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Chair's Column

Navigating FD: A Whole New World

by Stephanie Frangos Hagan

Generally speaking, with the passage of time and through continued practice comes the inevitable sense of comfort for family law practitioners. However, the one area of family law where that sense of comfort is diminished is in the non-dissolution division. After 30 years of practice, the non-dissolution (FD) division is an area of family law I still do not have a sense of comfortably navigating. Indeed, there is an entirely different set of rules and procedures in FD. I have learned the procedure for resolving complaints and motion applications in FD matters changes from one county to the next. This makes it difficult to not only navigate, but to provide your client with an understanding of the process and what they can expect to occur during a court appearance. Admittedly, the majority of my practice deals with dissolution matters, which have clear-cut rules that are uniform in every county regarding the filing of motions, deadlines for filing opposition, and the calendaring of court appearances. Unfortunately, those who attempt to delve into the world of FD are not bound by the same rules.

Initially, all cases filed in FD are handled as summary actions with little, if any, discovery. Both parties are required to appear for hearings, with few exceptions. It is also mandatory that all filings in FD be submitted on the proper forms. If an initial application or a responsive pleading is not submitted on the proper uniform non-dissolution forms, it will immediately be returned and will not be filed or processed by the court.

While most FD matters are filed by self-represented litigants, there are a number of cases where either one or both sides have attorneys. These cases often deal with complex custody and parenting time issues, non-parent relatives seeking custody, or complex child support issues that cannot be handled in a 'summary' fashion, as they require discovery and multiple

hearing dates. Unfortunately, attorneys who usually do not practice in FD are unaware of Rule 5:4-2(j), which addresses when a non-dissolution matter may be designated complex, as follows:

> In any non-dissolution action, any party or attorney seeking to designate a case as complex may submit that request in a verified complaint/counterclaim form promulgated by the Administrative Director of the Courts or in writing to the court prior to the first hearing. The procedure for the assignment of non-dissolution matters to the complex track is set forth in R.5:5-7(c).

The designation of "complex" tracking can be found in Rule 5:5-7(c), as follows:

> While non-dissolution actions are presumed to be summary and non-complex, at the first hearing following the filing of a non-dissolution application, the court, on oral application by a party or an attorney for a party, shall determine whether the case should be placed on a complex track. The court, in its discretion, also may make such a determination without an application from the parties. The complex track shall be reserved for only exceptional cases that cannot be heard in a summary matter. The court may assign the case to the complex track based only on a specific finding that discovery, expert evaluations, extended trial time or another material complexity requires such an assignment.

Some of the biggest problems in FD are the scheduling of hearing/return dates and service of initial applications filed with the court, in as much as the court, and not the party filing the complaint or notice of motion, is responsible for serving the other party. In fact, service is to be made by regular and certified mail, as opposed to personal service, which is required in divorce actions. When serving the other party, the court uses the information provided by the complainant, such as his or her name and address.

Even more notable, however, is the fact that the court is not required to mail a copy of the entire application to the opposing party. Nor are there any rules regarding how long before the hearing date the application needs to be served on the opposing party. In fact, some counties will only provide the opposing party with the summons, the court notice of hearing date, and the form complaint or notice of motion, without including the certification or other supporting documents attached to the application. Without the supporting documents and certification of the moving party (which can be up to 25 pages), the opposing party/attorney does not receive a complete copy of what has been filed and very often does not know that additional documents have been filed when they are preparing their response. Given most FD matters are handled in a summary fashion, this puts attorneys, as well as self-represented litigants responding to applications, at a severe disadvantage.

Ironically, the responding party is responsible (not the court) for serving a complete copy of their opposition on the opposing party within 15 days of the hearing. This can be problematic if there is a delay in receiving the complaint or notice of motion, as it may not allow the responding party sufficient time to prepare and serve a response within the required timeframe. Attorneys for the responding party must, therefore, be careful to affirmatively request the full and complete package of documents submitted to the court by their adversary.

In order to correct some of the inequities, the Family Law Section Executive Committee voted to request revisions to the court rules to ensure service of FD complaints and motions are fair and complete. Certainly, it is patently unfair for married litigants to be subject to a specific set of rules regarding the filing and service of applications made to the court while unmarried litigants are not.

The lack of uniformity throughout the state in how FD matters are scheduled and heard creates havoc for family law practitioners who do not regularly practice in non-dissolution. It is incumbent on our section to ensure there is a clear, uniform and fair set of rules in every division of the family part to enable attorneys, as well as self-represented litigants, to navigate through the system. So, how do we fix the problem? One way is to amend Rule 5:4-4(b)(1) to have the filing party (not the court) be responsible for serving the other party with a complete set of every document filed with the court, via regular and certified mail or, in the alternative, via verifiable overnight mail service such as USPS Priority Mail, UPS or Federal Express. The only exception would be in

matters where a temporary or final restraining order has been entered, in which circumstance the Family Division would be responsible for mailing a copy of every document filed with the court.

The section will also be requesting that a certification of mailing form be required to be submitted with the application, including the date of mailing and the receipt number. In addition, the FD calendar dates should be published both locally and on the Administrative Office of the Courts' website in the same manner as motion dates in the FM docket. Without a published schedule of hearing/motion dates, it is difficult to establish filing deadlines. If the dates are published, attorneys, as well as self-represented litigants, will have the ability to prepare and ensure responsive pleadings are filed properly and timely.

It is the hope that changes to the court rules will bring some semblance of uniformity to the non-dissolution division in every county and eliminate the uncertainty litigants and attorneys face when having to navigate their way through the system.

Inside this issue

Fischer v. Fischer: A Cautionary Tale

by Rosanne S. DeTorres and Caitlin DeGuilo Toker

In 2005, the Appellate Division rendered a decision in the matter of *Fischer v. Fischer,* the likes of which had not previously, and has not since, been seen.[1] At the time the subject motion to withdraw as counsel was heard, the matter was approximately nine years old.[2] Ms. Fischer retained an attorney in Sept. 2003, and signed a retainer agreement that provided, in part, that $5,000 of the $10,000 retainer was non-refundable.[3] A mere five months later, on Feb. 11, 2004, following an allegation of dishonesty by Ms. Fischer, her attorney filed a motion to be relieved as counsel.[4] It is unclear from the Appellate Division's opinion exactly what portion of the retainer had been utilized by Ms. Fischer's attorney at the time of filing. Nevertheless, Ms. Fischer opposed her attorney's motion, not because she still wished to be represented by him, but because she felt she had no other option, as she did not have the funds to retain new counsel and the trial date was only 52 days away.[5] The trial court determined that Ms. Fischer's attorney could withdraw from representation, but also that he must return the full $10,000 retainer to her so she could retain new counsel and an expert.[6] The trial court judge was not persuaded to modify its ruling upon Ms. Fischer's attorney's motion for reconsideration.

The Appellate Division upheld the trial court's decision despite the protestations of Ms. Fischer's attorney and the *amicus curiae* brief submitted by the New Jersey State Bar Association. Specifically, the Appellate Division ruled that the trial court judge had the authority to order the return of the full retainer, as it was considered the *res* of the marriage subject to distribution, and thus within the trial court's jurisdiction.[7] The Appellate Division also pointed out that the trial court judge did not make any determination regarding the reasonableness of the fees charged, and left open the possibility of Ms. Fischer's attorney seeking payment of his fees through alternative means, such as an attorney charging lien.[8] In other words, because Ms. Fischer's attorney had the right to seek payment through alternate means, the trial court did not overstep its authority by interfering with a fee dispute between an attorney and client.[9]

The panel additionally addressed the factors contained in Rule 5:3-5(d)(2), which governs an attorney's application to be relieved as counsel in a family part matter when the trial date is less than 90 days away from the date of application. Rule 5:3-5(d) (2) provides:

> Within 90 days of a scheduled trial date, an attorney may withdraw from a matter only by leave of court, on motion with notice to all parties. The motion shall be supported by the attorney's affidavit or certification setting forth the reasons for the application and shall have annexed the written retainer agreement. In deciding the motion, the court shall consider, among other relevant factors, the terms of the written retainer agreement and whether either the attorney or the client has breached the terms of that agreement; the age of the action; the imminence of the scheduled trial; the complexity of the issues; the ability of the client timely to retain substituted counsel; the amount of fees already paid by the client to the attorney; the likelihood that the attorney will receive payment of any balance due under the retainer agreement if the matter is tried; the burden on the attorney if the withdrawal application is not granted; and the prejudice to the client or to any other party.[10]

The Appellate Division noted that both Ms. Fischer's attorney and the state bar urged the panel to construe the court rule to permit only the grant or denial of the request for the withdrawal, and not a refund of the retainer. But the Appellate Division declined to view the rule restrictively, stating "…we believe that, in extraordinary circumstances, the court may both permit the withdrawal of counsel and yet impose reasonable condi-

tions upon that withdrawal for the benefit of the client and the ultimate resolution of the case, so long as those conditions are reasonable and do not unduly burden the withdrawing attorney."[11] Judge Robert Fall issued a concurring opinion in which he expressed his preference that the exercise of discretion in these circumstances be more restrictive than the majority opinion provided. Specifically, Judge Fall recommended that the granting of relief requiring the refund of a retainer should be limited to those circumstances where the attorney's retainer agreement does not comply with the requirements of Rule 5:3-5(a) and (b), and his or her actions contributed to the circumstances that led to the withdrawal application and the litigant's ability or inability to retain new counsel.[12]

While presumably the vast majority of family law attorneys' retainer agreements comply with the provisions of Rule 5:3-5(a) and (b), the majority's opinion does not limit the scope of a possible retainer refund only to those attorneys who are not in compliance, as Judge Fall's concurring opinion recommends. Therefore, it appears there is a much greater likelihood that a retainer refund could be ordered against practitioners who, despite their best efforts to settle, find themselves with a need to withdraw from a case scheduled for an impending trial.

The authors recently had a case that required them to consider the implications of the *Fischer* case. The assets in the case consisted of a marital residence and an escrow account containing funds related to the sale of the husband's business. Neither party earned a substantial income, and the case was approximately 19 months old. The wife had paid the authors' law firm in excess of $15,000 in counsel fees since the beginning of the matter, which she had borrowed from family. The husband was initially represented in the matter, but had been self-represented for the last six months. There was no agreement on any issue. The marital residence was encumbered by a home equity line of credit, which had gone unpaid for nearly nine months. The money in escrow could not be released for an extended period of time pursuant to the terms of the business sale contract. Therefore, like in *Fischer*, there were no assets from which to pay an additional retainer.

The case was scheduled for an intensive settlement conference, and the authors gave serious consideration to bringing a motion to withdraw in the event the case did not settle, as the client had advised she had no ability to borrow additional funds to pay for continued representation, though she also did not wish to proceed *pro se*. However, before the authors could reach any conclusion on the issue they received a court notice scheduling trial for 41 days later. While confident in the retainer agreement, the authors had to consider the possibility that the trial judge would order the firm to reimburse the client all or a portion of the retainer so she could retain new counsel, as the matter was within 20 days of the pre-trial conference and 41 days of trial. Ultimately, the authors determined there was a possibility the trial judge would require a refund of at least a portion of the retainer paid to the firm pursuant to the *Fischer* holding. Additionally, the authors determined that, while the marital assets were currently encumbered, the client would receive cash from the assets through equitable distribution at some future time. After weighing these factors the authors elected to move ahead with trial because they felt confident they would get paid from marital assets at the time of distribution of those assets.

Fischer does not seem like an especially realistic fact pattern, as it includes what some might consider a 'perfect storm' of factors. However, it is certainly a cautionary tale to attorneys who enter low-asset cases, especially when the limited assets are otherwise encumbered, and when the matter has stalled or is close to trial. With those factors in play, it is not inconceivable that a trial court might require an attorney seeking to withdraw from a case to refund his or her retainer to avoid prejudicing either party by delaying the trial date while also ensuring the client is adequately represented. To that end, the takeaway from the *Fischer* case is attorney beware; always be cognizant of the terms in retainer agreements, as well as the deadlines in each and every matter for which one is retained, so the practitioner can withdraw from representation without exposing him or herself to the possibility of a retainer refund. ■

Rosanne S. DeTorres is a founding member of the law firm of DeTorres & DeGeorge, LLC, with offices in Flemington and Morristown. Caitlin DeGuilo Toker is an associate at the firm.

Endnotes

1. 375 N.J. Super. 278 (App. Div. 2005).
2. Within its decision the Appellate Division references that the case was initially filed in 1995, but given a new docket number in 2003. *Id*. at 281 n.1.
3. *Id*. at 282.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*. at 286.
8. *Id*.
9. *Id*. at 285.
10. R. 5:3-5(d) (2).
11. *Id*.
12. *Id*. at 292.

Cohabitation Playbook: Anatomy of a Cohabitation Case

by John E. Finnerty

Cohabitation cases are not what they used to be. Until Sept. 10, 2014, the Legislature had *never* referenced cohabitation in the statutory framework regulating alimony. Cohabitation law was judge made, evolving from case to case. The ultimate judicial inquiry was whether cohabitation had an economic impact on the supported spouse, either by reducing that spouse's needs through payments from a paramour or by the paramour's receipt of benefit from the supported spouse's alimony. In either case, modification/reduction would likely be appropriate. Once a *prima facie* case of cohabitation was demonstrated, the law required the supported party—with greater access to evidence—to come forward to show there was no actual economic benefit being received from or provided to the paramour.[1]

In Sept. 2014, the Legislature took control of the cohabitation playing field. For the first time, the Legislature interjected itself and defined what cohabitation was—an intimate and mutually supportive personal relationship in which a couple undertakes duties and privileges commonly associated with a marriage or civil union, even if the couple was not maintaining a common household.

Economic impact was no longer the touchstone of a cohabitation analysis. Rather, the Legislature refocused the analysis from the economic impact of cohabitation to the nature of the relationship being examined. It also directed what evidence a court *must* consider when *assessing* whether cohabitation existed, and, at the same time, limited the remedies a court could employ if it concluded cohabitation was occurring.

The new law limits the court to suspending or terminating alimony. Simple modification of alimony in the event of cohabitation is no longer permitted.[2] If, after considering all evidence, the court concludes a relationship is enduring and the couple acts and lives like a married couple, then alimony has to end with discretion being maintained to do so only through suspension or termination. No standards were provided by the Legislature to assist courts in determining whether suspension or termination was appropriate, but factors were listed for the court's evaluation as to whether cohabitation was occurring.[3]

The Judicial Task

In reaching a conclusion about the nature of the personal bond that exists, and whether it constitutes cohabitation such that alimony must be stopped, the Legislature mandated that courts "shall" consider certain "assessment" factors, as well as "any other evidence." These assessment factors are:

- Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
- Sharing or joint responsibility for living expenses;
- Recognition of the relationship in the couple's social and family circles;
- Living together, the frequency of contact, the duration of the relationship, and other *indicia* of a mutually supportive intimate personal relationship;
- Sharing household chores;
- Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S. 25:1-5;
- All other relevant evidence.

In evaluating whether cohabitation is occurring, and whether alimony should be suspended or terminated, the court must also consider the length of the relationship. In addition, a court may not find an absence of cohabitation *solely* on grounds that the couple does not live together on a full-time basis.[4] Although the focus of the judicial inquiry is the nature of the relationship, the Legislature did *not* say there was a certain quantum of evidence that must be discovered about each assessment factor, or even that there had to be evidence related to each factor. Rather, the factors are a guide for the court to consider to help it ascertain whether a mutually supportive personal relationship exists such that, under the statute, it is appropriate either to suspend or to terminate alimony.

Before Filing

Does this statute now invite full-fledged discovery every time a supporting spouse finds out or hears a rumor that his or her former spouse is dating someone? Do such rumors justify intrusion into the lives and finances of the supported spouse and suspected paramour? This author thinks not; the law does not sanction intrusion without an evidential foundation that creates a reasonable basis justifying further inquiry.

The touchstone inquiry is whether a *prima facie* case has been presented justifying further proceedings. Certainly, this author believes such a finding must never be made based upon the presentation of hearsay, which is not competent evidence.[5] Discovery and a hearing should not be ordered just because a supporting spouse is told or believes that a former spouse is dating someone, or that someone has seen cars in the driveway for several weeks or months in a row. This should not be sufficient to justify a finding that a *prima facie* case has been made. The courthouse doors should not be thrown open and the docket of pending cases expanded frivolously without competent evidence.

A lawyer who is consulted by a payor who feels aggrieved must be a skillful guide in helping direct and supervise the gathering of evidence for the initial presentation, the primary realistic objective of which should be to have discovery sanctioned and a hearing ordered.

Prima Facie Case

Prima facie, according to *Black's Abridged 9th Edition Law Dictionary*, means:

> A parties' production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the parties' favor.
>
> It is also defined in the same dictionary as:
>
> Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.

The initial filing seeking a *prima facie* ruling must be deliberately and carefully prepared. A premature filing without sufficient basis, which is rejected, will likely doom future applications about the same relationship. The couple involved will have been put on notice and, in all likelihood, will be even more careful about covering their tracks. A premature application not properly developed without evidence being gathered over a long period of time also allows the knee-jerk defense mantra: "Judge, if you allow discovery on this, it will never stop. You will be opening the courthouse doors to a floodgate of litigation simply because people are dating."

If a client suspects the former spouse is involved in an intense relationship that has gone on for a significant period of time and is serious, he or she should do a 'quiet' investigation with counsel's assistance and under counsel's supervision. There should be no rush to file a motion unless there is competent evidence to support it.

The rules regarding certifications should be carefully followed. Rule 1:6-6 requires that certifications be based on personal knowledge or other competent evidence, not hearsay or speculation. Allegations of "somebody told me," or the naked conclusion without foundation that "I know they spend all their time together" likely will not be sufficient to open full discovery and obtain a hearing. Patience should be the watch word of the investigation. The longer the period of time one can demonstrate the relationship has existed, the more likely the obligor will be successful in getting permission for further inquiry by way of discovery.

Social Media and Social Sources

The former spouse's social media information should be vetted carefully, but properly. This obviously does *not* mean having counsel's staff 'friend' the former spouse on Facebook.[6] However, many people are very careless with social media information, which can provide a wealth of potential evidence by way of admissions in public postings. In addition, although former spouses may be unfriended and blocked, it may be that there are other interlocking family connections—the client's relatives or mutual friends—who *still* are connected via social media, through whom information can be obtained.

Counsel must quiz the client about any such evidential sources. Any such potential sources should be interviewed in a way that is most likely to produce the evidence sought. Before approaching a prospective witness, there has to be a high degree of comfort that the person approached will not 'spill the beans' to the client's former spouse. In most circumstances, that potential witness is best approached initially by the client rather than a paralegal from the attorney's office. The client should have an instinct about whether the potential witness is trustworthy and how to approach him or her. Counsel must sensitize the client to the importance of only inquiring of people he or she completely trusts, and who also are *already* connected to the former spouse via

social media. If there is any doubt, there should be no inquiry. Counsel and client do not want to do anything that will chill the ongoing relationship or have the couple being investigated go underground. If the source is open to providing evidence, then the attorney should do the formal specific evidence-gathering interview.

Private Investigators

Additional evidence that may be sought prior to going public with the application can be garnered by involving licensed private investigators. Private investigators may be able to obtain information that is not otherwise available, such as the identity of a person associated with a particular license plate, and other public databases through which information can be obtained about identified individuals. In addition, investigators can conduct actual or video/still camera surveillance. Actual surveillance may not be practical depending upon the location of the former spouse and the nature of the interaction with the suspected paramour.

If private surveillance is not practical or is too expensive, private investigators frequently utilize video or pole camera surveillance to monitor comings and goings at a particular location. This is considerably less expensive than in-person surveillance. Typically, a camera is installed on a public thoroughfare at a public location that targets the subject's location, whether it be a home or an office, or some other location. It is important the video/camera surveillance not be installed in such a fashion that a trespass occurs, and that all the surveillance provides access to is that which anybody passing by that spot would be able to see or hear with their naked eyes or ears at the location. These cameras usually have SIM cards, operate 24/7, and can be set at very short intervals, for example, to snap pictures every 10 to 15 seconds. The camera is checked periodically throughout the investigation, and when the card is filled, the camera or the cards are replaced. The time- and date-stamped images captured are inventoried and analyzed. The longer the surveillance occurs and demonstrates ongoing comings and goings of the couple, the more credible the application and the more likely permission will be given for full-scale discovery. Depending upon the existence of other evidence, surveillance should continue for at least multiple months.

Private investigators also may examine discarded garbage that is placed at the curb before it is picked up. So long as the garbage is not located on the private property of the surveillee and has been discarded for public pickup, it will likely be ruled grist for the mill.[7] Investigators should be creative, but counsel must warn them they are not to do anything that will cause aspersions to be caste on the investigation or anyone involved with it—litigant and professional alike.

This author was involved in one case where an investigator decided to attend an open house for the sale of the supported spouse's home. The detective appeared with his wife and received a tour of the home and was allowed to look around by himself. As he moved about the house, the detective saw substantial evidence of the presence of a man, including men's toiletry supplies in the bathroom, men's suits in the closet and other *indicia* that created a serious inference of cohabitation, and the identity of the cohabitant.

One must be mindful of complying with ethical requirements when commissioning an investigation by a private detective. For example, the use of GPS is fraught with risk.[8]

Client Knowledge

Counsel should also carefully interview the client and have him or her review and organize text message and email communications with the former spouse. There may be multiple concessions and acknowledgments of requests to assist with or switch dates for child care because of plans to be away. Knowing these dates will facilitate efforts to capture the couple together. Moreover, there may be inferential acknowledgments of a relationship in the communications.

It is also important to debrief and interview the client carefully about his or her own observations in the course of routine child exchanges or social interactions with the former spouse, such as those that occur at school functions or private social and family events, where the former spouse's significant other may be present. If the client has a reasonably cordial relationship with his or her former spouse, and is allowed access to the new home at the time of child pick-ups and drop offs, or to use the bathroom, there may be testimonial observations the client can make about activities or the contents of the house that suggest the presence of a third party. The client may even have interactions with the significant other to report. It is important to get as much information about the identity of that person as possible, and to have it reviewed by the private investigator to see what can be discovered on public websites or social media.

It is particularly important to counsel the client not to file an application prematurely. Patience while gathering evidence before the application is made is critical. The relationship that is the basis of the cohabitation claim must be allowed to develop to the point where it creates at least an appearance of being enduring before the circumstances that exist are presented to the court. Once the location of the video/camera surveillance is disclosed in the initial filing, it is reasonable to conclude that any further camera surveillance from that location will not work, and other arrangements will be made to assure comings and goings are masked.

Filing the Application

It is unlikely the court is going to terminate alimony on an initial filing. That request should be made—assuming the evidence gathered is strong enough—but counsel must alternatively ask for an order granting discovery and scheduling the matter for a plenary hearing. Counsel must ask for a declaration that a *prima facie* case has been made and request discovery to fairly assess and determine the issue raised. The submission made should be thorough. Remember, it is not likely that the initial application will have enough evidence to do more than persuade a judge that further inquiry must be made to seek evidence that the Legislature has said *must* be considered when assessing these issues.

In addition to requesting termination and/or suspension of alimony pending discovery and a plenary hearing, counsel should also suggest that, pending the plenary hearing, the support due should be paid into his or her trust account.[9] Such a ruling is fair to both parties because both are assured the money will be available following the court's decision after a hearing. It should further seek a temporary restraining order and a preliminary injunction to prevent the party spouse either from removing and deleting texts, emails and posts from social media accounts, or from altering, destroying, or discarding electronic hard drives of any devices or the devices themselves. It should further seek the same injunctive relief against spoliation of evidence.

Discovery

Discovery in post-judgment matters is not allowed to commence until an order has been entered permitting it.[10] However, once such an order is entered, the rules do not impose upon counsel the order in which discovery must occur. There is no rule that precludes discovery from a third party because discovery of a party is not complete.[11] There is likewise no rule that requires completion of party discovery before service of third-party subpoenas. It is counsel's right to obtain information deemed necessary to process the case expeditiously.[12] Discovery may be obtained in whatever order it is deemed effective, so long as the evidence sought is relevant or reasonably calculated to lead to relevant evidence.[13] Moreover, Rule 5:5-1(c) makes clear that depositions of any person can be taken as of course in connection with discovery. Leave of court for deposition of third parties is not required. If the statute requires judges to assess certain evidence, then *a fortiori* counsel should have a right to seek it and to present it.

Tactically, in connection with the initial filing, counsel should decide whether to detail the third-party discovery being sought, or simply seek a general discovery order and then issue subpoenas once the order has been entered. Obviously, if discovery is allowed, third-party subpoenas will be served on the paramour's financial institutions and other relevant providers, including cellphones. If counsel specifies in the initial motion what specific requests will be made, then the applicant will learn of any predilections the assigned judge has about the kinds of discovery being sought. If counsel does not make specific requests, then the judge's personal perspective will not emerge until and unless the paramour retains counsel who files a motion to quash. If generic discovery is requested and subpoenas served, the paramour might not retain counsel or object, and then the institution subpoenaed will provide the requested documents and the judge's predilections may never come into play. These are decisions that have to be made at the time based upon developments in consultation with the client.

A paramour or a couple that has nothing to hide should not reasonably seek to block access to this information, which could be exculpatory. If its release demonstrates no connection of any kind, then the respondent's case is made much stronger. In addition, resistance always engenders the suspicion of a pro-active attorney. If a *prima facie* case has been made, there would seem no reasonable basis to object to gathering evidence to assess whether people are involved in a relationship that the Legislature has said, if existent, will cause alimony to be interrupted or stopped.

Requests to Admit

As social media, surveillance and other evidence is

gathered, it is important to craft and serve carefully written requests to admit, which may dramatically simplify proofs and do away with any social media authentication issues.[14] Preparation of these requests will cause counsel to focus on and analyze the evidence as it is being gathered to get a sense of the impression it may make on a trier of fact. Carefully crafted requests to admit regarding the authenticity of Facebook and other social media posts are critically important. If properly prepared, many material substantive factual issues also may become undisputed by virtue of requests to admit responses. For example, a request to admit can be used to generate an admission about any fact that is contained within a post or social media communication, as well as to authenticate it.

Electronic and Other Discovery

Cellphone Records and Social Media Passwords

Critically important to the development of a cohabitation case is ascertaining where people are in proximity to each other from time to time during the course of a day and evening. Prompt provision of cellphone records of both the supported spouse and the cohabitant for the length of time the relationship has existed can put an immediate focus on the couple's physical interaction and emotional involvement. Cellphone records reveal the cell tower through which a call from or to a particular number is processed. When a person claims to be at his or her residence in Middlesex County at 11 p.m., but his cellphone provider records reveal that calls to or from his phone at that time go through a cell tower near the supported spouse's residence, powerful location evidence has been created. Such records also reflect the frequency with which the parties contact or seek to contact each other, another *indicia* of the nature of the relationship. Moreover, for the limited period of time for which cell providers retain the content of text messages exchanged (about 10 days), the content of transmitted communication between the couple is available.

Equally important is access to email communications between the supported spouse and cohabitant about their relationship, or their communications with others about it, either through social media, texts or emails. One assessment factor set by the Legislature is recognition of the relationship in the couple's social and family circle. Not only are communications and posts between the couple relevant regarding the nature of the relationship, but so also are communications by either of the couple with third parties *about* their relationship. In the initial application, a request should be made for social media passwords and access for a digital expert to devices and social media accounts. There can be no reasonable expectation of privacy if either member of the couple is sharing with third parties their feelings and opinions about each other or the nature of the relationship. Such communications, posts or tweets are directly relevant to assessment of the nature of the interaction between the couple and whether their bond is such that alimony should stop. Access to social media accounts through release of passwords to an expert is the only efficient way to obtain such information, as service of subpoenas on social media companies like Facebook and Instagram is an unwieldy process that is likely to occasion great delay.

Respondents will likely assert that their social media accounts, passwords and electronic devices are protected and private, and that they cannot be compelled to release private information. Respondents may seek to raise the Stored Communications Act as a bar to a request for social media information and electronic communications information.[15] That act prohibits internet service providers (ISPs) from revealing the content of, and/or turning over, stored communications in their possession under penalty of law, except in certain limited circumstances. An exception to this prohibition is conduct authorized by "a user of that service with respect to communication of or intended for that user."[16]

To the extent the information on devices and social media is privileged, meaning communications with doctors or lawyers, for example, it should be protected. Absent such a circumstance, this author believes a litigant should not be able to block information about the status of a relationship, which the law states will allow alimony to be stopped, if it reaches a certain level of connectedness. A litigant, or third party involved with a litigant, should not hide behind a statute and refuse to provide information about a relationship status the Legislature has said may be such that support rights are affected. This author believes people with such evidence in the face of claims about the viability of continued support should be compelled to disclose the information that may exist, so long as their privileged communications are kept private.

Counsel will need to persuade a judge that the expert, if directed to redact and create a privilege log for such information for review by the court, will do so honorably and comply with court orders. If the court is

unwilling to take that chance, then counsel can request a digital electronic expert to be designated as the court's expert to review accounts and provide the information to the court for *in camera* review. It is important that whomever the expert is, he or she be given a keyword list with which to search social media and electronic accounts. It is not just the spouse and paramour whose names should be searched; searches should be made of communications with family members of either person or people in their social circles. Compiling such a list requires close coordination and discussion with the client.

Although the former spouse may have blocked the paying spouse from social media accounts, if his or her new relationship with a paramour is openly disclosed on social media to anyone, then there is no reasonable expectation of privacy that precludes that information and data, whatever it may be, from being utilized in connection with the cohabitation case. Certainly, after posting or tweeting information on social media about one's relationship—even through hidden from the supporting spouse—there can be no reasonable expectation of privacy regarding that relationship.

In *People v. Harris*, Judge Matthew Sciarrino Jr. set forth:

> If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy.[17]

If one releases information to the world about a relationship, then it is grist for the mill on an application that seeks evidence to assess whether that relationship has grown into the realm of one the Legislature has concluded should result in the cessation of alimony.

As part of the initial request, a temporary restraining order and preliminary injunction should be sought enjoining the alteration or deletion of such material on devices and further preventing spoliation of evidence. Although one has an ethical obligation to alert one's client that such spoliation should not occur, it is best to put an order in place at the beginning prohibiting such actions. Digital experts also may be able to ascertain when and what the owner of an electronic device sought to delete, as well as any deletions that occurred. There are time limitations that are relevant to how much can be discovered with respect to attempted alterations or deletions, which is why these issues need to be raised and resolved promptly. That would be one reason why such discovery requests should be specifically delineated initially, to avoid delay in the adjudication of any dispute about them.

In addition to having no reasonable expectation of privacy about information that has been released to anyone in the world, this author believes a litigant should not have the right to hide their personal circumstances that are relevant to the case. Any non-privileged fact that exists that enables assessment of the nature of the new relationship and whether it should cause a change in an alimony entitlement is relevant. Just like a divorce litigant can not stand behind the privacy of his or her bank accounts and refuse to provide information about them, so too, in a case where a *prima facie* finding has occurred, the respondent cannot seek to cover up and block access to evidence that may assist in evaluating further the nature of the new relationship.

There is no privilege against incrimination in a civil case. A litigant should not be able to lie or withhold evidence about what is going on. Moreover, the Legislature has directed that such evidence must be assessed.

Assertions by a respondent that allowing such inquiries will open the flood gates of litigation can be demonstrated not to be correct if counsel has carefully made the initial application and gathered substantial evidence to support it. The requests will be made, not in the context of a former spouse who drove by his or her ex-spouse's house for a few weeks and saw the same car out front, but in the context of a long, demonstrated relationship that needs to be further probed and analyzed with access to evidence about the factors the Legislature has said must be used to assess that relationship. That is why it is particularly important to carefully develop the application before going public to make sure that counsel has enough to get an order allowing discovery.

E-Z Pass

E-Z Pass records facilitate learning about people's location from time to time. Service of a subpoena on E-Z Pass is not likely to result in any prompt return or any return at all. E-Z Pass honors authorizations from the E-Z Pass subscriber and that is the most effective way to obtain E-Z Pass records that are directly relevant to people's locations. E-Z Pass records regarding New Jersey toll roads are self-authenticating.[18] However, information from other state road authorities that appear in New Jersey E-Z Pass records must be authenticated in another manner. Records provided by New Jersey agencies make that clear.

Financial Records of Third Party

There are cases where the third party simply turns over records after hiring counsel, who communicates their willingness to cooperate. However, there are other instances where motions to quash are filed and every effort is made to block and impede access to information.

When dealing with resistance, counsel must emphasize that he or she is only doing what the Legislature has directed must be done. The Legislature has directed judges on how they must assess cohabitation; namely, they must consider several identified factors and anything else that anybody wants to present regarding the issue (*i.e.,* "all other relevant evidence"). If the court rules that a *prima facie* case has been made, then there is going to be discovery and a hearing about the issue of cohabitation. In connection with that hearing, the Legislature has stated that courts *must* consider evidence of financial intertwining and expense sharing. In order for courts to *consider* it, counsel must be able to *present* it, which means counsel must have the right to *access* it. How else is one to determine and utilize assessment evidence pertaining to finances without being able to examine both involved parties' financial records? If counsel is barred from the paramour's records on the basis of a privacy interest, then evidence about it can't be presented.

When there is a statutory right to seek cessation of alimony payments in the event of a finding of cohabitation, then how can those involved in that relationship reasonably assert either has a privacy right, which bars access to evidence the Legislature has said must be considered? How can one present evidence if one is not allowed to seek it? How can the court assess evidence if it doesn't have it?

The assertion that the statute requires joint holdings to establish a financially intertwined relationship, or that counsel is limited to seeking evidence of joint holdings, is belied by the language of the statute. Joint holdings are referenced as an example. The statute does not say that the parties must have joint holdings for there to be an assessment that they are intertwined financially. The author believes it is intuitively logical that it is impossible to examine the nature of a couple's financial relationship without examining both of their financial holdings. Without access to accounts to see whether money is coming from either to the other or being deposited into the account of the other or expended on behalf of the other, the financial interactions and interconnectedness cannot be fully vetted.

Conclusion

The law of cohabitation has now been set by the Legislature. This is the first time the Legislature has passed a statute defining cohabitation and declaring that alimony must be terminated or suspended if it is found. A finding of cohabitation can have the same statutory impact as the death or remarriage of a spouse[19]—alimony ends. The change in focus of the law has been to evaluate the nature of the relationship with the cohabitant, rather than its economic impact on the supported spouse.

It is important when presenting a cohabitation case that it be done in a deliberate fashion. Engage in careful investigation *before* the initial application. The longer the relationship being brought to the court's attention has gone on, the more likely a judge will be persuaded to order discovery and a hearing. Therefore, it is important to gather evidence from multiple sources before going public with a filing. Counsel must persuade the client to be patient. Success is more likely to come with deliberate preparation rather than a race to the courthouse. ■

John E. Finnerty is founder of Finnerty, Canda & Concannon, P.C. with offices in Bergen County.

Endnotes

1. *Ozolins v. Ozolins*, 308 N.J. Super. 243, 245 (App. Div. 1998).
2. Based on the legislative history of the statute, this is the only reasoned interpretation. At the time of the passage of this statute, two different versions were being considered as it pertained to cohabitation. One version permitted modification, termination or suspension. These amendments were not adopted and the Legislature passed the current version of the law, which is codified at N.J.S.A. 2A:34-23(n). The word "modified" was deleted prior to passage. In addition, prior proposed bills not adopted referenced economic impact on the supported spouse when assessing cohabitation. (*See* A-845, 216 Leg. at 11 (N.J. 2014); A-971, 216 Leg. at 5 (N.J. 2014); S-488, 216 Leg. at 5 (N.J. 2014); A3909, 215 Leg. (N.J. 2013).

3. An excellent article tracing the development of cohabitation law and discussing policy issues is "Cohabitation and the Amended Alimony Statute: Has the Economic Needs Standard Been Replaced," Murphy, 36 *New Jersey Family Lawyer*, 13, June, 2016.
4. N.J.S.A. 2A:34-23(n).
5. R. 1:6-6.
6. *Robertelli v. NJ Office of Attorney Ethics*, 224 N.J. 470 (April 19, 2010).
7. *See State v. Hempele*, 120 N.J. 182, 216 (1990); *State v. Johnson*, 171 N.J. 192, 208-09 (2002).
8. *Villanova v. Innovative Investigations, Inc.*, 420 N.J. Super. 353 (App. Div. 2011); *LAVH v. RJLH*, 2011 WL 347701 (App. Div. 2011).
9. *Wachtel v. Wachtel*, 2015 WL 1511181 (App. Div. 2015).
10. *See Welch v. Welch*, 401 N.J. Super. 438 (Ch. Div. 2008).
11. R. 4:10-4 and R. 4:14-1.
12. *See Zaccardi v. Becker*, 88 N.J. 245, 252 (1982).
13. *See Pfenninger v. Hunterton Central*, 167 N.J. 230, 237 (2001).
14. Scafari, "Authentication and Admissibility of Electronic and Social Media Evidence in Family Law Matters," 310 *New Jersey Lawyer*, 47, Feb., 2018
15. 18 U.S.C.A. Sections 2701-2712.
16. *See Id.*
17. 949 NYA 2nd 590 (2012).
18. N.J.R.E. 902.
19. N.J.S.A. 2A:34-25.

The Disqualification of an Expert Witness Who Has Had Contacts with Both Sides in the Litigation: When is it Appropriate and What is the Standard the Court Should Apply?

by Derek M. Freed

In complex matrimonial litigation, attorneys often retain expert witnesses to render opinions on behalf of their clients. Additionally, the court may, in its discretion, appoint its own expert if it concludes "that disposition of an issue will be assisted by expert opinion, and whether or not the parties propose to offer or have offered their own experts' opinions."[1] It is common for an expert to render opinions regarding custody and parenting time, the value of a business for purposes of equitable distribution, and a party's net cash flow for purposes of support. Additionally, experts are generally retained in cases where the issues presented are uncommon, such as the interpretation of a foreign contract (*e.g.*, a prenuptial agreement from a country outside of the United States) or the impact of a child's medical condition on custodial issues.

Whether the court appoints an expert witness or the parties retain experts on their behalf, conflict of interest issues can arise. A proposed expert on custody and parenting time issues may be affiliated with a private therapy practice and a different member of the practice may have consulted with a party or rendered treatment to the child.[2] An economic expert may have discussed a topic generally with an attorney before the litigation was filed without being retained and, then, the adverse party may seek to confer with that same economic expert and discuss his or her case in detail upon the commencement of the litigation.

Are these factual circumstances illustrative of conflicts of interest? How does one evaluate whether an expert is precluded from participating in the litigation due to a conflict of interest? What is the remedy that is appropriate if a conflict is found?

One area *not to start* the analysis is the New Jersey Rules of Professional Conduct, as these rules apply to attorneys and the vast majority of expert witnesses are not admitted to practice law.[3] As the Rules of Professional Conduct are not determinative, courts may look to the various professional guidelines that exist to regulate/govern an expert's field or area of practice, but these guidelines may prove complicated and difficult to interpret.[4]

There are, however, cases from both the New Jersey Supreme Court and from the federal court that provide guidance on how to first determine whether a conflict of interest exists and, if so, the appropriate remedy that should be imposed by the court.

In 1991, the New Jersey Supreme Court decided the case of *Graham v. Gielchinsky*.[5] The *Graham* Court phrased the issue as dealing with the "apparent gap in our Rules of Civil Procedure dealing with the discovery and use of the opinion evidence of an expert consulted by an adversary."[6] While the Court Rules did not permit discovery of the names/opinions of an expert "that a party has consulted but does not intend to call at trial… the Rules do not address whether a litigant may use that information at trial when obtained through means *other* than discovery."[7]

In *Graham*, the plaintiff consulted with an expert witness (Dr. Primich) about whether the defendant had deviated from the standard of care during cardio-thoracic surgery.[8] Dr. Primich concluded that the defendant had *not* been negligent in his conduct.[9] The plaintiff then switched attorneys, with his second attorney retaining a different expert, who concluded the defendant had deviated from the standard of care.[10]

In a manner that was unclear based on the record, the defendant "obtained Dr. Primich's report."[11] One week prior to the commencement of trial, the defendant requested that Dr. Primich testify on *his* behalf at the time of trial.[12] The plaintiff filed a motion to prevent the

defendant from calling the expert in question.[13]

In response to the motion, the trial court permitted the defendant to use the expert's opinion evidence. The trial court did bar the expert from "relying on any confidential information or suggesting that plaintiff had originally consulted him."[14] After the jury issued a verdict in favor of the defendant, the plaintiff appealed, asserting that it was an error for the trial court to permit Dr. Primich to testify on behalf of the defendant.[15]

The case went to the New Jersey Supreme Court, which began its analysis by discussing the history of discovery regarding opinions held by expert witnesses, noting that with the passage of time, "courts have gradually permitted increased discovery of expert-opinion evidence."[16] The *Graham* Court stated that in 1969, the New Jersey Rules of Court were amended to permit "discovery of opinions in expert witnesses."[17] However, the amendments to the Court Rules called for the exchange of expert reports "but only those experts who are intended to be *called as witnesses at trial*."[18] The *Graham* Court stated that "[b]ecause there would be no occasion to cross-examine the expert who would not be produced at trial, there was no need to provide for discovery of the expert's opinion."[19]

Notwithstanding the above, the Court Rules did permit the discovery of an expert who would not be testifying based on a showing of "exceptional circumstances."[20] The *Graham* Court surveyed the opinions from other jurisdictions on the issue, finding precedent from Arizona that had a similar set of facts to the case presented. In that case (*Granger v. Wisner*), the Supreme Court of Arizona "concluded that an expert witness whom the plaintiff's attorney had consulted could testify on behalf of the defendant that in the expert's opinion the defendant had not committed malpractice. That court emphasized that counsel had not questioned the witness about, and the witness had not testified to, any confidential communications with the plaintiff or her previous counsel. The expert based his testimony solely on his education, training, experience, and a review of the records."[21] As the expert was not relying on any confidential information obtained from the party, permitting that expert to testify fostered a critical goal of the court system, which was "to elicit truth essential to correct adjudication."[22]

The *Graham* Court also examined relevant, but not determinative, cases that had been decided in New Jersey, finding that the courts were divided on issues pertaining to the discovery of experts who had consulted with the other party. There were two policies that conflicted in evaluating whether an expert who had "switched sides" and/or consulted with both sides could testify: 1) the policy that "interests of truth outweigh [ ] any expectation of allegiance a party might have in consulting a prospective witness in preparation for trial…"[23] and 2) the "unavoidable element of unfairness" that exists in admitting opinion evidence from an expert who has consulted with both parties.[24]

The *Graham* Court expressed concern about how an expert who had consulted with each side could effectively be cross-examined at trial. The expert's motivation for testifying in the case at bar on behalf of the defendant "would remain unexplored if a lawyer could not effectively cross-examine the expert without, at the same time, disclosing the client's initial relationship."[25] The Court was concerned about the impact of its decision on attorneys selecting experts, as the lawyer who searched for the opinion of an expert would be placed "in an impossible situation. Countless claims of malpractice would be leveled against attorneys who put unfavorable expert evidence in as part of their clients' case-in-chief."[26] The lawyer's work product had to be "protected, subject to trial-fairness requirements."[27]

The *Graham* Court held that "[b]ecause effective cross-examination of such witnesses is inherently limited, truth has a better chance to emerge if the use of an adversary's expert is the exception, not the rule. Hence, we hold that in the absence of exceptional circumstances … courts should not allow the opinion testimony of an expert originally consulted by an adversary."[28] The *Graham* Court noted that exceptions to this rule could include matters involving the public interest, situations in which one party was attempting to "corner the field" of experts, as well as other situations implicating "trial surprise or other unfairness."[29] Ultimately, the *Graham* Court affirmed the trial court's decision because it was "satisfied that in the circumstances of this case, the trial tactics did not prejudice the trial of the issues."[30]

The limits of *Graham* were explored by the Appellate Division in *In re Pelvic Mesh/Gynecare Litigation*, which involved several hundred plaintiffs suing Johnson & Johnson and Ethicon, Inc., asserting "they have suffered injuries caused by a line of defendants' medical products."[31] In a pretrial order, the trial court precluded the "defendants from consulting with or retaining as an expert witness any physician who has at any time treated one or more of the plaintiffs."[32]

The record indicated the surgeries at issue in the litigation were "performed by a relatively small group of surgeons in the United States."[33] The defendants estimated that more than 1,000 physicians were precluded from serving as experts as a result of the trial court's determination, with that number increasing as the number of plaintiffs joining the litigation increased.[34] In response to the defendants' concerns about the impact of its order, the trial court indicated the defendants could seek to "exempt a physician from the disqualification order. The court also stated it would consider modifying its order more generally if future events reveal[ed] that defendants [were] unable to retain satisfactory expert assistance in this litigation."[35]

On appeal, the defendants asserted the trial court's order drastically limited "the pool of qualified and willing physicians that defendants can consult and engage as expert witnesses" and placed the "defendants in the precarious position of consulting and preparing experts only to have them later disqualified as new plaintiffs are added to the litigation," which had already occurred twice in the litigation to date.[36] As a result, the defendants claimed they would have to retain experts who had "less direct patient experience and knowledge," while the plaintiffs "will have the advantage of consulting with and presenting testimony at trial from American physicians who have treated patients and are personally familiar with the use of defendants'...products."[37]

On appeal, the Appellate Division expressed concern about the rationale underlying the trial court's order. Additionally, the Appellate Division found that the trial court's order "deprived defendants of fair access to physicians who could be among the best-qualified experts in these cases."[38] The Appellate Division looked at the Code of Medical Ethics and the limits the code placed on physicians with respect to their patients' medical interests, which were distinct from "litigation interests."[39]

Judge Jack M. Sabatino filed a concurring opinion, which provides an extensive analysis of conflict-related issues pertaining to expert witnesses. In his opinion, Judge Sabatino stated, "[s]ubject to certain procedural and evidentiary constraints, a litigant has a presumptive right to designate one or more expert witnesses that it may call upon at trial to render admissible opinions and, if the expert also has personal knowledge, facts relating to the case. A litigant within our adversarial system also has a presumptive right to engage, as consultants or advisors, experts who may not issue discoverable reports or testify in the matter, but who instead are retained to assist the litigant and its counsel in the prosecution or defense of the case."[40]

Judge Sabatino then examined several federal court decisions in which the courts recognized their "inherent power to disqualify expert witnesses to protect the integrity of the adversary process, protect privileges that otherwise may be breached, and promote public confidence in the legal system."[41] Moving his focus to *Graham*, Judge Sabatino stressed that the rationale behind the analysis in that case was "derived from principles of 'trial-fairness.'"[42] If an adversary had "free rein to retain an expert who had been originally consulted by an opponent [that] could result in him or her taking 'unfair advantage' of the opposing lawyer's attempt to evaluate the client's case."[43] While the search for truth at trial was important, such a search was "tempered by considerations of fairness and does not necessarily 'trump[ ] all other policies of law.'"[44]

Judge Sabatino then performed an analysis of the different role experts play in a litigation, as compared to attorneys. "Experts are not advocates in the litigation but sources of information and opinions."[45] As a result of these very different roles, the "expert disqualification standard must be distinguished from the attorney-client relationship…"[46] This is the underpinning of the rationale that "the disqualification of an expert 'is a drastic measure that courts should impose only hesitantly, reluctantly, and rarely.'"[47] Indeed, a "court's authority to disqualify experts is more limited than its authority to disqualify attorneys."[48] Thus, while Judge Sabatino agreed with the Appellate Division's reversal of the trial court's order, his detailed concurring opinion addresses additional critical matters that were not discussed by the majority.

The differentiation between the role an expert plays in litigation and the role of the attorney referenced by Judge Sabatino in the *Pelvic Mesh* litigation, as well as the different standards that are applied in evaluating whether either should be disqualified due to conflicts of interest, was examined by the federal court in great detail in *Cordy v. Sherwin-Williams Co.*[49] In *Cordy*, the court opened its decision with the following statement and query:

> In this day of divided and shifting loyalties, when it is not unknown for lawyers to change firms in the middle of litigation, we are faced with the phenomenon of an expert essentially doing the same thing by changing sides in the

> litigation. The question for the Court is whether he should get away with it.[50]

The court was faced with a situation where an expert, Mr. Green, was consulted by the plaintiff regarding the litigation.[51] After several conversations about the case, the expert sent a retainer agreement to the plaintiff's counsel, which the plaintiff's counsel subsequently executed and sent a check to Mr. Green as a retainer.[52] The plaintiff's counsel also sent Mr. Green documentation regarding the case, as well as correspondence outlining counsel's impressions of the case.[53] Mr. Green then performed substantial work on the matter, but did not provide a written report, instead providing only an oral opinion.[54] Mr. Green then terminated the relationship as per the retainer agreement and returned the retainer to the plaintiff's counsel.[55]

Approximately several months after Mr. Green terminated the relationship as the plaintiff's expert, counsel for the defendant in the litigation initiated contact with Mr. Green.[56] Mr. Green advised counsel that he had "consulted" with the plaintiff's counsel.[57] Mr. Green prepared a retainer agreement for the defendant's counsel that was identical (except for the client's name) to the retainer prepared for the plaintiff's counsel, which was executed by the defendant's counsel.[58] The defendant's counsel asked Mr. Green not to "disclose any information provided...by the Plaintiff's attorney or any documents... received from their office."[59]

Upon the plaintiff's law firm learning that Mr. Green had been retained by the defendant, an objection was immediately made.[60] Mr. Green rendered a 'preliminary' opinion for the defendant.[61] The record does not reflect that Mr. Green disclosed any information he learned from the plaintiff's counsel.[62] Additionally, "[t]here is no evidence that either party is unable to secure another expert on bicycle accident cases."[63]

As expressed in Judge Sabatino's concurring opinion in the *Pelvic Mesh* case, the *Cordy* court stressed that experts and attorneys serve very different roles in litigation and, therefore, "the standards and presumptions applicable to the attorney-client relationship have little bearing on an expert's disqualification."[64]

As the party seeking disqualification of the expert, the plaintiff had to show: 1) that there was the existence of confidentiality between the plaintiff's counsel and the expert, and 2) that the confidentiality was not waived.[65] The *Cordy* court then examined the federal law on whether to disqualify an expert. There was a two-part test: 1) was it objectively reasonable for the first party who retained the expert to believe that a confidential relationship existed, and 2) did that party disclose any confidential information to the expert?[66] The court was also required to "balance the competing policy objectives in determining expert disqualification."[67] These policies included "preventing conflicts of interest and maintaining the integrity of the judicial process" as well as "ensuring access to expert witnesses who possess specialized knowledge and allowing experts to pursue their professional calling."[68]

The *Cordy* court then addressed *Graham v. Gielchinsky*, which it referred to as "the leading state case on expert disqualification."[69] The *Cordy* court felt that *Graham* was decided on two different bases: "attorney-client privilege and fundamental fairness."[70]

In examining the situation, it was determined that the plaintiff did, in fact, retain Mr. Green.[71] Additionally, the court determined that it was reasonable for the plaintiff's counsel to believe that "a confidential or fiduciary relationship existed" with the expert.[72] Based on these facts, the court granted the plaintiff's request to bar Mr. Green from "serving as an expert witness, either in Court or as a consultant for the Defendant on this case."[73] The court stressed that in rendering this decision, it

> need not impute any evil motive to either Green or Defendant's law firm. This analysis does not seek out intentional wrongdoing but addresses an issue of fairness. Any party to a lawsuit who retains an expert should not have to worry that the expert will change sides in the middle of the proceeding. To hold otherwise would adversely affect the confidence parties place in this system of justice.[74]

In addition to disqualifying Mr. Green as the defendant's expert, the court disqualified the defendant's counsel, as well. The court stressed, "the fairness and integrity of the judicial process and the Plaintiff's interest in a trial free from the risk that confidential information has been unfairly used against him must also be considered and outweighs the Defendant's interest….The preservation of public trust is paramount."[75] The *Cordy* court stated that "[t]o believe [Mr.] Green did not and will not remember and ultimately use [the confidential] information [received from Plaintiff], even 'subliminally,' defies common sense

and human nature."[76] As such, in order to ensure a fair proceeding, the trial court disqualified the defendant's counsel from continuing with the representation.

The limits placed on the actual questioning of the "expert who switches sides" was explored in *Fitzgerald v. Stanley Roberts, Inc.*, a case in which the plaintiff made allegations of workplace discrimination.[77] At the time of trial, the defendants sought to call a psychiatrist who "had originally been scheduled to testify as plaintiff's expert."[78] During the course of the litigation, the psychiatrist had "modified his initial diagnosis after reviewing information provided during discovery," making it less favorable to the plaintiff.[79] As such, the defendants believed the psychiatrists' decision would actually be favorable to them.

Prior to trial, the plaintiff stated that if she elected not to call the psychiatrist, the defendant should be barred from calling the witness. The trial court agreed, precluding the expert from testifying on behalf of the defendants based on *Graham v. Gielchinsky*.[80] The Appellate Division reversed the trial court's determination. First, the Appellate Division stated, "Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance."[81] In what constitutes quite expansive language, the Appellate Division stated, "Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone. Unless impeded by privilege an adversary may inquire, in advance of trial, by any lawful manner to learn what any witness knows if other appropriate conditions the witness alone may impose are satisfied, e.g., compensation for his time and expertise or payment of reasonable expenses involved ...."[82] Per the court, given that: 1) the plaintiff had provided the expert's report, as well as 2) the plaintiff had indicated that the expert was a "testifying expert" warranted such a result.[83]

This, however, was not the end of the Appellate Division's analysis. While such an expert could be called by the adverse party, the question became what limits, if any, would be imposed on the questioning of the expert. For example, could the attorney question the expert regarding his "original retention," which may then lead to a discussion of why the expert had "switched sides."[84] Noting that courts in New Jersey and in the other states were divided on such an issue, the Appellate Division expressed concerns about permitting testimony about the expert's original retention and why he or she "switched sides."[85] The court was concerned that there was "a substantial risk that the jury will unfairly assume that the expert changed sides because the original hiring party did something wrong, whether that is the truth or not."[86] As such, there would be an "initial restriction" regarding the circumstances of the original retention.[87] However, the restriction would not be absolute and subject to review by the trial court.[88]

Given the above cases, several themes and considerations become evident. First, the analysis associated with disqualifying an expert due to a conflict of interest is different than the analysis for disqualifying an attorney. This is due to the different roles that an attorney and an expert witness have in litigation. An attorney is an advocate on behalf of a client. An expert, however, is a source of information and opinions.

Next, as per *Cordy*, the focus on the inquiry is *not* on whether the conduct of the expert was malicious, but instead, whether the party who initially retained the expert had an objectively reasonable basis to believe that a confidential relationship existed and whether that party provided the expert with any confidential information. This two-part test considers the conduct and mindset of the party seeking disqualification, not the mindset of the expert. The establishment of a confidential relationship should be easily provable if a retainer agreement was executed. In terms of proving that confidential information was provided to the expert, this could be confirmed by providing memoranda given to the expert, or by recounting telephone calls that the attorney had with the expert. All of this information and documentation would be in the possession of the party seeking disqualification. He or she would know what was provided to the expert and, as such, could present that information to the court for consideration.

The cases also express a common theme that access to experts (and replacement experts) should play a role in the court's analysis. For example, in the *Pelvic Mesh* litigation, the Appellate Division was concerned that if the trial court's order were enforced, the defendants would be extremely limited in the experts with whom they could consult and retain. As courts look to experts for information that helps explain complex issues, the scope of a disqualification order should not be overly broad. In matrimonial law, one can imagine cases involving subspecialties and topics on which there are very few experts who can offer an opinion. In those types of cases, a court may be concerned about disqualifying an expert due to a

conflict, especially where there is evidence on the record that suggests locating a replacement expert would be difficult.

Another theme that exists in these cases is a focus on the integrity of the trial process. For example, if an expert is being cross-examined in the presence of a jury about his or her retention and why he or she is now testifying on behalf of the adverse party, a jury could become confused in terms of the amount of weight afforded to the expert's opinion. This concern about jury confusion may not be present in a bench trial. However, in a bench trial issues pertaining to the overall fairness of the litigation would exist if an expert were permitted to continue to be involved in the litigation after 'switching sides.' As such, concepts of trial fairness, confusion of the issues, and whether limits would be imposed on the extent of cross-examination must be considered and analyzed when making an application to disqualify.

There are other relevant considerations that must be addressed. For example, has the expert provided his or her opinion in the form of a report? Has the expert been included on a trial list? Has the expert been deposed? Was the expert's report based on confidential information, or was it based on information that was available to either party (or in the public domain)? All of these questions would need to be resolved in the context of determining whether an expert should be disqualified from participating in the litigation.

Derek M. Freed is the managing member of Ulrichsen Rosen & Freed LLC in Pennington.

Endnotes

1. *See* Rule 5:3-3(a), which addresses the court's appointment of "medical, mental health, and social" experts. Additionally, Rule 5:3-3(c) permits the court to appoint economic experts in its discretion.
2. *See* Rule 5:3-3(a), which states, "No...appointment…shall be made of an expert who is providing or has provided therapy to any member of that person's family."
3. *See* RPC 1.7(a), which states "...a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." (Emphasis added. Also, *RPC* 1.8(a) states "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless…" certain circumstances are met. (Emphasis added).
4. A court could appoint its own expert to provide assistance on such matters.
5. *Graham v. Gielchinsky*, 126 N.J. 361 (1991).
6. *Id.* at 362.
7. *Ibid.*
8. *Ibid.*
9. *Id.* at 364.
10. *Id.* at 364.
11. *Id.* at 364.
12. *Ibid.*
13. *Id.* at 362-63.
14. *Id.* at 363.
15. *Id.* at 364-65.
16. *Id.* at 151-52.
17. *Id.* at 366. *See also* the Amendment to R. 4:10-2.
18. *Ibid. See also* Pressler, *Rules Governing the Courts of the State of New Jersey,* R. 4:17 comment (1971) (emphasis added in original).

19. *Id.* at 367.
20. *Id.* at 153. *See also* R. 4:10–2(d)(3). *See Koustsouflakis v. Schirmer,* 247 N.J. Super. 139 (Law Div. 1991).
21. *Granger v. Wisner*, 134 Ariz. 377, 656 P. 2d 1238, 1241 (1982).
22. *Sachs v. Aluminum Co. of Am.,* 167 F.2d 570 (6th Cir. 1948).
23. *See Graham*, 241 N.J. Super. 108, 113 (App. Div. 1990).
24. *Graham*, 126 N.J. at 371-72.
25. *Id.* at 372.
26. *Id.* at 373.
27. *Id.* at 155 *See* Pressler, *Rules Governing the Courts of the State of New Jersey* R. 4:10–2(c) comment (1992).
28. *Id.* at 373.
29. *Id.* at 374.
30. *Id.* at 376.
31. *In re Pelvic Mesh/Gynecare Litigation*, 426 N.J. Super. 167 (App. Div. 2012).
32. *Id.* at 171.
33. *Id.* at 174.
34. *Id.* at 174-75.
35. *Id.* at 175.
36. *Id.* at 176.
37. *Ibid.*
38. *Id.* at 179.
39. *Id.* at 189-190.
40. *Id.* at 196. *See, e.g., Franklin v. Milner*, 150 N.J. Super. 456, 472 (App. Div. 1977). *See also* Pressler & Verniero, *Current N.J. Court Rules,* comment 5.2.1 on R. 4:10–2 (2012).
41. *Id.* at 197. *Citing Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092 (N.D. Cal. 2004). *See also Erickson v. Newmar Corp.*, 87 F. 3d 298, 300 (9th Cir. 1996) (noting that courts may disqualify experts in possession of confidential information who "switch sides"); *Koch Ref. Co. v. Boudreaux M/V*, 85 F. 3d 1178, 1181 (5th Cir. 1996)(noting the multi-part balancing test that courts employ to determine whether an expert who has not "switched sides" should be disqualified). "This power derives from the court's duty to preserve confidence in the fairness and integrity of judicial proceedings, and to protect privileges which may be breached if an expert is permitted to switch sides in pending litigation." *United States ex rel. Cherry Hill Convalescent Ctr., Inc. v. Healthcare Rehab Sys., Inc.*, 994 F. Supp. 244, 248-49 (D.N.J. 1997). (internal citations omitted).
42. *Id.* at 198.
43. *Ibid.*
44. *Ibid. Citing Graham*, 126 N.J. at 371.
45. *Id.* at 199. *Citing English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501 (D. Colo. 1993).
46. *Ibid.*
47. *Ibid.* (*quoting Hewlett-Packard*, *supra*, 330 F. Supp. 2d at 1092. *See also, Koch, supra*, 85 F. 3d at 1181; *Procter & Gamble Co. v. Haugen*, 184 F.R.D. 410, 413 (D. Utah 1999).
48. *Id.* at 198-99. *See United States ex rel. Cherry Hill Convalescent Ctr., supra,* 994 F. Supp. at 249. *See also Hewlett-Packard, supra,* 330 F. Supp. 2d at 1092.
49. *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994).
50. *Id.* at 576.
51. *Ibid.*
52. *Id.* at 577.
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*
56. *Id.* at 578.
57. *Ibid.*
58. *Ibid.*
59. *Ibid.*
60. *Id.* at 578-79.
61. *Id.* at 579.
62. *Ibid.*
63. *Ibid.*
64. *Id.* at 580. Citing *English Feedlot, Inc. v. Norden Labs., Inc.,* 833 F. Supp. 1498, 1501 (D. Colo. 1993) (*citing Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.,* 734 F. Supp. 334, 336 (N.D. Ill. 1990)).
65. *Ibid. Citing English Feedlot, Inc. v. Norden Labs., Inc.,* 833 F. Supp. 1498, 1502 (D. Colo. 1993) (*citing Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.,* 734 F. Supp. 334, 336 (N. D. Ill. 1990)).
66. *Ibid.* (*citing Mayer v. Dell,* 139 F.R.D. at 3).
67. *Ibid.*
68. *Ibid.*
69. *Ibid.*
70. *Ibid.*
71. *Id.* at 581.
72. *Ibid.*
73. *Ibid.*
74. *Ibid.*
75. *Id.* at 584.
76. *Ibid.*

77. *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 293 (2006).
78. *Id.* at 296.
79. *Ibid.*
80. *Ibid.*
81. *Id.* at 301. *See also Int'l Bus. Machs. Corp. v. Edelstein*, 526 F. 2d 37, 41-44 (2nd Cir. 1975). *See also Edmund J. Flynn Co. v. LaVay*, 431 A. 2d 543, 551 (D.C. 1981). *See also* 8 *Wigmore on Evidence* § 2192 (McNaughton rev. ed.1961).
82. *Id.* at 301-302.
83. *Id.* at 302.
84. *Id.* at 302-303.
85. *Id.* at 304-305.
86. *Id.* at 305.
87. *Id.* at 305-306.
88. *Id.* at 306.

Commentary

Filing Fees in the Family Division: A Land of Confusion

by Robert E. Goldstein

The power to make rules governing the administration of all courts in the state is given to the New Jersey Supreme Court pursuant to Section II, subsection 3 of the New Jersey Constitution. This article seeks to examine what has occurred with the imposition of increased filing fees for Family Division litigants, and particularly FM litigants, since late 2014. The Administrative Office of the Courts asserted that N.J.S.A. 2B:1-7 provided the Judiciary with the limited authority to increase court filing fees by an amount not greater than $50 for the sole purpose of funding a statewide pretrial services program (*i.e.*, bail reform), development and maintenance of an e-Courts information system and the provision of legal assistance to the poor by Legal Services of New Jersey and its affiliates.

Rule 1:43 of the New Jersey Rules of Court provides for certain filing and other fees payable to the courts of New Jersey, revised and supplemented by the New Jersey Supreme Court in accordance with N.J.S.A. 2B:1-7, effective Nov. 17, 2014.

The Answer to Counterclaim Fee

In a notice to the bar dated Feb. 27, 2015, the clerk of the New Jersey Superior Court advised the bar that under Rule 1:43, as amended effective Nov. 17, 2014, litigants in FM litigation in the Superior Court, Chancery Division, Family Part, must pay a filing fee of $175 to file an answer to a counterclaim in such actions. This effectively means that the plaintiff in a FM action would have to pay filing fees of $300 for the filing of a complaint and $175 for the filing of an answer when, as is commonplace, a defendant in the action files a counterclaim for divorce. This is in addition to the $25 fee payable pursuant to the Parents Education Act. Thus, many plaintiffs were to be charged $500 in filing fees in actions for divorce.

The clerk's office published a sheet with filing fee changes dated Feb, 20, 2015. Specifically, with respect to the Superior Court, Chancery Division, Family Part, the following was published:

> Complaint (first paper) in divorce actions or actions for dissolution of a civil union or domestic partnership[1] $300.00
>
> Parent Education Registration[2] $25.00
>
> First Responsive Pleading (Dissolution)[3] $175.00
>
> Motion (Dissolution)[4] $50.00
>
> Order to Show Cause (Dissolution)[5] $50.00
>
> Motion or Order to Show Cause (Non-Dissolution) ..... No Fee
>
> Post-disposition Application (Non-Dissolution)[6] $25.00
>
> Writ of Execution[7] $5.00
>
> Warrant of Satisfaction[8] $5.00
>
> Application for Child Support Services[9] $6.00

From this author's experience, it appears that for most practitioners these notices containing filing fee changes were not widely known until late 2015 or early 2016, and most counties were not assessing the new answer to counterclaim fee until enforcement of the rule took place in all venues. The basis for the new charge for the filing of an answer to counterclaim remains unclear, since New Jersey legislation provides, in pertinent part, as follows:

> Payment of fees in Chancery Division of Superior Court upon filing of first paper.
>
> Upon filing of the first paper, in any action or proceeding in the Chancery Division of the Superior Court, there shall be paid to the clerk of the court, for the use of the State, the follow-

> ing fees, which except as hereinafter provided, shall constitute the entire fees to be collected by the clerk for the use of the State, down to the final disposition of the cause....[10]

This author questions how an answer to a counterclaim can be deemed the "filing of the first paper" by a plaintiff in an action in the FM docket, when the first paper filed by the plaintiff is the complaint.

Nevertheless, in an attempt to clarify Rule 1:43, the clerk's office, presumably upon direction of the Administrative Office of the Courts, stated the following in a notice to the bar dated Feb. 27, 2015:

> What is the fee for an Answer to a Cross-claim, Answer to a Counterclaim, or Answer to a Third-Party Complaint in the Superior Court? Since these Answers are made in response to a new cause of action, there is a fee for filing the responsive pleading to those actions. The fee for each of these document types is $175.00.

This position was re-stated by Judge Glenn A. Grant, acting administrative director of the courts, in responding to a letter written by the New Jersey State Bar Association objecting to the imposition of these fees and others. It seems to this author that this explanation for the collection of this additional fee, that was not collected prior to Nov. 2014, is in direct conflict with the authorizing statute, N.J.S.A. 22A:2-12. While it can be argued that a counterclaim is a "new cause of action," it is not a $50 fee authorized by N.J.S.A. 2B:1-7, but rather a new $175 fee.

This author questions why the cost of bail reform, development of an e-Courts system and the provision of legal services to poor citizens of New Jersey isn't the responsibility of the entire population of the state of New Jersey, to be paid for out of the general treasury funds?

The 'Penalty' Fees for Post-Judgment Motions and Substitutions of Attorney

One of two additional charges has been assessed for a new attorney coming into a case. Normally, when a case is active and a client switches attorneys, or the client decides to take over his or her own case and proceed *pro se*, a substitution of attorney must be filed, accompanied by a $35 filing fee. However, a new pleading, known as a notice of appearance, came into being with little notice or fanfare.

The Supreme Court, by order dated Feb. 10, 2015, supplemented and relaxed the provisions of Rule 1:11-2 ("Withdrawal or Substitution") to require an "attorney retained by a client who had appeared pro se" to file a notice of appearance, rather than a substitution of attorney. As explained in a notice to the bar issued by Judge Grant on Feb. 20, 2015, "the import of the Court's order is that a Notice of Appearance must be used whenever an attorney first appears in a matter at any time other than the filing of the initial complaint or answer." The notice to the bar went on to say "For matters where a party initially appeared pro se and subsequently is represented by counsel, a Notice of Appearance pleading and the filing fee for a Notice of Appearance ($50, except for the Special Civil Part, which is $30) would thus be required by counsel seeking to appear on behalf of that party."

Thus, the Court no longer allowed the filing of a substitution of attorney when a lawyer was entering a matter where the litigant had been appearing *pro se*. But the notice to the bar seemed to imply that this new pleading—the notice of appearance—was to be filed in cases being actively litigated. However, from this author's experience, that turned out to not be the case. In late 2015, this author was retained by a client who had been served with a notice of motion by his *pro se* former wife seeking an increase in child support. The parties had not had any post-judgment litigation between them since their divorce in 2003. For the first time, this author was told when filing a notice of cross-motion for a client whose case had not had any filings for approximately 10 years since the entry of the judgment of divorce that, in addition to the $50 motion filing fee, an additional fee of $50 had to be paid for a notice of appearance that also had to be filed. When the court clerk was asked what, if any, additional charges the *pro se* moving party had to pay, the answer was "none." Thus, for the privilege of being represented by an attorney, the client was being charged an additional $50 in filing fees. When this practice was brought to the attention of the Administrative Office of the Courts as being a discriminatory charge against a litigant who chose to be represented by an attorney, no explanation was offered.

It took months for the various counties to require the notice of appearance and additional filing fee. Some courts were asking for substitutions of attorney to be filed, some were asking for a notice of appearance to be filed, and some were not requesting either. This author believes filing a substitution of attorney makes no sense given Rule 1:11-3.

> Termination of Responsibility in the Trial Court: Responsibility on Appeal.
>
> Per Rule 1:11-3, the responsibility of an attorney of record in any trial court with respect…
>
> To the further conduct of the proceedings shall terminate upon the expiration of the time for appeal from the final judgment or order entered therein. For purposes of appeal or certification, however, the attorney of record for the adverse of party in the court below shall be considered as attorney of record for respondent, and notice and papers served upon that attorney shall be deemed good service until the appellant or petitioner is notified of an appearance entered by a new attorney or is given written notice by the respondent naming another attorney.[11]

The comment following this rule is particularly relevant to matrimonial actions in which there is often post-judgment or post-final order motion practice. The comment states, in pertinent part:

> The provision that an attorney's responsibility terminates on expiration of the time for appeal is intended to avoid the situation in which an opposing party, seeking supplementary or modified relief long after the entry of judgment, as is often the case in matrimonial actions, made service of the papers on the original attorney, *who may have had no further communication with his client since entry of judgment, no longer has a professional relationship with the client, and may not even know of the client's whereabouts. (Emphasis supplied)*[12]

Therefore, it seems clear to this author that under Rule 1:11-3 once the time for appeal has expired from the final judgment or last post-judgment order in a family law action, the attorney who appeared for a party is no longer attorney of record. Prior to Feb. 8, 2018, some clerks' offices insisted on the filing of a substitution of attorney signed by the previous attorney of record *after* the time for appeal from a judgment or order expired. This was directly contradictory to Rule 1:11-3, which has not been amended since 1994. However, on Feb. 8, 2018, by order of the Supreme Court, Rule 1:11-3 was relaxed and supplemented to provide that after the expiration of the time for appeal has expired, a newly retained law firm or attorney seeking to represent a party must file a notice of appearance with the trial court, accompanied by a $50 filing fee. Thus, it now appears that in post-judgment motions and order to show cause applications, where a new attorney is representing a party who was previously represented by another attorney or firm, the application must be accompanied by a notice of appearance and its filing fee, or the application will not be filed by the court clerk's office.

This new order in Feb. 2018 seems to have modified what was set forth in a notice to the bar dated Oct. 13, 2016, in which the director of the Administrative Office of the Courts issued a directive that stated it was being issued to clarify "the filing requirements related to substitutions of attorney and notices of appearance." Of relevance, the Oct. 13, 2016, notice stated:

> In instances where the substituting attorney is for whatever reason unable to obtain the required substitution transferring the case to him or her for representation, the filing of a notice of appearance will be sufficient to change the attorney of record with the court. The attorney in that situation will be required to pay the $50 notice of appearance filing fee.

What are the takeaways from the above? First, even though Rule 1:11-3 has not been amended, the courts insist that clients be charged with a $50 filing fee for a notice of appearance, long after the last final order or the entry of judgment and long after the time for appeal has expired. Despite this relaxation of Rule 1:11-3 by order of the Supreme Court only going into effect on Feb. 8, the Family Division was charging the $50 notice of appearance fee since 2015. Clients are now also being charged a legal fee for the preparation of a document known as a notice of appearance. This author questions why an attorney's filing of papers in a post-judgment matter after the time for appeal has expired is not the attorney's "appearance" in the action. This had always been the case until these charges were imposed on clients.

How does the Feb. 20, 2015, notice to the bar imposing a new pleading requirement and fee comport with the actual rule that only went into effect on Sept. 1, 2017, (more than two and a half years later), which only deals with the situation where an attorney is seeking to represent a client "who previously appealed *pro se*?" This

author believes litigants in the Family Division are being penalized for being represented by counsel by virtue of higher court filing fees that are not being imposed on *pro se* litigants. The Passaic, Middlesex and Bergen County Bar Associations filed a challenge to the imposition of the increased fees imposed in the courts, but the challenge was on constitutional grounds, and did not address fees on statutory or rule-based grounds. That constitutional challenge was dismissed by Judge Paul Innes in 2017, and, as of the writing of this article, the dismissal order is currently on appeal.

The Gold Seal Charges

Most family law attorneys who have been in practice for more than a few years recall that a litigant was entitled to a 'gold seal' copy of his or her judgment of divorce without charge. That changed when Rule 1:43 was amended in Nov. 2014. Under the amendment, a $10 charge was to be imposed for affixing of a court seal to a document, and an additional $15 charge was to be imposed for a certified copy of any document. Therefore, $25 was being charged to the litigant for their formerly free certified copy of the judgment of divorce with a gold seal. Were those fees being charged uniformly in each county? No, they were not. Some counties had it right; others did not. In a letter dated Sept. 12, 2016, and addressed to Thomas Prol, then NJSBA president, Judge Grant stated that he would remind the Judiciary staff that "by statute the first certified copy of a judgment of divorce provided to a party is at no cost." This author hopes by now, staff in all counties have received the message.

As for qualified domestic relations orders (QDROs), which are finalized post-judgment, a fee of $25 is being charged without exception for a certified 'gold seal' copy of the QDRO.

Conclusion

The institution of filing fee increases in the family part of the superior court has been the source of confusion among the bar, and even in the individual courthouses. This author believes litigants should never be financially penalized for the privilege of being represented by counsel; in fact, representation usually is an assistance to the overworked Judiciary. In addition, once the time for appeal from a final judgment or post-judgment order has expired, lawyers should have no further responsibility for the case, as Rule 1:11-3 provides. Thus, there was no basis for a lawyer who has no responsibility to sign a substitution of attorney, the filing fee for which is $35. Ironically, from this author's standpoint, instead of that fee, a new fee of $50 is being imposed together with a form called a notice of appearance, which must be filed for all post-judgment applications filed by an attorney for a litigant after the time for appeal has expired.

As of Feb. 8, the new attorney is now required to charge the client for the preparation and filing of a notice of appearance and the filing fee of $50 is assessed to the client. This author believes that the court system has been burdened with the obligation to raise funds to finance the legislatively mandated bail reform measures, as well as the implementation of the e-Court system; the problem is that in times of financial difficulty for most clients, the imposition of higher fees to them seems particularly unjust. This author believes the organized bar should continue to call on the Legislature to fund these reforms to the judicial system and not put all of the cost on the backs of Family and Civil Division litigants. ■

Robert E. Goldstein is of counsel to the law firm of Drescher & Cheslow, P.A. in Manalapan.

Endnotes

1. N.J.S.A. 22A:2-12; R. 1:43.
2. N.J.S.A.2A:34-12.2.
3. N.J.S.A.22A:2-12; R. 1:43.
4. *Id.*
5. *Id.*
6. R. 1:43.
7. N.J.S.A. 22A:2-7.
8. *Id.*
9. 45 C.F.R. 303.2 and N.J.A.C. 10:110-7.1.
10. N.J.S.A. 22A:2-12 (2013).
11. R. 1:11-3.
12. Comment to R. 1:11-3.

Interview with Marie E. Lihotz, J.A.D. (ret.): A Life on the Bench

The Honorable Marie E. Lihotz, the subject of the following in-depth interview, is known to family law practitioners as a prolific author of decisions addressing family law issues over the past 15 years.

Judge Lihotz retired when she was still young, after a 'lifetime' of judicial service. At the time of her retirement, she was serving as the presiding judge of part B of the Appellate Division, where she served since 2006. During her Appellate Division service, she was appointed to the Supreme Court Family Part Practice Committee in 2007 and became that standing committee's chair from 2009 until her retirement in 2017. Prior to her appointment to the Appellate Division, she was presiding judge of the Burlington Vicinage Family Part from Feb. 2001 to June 30, 2006, and a trial court Family Division judge from 1997.

During her career, she has been at the forefront of legal and judicial education. She was a founding member of the Thomas S. Forkin Family Law American Inn of Court, serving as president from 2008 to 2010, and continuing on the board of trustees at the time of her retirement. She chaired the Judicial Education Committee of the Conference of Presiding Judges between 2002 and 2006 and was responsible for updating program materials for the Comprehensive Judicial Orientation Program and coordinating the Family Judges Spring Educational Conference. She also served on the Supreme Court Judicial Education Committee; co-chaired the subcommittee on the New Family Judges Orientation, the Supreme Court Committee on Public Access to Court Records, the Public Access Working Group, the Supreme Court Committee on Internet Technology handling efiling; and was a member of the Supreme Court Committee on Women in Courts. She has served as a guest lecturer at the Rutgers University School of Law—Camden and continues to serve in that capacity for the Institute for Continuing Legal Education, the New Jersey State Bar Association and county bar associations.

During her tenure in the Appellate Division, Judge Lihotz authored 35 reported appellate decisions pertaining to family law and one reported trial court decision.[1]

We thank Judge Lihotz for allowing us to spend time with her. The following excerpts are from her multi-hour interview conducted by Editor-in-Chief Charles F. Vuotto Jr., Executive Editor Ronald G. Lieberman and Senior Editor John Finnerty. We have attempted to organize the transcript of the interview with topical headings.

What came across in our interactions with Judge Lihotz was the same quality that comes across in her published opinions: an unremitting compulsion to consider the facts and the record and to do everything she could to make sure she "got it right." We are saddened by her loss from the bench, but pleased that she has moved into another phase of her career.

Being a Judge

Vuotto: Your Honor, on behalf of the *New Jersey Family Lawyer*, I would like to thank you for taking the time to meet with us today. My first question is, what was your favorite part of being a judge?

Judge Lihotz: Well, I think lawyers get to advance positions of their clients. They get to help their clients present whatever issue or matter they want, but ideally a judge changes the law. That really is the most fundamental difference, and I think that if you really examine what a judge has to deal with—the controversy in front of you—and when you are presented with a unique issue, typically the judges decide how this is going to go—deciding which lawyers' arguments are found to be more persuasive, based on the law. And that, to me, is a pretty ominous responsibility. When you consider what you are doing, remaining neutral and looking at—especially in the Appellate Division—what is the impact of the decision. I know counsel sometimes don't view the issues that way. They know the impact to their client. They don't usually look at what happens after this case. So, in the Appellate Division, we have to consider where are the parameters? What are the ends of this particular argument and how is it going to affect other similar cases? What facts would change this result. That's why I know, during oral argument, many of our questions,

which seem as if they are from left field, are really trying to engage lawyers to talk about the possible parameters if the law is altered.

Lieberman: Judge, can you think of a case where you went into an oral argument on a family law matter having read the briefs and thought one thing about the case but after oral argument thought oral argument helped to clarify your thoughts?

Judge Lihotz: I can't think of a specific family law case, but there are cases. In one particular case, when the attorney started talking, the three judges looked at each other and said wait a minute, that's what this case is about? Because it was not clear from the brief that that's what it was about. There is another case that actually was a contract case and, during rebuttal, counsel made a comment in argument that, as far as I was concerned, made me take one giant step backwards and think he's right.

The Uniqueness of Each Case: The Judicial Experience—Trial and Appellate

Vuotto: So what will you miss most about being a judge?

Judge Lihotz: There is an intellectual stimulation to the Appellate Division that differs from the trial court. In the trial court it's more time spent trying to organize and analyze the issues and get people to an end result. The Appellate Division is more about analyzing the law, which is something that when you look that way, it's fun. But mostly I'll miss the people. I'll miss my colleagues more than anything else. Because, unlike the trial court where you're in a vicinage and you really don't have time to go to lunch with another judge sitting in a different vicinage unless you are really, really geographically close to each other, which a couple of the vicinages up north are close enough to have lunch together, the Appellate Division brings judges together from different parts of the state.

Vuotto: Do you have any general tips to practitioners about appellate practice?

Judge Lihotz: My sense has been for a long time that most lawyers don't understand appellate practice and most clients absolutely don't understand appellate practice. Mostly, they don't understand the very limited standard of review. No matter how many times we say it, many people think it's a do over.

Finnerty: Right.

Judge Lihotz: Lawyers want to tell you what the other judge got wrong and the reality is if a case turns on credibility, and the trial judge makes it very clear that the determination made turns on credibility, it is near impossible to reverse because we don't examine credibility. If the trial judge weighed the facts and you had competing facts and the judge said I choose A instead of B or B instead of A, and those facts are found in the record, again, there really is no basis for us to intervene. If it's a question of law, then you get a free pass because we look at the law and decide what the law should be. Now interestingly, our Supreme Court in the last several years has made clear that there are times when the law will change, and they have been persuaded to change it. The Appellate Division doesn't have that luxury. So, we're really bound by the Supreme Court's decisions, but the Supreme Court decides if the law is going to change.

Finnerty: When you get something like the new statute, someone's got to say what it means.

Judge Lihotz: That's right. That's the Appellate Division's role.

Finnerty: Right.

Judge Lihotz: When the Supreme Court hasn't spoken on the subject, we're the ones that give it the first shot, and then the Supreme Court tells us when we are incorrect.

Finnerty: But if a trial judge says, "I've observed the demeanor of the defendant and I observe him to be an angry man based upon the way he's answering questions and raising his voice…"

Judge Lihotz: Well, if he's short tempered and then there's an allegation that he was short tempered during the incident, sure the judge could support that statement. But it's interesting, sometimes judges, and I've seen this too in records, say, "Well my experience is a child under two should never spend an overnight with the non-custodial parent." Well that's not the law, that's their experience. Thank you, I appreciate your input, but judges are not appointed for their opinions; they are appointed to apply the law. In such a case, every child is unique. I think the Supreme Court in *Bisbing* made it very, very clear that each case turns on its own facts. I really think a driving force for the Court to switch gears resulted because if you use the best interests of the child test, then every case is unique.

Finnerty: Right, every case is unique. It's like this whole practice is like that. Every case almost, is unique.

Judge Lihotz: Right. So that gives lawyers the opportunity to make sure they marshal facts that show how our case differs from the facts in this case or the facts in that case.

Credibility Determinations and Appellate Review

Finnerty: Have you ever had an experience where the trial judge decided based on credibility and you had to handle the appeal and reverse the decision where the judge did make a credibility call but, because of other reasons, you decided that the overwhelming weight of the evidence as you assessed it beyond the credibility call was such that it didn't hang together?

Judge Lihotz: Addressing when there's a credibility determination, a lot of trial judges often start their opinion and say, "I find both witnesses are credible." Alright, thank you, that's not helpful enough. I remember one case in particular where the issue was whether the husband delivered to the wife certain stock certificates. She said no, he said yes. And the opinion started with I found both the witnesses credible.

Finnerty: How is that possible?

Judge Lihotz: That kind of a credibility determination is not helpful. The credibility determinations that are helpful explain what and why. Not every judge does it, and I can say the Supreme Court doesn't necessarily require it. But if you say, the wife gave this set of facts as an explanation for what happened, and the husband gave this set of facts as an explanation for what happened, I believe one side or the other and explain why, and then you can tie it to other facts and evidence.

Finnerty: That's interesting. A trial judge can say, "Okay, I find the defendant more credible then you," and render a final decision based upon that without telling why they find them more credible.

Judge Lihotz: That could be a problem. It depends on whether it hangs, as you said, whether the rest of the case hangs together. A lot of times judges do that with experts and accept one expert's opinion over another, but don't explain why, and sometimes that's a problem.

Lieberman: Often an appellate decision will cite Rule 2:11-3(e)(1)(E), saying that an argument will be affirmed without further explanation, because the argument lacked merit. What is it generally about an argument that would cause an appellate panel to use that citation?

Judge Lihotz: Often it's because the law on the issue is so very clear.

Special Expertise of Family Part and Judicial Experience

Finnerty: Can Your Honor explain why the Appellate Division cites to the "special expertise" of a family law judge, when sometimes those trial judges come to the family part with little to no experience in family law as an attorney?

Judge Lihotz: That phrase, "special expertise" is the most misunderstood phrase. Expertise is based upon fact finding. Since family law is a specialized area, the factual findings by a trial judge are what the court defers to and what the court references in terms of a judge's expertise. You have a family judge who only does family matters day in and day out, so when that judge makes a factual finding, if that factual finding is supported by the record, that's what we defer to. The issue often refers to the depth of discretion, because family court judges have very wide discretion in a factual determination.

Finnerty: In some counties, it has been my experience that when judges are first appointed to the bench, they get assigned to the family part, having had no experience there. Is that a good thing to occur?

Judge Lihotz: Well, I can appreciate that reality. As an aside, my personal opinion has always been, and I've always advocated and tried to explain to other lawyers and other judges, that family court is a way to help someone learn how to be a judge. You have lots of decisions you have to make regularly. You do have to learn how to exercise discretion. You do have to understand what that means. You do have to learn how to control the courtroom. You do have to learn application of Rules of Evidence, contrary to another misnomer advanced often. I do think it's a great forum to learn judging. I recognize that a lot of people don't view it that way because it's difficult and has a high-volume case load. And, I recognize your suggestion that if a judge has no family experience, how can they do an FM case? There's a lot of truth to that. I remember one noted family law judge who went to the Appellate Division said, "Oh [dissolution] it's easy when there's two lawyers on the case because they will guide you as to what the law is." I did not have that experience. I didn't think that was true. I thought attorneys tried to guide me away from the law, particularly when a lot of them didn't recognize that I actually knew what the law was. When I started, there's one lawyer who told me: "Judge, in this county, the person who talks last wins." I said thank you very much, that's not going to hold in this courtroom. I mean, it was just kind of silly stuff.

Another argument often is, "This is only fair." Well yeah, but fairness has to follow what the established law is. You're right, judges should take very, very seriously the responsibility to learn. And there's been some very, very good [family] judges who never touched a family case until they were appointed, and they learned because they have a certain pride.

Finnerty: It's in here, inside.

Judge Lihotz: They know how serious the responsibility is, and they want to make sure that they get it right, not for their own ego to look good, but because the impact of every decision in family court is very, very heavy, in my view.

Judicial Discretion

Vuotto: You mentioned judicial discretion. I find that to be one of the most difficult things to explain to a client and sometimes to understand myself, in terms of what are the standards for abuse of discretion. Your Honor actually had a wonderful discussion about that in *Slutsky*. I think these are important quotes: "The authority to exercise discretion is not an arbitrary power of the individual judge to be exercised when and as his individual passion or partiality may dictated." Then Your Honor went on to write: "The obligations to render a decision guided by the spirit, principle and analogies of the law and founded upon the reasoned and conscious of the judge to a just result in the light of the particular circumstances of the case." Finally, Your Honor said, "We must reverse if we find the trial judge clearly abused his or her discretion such as when the stated findings were mistaken or that the determination could not reasonably have been reached on sufficient credible evidence present in the record or where the judge failed to consider all of the controlling legal principles." So that seems to tell me, really, that abuse of discretion is the same as not finding support in the credible record or the substantial record.

Judge Lihotz: That's a good part of it. Chuck, part of what you're asking me is whether in some cases there's just a general sense of wrongness, and can the issue of judicial discretion pervade other areas of law? For example, in criminal sentencing much of it is discretionary, but if there is a sense of wrongness when the Appellate Division judges review a sentence and find the result enrages our sensibility, so to speak. In that case we would reverse the exercise of discretion and vacate the sentence. We examine the case to see whether the discretion went too far. Frankly, any time a judge would say "my experience is," you have a potential for an abuse of discretion. It's those kinds of things that are problems, because they ignore what the facts are and just make pronouncements. While the amount of alimony or support may be a discretionary call granting the support, whether it's warranted or not, is a legal issue.

Vuotto: So, what did Your Honor enjoy more, being at the trial court or in the appellate court?

Judge Lihotz: Each assignment has its benefits. I know many trial judges who go to the Appellate Division have a little difficulty with the solitariness of it because, yes, you have a panel you are assigned to, and you only have court once a week when you see the other judges. There's other judges in chambers, but everybody's very busy writing, and so there's not a lot of interaction. In the trial court, I could go talk to one of the other family judges and say, "what's your reaction to this, what do you think? Did you ever experience this kind of a problem?" Sometimes you make a phone call to somebody who you know has more experience in a particular area than you, but otherwise that type of interaction doesn't happen as often in the Appellate Division. I was lucky because I was able to satisfy the urge to be with people by lecturing, by working with the bar association. I did a lot of judicial education things, and the Family Practice Committee. But not everyone can balance all of those things with the responsibility in the Appellate Division because it can be a lot of work.

Interlocutory Appeals—When to Try

Finnerty: Let's address the concept of how you would counsel lawyers, young and old, about things such as when you take a shot at a motion for leave to appeal. I know it's a long shot and I know it's like five percent, maybe 10. (I don't know what the statistics are, but it's very small.) But I had the humbling experience of being so offended by a decision that happened on an interlocutory basis that really will affect the case. It's a discovery issue in a cohabitation case, and so I thought it was just wrong, so I filed a motion for leave to appeal and I told my client, "Listen, it's a long shot, but let's do it. What do we have to lose, since we're going to have a problem in the case if we don't do it and we are unsuccessful." My adversary did not file a brief in response and I still lost.

Judge Lihotz: As a lawyer, I once took an appeal of a *pendente lite* determination. The other side called me up and literally laughed at me on the phone. They said, "Nobody ever does this, you can tell you're a new lawyer,

you don't know what you're doing." I said, "Well do you remember when I asked the judge to provide findings and conclusions under Rule 1:7-4, and he said, "I've made my decision, get out of my courtroom?" I thought that was a reason to appeal it, and it was summarily reversed.

Lieberman: I'd like to hear this because I've got one right now.

Judge Lihotz: Well, it's really tough. So, for example, a lot of judges just enter orders. They don't give reasons. If there's no reasons, I think there is a much better shot than an order that has reasons.

Lieberman: Does it have anything to do with which standard a court would apply, which body of law to apply, or who has the burdens of proof and persuasion?

Judge Lihotz: Well that could be another issue. If, for example, it's pretty clear the burden rests on one party or the other, or there's a burden shifting, and the judge ignored that in making an interim decision so that ruling could make a difference going forward—interim relief is more likely. Sometimes issues of discovery with respect to third parties trigger interlocutory review because there's a privacy interest and because once you let the cat out of the bag...We often see issues with corporations. Discovery is demanded from a corporation, not a closely held corporation, and it's opposed but the judge orders production without really explaining why and without a protective order. Those kinds of things I think the court would examine more carefully than, for example, a guy challenging discover ordered from his own corporation, who is trying to hide behind the corporate shield. Also, jurisdiction questions, I think, always are looked at on an interlocutory basis because that makes a huge difference. But I candidly admit when someone is ordered to pay a certain amount of money, often times it's not something the court is going to examine.

Lieberman: Not even something as specific as a dollar figure? If there's a standard, there's a legal standard and a question about whether standard A or standard B is going to guide the remaining proceeding, a plenary hearing, would that be reviewed?

Judge Lihotz: Well that's a legal issue, right?

Lieberman: So you're an attorney bringing it up, and you are saying, "I need you, the Appellate Division, to say that the standard that the trial judge is going to apply to guide the next however many months this plenary hearing is going to take and then proceed is correct or that the judge is incorrect, in which case turn the ship around and move us around." Wouldn't that be something that, if you were handling it, you would say we need to do this right now as opposed to a year from now?

Judge Lihotz: Obviously I can't speak for all of my colleagues, but that's an issue I think that would be examined very carefully. In addition, if you can somehow garner some kind of irreparable harm. Let's say in an ongoing case the judge told one of the parents to do three specific things and then we'll have parenting time. The party did those three things and the judge said well let's just see how it goes over the next few months without following the order to allow parenting time. Again, it seems to be an arbitrary result that does make a huge difference. It impacts the child. It impacts the parent. But more importantly, it's irreparable harm to the child and the relationship between the parent and child.

The Judicial Process—Thinking and Deciding

Lieberman: Which decision out of all the family law decisions did Your Honor think was the most difficult to draft?

Judge Lihotz: I honestly don't think that family cases were difficult to write because I understood the different parts of the issues. In the Appellate Division, I would gather the law and examine where this case fits within the published spectrum of decisions, then come up with a decision. I mean, I appreciated and understood the issues. So, when you do that, when you start with that kind of a framework, the decisions are not that hard. Are you asking which one took me the longest to write?

Lieberman: In general, when we're writing whatever we're writing, gosh I just can't seem to figure out how to craft this cert or put this brief together or make these different.

Vuotto: Or how to resolve the issue.

Lieberman: I just don't know how to come up with the theory of the case.

Judge Lihotz: As a judge, the very first trial I did was a custody trial between what I'll call two less than stellar parents. I couldn't make a decision. It took me a long time. It took me almost a year, which is horrible after a trial. I knew it, and it was nagging at me and nagging at me. But each parent had deficits, each one had some benefits but how does one weigh that? It was kind of a complicated fact pattern. But then there was a physical altercation between one of the parents and the children and then it because easy.

Finnerty: So it worked itself out.

Judge Lihotz: Well you feel the necessity to get it right. But after that experience, I started to have a better sense of weighing those types of issues. That's why I think with trial judges it may be really difficult in the beginning to get your feet going and actually be able to write or make a decision, but once you do it, if you go through that process, then I think it becomes a lot better. There was a DYFS case where I actually…a termination of parental rights case where I actually would not terminate parental rights as to one child, but did terminate as to two others because the mother's relationship with each one of these kids was completely different.

Finnerty: That's fascinating.

Judge Lihotz: The one that I refused to terminate, or declined the request to terminate, had mental health issues and it seemed to me, based on the evidence, the only stability in this child's life was his mother, and he wasn't living with her. He was in a school because of his mental health issues, a resident facility, but at the same time, he was on the path to be released. But the other two children…her relationship with those children was not good, and it was harmful for the children. So, I know the division was very confused by the decision. The mom, at first, was confused, but then later wrote a letter to me and said "I understand exactly what you did," and so that's why I, again, emphasize every case turns on its own facts. If lawyers really want to have a judge decide something different from precedent, they need to marshal the facts to show why it's not guided completely by that published case.

Finnerty: We lawyers these days, I feel, are not encouraged to practice that way by trial judges. One example in alimony, the one-third rule.

Judge Lihotz: There is no such rule.

Finnerty: I know that. And I say that to every client. I say, "Well you're not going to find this in any of those books that are around the room that we're in, but this is the pressure you get in the courthouse to approach a case that way. So, it's get it over with. Let's get this over with. This is the range, the range sort of works for whatever reason it works." So, there's not an encouragement, I don't think, really to develop the details, to develop the evidence. I just feel that. Well these questions are for you, but I feel there's a change in the practice, if you will.

Judge Lihotz: I think there was an element of that, even when I practiced law. But I think the question for lawyers to consider as a business decision is, "Shouldn't I take an appeal, even though the client may not be able to pay for it? Shouldn't I do it to just right the ship?" And I know lawyers say, "Oh then the judge will hate me." Not the good judges. The good judges say, "I made a mistake. I realize now." I did file appeals a couple of times as a lawyer, and more than once the judge said to me, "You showed me something I never even considered." And I'm thinking, "Okay, I tried to show it while I was in front of you but obviously I wasn't successful," but the judge respected my arguments after that.

Lieberman: Well, those aren't easy to do. I had to go tell a judge who was just appointed, "I get to be the first one to appeal you." I called up and said, "I'm sorry to do this to you. There's a reason why we waited until almost the 45th day to do this. I have to do this. If you take offense at this, I'm sorry."

Judge Lihotz: No judge should ever take it personally if an appeal is filed and/or if they get reversed, because the objective is always to figure out what the law is. I know there's one or two issues where as a trial judge I was reversed by the Appellate Division, and I still disagree with the decisions. It's one of those things that sometimes everybody, appellate judges, trial judges, they get locked in the rubric of structure and stop thinking. More than anything else, good judges always think.

Original Appellate Jurisdiction

Lieberman: What situation will cause the Appellate Division to assume original jurisdiction?

Judge Lihotz: If you look at the original jurisdiction rule, it guides the court. There are certain parameters when the court would exercise original jurisdiction, but it is the exception. One area is when the expense for the parties does not warrant remand when the Appellate Division can just end it.

Changes in the Practice of Law

Lieberman: Have you noticed any changes in the way that the practice of law has been conducted since Your Honor first went on the bench as a trial court judge?

Judge Lihotz: I think attorneys and judges are all too busy, so at times there's less care taken in making presentations and decisions. There are more and more *pro se* litigants, both in the trial court and Appellate Division, likely driven by financial issues. Over the 11 years that I was in the Appellate Division the issues have become more complicated.

Lieberman: Has Your Honor noticed a change in the way attorneys conduct themselves as professionals?

Judge Lihotz: I haven't seen any significant disrespect, but some are more informal with the appellate court. I have seen more aggressiveness, which goes beyond advocacy. People, for whatever reason, think they win points by directing comments to the other side or calling the trial judge names. I always stopped counsel when that would happen. It definitely tears at professionalism.

Lieberman: I've even noticed that the younger attorneys coming up feel a little bit different than how I conducted myself as a younger lawyer. I mean when I was their age, I would never have said some of the things on the record or in papers or in letters that I get from some young lawyers.

Judge Lihotz: It definitely tears at professionalism, and I think that much of that results from less and less mentoring. Again, going back to there's not enough time. People want to get things finished. They want to get paid. They don't want to spend a lot of time if they don't have to. So, it makes it more difficult to spend time mentoring others.

Finnerty: In family law, perhaps it's become more of a business direction model. I don't know. The concept of mentoring is, I think, a really important thing that's fun to do. I find it fun to do. There's a lot of people that move around who say no one is teaching them anything.

Judge Lihotz: Judges have to be mentors too. But because they have calendars, they have so many things to do there isn't as much opportunity to provide for the kind of mentoring that occurred in the past. There's no school to learn how to be a judge. You learn by doing it and by seeing other people do it. I was lucky because I was a bankruptcy attorney, among other things, and Judy Wizmur was one of the people who I was amazed by, especially her demeanor on the bench, her ability never to lose her cool, her ability never to be caustic, never to be sarcastic. She was a great example, I think, of what all judges should be. Lawyers should always look for somebody to pattern themselves after. And I'm not so sure if young lawyers are even told to find somebody to emulate.

Changes in Systemic Pressures to Move Cases

Vuotto: Have you seen a change in pressure to move cases by the Administrative Office of the Courts over the years?

Judge Lihotz: That's always been a mantra, I think, that people assume. The balance to get cases concluded, but not at the expense of justice, is something judges have to learn.

Finnerty: I find that the experience of best practices and its implementation in terms of pressures on lawyers and compliance on deadlines varies from county to county.

Judge Lihotz: Judges understand the responsibility to get cases done without sacrificing a sense of fairness to the litigants. And I think in my experience as a presiding judge, I was very fortunate because I cross-trained all the judges. They all knew every case type. We all had partners so if one judge was on vacation, that judge's partner was responsible for what I'll call the volume calendar, whether it be FD or DV or child support enforcement, so those calendars would not fall behind. Could the divorce trials get backed up? Maybe, but they didn't because the judges also understood the responsibility to get those done and they kept specific track of cases they were assigned. I was able to have everybody really work together. They all cooperated with each other. So that sense of comradery, if you can achieve that in a courthouse, eases the case load. But it falls on the presiding judge, and it's a lot of work. It's a lot of responsibility. Everybody always says if you have a real trial date, the cases will go away and it's really, really true.

Finnerty: From a lawyer's perspective, there needs to be a partnership with the trial judge. I know the tradition was one judge per case. That was the tradition. It seems that is less honored now because of rotation into and out of judicial assignments.

Judge Lihotz: It is harder and harder to meet the ideal of one judge, one family, even though it makes sense. Now judges have specialized calendars, as opposed to handling all matters in the family part. If you have a child protection matter, the judge assigned to that calendar will hear that case, but a judge assigned to an FD matter involving that family may not be the same as the child protection judge or the judge handling domestic violence involving these same parents. It's a question of the resources available in the system.

Publication of Opinions

Vuotto: Many are perplexed by how an appellate matter is deemed worthy of being published, and thus becoming binding precedent. Would Your Honor give us some insight into that process?

Judge Lihotz: It's actually a fascinating thing because I think lawyers don't really understand the publication process in and of itself. For a trial judge, that judge could either submit it to the committee for publication or a lawyer could write a letter to the committee requesting publication. For the Appellate Division, each presiding judge is responsible for deciding whether an opinion gets published on the part. During my years as presiding judge, I knew when I first reviewed a case that it was more likely than not one designated for publication because of the issues to be addressed.

Finnerty: You can decide, as the presiding judge whether it should happen.

Judge Lihotz: Well yes and no. For example, during the panel's preliminary discussions, I would say, "John, I'm going to assign this case to you. I think it warrants publication, so when you are writing it, keep that in mind." Okay, John drafts the opinion for the court and when we get it finalized, each judge has a vote on publication. If the author of the opinion says no, it won't be published. If another judge says no and the group cannot be persuaded for it to be published, then it won't be published. If the presiding judge was not part of the panel, and the panel wants the case published but the presiding judge reviews it and says no, it won't be published.

Finnerty: So it's a veto. Ability to veto.

Judge Lihotz: Designation and veto. The other way to get the ball rolling is, any lawyer, even if you are not involved in the case, can ask the court to publish a case by writing and explaining it is really important. You write a letter to the Appellate Division clerk's office stating the significance and why you think it should be published. The letter is submitted to the panel and the same process is started. The presiding judge talks to the author and then it goes to the other judges. If you wait too long to submit a request—if it's more than 45 days after the opinion is issued—chances are the panel won't let it be published. It's also important to know if a case is published, the Supreme Court may look more carefully at certification requests.

Finnerty: What about the trial court?

Judge Lihotz: Trial court requests for publication go to the Committee on Publication, and the committee itself, at least in my understanding, is comprised of retired appellate judges.

Finnerty: So for a trial court opinion, any lawyer who reads it, even if they are not involved, can submit a request for publication to the committee with the rationale as to why he or she thinks it should be published?

Judge Lihotz: Correct.

Vuotto: So what published decision would you like an opportunity to re-write?

Judge Lihotz: The only one I would re-write would be one word changed in *Gnall* stating "*this* fifteen-year marriage is not short-term." The Supreme Court did not like use of a bright-line rule.

Vuotto: What published decision are you the proudest of?

Judge Lihotz: *Division of Youth and Family Services v. S.L.* The grandmother was requested by the division to have her granddaughter taken for psychiatric care and she said, "I do not think the child needs it," but the division said, "yes, the child does." The grandmother then gave permission for the division to take the child for a psychiatric exam and the grandmother didn't interfere with what the division thought was needed. Nevertheless, there was a complaint charging neglect: that grandmom failed to provide needed medical care for the child. The question required an objective examination of the facts to decide whether what happened was abuse or neglect under the statute because you don't want the arm of the state to overstep its authority. The decisions I'm most proud of are the ones that I corrected what I thought was an injustice. Justice was the winner.

Vuotto: What published decision do you think will have the most impact on family law?

Judge Lihotz: If you want to know what cases got the most attention, obviously *Gnall* caused a firestorm. I mean I would read letters to the editor in local county papers attacking me and my intelligence. From my perspective, I didn't really see the case as one that was difficult when you objectively look at the parties' respective incomes and their respective circumstances.

Vuotto: Judge, thank you very much for the time.

Finnerty: Thank you.

Lieberman: Thank you, Your Honor. ■

Endnote

1. *In re R.S.*, 448 N.J. Super. 374 (App. Div. 2017); *R.G. v. R.G.*, __ N.J. Super. __ (App. Div. 2017); *Ricci v. Ricci*, 448 N.J. Super. 546 (App. Div. 2017); *Slutzky v. Slutzky*, __ N.J. Super. __ (App. Div. 2017); *In re Adoption of a Child by M.E.B. and K.N.*, 444 N.J. Super. 83 (App. Div. 2016); *Lall v. Shivani*, 448 N.J. Super. 38 (App. Div. 2016); *Landers v. Landers*, 444 N.J. Super. 315 (App. Div. 2016); *Spangenberg v. Kolakowski*, 442 N.J. Super. 529 (App. Div. 2016); *Elrom v. Elrom*, 439 N.J. Super. 424 (App. Div. 2015); *In re I.N.W.*, 435 N.J. Super. 130 (App. Div. 2014); *In re S.I.*, 437 N.J. Super. 142 (App. Div. 2014); *Gnall v. Gnall*, 432 N.J. Super. 129 (App. Div. 2013); *Minkowitz v. Israeli*, 433 N.J. Super. 111 (App. Div. 2013); *Reese v. Weis,* 430 N.J. Super. 552 (App. Div. 2013); *D.N. v. K.M.*, 429 N.J. Super. 592 (App. Div. 2012); *Clark v. Clark*, 429 N.J. Super. 61 (App. Div. 2012); *Ducey v. Ducey*, 424 N.J. Super. 68 (App. Div. 2012); *In re Guardianship of A.T.D.*, 428 N.J. Super. 451 (App. Div. 2012); *Jacoby v. Jacoby*, 427 N.J. Super. 109 (App. Div. 2012); *Milne v. Goldenberg*, 428 N.J. Super. 184 (App. Div. 2012); *Sajjad v. Cheema*, 428 N.J. Super. 160 (App. Div. 2012); *Barr v. Barr*, 418 N.J. Super. 18 (App. Div. 2011); *In re B.*, 422 N.J. Super. 583 (App. Div. 2011); *In re E.C.*, 423 N.J. Super. 259 (App. Div. 2011); *Colca v. Anson*, 413 N.J. Super. 405 (App. Div. 2010); *In re J.B., J.D. and J.D.*, 417 N.J. Super. 1 (App. Div. 2010); *In re Guardianship of M.S.*, 417 N.J. Super. 228 (App. Div. 2010); *In re Guardianship of R.V.*, 414 N.J. Super. 423 (App. Div. 2010); *In re K.A.N., J.B. and K.B.*, 412 N.J. Super. 593 (App. Div. 2010); *In re J.B., J.D. and J.D.*, 417 N.J. Super. 1 (App. Div. 2010); *Parish v. Parish*, 412 N.J. Super. 39 (App. Div. 2010); *In re P.M.P.*, 404 N.J. Super. 69 (App. Div. 2008); *Genovese v. Genovese*, 392 N.J. Super. 215 (App. Div. 2007); *Finamore v. Aronson*, 382 N.J. Super. 514 (App. Div. 2006); *In re A.S.*, 388 N.J. Super. 521 (App. Div. 2006); *L.D. v. K.D.*, 315 N.J. Super. 71 (Ch. Div. 1998).

Top 10 Judge Jones Opinions

by Marla Marinucci

Following are what the author views as the top 10 opinions authored by Judge Lawrence R. Jones (Ret.), selected primarily because they address the common issues and conundrums family law practitioners face day in and day out. They are listed in no particular order, and include a selection of passages from each opinion.[1]

Lisa Mills v. Ronald Mills, 447 N.J. Super. 78 (Ch. Div. 2016)

Issue: The defendant sought a reduction of alimony based upon losing his prior long-term employment and re-employment of a job at a much lower salary.[2]

Facts: The parties' agreement contained a stipulation of baseline salaries for the parties, with the defendant's baseline salary being $108,000 per year.[3] After 12 years of employment, the defendant involuntarily lost his job due to company restructuring.[4] After nearly three months of searching, the defendant received a job offer from a company in the same industry, but at a salary of only $70,000 per year.[5]

Holding: The court held the defendant was entitled to a reduction in his alimony based upon a two-step inquiry: 1) Was his choice to accept the new job objectively reasonable based on the totality of the circumstances?; and 2) If so, what is a fair and equitable support adjustment that is reasonable to both parties and their respective situations?[6]

Passages:

> Pursuant to N.J.R.E. 201(b), *the court takes judicial notice that losing a longtime job can be one of the most difficult and challenging events in a person's life*, particularly when the displaced employee is the primary financial provider in a family. (Emphasis added).[7]

> While both parties will likely suffer financial stress and burdens as a result of the modified arrangements, *such consequences are not placed solely on the obligor or the obligee, but are fairly placed on both parties.* (Emphasis added).[8]

C. Madison v. W. Davis, 438 N.J. Super. 20 (Ch. Div. 2014)

Issue: The father filed a post-judgment application challenging the mother's decision to enroll the parties' child in a different preschool.[9]

Facts: After a four-year marriage, the parties entered into an agreement whereby they shared joint legal custody of their three-year-old, with the plaintiff serving as the primary residential custodian.[10] Less than four months after signing their agreement, the defendant started post-judgment litigation because the plaintiff changed the child's preschool without his consent.[11]

Holding: The court held the mother, as primary residential custodian under N.J.S.A. § 9:2-4, had the authority to select or transfer the child to a different preschool, provided the choice was reasonable. In arriving at its decision, the court implemented a seven-step analysis.[12]

Passages:

> …the court must analyze the present dispute with not only due consideration of the principles in Beck and Pascale, but with additional application of *fairness, logic, and practical common sense*. (Emphasis added).[13]

> Another important point in this case is that there may be occasions when defendant, as the non-custodial parent, has available time to spend with the child on days when the child is otherwise scheduled to attend pre-school for work-related day care purposes. *Generally, such additional parent/child time is worthy of encouragement, and may take priority over the child's pre-school time*, unless perhaps there is a very special event at the pre-school that day, such as a class party or a guest presenter. So long as the non-

custodial parent provides reasonable advance notice to the primary residential custodian and school, and so long as the request for occasional extra time is reasonable and there are no other existing court-ordered restrictions on the non-custodial parent's ability to see the child (such as suspended or supervised parenting time), *additional parenting opportunities should generally be supported when a working parent can arrange his or her schedule to reasonably accommodate same*. (Emphasis added).[14]

In this case, the reality is that the parties have at least fifteen more years of co-parenting on the horizon. *They have already been to court twice in one year, and may very likely continue this pattern, to their child's emotional and financial detriment, unless they both agree to attempt a drastic change in their interpersonal dynamics*. While the parties always technically retain the right to repeatedly return to court over newly arising issues, *what they truly need for their child's sake, as well as their own, is to commence participation in professional co-parenting counseling, and mutually work in a constructive and pro-active manner on improving their long-term ability to communicate and cooperate with each other as effective joint legal custodians*. (Emphasis added).[15]

Joint legal custody is more than simply an honorary title bestowed upon a parent. Rather, a joint legal custodian has an ongoing responsibility to act in a child's best interest, which includes *reasonable communication and cooperation with the other joint legal custodian in a positive and constructive fashion*. Hence, if two joint legal custodians have ongoing difficulties in meeting this very basic component of their roles, then *the court may order, among other relief, co-parenting counseling as a condition of ongoing joint legal custody*, consistent with *parens patriae* jurisdiction and the court's own obligation to protect the best interests of the child. (Emphasis added).[16]

Joanne Musico v. Scott Musico, 426 N.J. Super. 276 (Ch. Div. 2012)

Issue: What happens when parties consent to an above-the-guidelines child support amount, but then, due to a change in circumstances, a child support modification is warranted?[17]

Facts: The parties were married 13 years, and despite a substantial disparity in incomes, they mutually waived alimony in their settlement agreement.[18] On the issue of child support, the defendant agreed to pay the plaintiff an amount substantially higher than what the child support guidelines required, as he agreed to also pay guidelines support plus the cost of the plaintiff's health insurance, which was specifically labeled "additional child support" in their agreement.[19] When his overnights increased from 52 to 156 per year, the defendant sought a recalculation of his child support and also sought to extinguish his obligation to pay above-guidelines support.[20]

Held: While the guidelines must initially be applied when child support is recalculated, the analysis does not end there. The prior agreement must also be a factor and a review of why the parties deviated from the support must be done. In granting a recalculation of child support, the court held the defendant was still responsible to pay, as additional child support, an amount equal to the cost of the plaintiff's health insurance.

Passages:

> A "best interests of the child" analysis should never require a non-custodial parent to fall into financial ruin through an excessively high and impoverishing child support obligation. However, *it is erroneous to presume that every above-guideline support award is automatically inequitable and beyond an obligor's reasonable ability to pay*. This is especially true in a case such as the present one, where the obligor agreed to above-guideline child support and further received a substantial financial benefit (i.e., alimony waiver) in the same agreement, and where he has incurred no reduction in income or earning capacity at the present time.[21]

C. Zeitlin v. D. Zeitlin, FM-15-1601-03, 2014 N.J. Super. LEXIS 3088 (N.J. Super. Dec. 19, 2014)

Issue: Whether a non-custodial parent's right to claim the child as a tax exemption is affected by an inability to stay current on their child support obligation.[22]

Facts: The parties were previously married and had two children.[23] Pursuant to their settlement agreement that was incorporated into the final judgment, the defendant, who was the parent of alternate residence, was to pay the plaintiff child support of $250 per week.[24] The parties also agreed to equally allocate the tax exemptions for the child.[25] When the defendant accrued substantial child support arrears, the plaintiff filed an application seeking to modify the tax exemption provisions and suspend the defendant's right to claim any child as an exemption while he had arrears.[26]

Held: The court held that it was appropriate to enjoin the defendant from claiming any tax exemptions for the children while he had child support arrears.[27]

Passages:

> First, even though the parties' settlement agreement does not expressly state same, *the court finds that there is logically an implicit relationship between the child dependency exemption and the parental child support obligation*. In this case, *defendant's right to claim a child dependency exemption is inherently and equitably intertwined with his duty to pay child support*. The concept of a non-custodial parent receiving a child dependency exemption is generally based on the presumption that such parent is in fact financially supporting the dependent child or children, in a manner mandated under a court order or otherwise agreed by the parties. *If, in such a case, the non-custodial parent breaches the child support order and accumulates substantial unpaid arrears, then the very foundation for that parent's right to share in the tax exemptions collapses*. For this reason, *even when a divorce settlement agreement contains no language directly linking the non-custodial parent's right to claim the tax exemption to faithful payment of an existing child support obligation, then absent clear evidence to the contrary, a court of equity may infer the natural existence of such a relationship of common sense and fundamental fairness.* (Emphasis added).[28]
>
> This obligation was established under the very same settlement agreement as that which provided him the ability to claim one child as a tax exemption in the first place. Hence, *logic compels the conclusion of an equitable connection between the provisions. If this were not the case, then defendant could simply continue to accrue significant additional arrears, leaving plaintiff to essentially support the children by herself while defendant receives an annual tax break for her efforts. Such a result would be not only inequitable, but arguably unconscionable as well.* (Emphasis added).[29]
>
> A third legal basis supporting plaintiff's motion to modify the tax exemptions rests in Rule 5:3-7(b), which permits a court to take action against a party who violates a child support order. Such action may include, but is not necessarily limited to, economic sanctions (R. 5:3-7(b)(4)), and any other appropriate equitable remedy (R. 5:3-7(b)(8)). *The suspension of a delinquent payor's right to claim a child dependency exemption, until he/she satisfies his court-ordered child support balance, constitutes an appropriate sanction and equitable remedy under sections 4 and 8 of Rule 5:3-7(b).* (Emphasis added).[30]

D.W. v. M.W., FV-15-1025-16, 2016 N.J. Super. LEXIS 2684 (N.J. Super. Sept. 15, 2016)

Issue: The very first line of this opinion says it all: "This case involves separated parents, young children, and Little League baseball."[31] In other words, can a parent be banned from their child's Little League game due to the parent's alleged inappropriate and disruptive behavior?

Facts: The parties' son, who was seven years old at the time, played Little League baseball where the team's coach also served as the pitcher.[32] While the parties had previously agreed the defendant could attend the games provided he stayed 50 feet away from the plaintiff, the defendant had to file a motion seeking permission to attend a game his son was playing in the American Youth Football League.[33] The plaintiff's objection to the defendant being in attendance was due to his alleged embarrassing and inappropriate behavior, specifically aimed at the coach, at the Little League baseball games.[34]

Held: Instead of holding a plenary hearing, which would have been very time consuming, and not in the best interest of the child at the time, the court directed the parents to adhere to all league rules concerning parental conduct, as well as additional "parameters" established by the court.[35] The court further stated, "If these basic rules are followed, then there logically should be no need for any further litigation between the parties on this issue."[36]

Passages:

> Pursuant to N.J.R.E. 201(b), *the court takes judicial notice that the results of particular Little League games are not nearly as significant as the underlying goal of developing a child's ongoing personal character in a positive fashion.* In this respect, there is a paramount importance in maintaining the surrounding environment at the Little League field as one which promotes respect, integrity, responsibility, discipline and self-restraint. *Ironically, however, a great challenge in meeting these goals often comes not from the participating children, but from parents.* While fathers and mothers come to games and practices for the alleged purpose of supporting sons and daughters, *there are times when overly critical, judgmental, and interfering parents invariably end up acting in an objectively inappropriate manner, which can be highly embarrassing and emotionally detrimental to their own children and others as well.* (Emphasis added).[37]

> If, upon future application, the evidence reflects that notwithstanding the decision herein, a party is hereinafter engaging in disrespectful, and/or disruptive conduct at a Little League baseball game, American Youth Football game, or other youth sporting event which violates the intent and spirit of these rules, the court may enter an order granting any and all relief deemed appropriate and responsive to the situation in the children's best interests. *Such relief may include, but not necessarily be limited to, compulsory parenting classes, supplemental anger management counseling, financial sanctions, or similar interventions to protect a child's interests, pursuant to Rule 5:3-7* and other rules and principles of equity. Further, in extreme circumstances and when necessary to protect a child's interests, *the court may suspend or ban an offending parent from appearing at games or practices until further court order.* (Emphasis added).[38]

> Any future ongoing inappropriate public conduct by a parent at a child's youth sporting event following this order may evidence a lack of self-control and parental judgment, which also may also be relevant on a child's need for stability and peace. *A parent who is seeking primary or joint legal custody of a child must presently demonstrate a fundamental ability to adhere to rules and orders, and to act in a peaceful and civil manner. An inability or refusal to do, either at a baseball field or elsewhere, may be relevant in future litigation concerning a child's best interests,* particularly if such conduct essentially ignores all of the cautions, warnings, and parameters set forth in this ruling. (Emphasis added).[39]

In addition, footnote number four in this opinion provided as follows:

> Subsequent to the court's order in this matter, both parties appeared in court for follow-up proceedings regarding various issues. *Both parties confirmed that since the order, they are attending their son's games without further incident or allegations, in an appropriate and peaceful manner.* (Emphasis added).

Renee Ashmont v. Steven Ashmont, FM-15-1632-07, 2015 N.J. Super. LEXIS 3039 (N.J. Super. Nov. 17, 2015)

Issue: What happens when a party fails to abide by their obligation to carry life insurance pursuant to a written settlement agreement or judgment of divorce?

Facts: Pursuant to the parties' matrimonial settlement agreement, the defendant was to pay the plaintiff permanent alimony and child support.[40] The defendant was also required to carry insurance on his life to secure his alimony and child support obligations.[41] Several years after their 2007 divorce, in 2015, the plaintiff filed a motion seeking various forms of post-judgment relief,

including enforcement of the defendant's obligation to carry life insurance.[42] The plaintiff also sought sanctions for the defendant's non-compliance.[43] The defendant admitted he had not been in compliance with the life insurance provision for approximately four years.[44] After receiving the plaintiff's enforcement motion, the defendant brought himself into compliance and obtained the requisite life insurance policy.[45] Despite the defendant's eventual compliance, the plaintiff still wanted legal and equitable relief due to his past failure.[46]

Held: Finding the defendant was in clear violation of the parties' agreement without any evidence to justify his non-procurement of the life insurance, and that he financially benefitted by not having to pay the insurance premium for four years, the court ordered the defendant to transfer ownership of the policy to the plaintiff, but still required the defendant to pay the premium.[47] With regard to the plaintiff's request for monetary sanctions, the equivalent of which was the amount of money ($7,440) the defendant saved by not having the life insurance in place for four years, while the court found the amount being sought by the plaintiff was not unreasonable given the circumstances, it also took into consideration the defendant bringing himself into compliance immediately.[48] Ultimately, the court ordered the defendant to pay the plaintiff sanctions in the amount of $2,500, plus the plaintiff's $50 filing fee.[49] Note, there was no counsel fee application, as the plaintiff was self-represented.[50]

Passages:

> When one breaches a court order, but then ultimately brings him/herself into compliance prior to the conclusion of litigation, such remedial action does not erase or negate the violation as if it never occurred. Nor does such action or automatically or necessarily reduce sanctions or counsel fees (when applicable) which may have previously been incurred by the aggrieved party in enforcing the agreement. Nonetheless, subsequent corrective conduct is in fact an equitable and relevant factor on the issue of mitigating sanctions and penalties which might otherwise have been imposed under the circumstances. In particular, *there is a value in the family court for tools which create and support a realm of positive and persuasive reinforcement for a breaching party's cooperation, even if such cooperation comes very late in the day. In the long run, tardy compliance is still highly preferable to continuous non-compliance.* (Emphasis added).[51]

> As with all other financial aspects of divorce, *life insurance is not always an all-or-nothing proposition*. If the cost of maintaining insurance at a certain court-ordered level increases and becomes objectively unaffordable, a modification application can be filed seeking a potential reduction in mandatory coverage to a more reasonably affordable level. Alternatively, *coverage may remain at the higher amount, but with the custodial parent contributing a share toward the cost of the increased premium as well if he or she wishes to keep such higher amount of coverage in place*, notwithstanding the supporting spouse's change in financial circumstances. There may be various other ways for a court to *fairly allocate an increased premium as well, if and when equitable to do so.* (Emphasis added).[52]

In addition, footnote 11 of the opinion provided as follows:

> A related issue, which may often be relevant at the time of divorce and initial establishment of the life insurance obligation, *[is it] fair and equitable for only the obligor to carry the cost of the annual premium for maintaining life insurance, or whether the other party should equitably contribute to the cost of the policy as well.* One may argue that in an alimony case, the supported spouse should contribute to the cost of the policy, since that party is the only one who can financially benefit from the policy. Similarly, *if the policy is to cover child support for children, and if both parents can reasonably afford to contribute to same, some may argue that both parents should bear some responsibility for the cost of the premium* as well. Alternatively, it may be fair and equitable in certain cases for each parent to have an obligation to carry life insurance for the children's benefit and at his or her cost. These issues may logically be discussed, probed, negotiated and resolved or litigated at the time of divorce. (Emphasis added).[53]

M.C. v. P.C., FM-15-1352-14, 2016 N.J. Super. LEXIS 2594 (N.J. Super. Nov. 28, 2016)

Issue: Should a non-custodial parent exercise midweek overnight parenting time during the school year?

Facts: The parties married in 2007 and divorced in 2014.[54] At the time of the court's decision, the children were ages 10 and eight.[55] Pursuant to the parties' agreement, they shared joint legal custody, with the plaintiff designated as the parent of primary residence.[56] In accordance with the parties' settlement agreement, the defendant exercised an overnight every Thursday, in addition to having time on the weekends.[57] The plaintiff filed a post-judgment application seeking to modify the parenting time arrangement and alleged that the midweek overnights with the defendant were detrimental to the children's interests.[58]

Held: While the court found the plaintiff's concerns to be meritorious, they did not rise the level of terminating the defendant's midweek overnight parenting time.[59] Instead, the court established a four-step protocol to ameliorate the situation and to force the parties to better communicate with one another on the topic of the children's scholastic needs.[60]

Passages:

> As a starting point in this analysis, *the court takes judicial notice under N.J.R.E. 201(b) that education is one of the most important aspects of a young child's life.* Other than a child's health, it is difficult to envision anything as fundamentally important to a child's personal development as education. (Emphasis added).[61]

> *Theoretically, it should not be difficult at all for two responsible and well-meaning, divorced parents to provide their children with joint educational oversight through ongoing positive communication with each other (text, email or otherwise),* and with each parent pulling his or her respective weight by taking the time to make sure that a child satisfactorily completes homework and studies, and by communicating any problems along these lines with the other paren. If homework or test preparation has not been fully completed, for whatever reason, then the parent logically needs to respectfully communicate this information to the other parent in an informative and peaceful manner. N.J.S.A 9:2-4 expressly considers, as part of a custody analysis, the ability and willingness of each parent to communicate and cooperate with the other parent. (Emphasis added).[62]

The concept of midweek overnight parenting time during a school year, is not per se contrary or harmful to a child's best educational interests. In fact, in some cases, such an arrangement can encourage bonding, particularly when a parent assists a child with homework in an appropriate fashion. *Every case, however, is fact-sensitive.* Moreover, each parent and each child is a unique individual. Some children may, in fact, thrive under such an arrangement, while others may suffer from a scholastic standpoint due to a lack of stability and consistency in household schedules, as well as inconsistent or even conflicting parental approaches and expectations.[63]

> In many cases, *a breakdown in the entire process sometimes occurs because one parent drops the scholastic ball*, and simply does not prioritize oversight of homework in a parentally responsible manner. This situation may occur for several possible reasons. First, the parent may not have the self-discipline, patience and/or interest to oversee the child's homework, and may conclude in his or her own mind that it is easier and more self-convenient for the other parent to simply "take care of it " *Second, a parent might rather spend his or her parenting time doing "fun" things with the children, even though this may essentially amount to a conscious or sub-conscious avoidance or abdication of parental responsibility towards homework. Third, sometimes a parent insists on exercising parenting time, but actually spends little if any time interacting with the children at all, and instead spends much or most of his or her parenting time in his or her own personal activities.* (Emphasis added).[64]

> Further, *a parent needs to be honest with oneself in evaluating the question of whether a particular parenting time schedule unduly interferes or interrupts with a particular child's stability, consistency, and discipline relative to scholastic preparation and performance.* Some parents, on their own, might reach fact-sensitive conclusions in certain cases that a specific child might be best

off primarily remaining in one home during weekdays when school is in session, while others might reach an opposite but valid conclusion, depending upon the specific circumstances involved. (Emphasis added).[65]

One might reasonably expect [to] think that if there were missing homework assignments on a frequent rather than infrequent basis, this would have logically been the subject of more detailed and specific e-mails about alleged chronic delinquency, and such communications would have been produced as evidence at the hearing. The court makes this observation not to minimize or sweep under the rug any unnecessarily missed homework assignments by the children while in defendant's care, *but rather to emphasize the absence of significant corroborating evidence reflecting and substantiating the true scope of the problem, and whether same is vast enough to warrant the significant intervention and remedy which plaintiff seeks, i.e., the immediate stoppage of defendant's midweek overnight parenting time*, as opposed to other equitable alternatives and approaches. (Emphasis added).[66]

P.S. v. J.S., FM-15-1581-08, 2016 N.J. Super. LEXIS 2312 (N.J. Super. Sept. 2, 2016)

Issue: What qualifies as a 'gifted child' under the New Jersey child support guidelines? Additionally, should a non-custodial parent be compelled to pay additional child support, above the guidelines, to help defray costs related to his teenage daughter's acting expenses and other activities?

Facts: The parties are divorced and their daughter was 13 years old at the time of the opinion.[67] She was heavily involved in the theater and anything involving acting.[68] Having conducted two in-camera interviews of the child during previous post-judgment litigation, the court remarked, "this child presents as one of the most committed children this Court has interviewed in years. For Julie, acting is not simply a hobby or 'extracurricular activity,' but an integral part of her present and future goals."[69] The defendant filed an application seeking to require the plaintiff/obligor to pay as additional child support one-half the cost of all extra-curricular activities.[70] The plaintiff objected, citing that said costs are already included in his basic child support obligation in accordance with New Jersey's child support guidelines.[71]

Held: Finding the child in question was "gifted," the court ordered both parties to contribute up to $250 per year and earmark these monies for the child's acting-related activities.[72]

Passages:

With so much potential subjectivity at the very heart and inherent foundation of such an analysis, *does this court need to sit like a reviewer and watch the child perform in a particular play before making a decision on giftedness?* Even if, hypothetically, the court actually attempted such a process, there is nothing which would render this court's purely subjective opinion on acting any more or less valid than the next person's opinion on the same exact matter. *An issue as fundamentally important as the level of a minor's child support should not depend on whether a judge likes a minor's performance in a community production of Cats or Fiddler on the Roof. As a matter of fairness and equity, there needs to be a different and more logical perspective to addressing the issue.* (Emphasis added).[73]

From an evidentiary standpoint, it is theoretically possible that under N.J.R.E 702, *a parent may attempt to bring into court an alleged acting "expert," i.e, a purported acting coach or instructor, to offer an opinion on a child's giftedness. The practical reality, however, is that the cost of retaining a purported expert may be significantly more than the amount in dispute.* Moreover, there is no guarantee that the opinion of any such acting expert will be any less subjective or more valid than the personal opinion of anyone else on the planet. While the court is not preventing a party from bringing in a professed acting expert, such a step is by no means a mandatory prerequisite in this matter. (Emphasis added).[74]

A subjective opinion of one's acting ability—especially that of this very young teenager—is simply not a reliable point of focus in this

setting. *This child, like any other present or future actor at every level, is guaranteed to have both some supporters and some detractors along the way. The fact of the matter, however, is that Julie has already demonstrated to this court a clear and undeniable giftedness which is highly worthy of particular attention in this case.* Her giftedness does not necessarily relate to an ability to memorize lines or cry on cue, but rather, to *her inherently extraordinary drive, desire, focus and commitment to act and perform on stage at her young age in the first place.* (Emphasis added).[75]

From a legal standpoint, *the most likely purpose behind the "gifted" exception under the Guidelines is not to arbitrarily reward a child, or a child's custodial parent, with a financial bonus for having inborn talents.* Rather, the far more logical rationale is *to provide some extra but specifically earmarked funds, of a reasonable amount, to help advance a child's potential, when such child demonstrates an unusually heightened desire and ability to achieve in a particular field or discipline.* In this case, Julie demonstrates such an unusually heightened desire and ability, through her attitude, her confidence, and her willingness to work hard and commit. *In this respect, she is in fact a gifted child. Under these circumstances, it is fair and equitable under the Guidelines for both parents to contribute a small and reasonable annual supplemental amount, specifically to help support the child's ongoing acting-related efforts and expenses.* (Emphasis added).[76]

A parent should never be expected to function as an open checkbook. If the family court is going to authorize extra payments for the child's theater-related costs, such expenses must be reasonable as relating to the parties' financial circumstances and budgets. For this very reason, there is often a practical logic to placing a reasonable annual cap on such expenditures, rather than authorizing same on an open-ended basis. *In this particular case, after considering the available information, and unless otherwise jointly agreed by the parties, the court sets a reasonable sum of up to an additional $250 per year, per party (or $500 combined), as funds specifically earmarked for development of the child's theatrical related skills and activities.* These additional funds *equate to only $5 per week*, or about the cost of renting an old movie in high definition. This stipend clearly will not break either party's budget, but will provide at least some additional funds to help support their daughter's acting endeavors and theatrical development in the child's best interests.2Link to the text of the note Neither party will be required to expend more than $250 per year toward acting-related expenses. Nothing in this order, however, will prohibit either party from each voluntarily spending more money if he or she so agrees. (Emphasis added).[77]

The Court emphasizes that this case should not be interpreted as a ruling that a parent must pay for any extra activity that a child simply happens to "like." As noted, the court has otherwise denied defendant's request for plaintiff to pay extra money for other extracurricular activities at this time. *There is a clear equitable distinction, however, between general extracurricular costs and an isolated skill or discipline where the child demonstrates an enormous and highly impressive commitment.* Moreover, as the custodial parent earns a very modest amount of income, there is a legitimate risk that *if the parents do not both contribute a small and manageable additional sum, Julie may not participate in theater at all.* (Emphasis added).[78]

As a matter of equity and basic human experience, a child with a highly motivated and organic drive and focus to work and persevere towards a specific goal in a particular discipline or field, independent of parental prodding, may be considered gifted in spirit and heart.

The court is aware of the possibility that, with age, Julie's passion for acting may possibly diminish. Even if this ultimately occurs, however, the skills she may learn concerning public performance, responsibility, and working as a team in stage production will likely serve her well in whatever road she takes in life, as

will the lessons of discipline and sacrifice in attempting to reach her goals.

And if, by a combination of hard work, dedication, perseverance, and a great deal of luck, this child does in fact someday make it to the Broadway stage or silver screen, you heard it here first. (Emphasis added).[79]

L. Mantle v. C. Mantle, FM-15-656-15, 2015 N.J. Super. LEXIS 1858 (N.J. Super. March 9, 2015)

Issue: This case discusses the antiquated "DeVita" restraint, which comes from the 1976 case of *DeVita v. DeVita*, 145 N.J. Super. 120 (App. Div. 1976).

Facts: At the beginning of their divorce litigation, the parties entered into a consent order that granted them joint legal custody of their six-year-old son, with the plaintiff designated as the parent of primary residence.[80] The parties further agreed that neither would permit any new boyfriends or girlfriends in the presence of the child during their parenting time.[81] There was no timeframe on this provision.[82] A few months later, the plaintiff filed a motion to enforce this provision, alleging the defendant had a new girlfriend who he was permitting to be in the presence of the parties' son.[83] The plaintiff, however, did not allege the defendant's girlfriend was acting inappropriately around the child.[84]

Held: The court determined that neither the *Devita* case, nor any other reported decisions in New Jersey, stand for the proposition that exposing a child to a parent's new significant other, or even permitting the new partner to stay overnight when the child was present, "is *per se* inappropriate and contrary to the child's welfare and best interests in every case."[85] Additionally, the court set forth a gradual transition plan over a reasonable period of time to introduce a new significant other to a child.[86]

Passages:

Trial courts follow appellate court rulings. In analyzing *DeVita*, however, it is critical to carefully analyze the language of the 1976 opinion to determine what the majority actually did and did not hold. First, *a close reading of DeVita reveals that the appellate court did not establish the proposition that permitting contact between a child and a new parental dating partner in the course of the divorce, or having a dating partner stay overnight during such time, is automatically harmful per se to a child in every case,* regardless of the specific facts and attendant circumstances of a familial situation. *Nor did DeVita create any binding presumption or inference mandating such a conclusion, or mandate any type of blanket prohibition against a divorcing parent ever choosing to have a dating partner discreetly stay overnight while a child is present for parenting time.* (Emphasis added).[87]

There is a massive difference between an appellate court requiring the imposition of restraints, which did not happen in DeVita, and declining to reverse a trial judge's discretionary decision, which did happen in DeVita. Unlike the former, the latter arguably constituted an implicit recognition by the DeVita majority that the trial court could have ruled either way on the issue of restraints, and that neither decision would have necessarily been wrong to the point of constituting an abuse of discretion and reversible error. *Hypothetically, had the DeVita trial court declined the mother's request to impose restraints against the father's girlfriend staying overnight in the child's presence, there is nothing in the opinion which supports an irrefutable conclusion that the appellate court would have reversed or found fault with such decision by the trial court either.* Rather, whether the trial court upheld or struck down the restraints, either result may have ultimately been supported by the appellate court as a trial court's appropriate exercise of judicial discretion following a fact-sensitive analysis.[88]

Further, there is a very legitimate present-day question as to whether part of the rationale employed in 1976 by the DeVita majority is or is not still even socially viable in 2015….Today, nearly forty years after DeVita, it is highly debatable whether a "substantial body of the community" would still find anything immoral or inappropriate about a party having a dating partner sleep overnight in his or her home, or that a child's moral welfare would be significantly compromised by such action. Sociologically speaking, 1976 was a million years ago. Given the overwhelming number of couples from all walks of life who

presently live together full-time without the benefit of marriage, *the landscape has changed drastically since the long gone days of the Bicentennial.* While DeVita is still valid case law, it is in fact a fairly aged decision. (Emphasis added).[89]

There is also another possible scenario, which some parents seeking DeVita restraints against their ex-spouses parent might not want to acknowledge as even a remote possibility: *What if the dating partner is good for the child? For example, what if the child has long known this person, and has a strong, positive relationship with the individual?* Alternatively, *what if both parents have a volatile relationship with each other, while the dating partner is actually a relatively stable "voice of reason", whom the child feels comfortable talking with during the emotionally challenging and traumatic experience of divorce itself?* Further, *what if the dating partner has special skills which can be of assistance to the child, such as training in education, substance abuse counseling, psychology or social work, or even in recreational activities such as sports or the arts?* With more and more hypothetical scenarios, *the focus becomes more clear that protection of a child's best interests requires more than a general, blanket, indefinite prohibition against a parent bringing any dating partners around a child as a presumptive threat to a child's best interests.* (Emphasis added).[90]

In determining the reasonableness and enforceability of a restraint against exposing a child of divorcing parents to new parental boyfriends and girlfriends, there are certain unfortunate possibilities of which the family court must always be cautious. *First is the reality that following separation or divorce, some parents may act unreasonably, with a primary focus trained far more heavily on their own emotional needs than those of their own children.* For example, it is not difficult to envision a circumstance when a party who does not want a divorce in the first place starts improperly demanding the imposition of DeVita-type restraints against the other party. *Such insistence may at times actually have little to do with a child's protection and best interests, and much more to do with a spouse's personal agenda of control, payback, or the simple explanation that he or she does not want the former husband or wife party happily dating anybody else.* (Emphasis added).[91]

Further, *some divorcing parents may be so ultra-possessive over "their" child that they become highly agitated and threatened over any new adult figure entering the child's domestic life, subjectively fearing that their own parental role will somehow be diluted or diminished* in the process. *Sometimes, competitiveness, jealousy, over-reaction and paranoia steamroll over reason, flexibility and common sense, resulting in an unnecessary insistence upon DeVita-type restraints under the pretext that such restrictions are necessary for the sake of the child rather than the parent.* (Emphasis added).[92]

Reciprocally, however, there is often the equally *inappropriate and self-absorbed conduct by a divorcing parent who is so personally over-anxious to immediately lock into a committed relationship with a replacement partner that that he or she literally shoves a new "special someone" in their child's face,* fully expecting and insisting their child to instantly embrace this new person with open arms. (Emphasis added).[93]

In balancing these competing concerns, it is reasonable to conclude that when parties separate and file for divorce shortly thereafter, there is often an appropriateness in creating well-fashioned, balanced, mutual, temporary, short-term restraints against introducing a child to new parental boyfriends and girlfriends, so long as such restraints are reasonable and sensible as to nature and duration. *Conversely, however, a restraint which perpetually and indefinitely keeps all dating partners away from a child, under penalty of contempt for violating a court order, may inevitably contradict social reality and practicality.*[94]

No detailed social study needs to be conducted for the court to recognize the fundamental reality that people generally seek domestic companionship, and that most adults who have ended a prior marriage ultimately enter new relationships with new partners. While the timetable involved for each individual may vary, rare is the case where one actually and intentionally adopts a permanent monastic lifestyle. To the contrary, *the pursuit of a new relationship following the end of a prior marriage is not only natural, but generally encouraged as a mentally, emotionally, and socially healthy and constructive step in moving onward from what may have been a very hurtful chapter in one's life. Thus, a court order which intentionally or unintentionally puts an indefinite clamp on this possibility, at an ex-spouse's insistence, is subject to equitable scrutiny.*[95]

While children may likely experience some degree of pain and stress when parents end their marriage, *it is unrealistic to expect to indefinitely shield children from the occurrence of the divorce itself, or the fact that both parents will likely proceed to seek new relationships with new partners.* As with many other aspects of raising a child, *the most sensitive approach to this subject involves a reasonable dose of parental discipline and temporary self-sacrifice, with an eye towards developing an appropriate gradual phase-in plan for introducing the child to new parental boyfriends and girlfriends in due course.*[96]

C. Zoe v. D. Zoe, FM-15-623-07N, 2014 N.J. Super. LEXIS 3078 (N.J. Super. Jan. 23, 2014)

Issue: The first sentence of this opinion sums it up: "This case presents issues involving divorced parents, an 11-year-old girl, and rock music."[97]

Facts: The parties were divorced and in the middle of highly acrimonious post-judgment litigation involving residential custody of their three children.[98] At the forefront of this opinion was the parties, 11-year-old daughter (A.Z.), and the father's objection to her attendance at a Pink concert she and the defendant/mother attended, alleging the concert was "age-inappropriate" due to "lyrical profanities," as well as "sexually suggestive themes and dance performances."[99]

Held: The defendant taking the child to the concert was not age inappropriate, nor an abuse of her parental discretion, and would not be a relevant factor in the parties' ongoing custody dispute.[100]

Passages:

While the present matter involves a parental disagreement over a child's attendance at a rock concert, the case exemplifies an ever-growing challenge for the family courts which extends far beyond disputes over a child's exposure to rock music. Specifically, the system is often inundated with battles between warring ex-spouses who come to court with grievances and allegations about each other's parental skills and decisions. *In a great many of these circumstances, the dispute actually boils down to one parent, or sometimes each parent, attempting to micromanage how the other parent raises the child during his or her own parenting time. It is a virtual certainly that on nearly any motion day in any family court in New Jersey, the docket will include at least one case involving a parent critiquing and criticizing the other parent's decisions over some of the most basic elements of a child's everyday life, such as (1) what the child eats for lunch or dinner (pizza or fast food vs. "healthy" meals); (2) the child's style of clothes (grass-stained "dirty" jeans vs. "clean" or "presentable" pants ; (3) choice of movies and TV shows ("edgy" programs vs. "wholesome" family material), (4) choice of extracurricular activities (going to a baseball game or piano lessons vs. a relative's barbeque), (5) different curfews and bedtimes, and (6) other subjects generally tailored for individual parental discretion.* (Emphasis added).[101]

Clashes over parenting styles will sometimes be unavoidable. *This does not mean, however, that a parent serving as "joint legal custodian", or even one who is serving as a primary residential custodian, has an automatic right to script and control from afar every move the other party makes in his or her own house during parenting time.* Rather, *each parent has a basic constitutional right and ability to exercise reasonable discretion on child-related issues during his or her own parenting time, so long as such choices do not unreasonably*

compromise the child's general health, safety and welfare. (Emphasis added).[102]

Pursuant *to N.J.R.E. 201(b), the court takes judicial notice that over the past sixty years, in the United States, rock has grown into one of the most popular, deeply engrained, and culturally significant forms of creative artistic expression in the history of the nation and world.* People of all ages and backgrounds regularly listen to rock music for a multitude of reasons, including appreciation and enjoyment of the music, the lyrics, and the talents of the vocalists and musicians performing the songs. Many popular rock artists routinely sell out arenas and football stadiums within minutes after their concert tickets first go on sale. Further, and with the particular support of music video television programs and the internet, rock music has become not only an audio art form, but a highly visual art form as well. (Emphasis added).[103]

The court takes further judicial notice that historically, rock music has often involved socially controversial lyrics and themes, as well as what some people have at various times considered to be suggestive songs and performances. It is a matter of common knowledge that back in the 1950's and 60's, when rock music (then more commonly called rock and roll), was still in its relative infancy, millions of teens and pre-teens embraced this then-new style of music as not only exciting, but groundbreaking. (Emphasis added).[104]

Some of the most famous and time-honored names in rock music history were, in the 1950's and 60's, the subject of parental and cultural concern, social disapproval, and even direct censorship. *Perhaps the most notorious example concerned Elvis Presley, now universally known as the King of Rock and Roll. As chronicled in Parental Advisory, Presley's live performances and on-stage gyrations were in their early days considered highly controversial, and caused a great deal of consternation among adults convinced that he, his music, and his performances were obscene.* (Emphasis added).[105]

The foregoing examples demonstrate *the reality that notwithstanding the sometimes controversial or suggestive nature of some songs, lyrics, and stage performances, rock music is nonetheless a highly legitimate and culturally significant form of creative artistic expression in American society.* Of course, if the best way to predict the future is to study the past, then it is logical to predict that there will always be new rock songs and performances which again stir the pot of social controversy and debate over age-appropriateness for teens and pre-teens alike. *In this day and age, it is not too hard to search on the radio, television or internet to find current rock songs and performances which may raise the same type of parental reactions and objections as those raised by parents years ago to Elvis Presley, the Rolling Stones, Bob Dylan and other rock artists.* The specific reasons for objections may vary greatly from parent to parent, based upon subjective opinions, viewpoints and parameters concerning *(a) the subject matter of a song, or (b) the use of profanities or "curse words" in some lyrics, or (c) the production of allegedly suggestive and provocative videos or stage performances, costumes and choreography.* (Emphasis added).[106]

The law does not prohibit parents from permitting their own children to experience works of the creative arts which contain some verbal profanities. The reality is that minors in the United States are potentially exposed to profanities all the time through movies, television, and the internet. Further, *the fact that a minor hears a profanity in the context of an artistic performance, with parental consent, does not automatically render a parent's decision wrongful or age-inappropriate. To the contrary, in the context of story-telling as creative art, profanities are frequently implemented as part of socially acceptable artistic dialogue.* (Emphasis added).[107]

Perhaps the most well-known example of this point is found in *the classic 1939 film, "Gone With the Wind,"* a three hour fictional account of a romantic affair between two nineteenth century characters, set against the historical backdrop of the American Civil War. *At the end of the movie, the lead male character, Rhett Butler, delivers his final speaking line to the lead female character, Scarlett O'Hara, stating: "Frankly my dear, I don't give a damn." Upon the film's release seventy-five years ago, the word "damn" was considered by many as profane and culturally unacceptable for public uttering, and its use in the movie was actually considered by many at the time to be socially shocking.* However, this one sentence ultimately grew critical to the film's legacy as a cinematic and artistic masterpiece. In fact, *in 2005 the American Film Institute named this line as the single greatest quote in the history of American film.* (Emphasis added).[108]

Plaintiff has objected to his daughter's attendance at the Pink concert because of what he contends are age-inappropriate songs, as well as sexually suggestive dance performances. *A review of the concert set list, as well as the lyric sheets and videos from the concert on You Tube,* reflects that there are in fact some profanities and curse words in some of the songs. The use of profanity, however, is sporadic and incidental, and not unreasonably pervasive throughout the albums or show. *To the contrary, a very substantial part of the lyrics do not involve any profanities at all. More significantly, the lyrics in many of the songs are not only age-appropriate for teens and pre-teens in 2014 America, but from an artistic standpoint are particularly noteworthy in addressing important social themes and messages which are objectively relevant and very relatable to young Americans in high schools and junior high schools throughout the country.* (Emphasis added).[109]

For example, in her song, "The Great Escape," *Pink poignantly sings about the very real problem of young people physically harming themselves over stressful situations*, and contains lyrics which clearly attempt to provide listeners with a message of hope…In another song, "Perfect," *Pink sings about the stress people feel when they judge themselves too harshly for their own faults. The lyrics point out another very important message for young adolescents, i.e., that one does not have to be perfect to be strong and move forward in life…* (Emphasis added).[110]

The messages in these examples are inherently valuable to teens and pre-teens who often grow up in a world of relentless stress, pressure, tension and self-doubt. These songs and messages are age-appropriate in this case, and the fact that the artist may use some profanities in these or other songs on an album or in a concert set list does not logically disqualify the entire work or performance as "age-inappropriate" for a teen or pre-teen's ears. (Emphasis added).[111]

Overall, *the court finds that in permitting A.Z to attend the performance, defendant was allowing her daughter to enjoy, for the first time the culturally exciting experience of attending a major rock concert.* This event involved over ten thousand other attendees from multiple backgrounds and walks of life, including other children, all coming together in one venue for an evening of singing, dancing, and positive entertainment. Further, *defendant did not simply drop A.Z. off unattended at the front gate of the arena in an irresponsible fashion. Rather, she personally accompanied A.Z. to the show and was there at all times to supervise and protect her daughter's well-being.* In permitting the child to be part of this event, while chaperoning her in a safe and responsible manner, *defendant did absolutely nothing wrong as a parent.* To the contrary, the court finds that defendant acted appropriately and responsibly in her care of A.Z. on the evening in question. (Emphasis added).[112]

Perhaps most important, however, is the fact that A.Z. enjoyed a parent/child night out together, sharing an experience which was clearly very important to the child in her young life. In this day

and age, it is easy for parents to put off important bonding experiences with their children until a tomorrow which simply never comes. *Here, defendant invested her time, energy and money into providing the child with a memorable mother/daughter evening together. The positive value of this experience is not diluted in any fashion merely because there may have been some incidental curse words or allegedly suggestive themes during some of the songs at the concert.* (Emphasis added).[113]

Regarding plaintiff-father, the court understands his general parental desire as a parent to protect and shield his daughter as she approaches her teen years. The court further wholly appreciates the challenges which any parent faces in raising an adolescent son or daughter in today's society. *The truth of the matter, however, is that there is also much to be said for the value of parental flexibility. Children do not grow up in a bubble.* While a parent generally has a right to decide that an eleven year old child in his or her care should or should not listen to certain songs, or watch certain movies or TV shows, or read certain books, *the implementation of overly rigid restrictions on a teen or pre-teen sometimes has a way of severely backfiring on a parent.* While reasonable rules, limits and parameters must clearly be set for any child, a parent with an open mind for compromise can potentially demonstrate to the child an important knowledge of, and respect for, what is important in their child's own life. Such a demonstration can potentially go a very long way in enhancing and fortifying the parent/child relationship itself. *As William Shakespeare noted, it is a wise parent who knows his or her own child.* See The Merchant of Venice, Act 2, Scene 2, Page 3 (1596-98). (Emphasis added).[114]

Marla Marinucci is a partner in the law firm of Russell & Marinucci, PA in Ocean City.

Endnotes

1. This article does not include any of Judge Jones' opinions on domestic violence issues.
2. 447 N.J. Super. at 80.
3. *Id.* at 81.
4. *Id.*
5. *Id.* at 82.
6. *Id.* at 88-89.
7. *Id.* at 89.
8. *Id.* at 91.
9. 438 N.J. Super. at 29.
10. *Id.*
11. *Id.* at 30.
12. *Id.* at 39-41.
13. *Id.* at 34.
14. *Id.* at 42.
15. *Id.* at 45.
16. *Id.* at 46.
17. 426 N.J. Super. at 279.
18. *Id.* at 280.

19. *Id.*
20. *Id.* at 281.
21. *Id.* at 288.
22. 2014 N.J. Super. LEXIS 3088 at *1.
23. *Id.*
24. *Id.* at *1-2.
25. *Id.* at *2.
26. *Id.*
27. *Id.* at *4-5.
28. *Id.* at *5-6.
29. *Id.* at *6-7.
30. *Id.* at *10.
31. 2016 N.J. Super. LEXIS 2684 at *1.
32. *Id.* at *2.
33. *Id.*
34. *Id.*
35. *Id.* at *12-17.
36. *Id.* at *17.
37. *Id.* at *4-5.
38. *Id.* at *18.
39. *Id.* at *19.
40. *Id.* at *2.
41. 2015 N.J. Super. LEXIS 3039 at *2-3.
42. *Id.* at *3.
43. *Id.*
44. *Id.* at *4.
45. *Id.*
46. *Id.*
47. *Id.* at *18-19.
48. *Id.* at *22.
49. *Id.* at *23-24.
50. *Id.* at *24.
51. *Id.* at *23.
52. *Id.* at *28-29.
53. *Id.*
54. 2016 N.J. Super. LEXIS 2594 at *3.
55. *Id.*
56. *Id.*
57. *Id.* at *4.
58. *Id.*
59. *Id.* at *21.
60. *Id.* at *21-24.
61. *Id.* at *6.
62. *Id.* at *9.
63. *Id.* at *11-12.
64. *Id.* at *12-13.
65. *Id.* at *14.
66. *Id.* at *20-21.
67. *Id.* at *2.
68. *Id.* at *3.
69. 2016 N.J. Super. LEXIS 2312 at *6.
70. *Id.* at *7.
71. *Id.*
72. *Id.* at *21.
73. *Id.* at *12-13.
74. *Id.* at *13-14.
75. *Id.* at *14.
76. *Id.* at *17-18.
77. *Id.* at *19-20.
78. *Id.* at *21.
79. *Id.* at *22-23.
80. *Id.* at *3.
81. *Id.*
82. *Id.*
83. *Id.* at *3-4.
84. *Id.* at *4.
85. *Id.* at *7.
86. *Id.* at *30-32.
87. 2015 N.J. Super. LEXIS 1858 at *7-8.
88. *Id.* at *8-9.
89. *Id.* at *9-10.
90. *Id.* at *16-17.
91. *Id.* at *20.
92. *Id.* at *21.
93. *Id.*
94. *Id.* at *22.
95. *Id.* at *23.
96. *Id.* at *24.
97. 2014 N.J. Super. LEXIS 3078 at *1.
98. *Id.* at *2.
99. *Id.* at *3.
100. *Id.* at *7.
101. *Id.* at *8-9.
102. *Id.* at *9-10.
103. *Id.* at *13.
104. *Id.* at *13-14.
105. *Id.* at *16.
106. *Id.* at *21-22.
107. *Id.* at *26.
108. *Id.* at *26-27.
109. *Id.* at *34.
110. *Id.* at *34-36.
111. *Id.* at *36.
112. *Id.* at *40-41.
113. *Id.* at *41.
114. *Id.* at *41-42.

Commentary

A Cease and Desist Order for the Alleged Alimony 'Rule of Thumb'

by Brian M. Schwartz

In Sept. 2014, New Jersey's alimony statute, already one of the most comprehensive in the country, was amended. The amendments took into consideration decades of case law refining and interpreting the prior alimony statute. Importantly, the amendments also reflected the thoughts and positions of various opposing factions weighing in on the issue of alimony.

Among the many positions advanced, there was a movement to replace the alimony factors—which were based upon individual families—with the uniformity of strict guidelines, a one-size-fits-all form of the law. It was argued that guidelines would make determining alimony easy and predictable, and would save families money; in fact, that same argument was recently advanced in the pages of this publication.

But this author believes guidelines ignore the fact that each family, and each family dynamic, is different, and cannot be resolved with a simplistic formula. An analogy clarifies this point. For decades, the 'traditional' custodial arrangement was for fathers (generally speaking) to see their children every other weekend, from Friday to Sunday, and one evening a week for dinner. This form of time-sharing was essentially the visitation rule of thumb. Moreover, decision-making regarding the children was the sole domain of the custodial parent (generally mothers); this was the decision-making rule of thumb. In other words, custody and parenting time was subject to a fairly strict formula, and that formula was easy, predictable and uniform. The formula provided consistency and saved families money in terms of resolving these issues as they related to their dissolution.

However, the social sciences have found that children benefit from the active involvement in their lives of both parents—greater personal contact and greater involvement in decision-making by both parents makes for better development of children. Now, the notion of 'traditional parenting time' is seen as archaic; instead, parents enjoy a much greater sharing of time with and decision-making for their children. The result is that more parents spend time working through these issues to reach a resolution that best suits the individual families and the circumstances related to their matter. In other words, the 'ease and predictability' of the traditional custodial arrangement (the rule of thumb) has been substituted for the discretion to create a parenting time and decision-making arrangement that works best for the families involved and, more importantly, reflects fairness to the parties involved.

This concept is further confirmed by the recent Supreme Court decision in the matter of *Bisbing v. Bisbing*.[1] In *Bisbing*, the Supreme Court rejected the social science previously enunciated in *Baures v. Lewis*.[2] To be sure, prior to *Bisbing* it was widely accepted that the *Baures* standard made it easier for the custodial parent to relocate with the children outside of New Jersey. Now, the Supreme Court has rejected the more-simplistic premise of "happy custodial parent, happy child."[3] In its place, the Supreme Court confirmed that an application for relocation should be guided by the more complex "best interests of the children" standard. This, too, demonstrates a shift from a more simplistic approach, with greater certainty regarding the outcome, to a more complex standard based upon fairness under the facts and circumstances related to the family in question.

Marriage in New Jersey has long been viewed as a joint enterprise. New Jersey has long recognized that each partner to a marriage makes contributions, both financial and non-financial. Frequently, raising children and homemaking are considered the non-financial contributions made by a spouse; hence, there is a specific statutory factor. Yet, one does not have to be a stay-at-home parent to have made non-financial contributions:

One spouse changes his or her career track to improve the career of the other or to be more available for the benefit of children. There are professionals who, by agreement of the parties, take themselves off 'partner track.' There are workers who are forced to cut back on work-related travel or decline assignments that require travel, hindering their advancement. Still others are forced to decline promotions that would require additional time away from the family and less flexibility in their work schedules. In other words, often there is evidence that one party has sacrificed his or her career for that of the other or for the benefit of the family as a whole.

One spouse forgoes a benefit achieved, such as teachers who forfeit tenure, or union members who forfeit seniority, positions of leadership and overtime opportunities.

One spouse is forced to travel from town to town, state to state, and even country to country, following the career advancement of the other party at the expense of his or her own.

These are just a few examples of the various sacrifices one spouse may make for the benefit of the other, and for the benefit of the family at large. Yet, these sacrifices seem hollow when a marriage ends. Can one truly be compensated for 'the lost years'? Can one be expected to pick up where he or she left a career, especially once significant time has passed? Certainly, no formula can properly assess this type of economic loss.

Frankly, from the author's point of view, utilizing a rule of thumb for alimony is akin to asserting that all four-bedroom houses are the same. Surely, not all four-bedroom homes throughout New Jersey are equal in value. There are other factors to be considered to determine value—condition, location, amenities, school system, and property size are just a few of those factors. While establishing that all four-bedroom houses should be sold for $400,000 would be simplistic and provide certainty, it again ignores the facts related to each particular house.

But even if one were to consider the alimony rule of thumb to be a fair approach, the author questions whether that would truly be more simplistic. For example, what level of income would one use in order to determine the income attributable to a party? Would it be each person's highest level of income earned during the marriage? Would it be the most recent year? Would it be an average of three years? Of five years? And if so, *which* three-year or five-year period? If the dissolution action was taking place just before one party's career was 'taking off,' would that be considered? Clearly, there is no simplistic answer to these questions.

Similarly, *what happened* during a marriage is important. Did the parties have children? Did one of the parties remain at home to care for the children? Did one party forego advancement in his or her career in order to be more available for the children? Is there a child with special needs? Did one of the parties care for an elderly parent? Did one party work to support the other, which allowed the other to obtain an advanced degree (doctorate, master's, law)? Did one party suffer from an illness that prevented him or her from working during the marriage? Is one of the spouses physically abusive toward the other? Again, these are only a handful of facts that could (and frankly should) affect the determination regarding the amount of alimony. All of these would seemingly be ignored by the institution of an alimony rule of thumb.

Respectfully, from the author's assessment, an alimony rule of thumb serves one purpose—predictability. The author does not believe attorneys should be willing to sacrifice fairness for a family in exchange for predictability. Moreover, unlike the child support guidelines, there is no empirical data or statistical research to support an alimony rule of thumb. Rather, it would be intended to prevent consideration of the circumstances related to each individual family—consideration of all of the factors that contribute to a reasoned determination of alimony. Since every marriage is not the same, the author believes they should not be treated the same.

Family law practitioners represent both the payor of alimony and the recipient, and have zealously argued both sides of the alimony issue. The payor and recipient both benefit from the discretion currently granted to the court (and to attorneys) in making decisions—based upon the well-established statutory factors and case law—that best fit each individual family. Does the current alimony law still warrant continued review and refinement? From this author's perspective, yes—no law is perfect, and the courts will address the various issues raised by the amendments to the statute in the coming years. But, the author does not believe the apparent widespread use of an alimony rule of thumb is the answer. ■

Brian Schwartz practices in Summit.

Endnotes

1. 166 A. 3d 1155, 230 N.J. 309 (2017).
2. 167 N.J. 91 (2001).
3. *Bisbing*, at 1166-68.

Only the Strong Survive: The Treatment of Survivorship Interests in Divorce

by Jonathan W. Wolfe and Christopher McGann

Mrs. Smith has retained representation in her divorce from her husband. She is a 60-year-old retired teacher who is in good health. Her husband is 58 and is also in good health. At the initial consultation, Mrs. Smith explains that her pension is her most valuable asset. She also explains that five years ago she and her husband elected a survivorship interest on her pension naming her husband as the beneficiary. The effect of this election is that pension payments received by Mrs. Smith are reduced; however, in the event of her death, payments would continue to be made to her husband until his death. These payments to her husband will be made regardless of whether the parties are married at the time of Mrs. Smith's death. Mrs. Smith would like to understand how her pension, and specifically Mr. Smith's survivorship interest, will be treated in the divorce.

The following day, Mr. Anderson, an 80-year-old retired firefighter, suffering from a host of medical conditions, including emphysema, type 2 diabetes, lymphoma and stage 1A pancreatic cancer, seeks representation. Mr. Anderson also has a pension in pay status, and his 56-year-old wife, who is a fitness coach and participates in three marathons per year, is the surviving beneficiary on the pension. She will continue to be a beneficiary after his death, notwithstanding the parties' divorce, and her status cannot be revoked or modified. Mr. Anderson wants to know how a court would handle his pension and whether, and if so how, the survivorship benefit would be taken into account. He indicates that his pension payments have been reduced by several hundred dollars each month, and he believes that his wife—if she is anything like her mother—will live forever and benefit greatly from the survivorship election.

What guidance can be given to Mrs. Smith and Mr. Anderson? While New Jersey courts have long-since recognized that pensions are assets to be equitably divided, the courts have not yet determined whether, and how, to treat survivorship interests. The good news for Mr. Smith and Mr. Anderson is that the majority of other states that have addressed the issue have concluded that survivorship benefits—even if subject to forfeiture and speculative—should be considered as part of the division of marital property.

New Jersey Treatment of Pensions in Divorce

In New Jersey, a pension is an asset subject to equitable distribution, regardless of whether it is vested or unvested at the time of divorce.[1] As stated by the Supreme Court, "the concept of vesting should probably find no significant place in the developing law of equitable distribution...These now customary usages of the concept of vesting are in no way relevant to the question of effecting an equitable distribution...."[2]

In *McGrew*, at the time of the parties' divorce hearing, the husband's pension had vested and, although he had chosen to do so at the time, he had the ability to elect to start receiving payments immediately.[3] In *Kikkert v. Kikkert*, the appellate court held that a vested pension from which the husband would start receiving payments in nine years was an asset subject to distribution.[4] The court in *Whitfield* held that a non-vested pension is includable in the equitable distribution analysis.[5] There, the husband's pension would vest after 20 years of employment; however, the divorce proceedings occurred four years prior to that time.[6]

Underpinning the above holdings was the determination by each court that the applicable pension benefits, regardless of their status at the time of divorce, had been "legally and beneficially" acquired during the marriage.[7] As stated by the *Stern* Court, the court's inquiry should focus on "whether rights or benefits were *acquired* by the parties or either of them during the marriage, rather than on whether they were vested."[8] That determination is the touchstone for includability in the equitable distribution analysis. "The includability of property in the marital estate does not depend on when, during the marriage, the acquisition took place...[but] depends on the nature

of the interest and how it was earned."[9]

Like other forms of deferred income, pensions are "the result of direct or indirect efforts expended by one or both parties to the marriage—it is additional compensation for services rendered for the employer and a right acquired during the marriage."[10] Parties that contribute to pensions during a marriage undoubtedly expect to have the right to future enjoyment of the pension payments so long as the pensioner survives.[11]

The courts have employed three approaches to equitably distribute pension benefits in divorce: 1) a present-value offset distribution; 2) a deferred-distribution; and 3) a partial deferred-distribution award.[12] Regardless of the approach taken, only the "portion of a pension legally or beneficially acquired by either party during marital coverture is subject to equitable distribution."[13] To determine this marital component, the courts employ a coverture fraction.[14] The fraction reflects the relationship between the credits earned during the marriage and total credits earned, including those earned prior to and after the marriage.[15] The application of a coverture fraction is designed to ensure that the equitable distribution includes only that portion of the pension earned during the "shared enterprise" of the parties' marriage.[16]

The question now becomes will a court *also* take into consideration a pension survivorship interest payable to the surviving spouse, which is similarly based on efforts of the spouses during the marriage.[17] Can that election be valued similar to a pension payment, and how should it affect the equitable distribution analysis? While the results are not uniform (and are no doubt fact specific), many of New Jersey's sister states have concluded that survivorship benefits are assets to be included in the property distribution analysis.

Case Law from Other Jurisdictions

Indiana

In *Carr v. Carr,*[18] the appellate court held that the survivorship benefit was an asset that must be added to the marital property in the distribution scheme.[19] The husband's pension vested during the marriage and the wife was named as the surviving beneficiary.[20] The court rejected the wife's arguments that the survivorship interests should not be considered an asset because they were unvested and uncertain to be received.[21] Regarding the wife's uncertain receipt, the court stated that "this same uncertainty exists with any pension without a provision for survivor benefits—if the pension-earner dies before the other spouse, pension payments cease."[22] The court ruled that the uncertainty regarding the survivor benefit factors into the *value* of the interest, but does not nullify the survivor benefit's status as marital property.[23]

The court further reasoned that its holding conformed with the expectation of the parties, and any other result would create a disincentive for a pension-earner to elect a survivor benefit, as doing so reduces the income he or she would receive during his or her lifetime.[24] "Electing a [survivor benefit] provides value to the other spouse, which the law acknowledges by counting that value as part of the marital pot."[25]

Alaska

In *Ethelbah v. Walker,*[26] the Alaska Supreme Court rejected the husband's arguments that his survivorship rights were too speculative or highly contingent to be considered an asset in the divorce, and credited the husband with the present value of the survivorship rights at the time of divorce.[27] Of note, at the time of the parties' divorce, the husband was 68 and the wife was 64, but was undergoing treatment for breast cancer.[28] The Court stated that notwithstanding the fact that the husband bore the risk of forfeiture if he predeceased his wife, and his wife was getting a credit up front as the pension had already vested, calculating the present value payout was "much less speculative and [reduced] the risk of forfeiture."[29] The Court focused on the likelihood that the wife would predecease her husband and concluded that equity and fairness dictated that they both should share in the value of the survivorship benefits during their lifetimes.

New Mexico

In *Irwin v. Irwin,*[30] the New Mexico court of appeals held that a survivor's benefit provision "constitutes a valuable portion of the community assets, and the survivor's benefit provision should be considered in valuing and distributing the community interest in the retirement plan."[31] There, the wife was two years younger and had a four-year greater life expectancy.[32] If the pension payments were divided evenly, the wife would receive a greater portion of the pension than the husband. This would be contrary to New Mexico law, which requires an equal division of all community property.[33] As such, the court held that when dividing the actual retirement payments, the value of the survivor's benefit must be considered.[34]

California

In re Marriage of Cooper,[35] the court of appeals held that it was error to allocate the entirety of the survivor benefit to the wife without providing an offsetting payment to the husband, as this resulted in an unequal division of the community estate.[36] There, the parties stipulated the wife's interest in the husband's pension benefits totaled only 6.38 percent, or $33,900.[37] However, the survivor benefit was valued at $208,400 and the husband, therefore, argued that if he predeceased his wife she would receive a substantial windfall.[38] The court of appeals noted that the lower court's ruling was "tantamount to a finding that [husband] made an irrevocable and outright gift of a community property asset to [wife]" when he designated her as beneficiary."[39] However, there was no evidence presented of such a gift being made.[40]

Oregon

In re Marriage of Forney,[41] the court of appeals held that the value of the two survivor annuities should be assigned to the wife in the property division, with the husband receiving a corresponding credit.[42] At the time of the parties' divorce, the husband was 65 years old, took medication for his heart and to manage his blood pressure, cholesterol and depression, and had arthritis in one foot that could limit his physical activities.[43] Conversely, the wife was 47 and in good health.[44] The court of appeals held that a survivor's annuity is:

> analogous to an unvested pension and is subject to valuation and the court's disposition on dissolution. Although it is possible that wife could die before husband and never see the benefits from the annuity, *in light of the 18-year disparity in their ages, it is likely that wife will survive husband*.[45]

The contingent nature of the asset was not a basis for rejecting the above conclusion, as the court noted that the parties' expert took into account the contingency of the wife's survival when valuing the annuities.[46]

Illinois

In re Marriage of Sawicki,[47] it was held that a survivor's benefit is a distinct property interest.[48] "Even though it is of a contingent nature, a survivor's benefit has a determinable value and it is properly considered a marital asset."[49] That court stated it was irrelevant whether the husband "voluntarily" chose to elect the survivorship annuity during the marriage.[50] Because it was chosen during the marriage, it was a marital asset, and a division of the marital property without reference to the wife's interest in the survivor annuity is not a division "in just proportions," and, therefore, violates Illinois statutory law.[51]

Conclusion

Only time will tell how New Jersey will treat survivorship interests in divorce. For a litigant like Mrs. Smith this issue may be of little consequence, as she and her husband were of a similar age and health. However, for a party that is significantly older than his or her spouse, or in poor medical condition like Mr. Anderson, a survivorship interest could be of substantially greater value than the value of the pension itself. When confronted with such a disparity in life expectancy, the courts may be guided by the reasoning from other jurisdictions that equity and financial reality require the consideration of the survivorship interest as an asset, even if it is subject to forfeiture. ■

Jonathan W. Wolfe, is with Skoloff & Wolfe P.C. Christopher McGann is with Breed & Associates.

Endnotes

1. *Whitfield v. Whitfield*, 222 N.J. Super. 36 (App. Div. 1987); *Kikkert v. Kikkert*, 177 N.J. Super. 471 (App. Div. 1981); *McGrew v. McGrew*, 151 N.J. Super. 515 (App. Div. 1977).
2. *Stern v. Stern*, 66 N.J. 340, 348 (1975).
3. *McGrew* at 517.
4. *Kikkert*, 177 N.J. Super. at 471.
5. *Whitfield* at 47.
6. *Id.* at 46-47.
7. N.J.S.A. 2A:34-23(h).

8. *Stern* at 348 (emphasis added).
9. *Whitfield* at 47.
10. *Kikkert* at 476.
11. *Moore v. Moore*, 114 N.J. 147 (1989).
12. *Claffey v. Claffey*, 360 N.J. Super. 240, 255-56 (App. Div. 2003).
13. *Larrison v. Larrison*, 392 N.J. Super. 1, 14 (App. Div. 2007).
14. *Claffey*, 360 N.J. Super. at 256.
15. *Sternesky v. Salcie-Sternesky*, 396 N.J. Super. 290, 303 (App. Div. 2007).
16. *Eisenhardt v. Eisenhardt*, 325 N.J. Super. 576, 581 (App. Div. 1999).
17. In *Corrigan v. Corrigan*, 160 N.J. 400 (Ch. Div. 1978), the court ruled that the survivorship interest that could be designated by a spouse upon their death to a third party is not an asset subject to equitable distribution because the assets will never be legally and beneficially acquired by either party. Whether *Corrigan* remains good law or not, it does not address the issue presented here—namely, whether a survivorship interest payable to one of the divorcing spouses, as opposed to some other party, should be considered an asset subject to equitable distribution.
18. *Carr v. Carr* __ N.E.3d __ 2016 WL 320687 (Ind. Ct. App. 2016).
19. *Id.* at *4.
20. *Id.* at *1.
21. *Id.* at *4.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Ethelbah v. Walker*, 225 P.3d 1082 (Alaska 2009).
27. *Id.* at 1086-87.
28. *Id.* at 1085.
29. *Id.* at 1088.
30. *Irwin v. Irwin*, 910 P.2d 342 (N.M. Ct. App. 1995).
31. *Id.* at 347.
32. *Id.* at 346.
33. *Id.* at 345.
34. *Id.* at 347.
35. *In re Marriage of Cooper*, 73 Cal. Rptr. 3d 71 (Cal. Ct. App. 2008).
36. *Id.* at 76.
37. *Id.* at 73.
38. *Id.*
39. *Id.* at 77.
40. *Id.*
41. *In re Marriage of Forney*, 244 P.3d 849 (Or. Ct. App. 2010).
42. *Id.* at 851.
43. *Id.*
44. *Id.*
45. *Id.* (emphasis added).
46. *Id.*
47. *In re Marriage of Sawick*, 806 N.E.2d 701 (Ill. App. Ct. 2004).
48. *Id.* at 709.
49. *Id.*
50. *Id.*
51. *Id.*