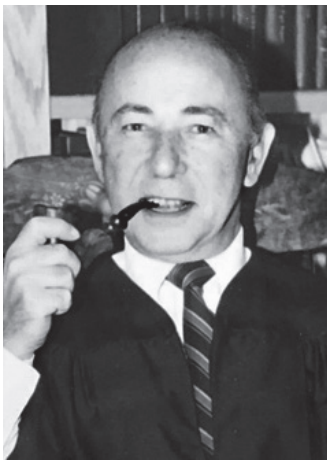
The love of John's life was his wife Joann. They were married for 29 years and had as close a relationship one could hope for. My wife, Sharon, and I often went to dinner with John and Joann, when we would talk about trips , as well as the children and grandchildren - all things that made us laugh, and proud as parents. We will really miss those dinners.

During John's tenure on the bench, he presided over several cases that were upheld by the state Appellate Division and became the leading cases on their specific issues and remain so today. That alone is a tribute not only to his knowledge of the law, but further demonstrates the he knew what was right and fair.

Having John as a colleague, and more so as my friend, is something I will always be grateful for. Rest in peace, John. ■

In Memoriam:
Hon. Robert Feldman, J.S.C. (ret.) (1932-2019)

by Timothy F. McGoughran



I was honored to be asked to write this tribute about Robert "Bob" Feldman, who passed away on Sept. 22, 2019. Bob had a very successful practice that included family law, but certainly was not limited to same. He went on the bench in 1992, at the age of 60, and was the quintessential gentleman as a judge, rarely losing his cool. There wasn't a case that Judge Feldman could not settle. He said it was his dream job, although he never considered it to be work since he enjoyed it so.

I believe I had the distinction of being one of the first, and possibly the last person, to have Judge Feldman storm off the bench as I was arguing vehemently for support for my client who was at the end stages of cancer with four children. His frustration was not with the case, but only that he could not do more. At the behest of a colleague,Phil Jacobowitz, I sent a dozen white roses to his chambers that afternoon and all was forgiven.

Judge Feldman was notorious for working late and not letting a close-to-settled-case out the door without finalizing the matter. On one Sept. 8 (my wedding anniversary), I had just such a case. I reminded him of my 7 p.m. dinner reservation with my wife and my desire not to have my name on his docket anytime soon. He then called my wife, took all the blame, and said she should get the extra expensive champagne before our (somewhat late) dinner.

On more than one occasion I recall sitting in chambers while our clients sat at the counsel table, where we were down to one last issue. Judge Feldman would get the details from counsel, and then say, "I'll be right back," and head into the courtroom. He would then speak directly with the parties, work out that final issue, and return to chambers indicating that the case was settled. It was that personal touch that made him a special judge. He took so much pride in his ability to help others, and used his unique personality to always make people comfortable in his company.

After his retirement from the bench, Judge Feldman had a very lucrative career as a mediator. When the issues would become somewhat difficult, he would take one of the parties and counsel outside to give what I termed the "Uncle Bob" talk. This was always accompanied by his pipe, some home spun wisdom, and an occasional Yiddish axiom. The aroma of that pipe smoke was always soothing to the parties and counsel. Bob knew the value of getting out of litigation, and how to deal with parties' emotions, rather than simply focusing solely on the issues at hand. He pointed out the value and importance of resolution for the sake of the family, the parties, and how that had significance.

For many years, Bob was the go-to mediator for the sitting judges in Monmouth County (and elsewhere) on particularly difficult cases. He was always thorough, well prepared, calm and charming. I used to think he always had a Yoda-like demeanor that influenced all with a "settle you will" charisma. He was one-of-a-kind in his ability to connect with individuals and settle the most difficult of cases, with the most difficult litigants. He was also an active member of the New Jersey State Bar Association's Family Law Section, adding his wisdom and common sense to the issues of his day.

Never one to take himself too seriously, when Bob was on the bench in the civil division, it was reported that on Halloween he informed the jury that they could dress up in costume, and he came out with red nose, and some type of clown-like hair piece. I don't believe there is a reported opinion on this, but I believe it was frowned upon at the time.

Whenever a lawyer headed into his chambers, you could always expect to hear opera or other classical music. He loved classical music, reading and the New York Football Giants. He even DVR'd the games when he went into the hospital for the last time, assuming he would have returned home from the hospital to watch it. He passed away that day.

Bob went to New York University Law School at night, working full-time during the day to support his wife, Ellyn, and three very young children, whom he watched on Sundays to give Ellyn a break. He coached the children's sports teams. He graduated from Lehigh University, where his son and grandson also graduated. He was married to Ellyn in December 1960, and is survived by their three children: Mark (wife Stacey), Nancy and Amy, as well as two grandchildren, Jake and Hannah.

Bob was an incredible man who loved his family and left them with nothing but wonderful memories and life lessons. His life was fulfilled and complete, and he did all you could ever ask of a man.

He will certainly be missed by his colleagues, friends and family. ■

DCPP 101: What Happens When Allegations of Child Abuse are Reported to DCPP?

by Dina Mikulka and Theodore J. Baker

A parent often is informed of a pending Division of Child Protection and Permanency (DCPP) investigation by opening the door to find a caseworker asking questions and wanting access to the family home, or maybe even seeking to remove the children. A daunting encounter, indeed. The family practitioner is likely to receive a phone call shortly thereafter from a highly emotional client seeking advice and direction.

Unless an attorney represents clients in matters involving DCPP in the regular course of their practice, it is possible, if not likely, that they may not be aware of the numerous steps and potential pitfalls that await the client. This article is a primer on a DCPP investigation and accompanying litigation with the hope that an attorney who may not be intimately familiar with this highly specialized area of the law will know what to expect from the process.

Step 1: The Referral & Investigation

DCPP investigations begin with a referral. The concept of mandatory reporters of child abuse and neglect is a common misperception. In New Jersey, N.J.S.A. 9:6-8.10 provides that all people are mandatory reporters:

> Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to the Division of Child Protection and Permanency by telephone or otherwise.

Since the early 2000s, DCPP referrals have been centrally screened through a call-in mechanism conducted though a hotline number (1-877-NJ ABUSE). In addition, each DCPP local office has a procedure in the event there is a walk-in referral. Typically, the reporter is provided with access to a phone to call the hotline. The calls are screened by the State Central Registry (SCR). This number is operated 24 hours per day, seven days per week.

Currently, individuals who make referrals of child abuse allegations are immune from "any liability, civil or criminal," which extends to individuals who testify in court proceedings.[2] This immunity extends even to individuals who make referrals to DCPP for malicious reasons. It is a disorderly persons offense to fail to report an act of child abuse "having a reasonable cause to believe that an act of child abuse has been committed."[3] Under the existing statutory and case law scheme, it is not a violation of Title 9 or *per se* neglectful for a person to make multiple baseless referrals to DCPP.

The initial screener is responsible for determining if the allegations are treated as a Child Protective Services (CPS) referral or Child Welfare Service (CWS) referral.[4] A CPS referral requires the screener to determine that the allegations constitute child abuse/neglect if true. A CWS categorization means that the situation warrants a "potential service" for the child and/or family, but "there is insufficient risk to justify a child abuse/neglect investigation."[5]

The investigator's initial response times differ based on the categorization of the referral by the screener. The response times for CWS referrals vary between 72 hours and five working days.[6] The response time for a CPS referral is typically either within 24 hours or "immediate," by the end of the workday.[7] Although the response timeframes are clearly spelled out, some discretion is afforded to both the screener and the local office manager.[8] Note that DCPP has the capacity to respond overnight, on weekends and holidays by way of the Special Response Unit (SPRU), so these timeframes for initial contact in CPS investigations are typically kept.[9]

Each CPS referral will require the assigned DCPP worker to render an investigatory finding.[10] The timeframe for rendering these investigatory findings is 60 days after the report was received by the central registry.[11] However, there can be 30 day extensions by the

local office manager "if the child protective investigator is continuing efforts to confirm credible information."[12]

Step 2: The Investigation & Findings:

At the conclusion of the investigation, specific findings are made and recorded in the DCPP Central Registry.[13] Currently, there are four possible findings: (1) substantiated; (2) established; (3) not established and, (4) unfounded.[14] Prior to April 1, 2013, findings were limited to two categories (1) substantiated or (2) unfounded.

The established finding is a newer investigatory conclusion. It constitutes a finding of child abuse and neglect yet further acknowledges factors mitigating against a more serious finding of substantiated.[15]

The code goes on to clarify that a finding of either established or substantiated results in a determination that the child is abused/neglected pursuant to N.J.S.A. 9:6-8.21.[16] The findings of not established and unfounded constitute a determination that a child is not abused or neglected pursuant to the same statute.[17]

N.J.A.C. 3A:10-7.3(c) provides the basic criteria for each investigatory finding:

> (c) For each allegation, the Department representative shall make a finding that an allegation is "substantiated," "established," "not established," or "unfounded."
>
> 1. An allegation shall be "substantiated" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21 and either the investigation indicates the existence of any of the circumstances in N.J.A.C. 3A:10-7.4 or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 3A:10-7.5.
> 2. An allegation shall be "established" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21, but the act or acts committed or omitted do not warrant a finding of "substantiated" as defined in (c)1 above.
> 3. An allegation shall be "not established" if there is not a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, but evidence indicates that the child was harmed or was placed at risk of harm.
> 4. An allegation shall be "unfounded" if there is not a preponderance of the evidence indicating that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, and the evidence indicates that a child was not harmed or placed at risk of harm.

The division investigator must look to N.J.A.C. 3A:10-7.4 to determine whether child abuse or neglect is substantiated. More specifically, N.J.A.C. 3A:10-7.4(a)1-6 provides, "the existence of any one or more of the following circumstances shall require a finding of substantiated when the investigation indicates:"

1. The death or near death of a child as a result of abuse or neglect;
2. Subjecting a child to sexual activity or exposure to inappropriate sexual activity or materials;
3. The infliction of injury or creation of a condition requiring a child to be hospitalized or to receive significant medical attention;
4. Repeated instances of physical abuse committed by the perpetrator against any child;
5. Failure to take reasonable action to protect a child from sexual abuse or repeated instances of physical abuse under circumstances where the parent or guardian knew or should have known that such abuse was occurring; or
6. Depriving a child of necessary care, which either caused serious harm or created substantial risk of serious harm.

Emphasis added.

If N.J.A.C. 3A:10-7.4 does not apply, DCPP staff must look to N.J.A.C. 3A:10-7.5 to determine whether a finding should be substantiated or "stablished.[18]

There are aggravating factors which lean toward substantiation as opposed to established. N.J.A.C. 3A:10-7.5(a) 1-7 provides, "the Department representative shall consider the aggravating factors below in determining if abuse or neglect should be substantiated or established:"

1. Institutional abuse or neglect;
2. The perpetrator's failure to comply with court orders or clearly established or agreed-upon considerations designed to ensure the children's safety, such as a

child safety plan or case plan;
3. The tender age, delayed developmental status, or other vulnerability of the child;
4. Any significant or lasting physical, psychological, or emotional harm on the child;
5. An attempt to inflict any significant or lasting physical, psychological, or emotional harm on the child;
6. Evidence suggesting a repetition or pattern of abuse or neglect, including multiple instances in which abuse or neglect was substantiated or established; and
7. The child's safety requires separation of the child from the perpetrator.

N.J.A.C. 3A:10-7.5(b) 1-4 further provides that "the Department representative shall consider the mitigating factors below in determining if abuse or neglect should be substantiated or established:"

1. Remedial actions taken by the alleged perpetrator before the investigation was concluded;
2. Extraordinary, situational, or temporary stressors that caused the parent or guardian to act in an uncharacteristically abusive or neglectful manner;
3. The isolated or aberrational nature of the abuse or neglect; and
4. The limited, minor, or negligible physical, psychological, or emotional abuse or neglect on the child.

Many DCPP investigations conclude at this point, without a complaint being filed in the superior court. The individual being investigated with receive a findings letter that advises of the DCPP finding. A similar letter will be directed to the individual would made the initial referral had the referral not been made anonymously.

The findings letter will also advise a perpetrator of the right to an administrative appeal. Recently, appellate case law required alleged perpetrators be afforded the right to administrative due process not only for substantiated findings, but for established findings as well.[19] Other recent appellate case law has recognized the right to counsel at these hearings, and has directed the Office of the Public Defender to provide representation for indigent individuals.[20] The administrative appeal process will be discussed in further detail below. However, it should be understood that the process itself is extremely lengthy. At the present time, it is not uncommon for an administrative hearing to be scheduled well over a year after the initial notice of appeal was filed.

The only findings that may be expunged from DCPP records are those categorized as unfounded. If an unfounded finding was entered, reports of the investigation would be typically expunged within three years.[21]

As will be discussed in further detail below, DCPP may choose to file a complaint in Superior Court seeking various relief. In cases pled under Title 9, the judge will be charged to determine if the child at issue is abused and neglected under the statute. N.J.A.C. 3A:10-7.5, however, limits the trial court to a general finding of whether the child was abused or neglected, but not substantiated or established. "The Superior Court, Chancery Division, has jurisdiction to adjudicate determinations that a child is an abused or neglected child."

The administrative code prevents the superior court from rendering a decision as to a specific finding. Specifically, N.J.A.C. 3A:10-7.3(h) 1-3 provides, the "Department shall retain the administrative authority to:

1. Determine whether an allegation of conduct determined to be abuse by the Superior Court, Chancery Division, is established or substantiated;
2. Determine whether an allegation of conduct determined to not be abuse or neglect by the Superior Court, Chancery Division is not established or unfounded; and
3. Determine the finding for each allegation of abuse or neglect that is not adjudicated by the Superior Court, Chancery Division.

Moreover, there is no statutory requirement under Title 9 for a trial court to make specific findings regarding aggravating or mitigating circumstances. The court is only required to conduct a fact-finding hearing, which is defined as "a hearing to determine whether the child is an abused or neglected child as defined herein."

Even though a trial court may conduct a fact-finding trial pursuant to Title 9, "[a] determination by the Superior Court that abuse or neglect did occur shall not extinguish a perpetrator's right or eligibility to contest a substantiated finding of the allegation by administrative hearing pursuant to N.J.A.C. 3A:5."

One very obvious question that needs to be addressed with clients facing DCPP litigation or administrative proceedings is whether there is any real benefit to a litigant of having a finding of established versus substantiated. Although higher courts may eventually weigh in on this issue, it does appear that a substantiated finding may have a more significant negative impact

on a litigant's life including preclusion from working as a childcare provider, being licensed to run a daycare center or preschool and possibly expanding a family by way of adoption. The way DCPP uses established findings or even not established findings remains to be seen and likely determined by way of additional litigation which explores what, to many practitioners, is a very murky area of the law.

Step 2.5 - Administrative Appeal

Not every case in which there are investigatory findings of child abuse or neglect is litigated before the Superior Court. Investigatory findings of child abuse or neglect can be administratively appealed for a trial de novo before the Office of Administrative Law (OAL).

Originally, neither a substantiated finding nor inclusion in the central registry was entitled to procedural due process and was appealable to the appellate division as a final agency decision. However, based upon a due process challenge, an administrative appeal procedure was established.

The *East Park High School* decision recognized that, although the substantiated reports are deemed confidential pursuant to N.J.S.A. 9:6-8.10a, they were subject to disclosure to third-parties upon written requests for certain statutorily authorized purposes. For example, if necessary to provide evidence in a matrimonial custody dispute, DCPP investigatory records could be obtained by a litigant. Based upon the foregoing, the court held that the inclusion in the central registry created a protectable liberty interest under the state constitution warranting due process to protect an individual's reputation. The court ultimately determined that the procedure utilized by DCPP was constitutionally infirm since the alleged perpetrator was not afforded the right of cross-examination or any opportunity to rebut the referral. As a result, DCPP (then DYFS) was required to provide administrative appeals from determinations of substantiation.

Step 3: Superior Court Litigation

At any point after the initial referral, DCPP can commence litigation under Title 9 or Title 30, by way of a verified complaint/order to show cause, or an emergency removal without a court order. While DCPP is typically the party originating child abuse and neglect proceedings under Title 9, a parent or other person with knowledge that a child is being abused or neglected may originate the proceedings by filing an appropriate complaint.

Litigants in DCPP proceedings can seek affirmative relief in the form of a return of their children at a hearing which takes place within three court days of the application being filed and after which the children shall be returned "unless [the court] finds that such return presents am imminent risk to the child's life safety or health."

An underutilized alternative available to parents in DCPP matters prior to litigation is a request for preliminary procedure permitted by N.J.S.A. 9:6-8.35. DCPP may "adjust suitable cases before a complaint is filed," with that adjustment to include a "preliminary conference held by the division at its discretion upon written notice to the parent or guardian … for the purpose of attempting such adjustment." Statements made by potential defendants in child abuse matters during the preliminary procedure process are granted limited use immunity: "No statement made by the potential respondent during a preliminary conference … may be admitted into evidence at a fact finding hearing under this act or in a court of criminal jurisdiction at any time prior to conviction."

These types of DCPP hearings are the subject of a much longer dissertation, but include dispositional hearings (N.J.S.A. 9:6-8.45), fact-finding hearings (N.J.S.A. 9:6-8.44) and permanency hearings (N.J.S.A. 30:4C-11.4). It is important to know that there, DCPP matters are governed by their own evidence statute and court rules.

The issue in most cases docketed under FN dockets is whether or not the child is abused or neglected as defined by N.J.S.A. 9:6-8.21(c). Children are appointed law guardians in Title 9 litigation "to help protect [the child's] interests" and "to help [the child] express [the child's] wishes to the court." Defendants have the right to counsel and, if financially eligible, may be appointed counsel through the Office of the Public Defender.

Title 30 – Family in Need of Services

As noted above, complaints filed in the superior court under which DCPP can be granted custody, care and supervision of children may be filed under Title 9 or Title 30. It is standard practice for complaints to be filed under both titles.

The practical focus of the litigation under each of these titles is different. While the focus of litigation under Title 9 is the alleged abuse or neglect of children, the focus of Title 30 litigation is the provision of services to a family to help remedy the issues that prompted DCPP's involvement. While not found in Title 30 itself, this litigation has colloquially become known as one having a family in need of services.

While DCPP may still be granted custody of a child under Title 30 just as in Title 9, such custody may only be granted for a period of up to six months, whereupon custody can only be extended by specific application to the court.

While certainly not always the case, litigation under Title 30 is often less accusatory in nature and often used as a means as a backstop following a withdrawal of the generally harsher litigation under Title 9. In this instance, it should be noted that the withdrawal of a complaint under Title 9 does not necessarily mean that DCPP has also downgraded its administrative finding. A practitioner should be mindful that even though DCPP would not be seeking a finding of abuse and neglect from the court, it is possible that a substantiated or established finding could very well remain. In that instance, a litigant would maintain his or her rights to the administrative appeal process.

Order to Investigate

One issue facing individuals faced with the specter of a DCPP investigation process is whether or not, and to what extent, to cooperate with the investigation. In almost all instances, a parent's cooperation in a DCPP investigation is voluntary. For instance, DCPP may not compel a parent to answer questions from a caseworker or allow a caseworker inside the family home. However, as a practical matter, an attorney and client will often be faced with the uncertain navigation of offering cooperation with the hope of a more advantageous outcome than might have been achieved with stonewall approach. Obviously, each case is different for myriad reasons, and this consideration should be made separately in each case and revisited often.

DCPP is not without options when facing a parent that is not willing to cooperate with an investigation. One option is to simply exercise its authority and remove the children at issue from the home, thus triggering a case in the Superior Court. This is a potential downside to the stonewall approach – perhaps goading DCPP into exercising a removal. A second option is to file a complaint under Title 30 seeking an order to investigate.

A complaint in such a matter will lay out the allegations received by DCPP, its efforts to investigate the matter, the nature of a parent's alleged lack of cooperation, and the division's position that further investigation is needed to protect the best interest of the child involved. If convinced of DCPP's position, a court may enter an order requiring a parent to cooperate in specific aspects of the investigation.

Termination of Parental Rights

In the normal course, if after approximately 12 months, the parents of a child have not remedied the issues that had led to removal of the child in the first place, DCPP may opt to file a new complaint for termination of parental rights. Pursuant to N.J.S.A. 30:4C-15.1(a), using the "best interests of the child standard," the division must prove by clear and convincing evidence that:

(1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
(2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
(3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
(4) Termination of parental rights will not do more harm than good.

A separate section of the statute addresses termination of parental rights due to parental abandonment.

Conclusion

As can be seen, the journey from an initial referral to the conclusion of litigation is lengthy and arduous with numerous twists and turns. No two cases are the same, involving different families and different issues, not to mention different judges and the different ways that different counties conduct litigation. However, the basic framework of a DCPP matter is set for every litigant from Bergen to Cape May counties. Any attorney that chooses to represent a client along this journey would be well to have a full understanding of the roadmap. ■

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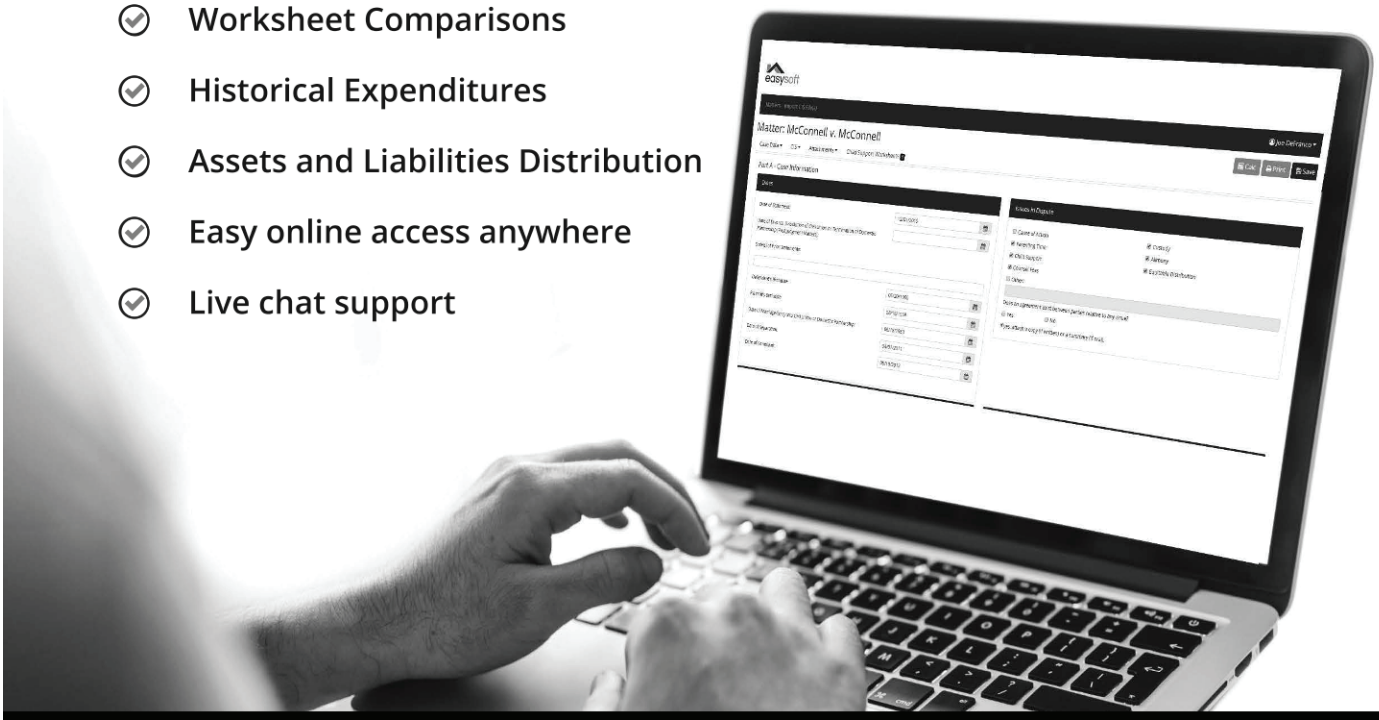

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Settlement Negotiations as Evidence in Contested Custody Disputes: Highly Probative Evidence or an Impermissible Infringement on a Party's Right to Confidentiality?

by Thomas DeCataldo

Any practitioner regularly handling family law matters has been there. You are sitting in the hallway of the courthouse as part of an all-day-long intensive settlement conference. In the throes of a contentious and protracted dispute, a previously intractable party finally makes an offer of compromise on a custody issue, but the offer comes with a catch — the offer is conditioned upon obtaining a specific result on an unrelated economic issue such as alimony or equitable distribution. Enraged and frustrated, your client begins questioning whether the court can be made aware of this negotiation tactic, which unquestionably uses the children as negotiable items. Much like anything else in the law, the answer to this question depends upon the unique facts and circumstances of the case.

This scenario happens regularly. For example, a party may be willing to agree to a more expansive parenting schedule for the non-custodial parent if the alimony award paid to that party is increased. Alternatively, one party may be willing to consent to another parent's request to relocate with a child, conditioned on certain economic demands being met. Sometimes, the tactic is not as unsavory as it might sound and there is a cognizable nexus between the custody issue and the economic issue. A party may be considering a compromise in good faith, but certain economic considerations are triggered if the compromise is made, such as in a dispute over sending a child to private school. Other times, one party may believe if they compromise on one issue, such as custody, they are entitled to a concurrent compromise on another issue.

Most practitioners recognize that negotiating the rights of children in exchange for money or some other unrelated demand is an anathema, universally disfavored by judges and custody experts. However, in matrimonial practice it goes on every day. The parties are supposed to formulate their positions in a custody dispute based upon the best interests of the children. When a parent leverages their position on a custody issue against another demand, one must question whether they are sincerely advocating for the best interests of a child or simply advancing their own agenda. Evidence of such behavior has the potential to be highly probative in a custody dispute, for purposes of credibility, and for purposes of evaluating whether a parent sincerely believes their proposed position reflects the arrangement that is best for the children at issue.

There is a fundamental difference between negotiating resolutions to custody and parenting time disputes and negotiating financial issues in family law disputes. With the former, the outcome of the dispute carries tremendous significance to the child at issue. The resolution to a custody dispute determines where a child will live, how major decisions will be made for the child, and how often the child will see his or her parents. Our courts have previously recognized the importance of resolving this issue, holding:

> "There are obviously few judicial tasks which involve the application of greater sensitivity, delicacy and discretion than the adjudication of child custody disputes, which result in greater impact on the lives of those affected by the adjudication, and which require a higher degree of attention to the properly considered views of professionals in other disciplines."[1]

While economic issues also carry significance in the lives of the family involved in the dispute, clearly the stakes are not quite as high.

Most litigants going through a custody dispute are routinely assured that a family part judge will never learn

about the substance of settlement negotiations because of the various evidence rules governing settlement discussions, but a legitimate question arises as to whether that should hold true. While the mere mention of settlement negotiations to family part judges often triggers a protective and disinterested response, the reality is that the rules of evidence are not quite as stringent as many attorneys and judges seem to believe. In certain settings, settlement negotiations are not sacrosanct or unmentionable and in fact they are appropriately admissible in court.

In this author's opinion, there are several valid reasons settlement proposals in child custody disputes should be more regularly admitted into evidence, depending upon the circumstances in which they arise. Conversely, there are also numerous valid reasons why these proposals should be excluded from evidence. This article examines the various considerations that are triggered when a party to a custody dispute seeks to include such evidence in a contested custody dispute.

The Rules Governing Settlement Negotiations

In determining whether or not to allow settlement proposals into evidence, it is important that the context of the proposal be established, as this will dictate the rules of its admissibility. Essentially, there are two rules that govern the admissibility of settlement negotiations: N.J.R.E. 408 and N.J.R.E. 519. The former governs general settlement negotiations and the latter governs mediation and meditation communications. Although the two rules are distinct and distinguishable, they are often confused and relied upon improperly.

Many times, family law practitioners convey a settlement proposal and refer to the proposal as privileged, or inadmissible in any further action. However, these statements are a misnomer if the proposal did not constitute a mediation communication. Settlement proposals in New Jersey are not privileged and are not confidential. To the contrary, they are supposed to be admissible in evidence so long as they are proffered for a permissible purpose.

Settlement negotiations are governed by N.J.R.E. 408. This rule does not convey any privilege or confidentiality to such communications. In fact, it is simply a rule of relevance – not a codified privilege. Specifically, the rule provides as follows:

> "When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim, shall not be admissible to prove liability for, or invalidity of, or amount of the dispute claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.[2]"

The rule governing settlement negotiations differs significantly from the rule governing mediation. If the parties exchange settlement proposals as part of mediation, the situation is governed by N.J.R.E. 519, not N.J.R.E. 408. This rule *does* render mediation communications privileged and confidential, with only very narrow exceptions, such as evidence of a signed agreement in a record, or if a threat of criminal conduct is made, among other very limited exceptions.[3]

The two rules have important distinctions. To begin, they are not even housed in the same chapter of the rules of evidence. The rule governing settlement offers and negotiations is provided under "Relevancy and Its Limits." The rule governing mediation is addressed under "Privileges." Consequently, settlement negotiations are deemed irrelevant, whereas mediation communications are confidential and privileged. This is a critical difference.

Effectively, there is virtually no way to appropriately introduce mediation communications into evidence. The focus of this article is on settlement negotiations made outside of a mediation, as such communications are not subject to confidentiality or privilege – it is simply a question of whether they are relevant.

Evidence Rulings on Settlement Negotiations is a High Stakes Determination

When a party seeks to introduce evidence of settlement negotiations before a family part judge, the court is immediately confronted with a critical decision that can impact the outcome of the dispute, as well as an inherent and irreconcilable tension between the rights of children and the rights of the parents. Pursuant to New Jersey's custody statute, children are entitled to have a custody determination made by the court that promotes their best interests.[4] This decision must consider the 14 factors set forth in the statute, which include:

1. Parents' ability to agree, communicate and cooperate in matters relating to the child;

2. Parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;
3. Interaction and relationship of the child with its parents and siblings;
4. History of domestic violence, if any;
5. Safety of the child and the safety of either parent from physical abuse by the other parent;
6. Preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;
7. Needs of the child;
8. Stability of the home environment offered;
9. Quality and continuity of the child's education;
10. Fitness of the parents;
11. Geographical proximity of the parents' homes;
12. Extent and quality of the time spent with the child prior to or subsequent to the separation;
13. Parents' employment responsibilities; and
14. Age and number of children.[5]

For their part, parents are entitled to, and in fact required to, privately pursue amicable resolutions to custody and parenting time disputes before proceeding with litigation. By court rule, parents are required to attend custody mediation, where they negotiate resolutions to custody and parenting time issues.[6] Parents expect and rely upon these conversations being confidential and not ultimately admissible in court. To a large degree, the law supports this concept. New Jersey law favors and encourages amicable out-of-court settlement of disputes. This is the underlying rationale behind the evidence rule barring the use of settlement negotiations as evidence.[7]

New Jersey decisional law has recognized the high stakes facing trial judges when determining whether to allow settlement negotiations into evidence. The court must take great care to balance the probative value of any appropriate use of settlement evidence against the very great risk of prejudice caused by such evidence.[8] Without exaggeration, this one evidentiary ruling could easily impact the outcome of a dispute depending upon the content of the settlement negotiations.

The Case for Admitting Settlement Negotiations into Evidence

Generally, a party seeking to admit evidence of settlement negotiations into evidence does so for a specific reason. Little is gained if the information set forth in the settlement negotiations is simply a recitation of the trial positions. Ordinarily, this situation arises because the proponent of the evidence wishes to attack the credibility of the other parent, or undermine the sincerity and consistency of the position the other parent is taking in the custody dispute. There are several valid reasons why this evidence should be admissible.

To begin, the task at hand for both litigants and the court is to produce a resolution that promotes the best interests of a child. If information set forth in settlement negotiations assists in that task for some meaningful reason, the court does a disservice to the child if it fails to consider same. A parent's desire to keep settlement discussions private should not trump information that could lead to improving a custodial arrangement for a child. New Jersey law regularly makes clear that the rights of children are a priority over the rights of their parents. By way of a few examples, consider:

- Parents may never waive child support as part of a negotiation;
- Parties may not address custody or child support in a prenuptial agreement; and
- Parents may not consent to an emancipation age if the child is not actually emancipated.

If there is evidence in the form of settlement negotiations that demonstrates a parent is willing to compromise his or her position on the custody issues in exchange for some other demand being met, economic or otherwise, a strong case can be made that this evidence should be considered. There is authoritative support for this argument from two sources.

N.J.S.A. 9:2-4 Implicitly Authorizes the Use of Settlement Negotiations

First, the court is required to consider the 14 factors set forth in N.J.S.A. 9:2-4. Among these factors is the "parents' ability to agree and communicate in matters relating to the child," and "any history of unwillingness to allow parenting time not based on substantial abuse."[9] Both of these factors can be examined in certain circumstances by reviewing settlement negotiations.

With regard to the first factor, one can easily envision a scenario where a party links a proposed compromise on a custody issue to a concurrent unreasonable position. For example, a parent might be willing to allow a child to spend additional overnights with the adverse party if a certain demand is met. However, using N.J.R.E. 408 as

a shield, the parent opposes this request for additional overnights to the court in certifications and a trial brief. The parent seeking the additional overnights should be permitted to share this information with the court for purposes of demonstrating that the parent opposing this request was willing to agree to the relief conditioned on a different demand being met. Allowing this into evidence ensures the statutory factor is given proper consideration.

By the same token, the court must consider any unwillingness to allow parenting time that is not based on substantial abuse. If a parent is conditionally willing to allow additional parenting time, the court should consider the nature of the condition, so it can determine whether the unwillingness to allow the parenting time was reasonable or unreasonable. Without allowing the court to consider this information, it never really obtains a full picture, which inhibits an exhaustive application of the factors it is required to consider when fashioning an award of custody.

New Jersey Decisional Law Suggests Settlement Negotiations Should be Considered

In *Burns v. Burns*, a party refused to provide his former wife a Jewish "get," citing a religious objection.[10] However, the trial court allowed evidence of settlement negotiations, which demonstrated that the man was willing to provide the "get" if the wife transferred $25,000 into a trust for their daughter.

The court's rationale for allowing evidence of the settlement negotiations was relatively obvious. The use of the settlement proposal was authorized under N.J.R.E. 408 not to conclusively prove whether or not the wife was entitled to the "get," but rather for another purpose, namely to demonstrate that man's objection was not truly religious.

The Supreme Court of New Jersey has also recognized the need to relax the rules of evidence in contested custody disputes. In *Kinsella v. Kinsella*, the Supreme Court noted that one consequence of the special role of the courts in custody disputes is that evidentiary rules normally accepted as part of the adversarial process are not always controlling in child custody cases. The rules of evidence are somewhat relaxed in trials having to do with a determination of custody, where it is necessary to learn of the child's psychology and preferences. In order to determine what is in the child's best interest, courts have often relaxed the seemingly inflexible procedural rules of traditional adversary proceeding. Thus, it is said that the courts must try to give the parties their fair trial in open court and at the same time try to do what is best for the child or children.[11]

Although there is no published authority specific to the issue of settlement negotiations in family law matters since *Burns*, clearly the rationale in that decision could be analogized to custody disputes. For example, if a parent was unwilling to agree to a parenting plan in trial submissions, but there were prior settlement proposals that reflected a willingness to do so if other demands were satisfied, the court should consider the proposal to understand the true nature of the parents' objection, if there is one. This would also seem consistent with the Supreme Court's preference for relaxing the stringency of the rules of evidence in order to fairly determine a child's best interests.

The Supreme Court of New Jersey recognized that a child's best interests is the lodestar consideration in a custody matter.[12] Given the focus our courts place on promoting the best interests of the children, the use of settlement negotiations as evidence in custody disputes should be more readily allowed. A parent should not be permitted to use the rules of evidence to shield a willingness to compromise on the custody issues in exchange for money or some other demand unrelated to the child's best interests. If the court does not allow evidence of this nature, it is deprived of probative information that provides insight into the parent's sincerity with regard to the best interests of the child(ren) at issue, as well as that parent's credibility, which in the end, only serves to hurt the very children the court is seeking to protect.

The Case Against Admitting Settlement Negotiations

Although there may be numerous reasons to consider allowing settlement negotiations into evidence in a contested custody matter, there is also great danger that doing so creates serious and irreparable prejudice to a party.

To begin, it is somewhat inconsistent that New Jersey law provides such stringent protection to mediation communications, yet treats settlement negotiations made outside of mediation in a far less protective fashion. One could reasonably question why the involvement of a third-party mediator transforms what are effectively the same communications from settlement negotiations, treated under a relevancy standard, to mediation communications that are privileged and confidential. Applying simple common sense, one could reasonably extrapolate

that settlement negotiations should rarely, if ever, be evidential, if they are effectively the same thing as mediation communications and mediation communications are almost never admissible evidence.

Both the Legislature and the Judiciary favor amicable out-of-court settlements. N.J.R.E. 519 was enacted to mimic the mediation statute enacted by the Legislature.[13] As referenced above, the Supreme Court of New Jersey favors the amicable resolution of disputes without the need for litigation, hence the rationale behind barring settlement negotiations from coming into evidence.[14]

Given the judicial and legislative desire to encourage out-of-court settlements, there is real reason to be concerned that allowing settlement negotiations into evidence would have a chilling effect on the negotiation process. If parties feared that settlement discussions would one day be revealed to the family part judge, they may be reluctant or hesitant to make any suggestion of compromise, which discourages settlement. Clearly, this is not a public policy the judiciary or legislature would likely support. Again, this could lead one to surmise that settlement negotiations were not intended to be liberally allowed into evidence given the public policy consequences that would follow.

Additionally, the consideration of settlement proposals creates the real risk that a party is severely prejudiced by the disclosure of such information. Part of the underlying rationale of N.J.R.E. 408 contemplates that a party's willingness to compromise and avoid protracted litigation may be unrelated to the merits and sincerity of the party's position. A person may merely be seeking peace of mind when compromising a claim, or simply not want to pursue the matter.[15]

While this is true in all types of litigation, it is especially present in contested custody disputes. Often, parents simply do not want to expose their children to the trial process, which can include forensic evaluations, as well as the possibility of being interviewed by an expert or the trial judge. Under these scenarios, it is reasonable to assume the party's willingness to compromise is being offered solely to bring an end to the dispute for sake of their children, not because they believe the compromised arrangement to be best for the children at issue or because their trial position is insincere.

Additionally, a party opposing the use of settlement negotiations as evidence may find support in other Rules of Evidence. N.J.R.E. 403 allows the trial court to exclude otherwise relevant evidence if the probative value is outweighed by the prejudice to a party. A party opposing the use of settlement negotiations could readily argue that the disclosure of settlement negotiations provides only modest probative value, while greatly prejudicing one of the parties.

Conclusion

Much like any other evidence ruling, the use of settlement negotiations as evidence requires a critical analysis of the purported proffer, and the specific facts of the case at bar. Even if the settlement negotiations are allowed into evidence, the court always maintains discretion over how much weight, if any, to afford such evidence. In any event, practitioners are well-served understanding the distinction between settlement negotiations and mediation communications, and making the correct arguments to the court when seeking to rely upon settlement negotiations, or to preclude the disclosure of this information.

Given the importance of custody disputes to the children at issue, there is reason to give more than mere superficial consideration to allowing the admission of settlement negotiations into evidence. Conversely, the court must be very careful to thoughtfully rule on these issues, so as to avoid deterring the free flow of settlement negotiations and to avoid unfair prejudice. ■

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Calculating Alimony in New Jersey as a Result of the Tax Code Changes

by Lynne Strober and Anthony Prinzo, CVA

The Tax Cuts and Jobs Act is changing how the Internal Revenue Service (IRS) treats alimony and makes other substantial changes that will impact family law practitioners, and their clients.[1] Effective Jan. 1, 2019, alimony paid by the payor will no longer be deductible, and will not be taxable to the recipient for federal tax purposes. The relevant IRS code sections are as follows:

> **Sec. 206. Alimony deduction by payor/ inclusion by payee suspended.**
>
> Under pre-Act law, alimony and separate maintenance payments were deductible by the payor spouse under Code Sec. 215(a) and includible in income by the recipient spouse under Code Sec. 71(a) and Code Sec. 61(a)(8).
>
> **New law.** For any divorce or separation agreement executed after December 31, 2018, or executed before that date but modified after it (if the modification expressly provides that the new amendments apply), alimony and separate maintenance payments are not deductible by the payor spouse and are not included in the income of the payee spouse. Rather, income used for alimony is taxed at the rates applicable to the payor spouse.[2]

The Rule of Thumb Analysis

In New Jersey, our prior rule of thumb was that the alimony paid in most cases was one-third of the difference of the gross income from all sources of the parties. This calculation provided an unofficial alimony amount as a starting point from which negotiations began.

The rule of thumb was not authorized by statute or case law. There were and are specific factors to be utilized to assess the amount of alimony to be paid. In fact, there are cases opposing the use of a formula. However, in negotiating settlements, the rule of thumb was often utilized. If the divorce case was not going to trial, alimony may have been negotiated utilizing the rule of thumb.

Effective Jan. 1, 2019, during settlement discussions, the "Rule of Thumb" must be taken one step further to consider the federal tax law changes.

In taking the rule of thumb one step further, the amount of alimony paid will, in all likelihood, be less than before the Tax Cuts and Jobs Act was enacted. The goal of a revised rule of thumb is to leave the parties in approximately the same tax position on their respective federal returns as before the enacting of the Tax Cuts and Jobs Act. This may be accomplished by tax-effecting the alimony amount.

Blended Rate

Upon divorce, there are only two possible filing statuses: single or head of household. Therefore, in tax-effecting the alimony, our blended tax rate only considers these two filing statuses. In looking at the new tax charts, effective in 2018, they appear as follows:

Federal tax brackets: 2018 tax brackets (for taxes due April 15, 2019)		
Tax rate	**Single**	**Head of household**
10%	Up to $9,525	Up to $13,600
12%	$9,526 to $38,700	$13,601 to $51,800
22%	$38,701 to $82,500	$51,801 to $82,500
24%	$82,501 to $157,500	$82,501 to $157,500
32%	$157,501 to $200,000	$157,501 to $200,000
35%	$200,001 to $500,000	$200,001 to $500,000
37%	$500,001 or more	$500,001 or more

There are only seven tax brackets for these two filing statuses. Therefore, these tax brackets provide 49 possible combinations. The following are the averages for the 49 possible combinations:

Tax Rates	10%	12%	22%	24%	32%	35%	37%
10%	10.0%	11.0%	16.0%	17.0%	21.0%	22.5%	23.5%
12%	11.0%	12.0%	17.0%	18.0%	22.0%	23.5%	24.5%
22%	16.0%	17.0%	22.0%	23.0%	27.0%	28.5%	29.5%
24%	17.0%	18.0%	23.0%	24.0%	28.0%	29.5%	30.5%
32%	21.0%	22.0%	27.0%	28.0%	32.0%	33.5%	34.5%
35%	22.5%	23.5%	28.5%	29.5%	33.5%	35.0%	36.0%
37%	23.5%	24.5%	29.5%	30.5%	34.5%	36.0%	37.0%

The overall average of the 49 possible tax combinations is 24.6%. Therefore, to obtain a new rule of thumb for settlement purposes, the blended tax rate of 24.6% would be applied to the calculated annual alimony amount.

In applying this methodology, the tax-effected alimony amount would be calculated as follows:

Husband - Annual Cash Flow	$200,000
Wife - Annual Cash Flow	$50,000
Difference	$150,000
Applicable Percentage	÷33%
Annual Alimony	$50,000
Alimony with Revised Rule of Thumb to Tax Effect x 75.4% (100%-24.6%)	$37,700

The example above applies the blended Federal tax rates, and considers both parties' tax brackets, as well as the lost tax benefit to the payor. This provides a new negotiation starting point for alimony discussions in a divorce, effective Jan. 1, 2019.

Clearly, while this is a simplified approach to approximate the amount of tax effected alimony, the prior rule of thumb was a simplified approach as well. As settlement negotiations progress, it is suggested that a *pro forma* tax return be prepared, inclusive of the alimony amount in discussion, reflecting each party's deductions and other income. This would provide a more accurate blended rate. Practitioners should consider doing this even now to be sure the rule of thumb provides a fair result. Practitioners should review the statutory factors as well to determine if the facts of each case require a more tailored analysis.

This type ofanalysis is part of the discussion on how to deal with the code change. Others may have a better formula. This calculation is intended to start a discussion among practitioners and accountants as to the best way to address the Tax Cuts and Jobs Act alimony treatment. It is best to have an accountant review the result to be sure it is in your client's best interest.

Alimony Taxation at the State Level

As of Jan. 1, 2019, many states, including New Jersey, continue to allow for the deductibility of alimony by the payor, while the recipient will still be paying taxes on the amount received. This conflicts with the Tax Cuts and Jobs Act that did away with the tax effecting in the federal return. The authors propose that parties should agree, and courts should order, that the payments be deemed non-taxable to the recipient and non-deductible by the payor for state purposes for consistency unless an accountant advises otherwise. This will provide consistency in the amount being paid and received. Otherwise, the tax impact on the amount of support at the state level will skew the amount being paid, because one will be taxable and the other will not. The federal alimony amount would be a tax-effected number, while the state alimony amount would be a gross number. As long as a court order or judgment specifically waives the deductibility of the payments by the payor and the recipients' obligation to pay taxes on the alimony received, for New Jersey tax filings it will be acceptable.

The payor may relocate or may already live in another state. In that case the parties must determine how other states treat the alimony, and then, if necessary, should adjust the payments to be consistent with the Tax Cuts and Jobs Act. The parties cannot agree to make alimony taxable or deductible for Federal tax purposes. Nor can a court order such. But the parties can do the inverse at the state level, and waive the right for the payor to deduct the alimony and the recipient to pay the taxes.

Tax Reform and Prenuptial Agreements

Some prenuptial agreements entered before the Tax Cuts and Jobs Act provide for the payment of alimony

deductible by the payor and taxable to the recipient. Unless these prenuptial agreements were incorporated into a judgment of divorce before Jan. 1, 2019, the provisions providing for deductibility by the payor and having the recipient pay the taxes may or may not be allowable. The interpretation of the act as it relates to these pre-marital agreements is not yet known because many such prenuptial agreements were entered many years ago. Their incorporation into a judgment of divorce may not occur, if at all, until years from now, long after the effective date of the act.

Not every prenuptial agreement will contain a provision allowing for the amounts to be renegotiated if the tax law changes. Who would have thought such would occur? Certainly, drafting a prenuptial agreement consistent with the then existing tax code is not malpractice. The standard of care in the practice has been for the alimony to be deductible/taxable with few exceptions.

It is clear that prenuptial agreements executed after Jan. 1, 2019, will need to reflect the change in the Federal tax code and be net payments. However, the general consensus is that deductibility by the payor with the recipient paying the taxes on prenuptial agreements executed prior to Jan. 1, 2019, may not be upheld. These agreements may have to be renegotiated. It will be up to the IRS and tax court to provide guidance. While all premarital agreements are agreements incident to divorce, the time of enforcement may be too far in the distance.

The Tax Cuts and Jobs Act will apply where an agreement or judgment of divorce is entered after Jan. 1, 2019.

The Divorce from Bed and Board

The judgment of divorce from bed and board is not a final judgment of divorce. Therefore, the parties can file a joint return. If the parties elect to file married filing separately and the agreement was executed before Jan. 1, 2019, the alimony can be deductible/taxable. If the agreement incorporated into a divorce from bed and board is executed after Dec. 31, 2018, even if the parties file separately, the alimony will not be deductible and taxable unless the law changes. The divorce from bed and board has become more popular because this mechanism allows for the continuation of medical insurance coverage. It should be confirmed in writing by the payor's employer and the insurance company providing the coverage that the divorce from bed and board will be honored, and that the spouse not employed by the company providing insurance coverage will continue to receive coverage until the entry of the final judgment of divorce.

In addition to the tax law changes effecting alimony, other issues may need to be addressed within a divorce settlement. Some of these issues are the following:

Dependency Exemption

Historically, a taxpayer was allowed to exclude from income an amount each year for each dependent he or she reported on their tax return. In 2017, this amount was $4,050 per dependent, so a family of four would exclude $16,200 from their taxable income. Beginning with the filing of the 2018 tax return, this dependency exemption has been eliminated. In a divorce setting, often the party who will take a child or children as dependents was negotiated, as it would afford one of the parties a tax savings. The new tax code eliminates the personal exemption for the tax years 2018 through 2025. Therefore, no deduction is available for qualified dependents on the client's tax return and this issue will not be addressed in a matrimonial settlement agreement or decision.

Child Tax Credit

Perhaps in an effort to somewhat offset the impact of elimination of the personal exemption of $4,050 per individual, the new tax law doubled the child tax credit from $1,000 to $2,000 per child under the age of 17. Income limits on who may claim the credit have been substantially increased from $75,000 to $200,000 (single filers) and from $110,000 to $400,000 (married filing jointly). Even taxpayers with no tax liability are eligible for a $1,400 refundable tax credit per eligible child. The new law requires that taxpayers provide the social security number of each qualifying child. This credit needs to be addressed as part of the resolution of a divorce.

Medical Expense Deduction

Through 2018, the medical expense tax deduction was permitted once the medical expenses exceeded 7.5 percent of adjusted gross income. However, currently and through 2025, the adjusted gross income minimum increases to 10 percent. When applicable, this deduction needs to be addressed.

Standard Deduction and Limit on State and Real Estate Taxes and Mortgage Interest Deductibility

There are now new limits on the deductibility of real estate and state taxes. The cap of $10,000 impacts cash flow and may make retention of the marital home

costlier, as now real estate taxes above $10,000 a year are not deductible. As for mortgage interest, interest on any acquisition indebtedness incurred after Dec. 31, 2017 is only deductible for loan amounts not exceeding $750,000 (for married filing jointly). Home equity loan interest is no longer deductible now, unless the proceeds are used to substantially improve a home, and therefore meet the definition of acquisition debt. Included in the resolution of a divorce case, the parties may elect to pay down a portion or all of the mortgage to address the increased non-deductibility of the annual mortgage payment. If a party elects to relocate due to the expense of maintaining the marital residence, this may have a negative impact on the children. This will need to be considered in resolving divorce cases.

529 Plans

Originally, 529 Plans were funds set aside for post-high school educational purposes. With the new tax laws, 529 account funds may now be utilized to pay for the educational costs related to elementary or secondary schools. The schools may be public, private, religious or vocational institutions. This may affect how educational costs are addressed as part of the divorce. The intent with these plans is that the funds, along with growth, will not be taxed when withdrawn for qualified educational expenses. However, if funds are withdrawn for non-qualified purposes, only the increase due to growth is taxable, and may be subject to an additional 10% penalty.

Tax Rates

With the lowering of the tax rates, how a spouse handles the receipt of assets, such as investments within the divorce setting may be affected. Perhaps the lower rates will affect the decision to keep or sell those assets. It is best to receive the input of an accountant.

Capital Gains Rates

The capital gains rates have been lowered. The rates have been lowered on long-term capital gains, to range from zero-to 20%, depending on a person's tax bracket. This may impact settlement discussions to include the treatment of assets, such as investments which are received in equitable distribution. Again, the involvement of an accountant is beneficial. It is suggested that a client be advised to receive the input of an accountant before committing to an agreement or presenting a case at trial.

2% Miscellaneous Itemize Deduction

Miscellaneous deductions that were previously allowed exceeding 2% of adjusted gross income have been eliminated. Therefore, tax or investment advice received as a result of divorce related issues, will not be deductible at all.

For Agreements Signed and Cases Which are Decided by a Court After Dec. 31, 2018

Family law attorneys may want to recommend in writing that clients have an accountant review their matrimonial settlement agreement to be sure that all aspects of the Tax Cuts and Jobs Act are factored into the agreement, and that the net numbers after a full calculation are correct.

It is also suggested practitioners include language in matrimonial settlement agreements that the net treatment of the alimony shall be revisited if the code changes again, and that they include a waiver of the use of an accountant if they choose not to use one.

Beware of doing something clever to try to circumvent the Tax Cuts and Jobs Act. It could cause the IRS to make a closer review of a client's return which may not be in the client's best interest. Further, it could be costly if the approach is not upheld by the IRS or Tax Court and that could be problematic for the client, and the attorney. Strict adherence to the changes in the Tax Cuts and Jobs Act is essential. ■

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Endontes

1. BUDGET FISCAL YEAR, 2018, PL 115-97, Dec. 22, 2017, 131 Stat 2054.
2. Former Code Secs. 215, 61(a)(8), and 71, as stricken by Act Sec. 11051

Munchausen Syndrome by Proxy (FDIA): Science and Strategies

by Eileen A. Kohutis, Ph.D. and Curtis J. Romanowski

News reports of young children dying at the hands of their parents make sensational news. Lacey Spears gave her 5-year-old son sodium which resulted in his brain swelling and ultimately led to his death.[1] Hope Ybarra, a chemist, poisoned her youngest child with pathogens from her workplace, altered the child's sweat tests to indicate cystic fibrosis, put water in the feeding tube which prevented the child from gaining weight, and removed the child's own blood, leading to anaphylactic shock.[2] Additionally, Ybarra claimed that she herself had cancer.[3] What connects these tragic cases, and others like them, is that these mothers were diagnosed with Munchausen Syndrome By Proxy (MSBP), now called Factitious Disorder Imposed on Another (FDIA) in the *Diagnostic and Statistical Manual of Mental Disorders-5.4.*

The German Baron Hieronymus Karl Friedrich von Munchausen was known for regaling his listeners with fanciful stories about his military career in the 18th Century. In 1951, Richard Asher, a British physician, described patients who had multiple hospitalizations in numerous hospitals and symptoms that were fabricated as having Munchausen syndrome. These patients only wanted medical attention for "the sick role."[5] Roy Meadow, a British pediatrician, coined the term MSBP in 1977, to describe the condition in which a caregiver (often the mother) fabricated or created medical symptoms in her own child, who then underwent various medical procedures for disorders that may not exist.[6]

FDIA

FDIA has four criteria: 1) falsification of physical or psychological symptoms or the inducement of a disease or injury on another person and this behavior is deceptive; 2) one person describes the other person (victim) as injured, ill, or impaired; 3) the deceptive behavior is apparent and there are no external rewards; and 4) the behavior cannot be accounted for by another disorder, such as psychosis or delusions.[7]

FDIA is a severe form of child abuse. A mother may inject foreign substances, administer laxatives, inject insulin, alter medical equipment, or suffocate her own child to create symptoms, such as diarrhea, dizziness, seizures, vomiting, and/or sleep apnea.[8] This abuse occurs in all income groups.[9] Although the typical victim is a child under the age of six,, adults and pets have also been victims.[10] Boys and girls are equally likely to be victims and fathers tend to be uninvolved in the child's care.[11] Some researchers have reported that the mothers themselves were victims of FDIA as children.[12]

An allegation of FDIA may arise in various circumstances. In educational cases, a mother with FDIA may claim that due to academic difficulties, her child needs an individualized education plan.[13] In family court, a mother may allege that the father is sexually abusing the child and the father counters by alleging that the mother has FDIA.[14] In personal injury cases, a mother may allege the child was the victim of medical malpractice.[15] Once a false allegation of FDIA has been made against a mother, she may have a very difficult time trying to invalidate the allegation and have her child returned to her.[16]

Mortality rates in FDIA cases have not been clearly established because there have not been any epidemiology studies.[17] Donna Rosenberg, a pediatrician, reviewed cases of MSBP or factitious illness in the professional literature from 1966 through 1987. She identified 117 cases and reported that, from her sample, 10 children (9 percent) died and of the 107 survivors, 8 percent of them had permanent impaired function or were disfigured.[18] However, some researchers argue that these figures are inaccurate and are overestimations of its true incidence.[19]

Diagnosis

In an effort to better understand FDIA, researchers have tried to differentiate mothers who are alleged to have this condition from mothers who do not. The results have been contradictory. Some investigators argue that mothers who are alleged to have FDIA have had some

medical training and knowledge while other investigators counter this argument stating that these mothers are not significantly different from mothers of chronically ill children who also have some medical training to care for their child.[20] Mothers alleged to have FDIA have been diagnosed with somatoform disorders, various personality disorders (*e.g.,* antisocial, borderline, narcissistic, paranoid, and schizotypal), and psychiatric disorders.[21] These disorders, too, are controversial because they exist in the general population and many parents who have these disorders do not make their children ill.[22]

Over 110 signs and symptoms suggestive of FDIA have been identified.[23] However, many of these indicators could be found in mothers who have severely disabled or chronically ill children.[24] Some of these signs are contradictory, such as describing a mother alleged to have FDIA as hostile, caring, calm, and distant.[25] When such discrepancies exist, these signs and symptoms have little value.

Most of the information about FDIA is based on case studies, retrospective review of hospital files, or women who were referred by the courts and presumed to have the condition.[26] Data obtained in this way is not based on randomly selected participants, and introduces an aspect of confirmatory bias – data that supports a certain hypothesis rather than looking at information that could disconfirm a hypothesis.

Diagnosing FDIA is difficult because the criteria are not clear.[27] Most of the data in the scientific literature are case studies, and, although this type of data is valuable, it is limited in the extent to which it can be applied to the general population. Systematic research with controls groups has not been done. Nevertheless, the courts act as if there were data to support this diagnosis.

On average, it takes about two years before a case of FDIA is presented to the court.[28] One reason for this is that health care providers are trained to trust a patient's presentation and reported history. Women with FDIA may not tell one health care provider that another provider is treating the child for the same symptoms.[29] To try to resolve the child's symptoms, the health care provider orders additional tests for which the child is subjected to medically invasive and unnecessary procedures. When the child's symptoms do not improve, or when they do not follow the typical course of a disease, the provider may refer the child to another specialist for further evaluation. It is at that point the physician may consider that the mother has FDIA, but the mother may also have become suspicious of the physician and taken the child to another physician in another hospital.

In some instances, a separation test is performed. The test typically occurs in a hospital, with covert monitoring, and involves separating the child from the mother to determine whether the child's symptoms improve, remain the same, or worsen.[30] If the symptoms improve, this is considered evidence that the mother has been inducing the symptoms in her child. Sometimes, however, the child's symptoms persist, and this may be indicative that the child's symptoms are of the result of a genuine underlying condition or that the child is not being adequately monitored.[31] However, at least one study has pointed out that alternate hypotheses are not offered to explain the findings or to question the FDIA diagnosis.[32]

A central component of FDIA is deception. Although deception can be assessed with various instruments, the motivation for the deception cannot. A woman facing FDIA allegations will vigorously deny that her actions are making her own child ill and that she is deceiving health care providers.[33] Although some mothers may truly believe they are acting in the child's best interest, others may receive secondary gains (benefits a person receives in response to physical and/or psychological symptoms), such as welfare payments, child custody, or help with a difficult child.[34] The motivations for engaging in such actions are unclear and cannot be measured.[35]

FDIA in the Law

Presently, there are no reported cases in New Jersey concerning FDIA, although the lawyer-author of this article has encountered many such cases, all of which involved the mother as the probable offender. It is the lawyer-author's opinion that it is entirely unnecessary, given the interplay of FDIA dynamics and *N.J.S.* 9:2-4, for any FDIA diagnosis to be confirmed or even likely for the factual underpinnings to affect custody and parenting time determinations, similar to parental alienation and other conclusory findings.

J.L.T. v. M.T.

The unreported appellate division decision of *J.L.T. v. M.T.*, is informative as to the treatment of MSBP or FDIA cases in this state.[36] In that case, the Appellate Division affirmed the trial court's post-judgment ruling concerning custody and parenting time, entered after allegations of MSBP against the mother.

By way of brief background, the parties in *J.L.T. v. M.T.* were divorced in 2005. Their 2005 property settlement agreement (PSA) provided that they would share joint legal custody of the child, Marissa, and that her primary residence would be with J.L.T. The PSA recognized that Marissa suffered from a respiratory illness and had been treated by doctors for some time.[37]

Just months after the divorce, there was a change in custody of Marissa after the parenting coordinator (PC) expressed a belief that Marissa, who was about 10-years-old when the case was pending, was not being properly cared for physically, psychologically or emotionally by J.L.T. The PC expressed her concerns not only about Marissa's condition, but about the obstacles posed by J.L.T.'s inability or unwillingness to care for her and interact with other adults responsible for her welfare in a mature and honest manner. She voiced deep concerns about J.L.T.'s versions of the facts, and described J.L.T. as "a very manipulative person," who is emotionally invested in Marissa's poor health and in painting M.T. as a poor caregiver.

Addressing J.L.T.'s contention that Marissa was returned home sick after visiting M.T., the PC stated that her greatest concern about J.L.T. was her "gnawing fear" that she may be doing something to Marissa to make her sick after having been with M.T. The PC thus recommended that temporary custody of Marissa be transferred to M.T. immediately, until a plenary hearing could be held, and that J.L.T. should have supervised parenting time only until it could be ascertained that she was not poisoning Marissa's mind or body.

The trial court ordered the temporary change in custody recommended by the PC and scheduled a plenary hearing. The trial court also appointed a guardian *ad litem* (GAL) for Marissa. At the plenary hearing that took place in 2008, a psychiatrist testified that J.L.T. suffered from major depression and that her symptoms included anger, suicide attempts, substance abuse and intolerance of being alone. The psychiatrist further stated that he prescribed J.L.T. medication, that she was doing well, and that he saw no psychiatric impediment to her having custody of Marissa. There was also testimony at the plenary hearing about a time when M.T. had serious problems and attempted suicide.

The GAL also testified at the plenary hearing. She testified that J.L.T. considered her own opinions regarding appropriate treatment for Marissa to be superior to those of treating physicians. She further stated that J.L.T. exaggerated Marissa's medical condition to the point of inaccuracy to treating physicians, in an effort to convince them to agree to her ideas, and that when a lung transplant for Marissa was being considered, J.L.T. appeared to be looking forward to Marissa being placed on the lung transplant list because of all the attention and medical notoriety it entailed. J.L.T. denied this was the case.

The GAL also testified that she suspected early on that J.L.T. was either doing something to harm Marissa during her visits or exaggerating Marissa's symptoms to support her claims that Marissa became ill when visiting M.T. She opined that J.L.T. wanted Marissa to be more ill than she really was. To that end, the GAL prepared several reports for the court that detailed not only her concerns, but also those of Marissa's pediatrician and her school principal that J.L.T. manipulated Marissa's symptoms or reported symptoms exaggerated for her own interest. In one such report, the GAL discussed the possibility that J.L.T. suffers from a variation of MSBP – a notion initially raised by one of Marissa's pediatricians However, another pediatrician explained this was not a classic case of MBSP because Marissa was actually ill.

The PC also testified at the plenary hearing, providing testimony consistent with her earlier report to the court. Quoting from different experts in the case whose reports had been supplied to her, the PC stated that J.L.T. suffered from psychological problems that were resistant to management, even with time and professional help. She also testified that J.L.T. interfered with M.T.'s parenting.

A law guardian for Marissa also testified at the plenary hearing. She testified that Marissa had expressed a desire to live with her mother. However, in its ultimate decision the trial court expressed its concern, based upon the evidence presented and the reports of the PC, together with the Law Guardian, as to whether or not the child was saying she wanted to live with her mother because she has been told to do so by J.L.T., or whether it was a true feeling. The court did not interview Marissa in association with the plenary hearing.

Ultimately, the trial court determined to award sole custody to M.T. In support of its decision, the trial court found Marissa's needs were well taken care of by M.T., as demonstrated by the substantial progress the child made since being placed in his custody, while the medical condition of the child and the treatments while living with J.L.T. "left a lot to be desired."

Neither party appealed the trial court's decision entered after the plenary hearing. However, J.L.T.

appealed a subsequent order denying her request for more visitation and for the court to interview Marissa. On appeal, the reviewing court determined not to disturb any of the trial court's prior decisions, including the change in custody after the plenary hearing and the decision not to interview Marissa. In so holding, the Appellate Division acknowledged the decision whether to interview Marissa was discretionary, and that the testimony and evidence from a number of independent sources in this case presented a very disturbing picture of a mother who loved her daughter but failed to attend to her legitimate needs in a responsible manner, placing her at risk in order to promote her own interests. The Appellate Division further opined there was ample evidence to support the trial court's conclusion that custody had to be transferred to M.T. to promote Marissa's best interests, that J.L.T. had to be entirely removed from medical decisions involving Marissa, and that substantial safeguards had to be in place to prevent J.L.T. from harming Marissa in the future. The Appellate Division then concluded that in the face of such compelling evidence of the need for a change it was unnecessary to solicit Marissa's views.

The Appellate Division also cited to ample evidence in the record below of J.L.T.'s manipulation and misrepresentation of facts for her own ends. Thus, the reviewing court found there was evidence to support the trial court's observation that it would be questionable whether statements Marissa might make in an interview would represent her own feelings or what she had been told to say by J.L.T.

Practice Tips

Based on the foregoing, when dealing with a party opponent who is alleged to have FDIA characteristics and behaviors, it would be advisable never to use that label in presenting your case to the trial judge. Allegations should be that there is a *concern* about catalogued behaviors. Then let third-party reviewers draw a conclusion as to whether FDIA is present. The conclusions of the third-party reviewer can then be applied to the statutory custody factors set forth in N.J.S.A. 9:2-4 to establish that custody remaining with the party opponent is contrary to the child's best interests.

On the other hand, when representing the alleged offender, it is generally a good idea to steer clear of parenting coordinators, guardians *ad litem* and custody neutral assessments if at all possible. Once FDIA has been mentioned, the label is going to be very difficult to shake and so avoiding its mention in impermissible and unscientific net opinions is key.[38] N.J.R.E. 703 contemplates that an expert's opinion will be based upon facts or data. Those facts or data may be inadmissible, as long as they are of a type reasonably relied upon by experts in the field. An expert must rely upon something, however. Thus, an expert's bare conclusions, unsupported by factual evidence or other data, are inadmissible as a mere "net opinion."[39]

Although parenting coordinators, guardians *ad litem* and custody neutral assessment providers are all subject to cross-examination, once the bell of FDIA is rung, it is difficult to un-ring. If any expert or other third-party assigns the label MSBP or FDIA, it is prudent practice to research FDIA and its elements to prepare for rigorous cross-examination. Careless use of this label is rather prevalent and inaccuracies and faulty conclusions must be exposed at the earliest opportunity. The American Psychological Association's Specialty Guidelines for Psychologists in Custody/Visitation Evaluations and the Specialty Guidelines for Forensic Psychology while not specifically applicable to psychiatrists or social workers, are useful resources when preparing to cross-examine an expert as to quality assurance, scientific efficacy and ethics in association with their FDIA diagnosis[40]

Another area ripe for cross-examination in association with an FDIA diagnosis is whether the forensic mental health professional adequately considered data that would tend to disconfirm the FDIA hypothesis. Examples of an alternate hypothesis to FDIA include that a parent takes her child to various providers because her cognitive abilities are limited, she has poor parenting skills, or she has an underlying psychological disorder.

Yet another thing for the family law practitioner to consider when faced with an accusation of FDIA is that the judicial interview of a child seven years of age or older is no longer mandatory. So, where a parenting coordinator, guardian *ad litem* or custody expert has already weighed in with an opinion of FDIA, it is unlikely judicial interviews will be entertained, the thinking being that this would be yet another intrusion upon the child, as well another potential opportunity for the alleged offending parent to improperly influence the child.[41]

Conclusion

FDIA is a serious accusation that can have a lasting and significant impact on all involved. As with any claim of abuse or neglect that is made only in the context of the

custody trial (i.e. not to the Division of Child Protection and Permanency [DCPP] or otherwise) should be considered with careful deliberation, as particularly contentious custody disputes have been known to involve spurious claims of maltreatment.[42] If it appears a child has been abused or neglected by a parent exhibiting signs of FDIA, the court is obligated not only to protect and promote that child's best interest through its custody determination, but also to report the matter to DCPP, which must undertake a complete investigation. On the other hand, if it appears one parent has attempted to manipulate custody proceedings by deliberately lodging false claims of abuse or neglect against the other, sanctions, including reasonable attorney's fees, are appropriate. ■

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Endnotes:

1. Troy Roberts, et. al., *A Mother Accused*, 2016, available at cbsnews.com/news/48-hours-lacey-spears-a-mother-accused
2. Deanna Boyd, *Moms to Monsters*, Fort Worth Star Telegram, December 18, 2015, available at star-telegram.com/news/special-reports/article50437920.html (last visited Nov. 11, 2019).
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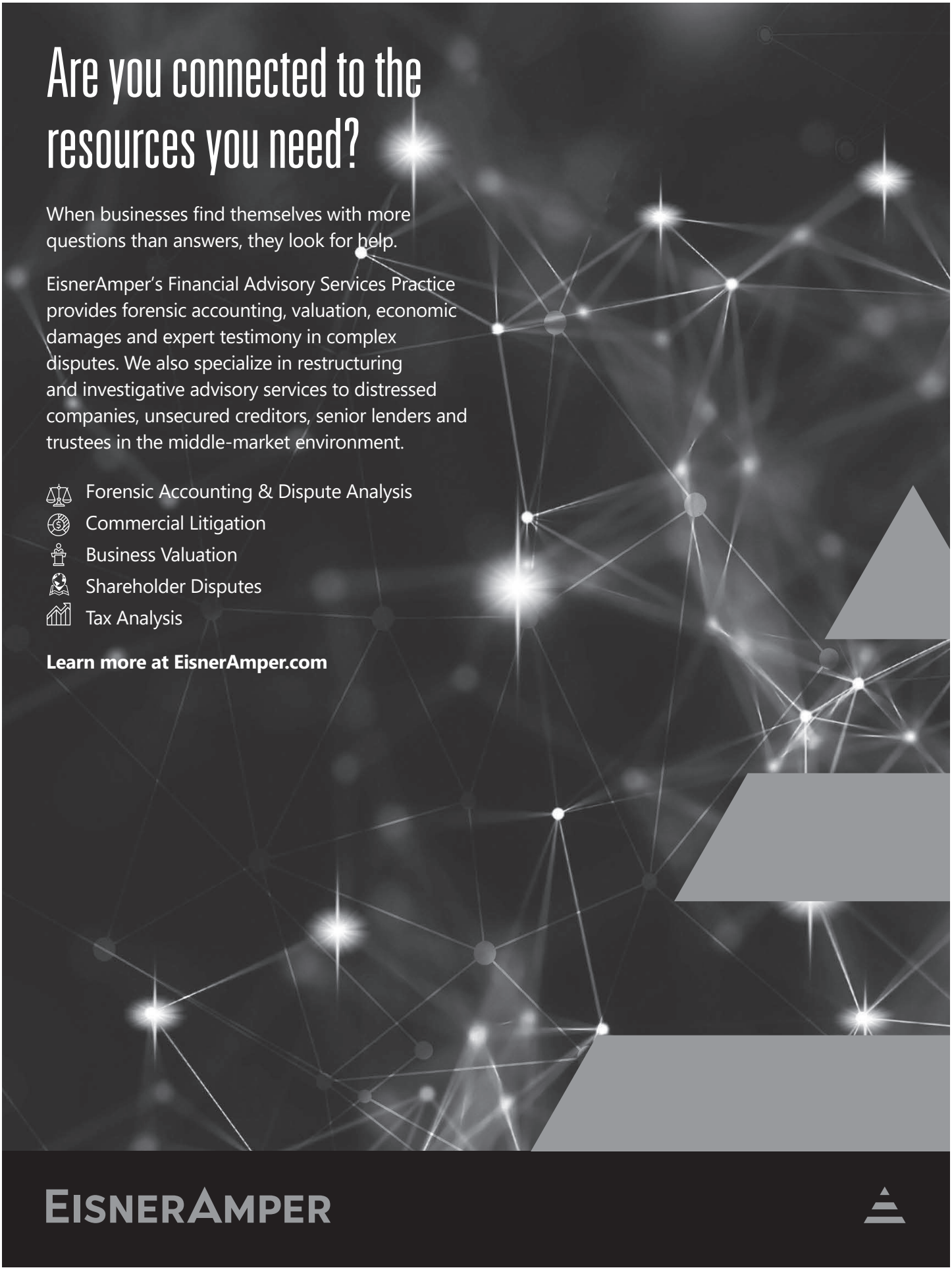
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Bankruptcy and Divorce: Exceptions to Dischargeability

by Samuel J. Berse and Jenny Berse

For a family law attorney, the thought of representing a creditor-client in bankruptcy court against a debtor-spouse may seem a bit nebulous and daunting. Fortunately, with the law on your side, there is nothing to fear. This article is the first of a multi-part series covering a scenario that begins with a debtor-spouse, in the midst of a divorce, filing for Chapter 7 bankruptcy in the United States Bankruptcy Court.

Stepping Back to Basics

Title 11 of the United States Code (USC) covers all provisions of bankruptcy laws and filings. The automatic stay of other proceedings is addressed in § 362. In short, the filing of a bankruptcy stays the eight proceedings enumerated under § 362(a) and does not stay the 28 proceedings enumerated under § 362(b). Relevant for our purposes are the stay exceptions under § 362(b)(2), specifically: § 362(b)(2)(A)(iv), which provides there is no stay for "the commencement or continuation of a civil action or proceeding…for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate"; § 362(b)(2)(B), which provides there is no stay "of the collection of a domestic support obligation from property that is not property of the estate"; and § 362(b)(2)(C), which provides a stay exception "with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute."

Collectively, the above enumerated provisions allow for family court proceedings to continue in most instances, despite a party's ongoing bankruptcy. But more typically in practice, even in the face of what could be a clear ability to proceed with a pending divorce, the family court will stay the matter until the stay is lifted by the bankruptcy court. To accomplish this, in order to collect money and have the family court enforce its orders, the creditor-spouse must file a motion with the bankruptcy court seeking a relief from stay (also called a comfort order). In essence, an order from the bankruptcy court is needed to vacate the automatic stay and either permit the parties to proceed with their divorce or exclude specific items from the bankruptcy (situations where the creditor-spouse seeking as-of-yet unquantified equitable distribution is at war with other creditors over the same assets obviously cannot be cleanly resolved at the outset of the debtor-spouse's bankruptcy filing).

Avoiding Discharge by the Debtor-Spouse

This takes us to the next issue: after you obtain relief from stay, or comfort order, and instill within the family court the ability to proceed with the divorce, how can you actually avoid discharge of the debtor-spouse's financial obligations to the creditor-spouse? The bankruptcy code provisions speak for themselves.

> Under 11 USC § 523(a), a bankruptcy discharge does not discharge an individual debtor from any debt:
>
> (5) for a domestic support obligation;
>
> …
>
> (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit[.]
>
> First, dealing with § 523(a)(5):
>
> The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable non-bankruptcy law notwithstanding any other provision of this title, that is-
>
> (A) owed to or recoverable by-

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of-

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.[1]

As interpreted, the elements that must be satisfied for a domestic support obligation to arise are as follows: (i) the payee of the obligation must be either a governmental unit or a person with a particular relationship to the debtor or a child of the debtor; (ii) the nature of the obligation must be support; (iii) the source of the obligation must be an agreement, court order, or other determination; and (iv) the assignment status of the obligation must be consistent with paragraph (D).[2]

In short, a "support" obligation from a debtor-spouse to a creditor-spouse that is the subject of an agreement or court order is not dischargeable in bankruptcy.[3] This is not the entire universe of the issue, however, because there is still § 523(a)(15) to discuss, which is even further creditor-friendly.

In situations where it may be difficult to discern whether certain financial obligations are actually considered support and, therefore, non-dischargeable pursuant to § 523(a)(5), the much more broadly encompassing § 523(a)(15) comes to the rescue. Recall that under § 523(a)(15), debt is not dischargeable:

to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit[.]

Accordingly, to be non-dischargeable under this provision, the debt must be: (1) owed to a debtor's spouse, former spouse, or child; (2) not covered by § 523(a)(5); and (3) incurred during the divorce or in connection with a separation agreement, divorce decree, or pursuant to another court order or legal determination made by a governmental unit. This is surprisingly and remarkably broad, and as it so happens, that was the intention. One of the obvious goals was to eliminate a former spouse or soon-to-be former spouse's ability to reach a marital settlement agreement, strategically crafted with the idea of bankruptcy in mind (i.e. by providing for a higher amount of equitable distribution and a lower amount of alimony), to wipe out resulting financial obligations to the pure detriment of the creditor spouse. In sum, taken together, 11 U.S.C. § 523(a)(5) and (15) seem to account for the entire known universe of scenarios, and thus, debtor-spouses cannot avoid financial obligations to creditor-spouses pursuant to a divorce by filing for Chapter 7 bankruptcy.

Case Study and Takeaway

Recently, we were faced with a debtor-spouse filing for Chapter 7 bankruptcy during the pendency of the divorce. In our case, the parties signed an agreement detailing the marital debts that one spouse agreed to pay, and we put that agreement on the record. Said spouse did not pay, thinking bankruptcy would wipe out the debts. We first attended the meeting of the creditors and spoke to the bankruptcy trustee. Had the debtor agreed at the meeting to the non-dischargeability of the debts to our client, we would have only needed the comfort order to proceed with the divorce. Instead, the debtor-spouse's seasoned bankruptcy attorney tried to intimidate us into backing down on our claim that his client's obligations were not dischargeable, but we were not dissuaded. That this was not a classic case of a debtor owing child support and/or alimony did not mean our client was not entitled to receive what the ex-spouse-to-be agreed to pay.

We researched the law and filed a motion for relief from stay simultaneously with our request for an order that the domestic support obligations (referred to in the bankruptcy world as DSOs) are non-dischargeable, assessing the facts under both 11 U.S.C. § 523(a)(5) and (15). We argued the motion and the bankruptcy judge agreed with us. The judge granted almost exactly what we requested, entering an order as follows:

> This matter having been opened to the Court on Motion of [creditor-spouse] for relief from stay and order that debtor [spouse's name's] domestic support obligations are non-dischargeable, and good cause having been shown,
>
> IT IS HEREBY ORDERED
>
> 1. The automatic stay is vacated to permit movant [creditor spouse's name] and [debtor spouse's name] to resume their divorce proceeding in the state court in [venued County], New Jersey as to the issues of dissolution and debtor's domestic support obligations of [description of the aforesaid obligations], which are hereby ordered to be non-dischargeable, and including [debtor-spouse's] obligation to pay the non-dischargeable [repeat recitation of the aforesaid obligations].
>
> 2. The movant shall serve a copy of this order on the debtor, debtor's attorney, if any, the Office of the U.S. Trustee and any trustee appointed in this case, and any other party who entered an appearance on the motion.

Note that this form of order that we supplied did not recite with specificity whether § 523(a)(5) or (15) applied. The judge summarily granted the relief from stay and found the DSOs were non-dischargeable. As a hot tip during a divorce, obtain a party's financial obligations, either in writing and signed by the parties or by a court order, and place it on the record if you can; however, even if you cannot, 11 U.S.C. § 523(a)(5) and (15), collectively, secure the non-dischargeability of financial obligations between family court litigants in connection with their matter.

Stay Tuned…

As to the difference between the form of order we provided and the order issued by the bankruptcy judge, the two words the judge omitted will be discussed during the next part of this series regarding collections. ■

Jenny Berse is the founding member of Berse Law, LLC, located in Westfield, and Samuel J. Berse is an associate at the firm.

Endnotes

1. 11 U.S.C. § 101(14A).
2. *In re Anthony*, 456 B.R. 782, 786 (Bankr. D.N.J. 2011).
3. *Ibid.*

Equitable Distribution of Real Property: What Is Really "Equitable"?

by Brian Schwartz

> The suggestion has been offered that in undertaking to affect an equitable distribution of marital assets, the trial court should, to establish a starting point, presumptively assign some proportion, generally mentioned as 50%, of all eligible assets to each spouse. We disapprove of this proposal. No basis for it is to be found in the statute itself, it would import into our law concepts now held chiefly, if not solely, in those states where community property law principles have gained acceptance, and we foresee that it might readily lead to unjust results. Rejecting any simple formula, we rather believe that each case should be examined as an individual and particular entity.[1]

The facts in many divorce cases are fairly commonplace. One party has either purchased a home prior to the marriage or utilized premarital/exempt funds to purchase a home during the marriage. That home may be placed in one party's name or in both parties' names at the time of purchase (or transferred into both parties' names during the marriage). Routinely, when these facts are presented, the response is the transfer was a gift to the other party, there has been a commingling, or houses are different from other premarital/exempt assets; therefore, the story goes, any premarital interest is lost and the equity must be divided equally. Respectfully, while in some cases this may be the right result, it cannot, and should not, be the rule.

N.J.S.A. 2A:34-23(h) authorizes courts to make "an award or awards to the parties, in addition to alimony and maintenance, to effectuate the equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage." Based on this statutory language, courts may allocate marital assets between the parties, regardless of ownership.[2] In *Rothman*, the New Jersey Supreme Court established a three-pronged approach to equitable distribution:

> Assuming that some allocation is to be made, [a judge] must first decide what specific property of each spouse is eligible for distribution. Secondly, [a judge] must determine its value for purposes of such distribution. Thirdly, [a judge] must decide how such allocation can most equitably be made.[3]

Accordingly, property owned by a party prior to marriage and held separately thereafter is generally considered an asset immune from equitable distribution.[4] Further, when the original asset is exchanged for another asset, or the proceeds from the sale of the original asset can be traced to the purchase of a new asset, the new asset is likewise immune.[5]

In proving an asset is immune, the party asserting the claim of immunity bears the burden of proof.[6] To the extent that the party fails to prove a portion of the marital estate represents his or her separate property, it will be classified as a marital asset and subject to division.[7]

Pursuant to the New Jersey Supreme Court's seminal decision in *Painter*, property owned by either party at the time of the marriage is immune from equitable distribution, and "if such property, owned at the time of the marriage, later increases in value, such increment enjoys a like immunity."[8] However, footnote 4 of the *Painter* decision provides the following:

> The immunity of incremental value to which we refer is not necessarily intended to include elements of value contributed by the other spouse, nor for those for which husband and wife are jointly responsible.[9]

Therefore, the first inquiry with a property that is purchased by one party either prior to marriage or with premarital funds is whether the other party's efforts contributed to an increase in its value. Based on the footnote in *Painter*, if a court finds that the increase in

value of a property is attributable to the efforts of the other spouse, such effort may warrant the property's inclusion in equitable distribution. This rule applies, for example, when real property is purchased by one spouse prior to the marriage, but a mortgage encumbering the property was paid down by the efforts of both spouses during the marriage.[10]

In contrast, in *Mol v. Mol*, the court held that the wife was not entitled to share in the increase in value of the property, which had been purchased by the husband prior to the marriage.[11] The court reasoned that the enhancement in value was found to be due solely to inflation or other economic factors, and not from any efforts from or contributions by the wife. In other words, the *Mol* court determined that the passive increase in the value of a house due to inflation and economic factors, beyond the control of the parties, is immune from equitable distribution when the property was purchased before the marriage and owned by only that party.

It should be noted that in *Mol*, the Appellate Division distinguished its decision in *Scherzer v. Scherzer*, in which the court held the husband's stock interest in a close corporation was not necessarily immune simply because he acquired the stock before the marriage.[12] In *Scherzer*, the court noted the following:

> The stock in question, unlike ordinary marketable securities, necessarily derived its value in large part from defendant's personal participation in the business…The value of defendant's interest in the corporation which predated the marriage is, of course, immune from distribution. However, any increase in value occurring after the marriage should be considered eligible to the extent that it may be attributable to the expenditures of the effort of plaintiff wife.[13]

Thus, the *Scherzer* court reaffirmed that if there is an increase in value due to the active efforts of the title party, the increase in value is subject to equitable distribution. This applies even if there was no monetary contribution by the wife, as non-economic contributions were sufficient to render an increase in value during the marriage as distributable.

The theory espoused by the *Scherzer* decision was also applied in *Weiss*. In *Weiss*, the court noted that the wife's efforts as a homemaker, which enabled the husband to work 60 hours per week, resulted in the wife's entitlement to share in the increase in value of the husband's interest in the business that occurred during the marriage.[14] As such, *Weiss* clarified footnote 4 of *Painter* by holding that non-financial contributions, such as those contributions to the marriage itself, rendered the increase in value of the asset subject to equitable distribution.

In *Wadlow v. Wadlow*, the Appellate Division relied on the principle established in *Mol* in affirming the trial court's finding that the wife's pre-marital securities account was not subject to equitable distribution because the account remained segregated throughout the marriage, was managed solely by the wife's father, and was "never intended to benefit the defendant."[15] Citing both *Mol* and *Scherzer*, the Appellate Division noted "there is not a scintilla of evidence to support the thesis that the enhanced value was in any way attributable to [the husband's] efforts."[16]

In sum, then, if the increase in value of an asset is "derived, in part or in whole, from the efforts of the non-owner, it is subject to distribution."[17] Moreover, a contribution to an increase in the value of an asset may consist of one spouse maintaining the home or raising children so the other spouse can focus exclusively on increasing the value of the asset.[18]

All too often, however, when addressing equitable distribution of real property purchased prior to marriage or purchased with premarital/exempt funds, lawyers combine steps one and three of the *Rothman* analysis.[19] That is, while the real property itself, or the increase in its value, may ultimately be deemed *eligible* for distribution (step one), there are still a number of factors to consider when effectuating an *equitable* distribution (step three).

In effectuating an equitable distribution, the court must consider all of the factors set forth in N.J.S.A. 2A:34-23.1. When considering real property that was acquired by one party prior to marriage, or acquired during the marriage by utilizing the separate assets of one party, N.J.S.A. 2A:34-23.1(i) provides that a court must consider "[t]he contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property…" It is clear, then, that the amount of the funds utilized to purchase the property prior to marriage, or the amount of the separate funds utilized to purchase the property during marriage, must be considered when making an *equitable* distribution.

In *Pascarella v. Pascarella*, the parties had been married for just over eight years when the wife filed for divorce.[20] This was a second marriage for both parties, and no children had been born of their union. Prior to their marriage, the husband had owned real property that later became the marital residence. After a plenary hearing, the trial court awarded the wife a 40% interest in the value of this real property. The husband appealed, arguing the trial court failed to take into account various factors, including its failure to provide the husband with a credit for either the original purchase price or the value at the time of the parties' marriage, and its failure to consider a $33,000 debt owed to the husband's mother. The Appellate Division agreed:

> We are satisfied from our study of the record that the trial judge gave undue weight to "the education of plaintiff, present non-employability, and her mental condition" in awarding her 40% of the marital property. The judge did not properly weigh and evaluate other equally appropriate criteria in reaching its decision as to how to most fairly distribute the marital property. See *Painter v. Painter*, 65 N.J. 196, 211-212 (1974). Illustrative in this regard is the judge's failure to consider that (1) this was the second marriage for both parties, (2) no children were born during the marriage, (3) the marriage lasted only 8½ years, and (4) plaintiff did not bring any money or property into the marriage. When these factors are properly weighed and evaluated together with all of the other pertinent factors concerning these parties, it is evident that the award of 40% of the total marital assets was excessive and constituted a mistaken exercise of discretion on the part of the trial court. Accordingly, we reverse that portion of the judgment awarding plaintiff $138,008 and remand the matter to the trial court to redetermine the proportion of the marital assets to be awarded plaintiff in accordance with the criteria established in *Painter v. Painter*, supra, and reaffirmed in such cases as *Carlsen v. Carlsen*, 72 N.J. 363, 368-369 (1977), and *Esposito v. Esposito*, 158 N.J. Super. 285, 298 (App. Div. 1978), and on the basis of a valuation which shall be recalculated in accordance with the views expressed hereinafter.[21]

Similarly, in *Griffith*, the husband was the sole owner of certain real property when he married the wife. During their marriage, the property remained solely in the name of the husband; however, the husband paid down $8,000 on the mortgage during the marriage. The wife made a contribution by devoting herself to being a homemaker during the marriage, and she claimed that the husband did not want her to work outside the home. The wife cleaned, cooked and took care of the house and "helped make it a pleasant home."[22] Citing both the *Scherzer* and *Mol* opinions, Superior Court Judge Conrad Krafte found that the wife, through these non-financial contributions, contributed to the incremental increase in value. That noted, Krafte limited that which was subject to distribution, distributing only the mortgage pay-down. In doing so, the court acknowledged the relative contributions of both parties – the husband's purchase of the home prior to the marriage and the wife's non-financial contributions to the incremental increase in its equity.[23]

In some circumstances (i.e. long-term marriages, multiple refinances, or a relatively small financial contribution at the time of acquisition), an equal distribution of real property, regardless of the original source of funding, may be appropriate. But quite often, equity requires a disproportionate distribution. For example, consider a wife who has significant separate assets in the form of an account with $300,000. Assume further that she retains her separate assets in her individual name. Next assume that the parties purchase a home, but the wife refuses to contribute any of her separate assets toward the purchase, requiring the parties to obtain a large mortgage. Years later, when the parties divorce, it is undisputed that the equity in the residence would likely be divided equally, and the wife would retain her separate assets.

Now assume, instead, that the wife contributes $300,000 from her separate assets toward the purchase price of a residence. This significant down payment allows for the husband and wife to have a lesser mortgage payment which, in turn, ultimately leads to an accumulation of joint savings. Years later, if the equity in the home is divided equally when the parties divorce, then the husband not only shares in the wife's separate assets but also benefits from the accumulation of savings.

In the first scenario, the wife's assets are preserved and the parties' assets suffer as a result. In the second scenario, the wife's generosity resulted in joint savings that would not have otherwise existed, to the benefit of

the husband. Would it not, then, be *equitable* for the wife to receive a greater share of the equity in the home – equity that she created? Put another way, would it not be *inequitable* for the husband to receive a windfall? The answer seems clear.

In conclusion, as noted by the New Jersey Supreme Court in *Painter*, we, as lawyers, must reject any simple formula when considering the distribution of real property where one party has either purchased a home prior to the marriage or utilized pre-marital/exempt funds to purchase a home during the marriage. Rather, each case must be examined as an individual and particular entity in order to achieve a fair and equitable result. ■

Brian Schwartz is the managing member of Schwartz Vinhal & Lomurro Family Law, LLC, in Summit. *He wishes to thank his associate, Jayde Wiener, for her assistance.*

Endnotes

1. *Rothman v. Rothman*, 65 N.J. 219, 232 (1974).
2. *Painter v. Painter*, 65 N.J. 196, 213 (1974).
3. *Rothman*, 65 N.J. at 232.
4. *Painter*, 65 N.J. at 214.
5. *Id*.
6. *Weiss v. Weiss*, 226 N.J. Super. 281, 288 (App. Div. 1988).
7. *Landwehr v. Landwehr*, 111 N.J. 491, 504 (1988).
8. *Painter*, 65 N.J. at 214.
9. *Id*.
10. *Griffith v. Griffith*, 185 N.J. Super. 382,385 (Ch. Div. 1982).
11. *Mol v. Mol*, 147 N.J. Super. 5, 9 (App. Div. 1977).
12. *Scherzer v. Scherzer*, 136 N.J. Super. 397 (App. Div. 1975).
13. *Id.* at 400-401.
14. *Weiss*, 266 N.J. Super. at 287.
15. *Wadlow v. Wadlow*, 200 N.J. Super. 372, 381 (App. Div. 1985).
16. *Id*. at 382.
17. *Scavone v. Scavone*, 230 N.J. Super. 482, 488 (Ch. Div. 1988).
18. *Valentino v. Valentino*, 309 N.J. Super. 334, 240 (App. Div. 1998).
19. *Rothman*, 65 N.J. at 232.
20. *Pascarella v. Pascarella*, 165 N.J. Super. 558 (App. Div. 1979).
21. *Id.* at 562.
22. *Griffith*, 185 N.J. Super. at 385.
23. *Ibid.*

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New Jersey's Child Abuse Registry and its Effects on Family Practice

by Sylvia L. Thomas

As a family law practitioner, it is important to understand what happens during a Division of Child Protection and Permanency (DCPP) investigation and how these investigations can affect the court's evaluation of many family matters, including dissolution. A DCPP investigation of an allegation can impact a client's custody or parenting time requests, or be used in obtaining a final restraining order. In order to understand its impact, practitioners need to know how child abuse information is retained and utilized by various agencies and service providers.

N.J.S.A. 9:6-8.11 requires that the DCPP investigate any and all allegations made within 24 to 48 hours and retain and report any affirmative findings of abuse and neglect to the child abuse registry operated by its central office in Trenton. Findings of abuse and neglect are maintained by the central registry and individuals who are the subject of an abuse or neglect finding may be subject to Child Abuse Registry Information (CARI) checks in various facets of life, including employment in many social services-related fields, and may effect considerations for relative placements through DCPP. The concept of registries is common in the context of criminal law; however, CARI is unique in it being the only registry where an individual is subject to record inquiries following an agency determination in a civil context.

New Jersey's Four-Tier Findings System

In New Jersey there is a four-tier finding system for issuing determinations regarding the outcome of a child abuse or neglect investigation. The four designated conclusions are substantiated, established, not established, and unfounded. Statutorily, an allegation of abuse or neglect is substantiated if the preponderance of the evidence submitted to the trier of fact indicates the child is abused or neglected as defined in N.J.S.A. 9:6-8.21(c), and alternatively is unfounded if there is not a preponderance of the evidence. Through the regulatory powers enumerated in N.J.S.A. 9:6-8.15 and N.J.S.A. 9:6-8.40a, DCPP further codifies the definition of substantiated and unfounded and adds the intermediary findings of established and not established. The Department of Children and Families (DCF) administrative code provides a list of aggravating and mitigating factors in N.J.A.C. 3A:10-7.5 to be considered in addition to the statutory definition of abuse and neglect in determining a finding of substantiated or established. N.J.A.C. 3A:10-7.4 provides circumstances, such as death, exposure to sexual misconduct, hospitalization, and repeated instances of physical abuse, which require a finding of substantiation following an investigation.

Pursuant to N.J.A.C. 3A:10-7.3(c) the four-tiers are defined as follows:

1. An allegation is **substantiated** if the preponderance of the evidence indicates a child is an "abused or neglected child" as defined in N.J.S.A. 9:6–8.21 and either the investigation indicates the existence of any of the circumstances in N.J.A.C. 3A:10–7.4 or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 3A:10–7.5.
2. An allegation is **established** if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6–8.21, but the act or acts committed or omitted do not warrant a finding of substantiated as defined above.
3. An allegation is **not established** if there is not a preponderance of the evidence that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6–8.21, but evidence indicates the child was harmed or was placed at risk of harm.
4. An allegation is **unfounded** if there is not a preponderance of the evidence indicating a child is an "abused or neglected child" as defined in N.J.S.A. 9:6–8.21, and the evidence indicates a child was not harmed or placed at risk of harm.

Reports to DCPP and the child abuse registry are confidential, with penalties imposed for any breach of

confidentiality per N.J.S.A. 9:6-8.10b. However, there are numerous exceptions to the confidentiality provided. N.J.S.A. 9:6-8.10a indicates 23 expressed exceptions to the confidentiality of the information retained. These 23 exceptions are not limited by the confidentiality provided by the statute, and are provided greater access to information than CARI inquiries allow. Additionally, the act requires CARI checks on those intending to care for children of the incarcerated; those seeking to or registered as professional guardians to the elderly; and any person working for the Department of Children and Families (DCF), the Department of Human Services (DHS), or any facility that might be licensed, contracted, regulated or funded by DCF or DHS. Moreover, out-of-state CARI checks may be made pursuant to the Adam Walsh Child Protection and Safety Act, the Hague Convention requirements, the Universal Accreditation Act (UAA), or the laws of the requesting state.

Use, Retention, and Expunction of CARI Records

Pursuant to the *DCF Policy Manual*, CARI information is released to confirm individuals of a substantiated reporting of child abuse or neglect. DCF policy, as codified in N.J.A.C. 3A:10-7.7, provides that the lesser findings of established, not established, and unfounded are not disclosed upon a CARI request but are maintained indefinitely within the agency records, with unfounded reports eligible for expunction pursuant N.J.S.A. 9:6-8.40a if certain criteria is met. N.J.S.A. 9:6-8.11 provides that the registry is the repository of all information regarding child abuse or neglect and is only disclosed to the public pursuant to applicable laws. The 23 entities expressed in N.J.S.A. 9:6-8.10a are granted access to the entire existing DCPP file, including that which discloses lesser findings that are not disclosed in a CARI check pursuant to N.J.A.C. 3A:10-7.7. The 23 exceptions to the rule play a crucial role in employability with any agency or organization providing services to children, licensing for resource/foster parenting, prospective private adoption, placement of kin in DCPP involved cases, and prospective daycare providers. The courts are expressly provided full disclosure of the DCPP file pursuant to N.J.S.A. 9:6-8.10a(6). This exception regularly impacts the routine practice of family law related to custody evaluations, parenting time, and the outcome of domestic violence matters. With the mention of a past or present child abuse investigation, the court would have access to the full DCPP file, regardless of the outcome of the investigation, with the only limits imposed by the possibility of expunction.

N.J.A.C. 3A:10-8.2 provides that unfounded reports should be expunged at the expiration of three years from the date of the finding associated with the last reported incident, if unfounded, unless the reported individual meets one of the exceptions enumerated in N.J.A.C. 3A:10–8.3 for retention of a record that contains an unfounded report. The most notable of the exceptions is that which compels the retention of unfounded reports if there is the incurrence of an additional finding of substantiated, established, or not established within the three-year waiting period. This waiting period may be further extended based upon a number of conditions, including the length of time support services are offered through the division after a finding is issued or whether there is a newly pending child abuse investigation for which the three-year clock resets upon the issuance of an additional unfounded report. The act only allows for the expunction of unfounded reports. If a client has been subjected to a DCPP investigation that resulted in the issuance of an unfounded reporting, it is recommended that a written request for expunction of the record be made to the Department of Children and Families' Closed Records Liaison at P.O. Box 7171, Trenton, NJ 08625. The other categories of investigatory findings are permanently subject to retention within the central registry with substantiated findings subject to indefinite CARI checks, absent success on appeal.

Appealing a DCPP Finding

At the conclusion of a DCPP investigation, the alleged perpetrator of child abuse or neglect is mailed a notice that provides the findings issued. N.J.A.C. 3A:10-7.6 sets the standards for providing notice and additionally requires information be included regarding the right to dispute substantiated findings pursuant N.J.A.C. 3A:5-1.1-1.5. DCF regulation affords an automatic right to appeal of a substantiated finding through the Office of Administrative Law (OAL) if requested within 20 days of the issuance of the notice. Neither DCF nor the Legislature has expressly provided the right to an administrative appeal of established or not established findings. However, the appellate panel in *V.E.* found that while the established finding denotes less egregious conduct than substantiated, regulation makes clear that a finding of either established or substantiated constitutes a determination

that a child has been abused or neglected pursuant to the statute.[1] There, the court acknowledged that disclosure of information contained in the registry is not limited to CARI checks, as N.J.S.A. 9:6-8.10a indicates a number of entities that are provided access. Because the result of an established finding is accompanied by adverse consequences equivalent to that of a substantiated finding, the court found the opportunity for an administrative appeal of an established finding is required. There is still no right to an administrative hearing following the issuance of a not established finding. As such, the issuance of a not established finding is considered a final agency determination, which can be brought before the appellate division pursuant to New Jersey Court Rule 2:2-3(a)(2).

Right to Counsel on Appeal

New Jersey's Courts have long recognized an indigent parent's constitutional right to appointed counsel in Title 9 and 30 proceedings.[2] In the appellate decision *Crist*, the court charged the private bar with providing *pro bono* representation to accused parents in these matters.[3] Subsequent to the development of New Jersey's Child Welfare Reform Plan in 2006, the legislature enacted N.J.S.A. 30:4C-15.4 charging the Office of Parental Representation, a subsection of the Office of the Public Defender (OPD), with representing parents and legal guardians in abuse and neglect litigation. N.J.S.A. 30:4C-15.4 additionally charges the OPD with representing children in abuse and neglect proceedings through the Office of Law Guardian. Despite the consequential nature of being issued a substantiated finding, there was no right to the assistance of counsel on appeal of the finding until the appellate decision *L.O.* was issued in June 2019.[4]

In *L.O.,* a mother was issued a substantiated finding for child abuse subsequent to a mental health misdiagnosis by a court appointed family therapist during a contentious custody battle.[5] On appeal, the administrative law judge (ALJ) overturns the substantiation, finding that DCPP failed to demonstrate harm to the child stemming from the claimed diagnosis and instead selectively interpreted a conflicted expert opinion.[6] This decision is rendered in spite of the testimony provided by numerous DCPP witnesses being weighed against the sole testimony of L.O. in her defense.[7] The assistant commissioner of DCPP rejected the ALJ decision taking judicial notice of the family court judge's findings which relied heavily upon the claimed diagnosis.[8] Upon receiving notice of the reversal, L.O. appealed it as a final agency decision requesting that the Appellate Division grant her appointed counsel, permission to proceed as indigent, free transcripts, and supplementation of the record.[9] The only request that was granted was the right to proceed as indigent.[10]

After L.O. was granted leave to appeal to the Supreme Court, the division was ordered to pay for transcripts and the Court appointed counsel specifically to address the issue of recurring indigent needs, such as, transcripts and the assignment of counsel on an administrative appeal.[11] The matter was then remanded for a determination on these issues.[12] On remand, the court ruled in favor of L.O., finding that the consequences of substantiation are of sufficient magnitude to warrant the appointment of counsel to indigent defendants.[13] The court further held that the right attaches upon receipt of the finding notice from the agency, continues through appellate review, and charges the private bar with the duty to appoint *pro bono* representation to indigent defendants from the *Madden* list.[14]

The right to counsel on appeal of substantiation does not extend to established and not established findings. While the holding in *V.E.* makes a point of drawing comparison between the determinations and consequences associated with substantiated and established findings, it remains to be seen if this analysis is similarly persuasive in the context of right to counsel.[15]

CARI Case Law and Context

The relaxed evidentiary standard associated with the issuance of an abuse and neglect findings under Title 9 as opposed to Title 30, which requires clear and convincing evidence to terminate parental rights, exposes parents to negative findings for incidences they might consider mere inadvertences. As indicated previously, under Title 9, DCPP must present a preponderance of the evidence in finding that abuse or neglect has occurred. The question then becomes, what is evidence of child abuse? Pursuant to N.J.S.A. 9:6-8.46, proof of child abuse of one child is admissible evidence on the issue of abuse of another child of the same parent or guardian. Further, proof of injuries sustained by a child that cannot be explained except by reason of the act or omission of the parent or guardian is *prima facie* evidence the child has been abused or neglected. Writings, records, or photographs made as a record of any condition relating to a child who is the subject of an abuse or neglect proceeding of any hospital or any other public or private institution is admissible and *prima facie* evidence of abuse or neglect if

a judge determines it to be a business record. Additionally, any prior corroborated statements made by the child represent admissible evidence.

Case law provides the context for humanizing alleged offenders and perspective for the sort of conduct that might subject any person to a negative finding. For instance, a victim of domestic violence might be issued a substantiated finding because her child was present while violence was inflicted upon her, despite the lack of evidence indicating any harm to the child.[16] In *S.S.*, the DCPP referral was made by police who were called to the scene.[17] Pursuant to N.J.S.A. 9:6-8.10a(2), the police are provided full access to the division file if required for investigative purposes. Further, a court conducting any subsequent domestic violence trial or custody hearing would have access to the full division file, pursuant N.J.S.A. 9:6-8.10a(6), as assistance in rendering its determination. The evidence relied upon by DCPP in issuing the substantiated finding in *S.S.* was the occurrence of domestic violence in the child's presence, the caseworker's claim that the abused failed pursue a restraining order against her abuser, and her inquiries regarding her husband's bail subsequent to his arrest.[18]

Case 1: Children locked in restroom. A mother (and former teacher), J.L. sent her children to use the restroom in their condominium a short distance from where she sat.[19] The children were inadvertently locked inside, and the eldest called 911.[20] Police arrived and referred the matter to DCPP.[21] When the division discussed the family with the children's school, only positive reports were made about the children and mom's involvement volunteering in school activities.[22] Following investigation, J.L. is issued a substantiated finding despite no indication of lasting harm to the children or even their recollection of what occurred.[23] On appeal, an ALJ overturned the division finding which was rejected by the DCPP director in upholding the substantiated finding. The director reasoned that the court incorrectly analyzed the issues in the case and focused too much on whether J.L. should be subject to the child abuse registry in a future context and not enough on whether this particular incident was neglect due to her failure to supervise the children.[24] The director concluded that the children's fear in the moment and fact that J.L. let them be unsupervised for a period of time is so serious that it rises to the level of risk of harm defined by the statute.[25]

Case 2: Home alone. A mother (and teacher), T.B. mistakenly believed that, as per the *status quo* and the presence of her car in the driveway, her mother was present in the home in bed when she inadvertently left her child asleep in his bed to step out for a moment.[26] Following investigation, she is issued a substantiated finding despite the lack of evidence indicating any physical, mental, or emotional harm to the child. T.B. is successful on appeal to the OAL, and subsequently the director of DCPP rejects the ALJ decision claiming that T.B. failed to take the cautionary actions of supervision that are expected.[27]

Case 3: Crime in another dwelling. A mother is issued an established finding because unbeknownst to her, residents of the basement apartment in the multifamily home wherein she also resides are committing crimes that are found during a gas leak investigation. [28] The established finding is issued despite the mother and child's lack of knowledge or exposure to the crime and not being present when the criminal activity was discovered by authorities.[29] Holding that there is a right to administrative appeal of an established finding, the court took issue with the circumstantial nature of the evidence utilized by DCPP in issuing its finding and DCPP's failure to consider the weight of evidence offered by V.E. in refute.[30]

Case 4: Child retracts statement. An emotionally disturbed 8-year-old told school officials his mother, S.C., occasionally spanks him and hits him with a spatula, but denies ever being bruised or cut while being disciplined, and subsequently retracts the statement. [31] The court finds that admitting to occasionally spanking the child and his initial claim that his mother previously disciplined him with an object was enough evidence to uphold the not established finding that indicates that S.C. may have harmed or placed the child at risk of harm.[32] This finding is issued despite no physical evidence of abuse, and after the investigator concludes the children were safe in their parents care.[33]

The above-referenced cases represent ordinary inadvertences and occurrences that can subject parents to indefinite CARI checks or further exposure if meeting with the exceptions to confidentiality for disclosure of the full DCPP file. CARI's greatest affect to family practice is contained within the exceptions to confidentiality, which is promulgated under N.J.S.A. 9:6-8.10a. Through 8.10a(6) the court and the OAL are granted access to any records that may be necessary for determination of an issue before it, and they are permitted to disclose any portion of the record to the law guardian, attorney, or other appropriate persons upon a finding that such

further disclosure is necessary for determination of an issue before the court or the OAL. Upon receiving notice of an abuse and neglect record for litigants before it, family court would have access to the full division file in making a determination on common family court issues such as custody, parenting time, relocation, and domestic violence matters. Additionally, evaluative professionals involved in family court matters qualify as other appropriate persons who would also have full access to the DCPP file, such as early settlement panels assigned in divorce litigation, mediators, and professionals contracted to conduct custody and best interest evaluations. It takes little to envision scenarios in which abuse allegations and subsequent findings might be used as a litigation or negotiation tools in a litany of family court contexts. ■

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Endnotes

1 *New Jersey Div. of Child Prot. & Permanency v. V.E.*, 448 N.J. Super. 374, 389 (App. Div. 2017).
2 *Crist v. New Jersey Div. of Youth & Family Servs.*, 135 N.J. Super. 573, 577 (App. Div. 1975).
3 *Id.*
4 *New Jersey Div. of Child Prot. & Permanency v. L.O.*, Docket No. A-0007-15T2 (App. Div. June 17, 2019).
5 *Id.* at 4. The level of professional misconduct attributed to the appointed therapist and her diagnosis of "Munchausen by Proxy" led to a separate ALJ proceeding which resulted in a consent order that enjoined the doctor from engaging in forensic psychological services and memorialized the permanent retirement of her license to practice marriage and family counseling.
6 *Id.* at 5-6.
7 *Id.* at 5.
8 *Id.* at 7.
9 *Id.* at 8.
10 *Id.*
11 *Id.*
12 *Id.* at 9.
13 *Id.* at 11, *citing Rodriguez v. Rosenblatt*, 58 N.J. 281, 295 (1971). Any criminal matter that subjects an indigent defendant to a loss of liberty (i.e. incarceration) affords them right to appointed counsel. *Rodriguez's* "consequence of magnitude test" has additionally informed courts in noncriminal matters such as the threat of incarceration for nonpayment of child support. *Pasqua v. Council*, 186 N.J. 127, 149 (2006).
14 *Id.*
15 *V.E.*, *supra* note 1.
16 *New Jersey Div. of Youth & Family Servs. v. S.S.*, 372 N.J. Super. 13 (App. Div. 2004).
17 *Id.* at 17.
18 *Id.* at 22.
19 *New Jersey Dep't of Youth & Family Servs. v. J.L.*, 410 N.J. Super. 159, 161 (App. Div. 2009).
20 *Id.* at 162.
21 *Id.*
22 *Id.*
23 *Id.* at 163.
24 *Id.* at 165-6.
25 *Id.*
26 *Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B.*, 207 N.J. 294, 297 (2011).
27 *Id.* at 298.
28 *New Jersey Div. of Child Prot. & Permanency v. V.E.*, 448 N.J. Super. 374, 381 (App. Div. 2017).
29 *Id.* at 400.
30 *Id.*
31 *S.C. v. NJ Dep't of Children & Families*, No. A-4792-15T3, 1-3 (App. Div. Aug. 31, 2018).
32 *Id.* at 18.
33 *Id.* at 3-4.

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