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EDITOR-IN-CHIEF'S COLUMN

What is Harm to the Child?

by Charles F. Vuotto Jr.

Harm to the child. An easy enough legal standard, right? Perhaps not. Although our case law is riddled with this critical standard for judicial review in a myriad of situations, there is minimal instruction from our courts regarding how the standard of harm to the child is met, nor is there any solid definition of the term. This author asks one question: What constitutes harm to a child in the context of family law?

In order to find the answer (if such an answer exists), there must be an analysis of those key areas of family law that apply the standard. What cases address harm to the child as the critical standard? Do these cases offer any guidance for the practitioner when attempting to demonstrate, or defend against, a showing of harm to the child?

Apparently, this standard is found more than one would expect. Of course, we are all aware of the standard created by *Fawzy*[1] governing arbitration of custody and parenting time issues. The harm to the child standard is also applied to a parent's right to custody,[2] a noncustodial parent's right to have a relationship with his or her child,[3] interference with parental autonomy,[4] the doctrine of *parens patraie,*[5] and termination of parental rights.[6] Harm to the child is the critical element of a parent's request for removal.[7] The standard is further applied when addressing issues of third-party rights to custody and visitation, including grandparent rights,[8] and when defining the concept of a psychological parent.[9] The right of a parent who has committed domestic violence to parenting time is governed by the harm to the child standard,[10] as is the right of a parent to record his or her child's conversation by way of vicarious consent.[11] Civil commitment of a minor is governed by the harm standard,[12] as are Division of Youth and Family Services findings and definitions of abuse and neglect.[13]

With so much law focusing on the harm to the child standard, one would think that a clear definition must be found in statute or case law. Unfortunately, that is not the case. Not only is no definition provided by our courts, but there is little guidance on an appropriate interpretation of the standard. In terms of the guidance provided, the law is clear that the harm to the child standard is a "significantly higher burden than a best-interests analysis."[14] In the context of termination of parental rights, "[t]he harm shown…must be one that threatens the child's health and will likely have continuing deleterious effects on the child."[15]

When will the courts make a finding of harm to the child? We only find limited examples of what is or is not harm to the child. For example, the Supreme Court in *Fawzy* was clear that such a finding will not be found in cases involving "two fit parents," where one argues he or she is the "better" parent, or argues that there is not sufficient summer vacation parenting time.

Disputes concerning "parenting style, not capacity" will also not rise to the level of threatening harm to the child.[16] However, such a finding of harm may be made where "the arbitrator granted custody to a parent with serious substance abuse issues or a debilitating mental illness…."[17]

Regarding grandparent visitation, a father's alienation of his children from their maternal grandparents, coupled with the close relationship between the children and the maternal grandparents, has been found sufficient to demonstrate harm to the child in the absence of grandparent visitation.[18] Also, where there is an "objectively reasonable belief that [children are] being threatened, intimidated, and verbally abused by [a parent]," or where a parent is "trying to undermine [the other parent's] relationship" with her children, there may be a finding of harm to the child.[19]

In the context of removal, the courts have provided 12 factors to be considered,[20] although specific application of these factors to a finding of harm is sparse

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among published cases. From what the removal cases provide, examples of harm to the child may be demonstrated where "the move will take the child away from a large extended family that is a mainstay in the child's life," or where the "educational, vocational or health care available in the new location are inadequate for the child's particular needs," or where "neither [the noncustodial parent's] relocation nor reasonable visitation is possible, and that those circumstances will cause the child to suffer."[21]

In addition, the requisite demonstration of harm in the removal context may be determined where the "child has an emotional disorder and the noncustodial parent has provided a needed safety net, the impact of a move, with concomitant irregularity in visitation, might well cause the child to suffer," or where "the proofs [] reveal that because of the child's developmental disorder, a change in visitation will be harmful."[22] And, "if the child has a particular talent or skill, a noncustodial parent who has driven him or her to early and late practices, assisted the teacher or coach, organized road trips, attended competitions, and is the constant support in the child's dedication to the talent, can advance a persuasive argument that the inability to fulfill that role and pursue that connection with the child will be the kind of harm that should tip the scales against removal."[23]

Perhaps the most concrete guidance is provided in the context of abuse and neglect cases, where the definition of an "abused or neglected child" is statutorily defined as "a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care…in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment."[24]

As set forth above, case law concerning termination of parental rights further provides that sufficient harm to the child "must be one that threatens the child's health and will likely have continuing deleterious effects on the child."[25] However, even these explanations fail to fully explore the parameters of "harm," and fail to address whether the harm described therein is specific to abuse and neglect cases.

Although this column is not intended to provide an exhaustive analysis of the harm to the child standard in the context of family law, it is intended to draw the practitioner's attention to the disproportionate amount of weight placed on the standard in contrast to the limited guidance provided by our courts and Legislature. The questions still remain. What definitively constitutes harm to the child? Where is the line between not in a child's best interests and harm to the child? Does the harm to the child standard require the same demonstration (whatever that demonstration may be), irrespective of what specific family law issue is being addressed by the court? In other words, does harm to the child have the same definition no matter what the context? For example, is the standard different when addressing the review of a custody arbitration as opposed to a grandparent visitation case or the right of a parent to vicariously record his or her child's conversation?

In order for there to be definitive answers to these questions, two things must occur: 1) the courts and/or Legislature must provide more definitive guidance; and 2) family law practitioners must help shape such guidance by exploring the definition of "harm to the child" when presenting matters to the court. ■

ENDNOTES

1. *Fawzy v. Fawzy,* 199 N.J. 456, 461-62 (2009) ("The only exception [to review in accordance with the Arbitration Act] is the case in which a party establishes that the arbitrator's award threatens *harm to the child*.").
2. *Watkins v. Nelson,* 163 N.J. 235, 246-47) (2000) ("The principle that a showing of gross misconduct, unfitness, neglect, or "exceptional circumstances" affecting the welfare of the child will overcome this presumption, is a recognition that a parent's right to custody is not absolute. That parental right must, at times, give way to the State's *parens patriae* obligation to ensure that children will be properly protected from *serious physical or psychological harm*.").
3. *Wilke v. Culp* , 196 N.J. Super. 487, 496 (App. Div. 1984) ("Nevertheless, a parent's custody and visitation rights may be restricted, or even terminated, where the relation of one parent (or even both) with the child cause *emotional or physical harm to the child*, or where the parent is shown to be unfit…").
4. *In re D.C.*, 203 N.J. 545, 573 (2010) ("The foregoing authority, including *W.P.,* constitutes a seamless expression of the principle that the application of the best interests standard to a third party's petition for visitation is an affront to the family's right to privacy and autonomy and that interference with a biological or adoptive family's decision-making can only be justified on the basis of the exercise of our *parens patriae* jurisdiction to avoid *harm to the child.*").
5. *Segal v. Lynch,* 413 N.J. Super. 171, 178 (App. Div. 2010) *(*"Our *overarching* consideration in all matters concerning children involved in the judicial system is "the best interests of the child." This principle is embedded in the doctrine of *parens patriae,* which authorizes the court to intervene when neces-

sary to prevent *harm to the child*.").

6. *In re Guardianship of K.H.O.,* 161 N.J. 337, 352 (1999) ("The harm shown under the first prong [of the test for termination of parental rights] must be one that *threatens the child's health and will likely have continuing deleterious effects on the child*.").
7. *Baures v. Lewis*, 167 N.J. 91, 118 (2001) ("In terms of the burden of going forward, the party seeking to move, who has had an opportunity to contemplate the issues, should initially produce evidence to establish *prima facie* that (1) there is a good faith reason for the move and (2) that the move will not be *inimical to the child's interests*. Included within that *prima facie* case should be a visitation proposal.").
8. *Moriarty v. Bradt*, 177 N.J. 84, 88 (2003) ("We hold that grandparents seeking visitation under the statute must prove by a preponderance of the evidence that denial of the visitation they seek would result in *harm to the child*. That burden is constitutionally required to safeguard the due process rights of fit parents.").
9. *V.C. v. M.G.B.,* 163 N.J. 200, 229 (2000) (Psychological parent is entitled to visitation with the child unless such visitation will result in "*physical or emotional harm to the children.*").
10. N.J.S.A. 2C:25-29(b)(3)(a) ("The court shall consider a request by a custodial parent who has been subjected to domestic violence by a person with parenting time rights to a child in the parent's custody for an investigation or evaluation by the appropriate agency to assess the risk of *harm to the child* prior to the entry of a parenting time order.").
11. *D'Onofrio v. D'Onofrio*, 344 N.J. Super. 147, 157 (A.D.2001) ("Under the circumstances, where there is clear evidence of *harm to the children*, a residential custodial parent's recording in his or her own home of conversations between a minor child and a non-resident parent is permissible under New Jersey's Wiretap Act pursuant to the vicarious consent exemption."); *see also Cacciarelli v. Boniface,* 325 N.J. Super. 1333 (Ch. Div. 1999).
12. 4:74-7A(a)(3) ("With respect to a minor under 14 years of age, dangerous to self shall also mean that there is a substantial likelihood that the failure to provide immediate, intensive, institutional, psychiatric therapy will create in the reasonably foreseeable future a genuine risk of irreversible or significant *harm to the child* arising from the interference with or arrest of the child's growth and development and, ultimately, the child's capacity to adapt and socialize as an adult.").
13. N.J.S.A. 9:6-1 ("Neglect also means the continued inappropriate placement of a child in an institution…with the knowledge that the placement has resulted and may continue to result in *harm to the child's* mental or physical well-being; 9:6-8.9(f) ("Abused child" means…(f)…a child who is in an institution…and (1) has been so placed inappropriately for a continued period of time with the knowledge that the placement has resulted and may continue to result in *harm to the child's* mental or physical well-being; 9:6-8.21(c)(4)(b). ("Abused or neglected child" means…. "a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care…in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment"); *G.S. v. Department of Human Services, Div. of Youth and Family Services,* 157 N.J. 161 (1999) ("Viewing the practical implications of our decision in light of the purposes of Title 9 lends support to our conclusion that the proper focus of an inquiry under N.J.S.A. 9:6-8.21 is on the *harm to the child*.").
14. *Fawzy* 199 N.J. at 462 ("The *threat of harm* is a significantly higher burden than a best-interests analysis.").
15. *In re Guardianship of K.H.O.*, 161 N.J. 337, 352 (1999) (*see also New Jersey Div. of Youth and Family Services v. F.H.*, 389 N.J. Super. 576, 914 A.2d 318 (A.D.2007), *certif. denied* 192 N.J. 68 (2007).
16. *Johnson v. Johnson,* 204 N.J. 529, 548 (2010) ("The issue was always parenting style, not capacity, and the arbitrator's commission was to create a schedule that would minimize conflicts and problems in the face of such different parenting styles. His new schedule was nothing more than a tweaking of an agreed-upon parenting time schedule to minimize disruption for the children. Simply put, that does not begin to approach a *showing of harm* sufficient to warrant judicial inquiry beyond what is provided in the APDRA.").
17. *Fawzy,* 199 N.J. at 462.
18. *Moriarty,* 177 N.J. at 122. Supreme Court affirming trial court and reversing appellate court, by confirming trial court's finding, that due to mother's death and special closeness between children and grandparent, visitation was needed to prevent *harm to the children* in light of the father's

campaign of alienation of the children from their deceased mother and grandparents.

19. *D'Onofrio*, 344 N.J. Super. at 157.
20. *Baures,* 167 N.J. at 116-17 ("With those principles in mind, in assessing whether to order removal, the court should look to the following factors relevant to the plaintiff's burden of proving good faith and that the move will not be inimical to the child's interest: (1) the reasons *given* for the move; (2) the reasons given for the opposition; (3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move; (4) whether the child will receive educational, health and leisure opportunities at least equal to what is available here; (5) any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location; (6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; (7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed; (8) the effect of the move on extended family relationships here and in the new location; (9) if the child is of age, his or her preference; (10) whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent; (11) whether the noncustodial parent has the ability to relocate; and (12) any other factor bearing on the child's interest.")
21. *Baures,* 167 N.J. at 119.
22. *Id.*
23. *Id.*
24. 9:6-8.21(c)(4)(b).
25. *In re Guardianship of K.H.O.*, 161 N.J. at 352 (1999).

*The author would like to thank **Lisa Steirman Harvey, Esq.,** who contributed significantly to this column.*

Greetings from Asbury Park

by John P. Paone Jr.

The 2011 Saul Tischler Award was presented to John F. DeBartolo at the Family Law Section annual dinner on March 14, 2011, at the Berkeley Oceanfront Hotel in Asbury Park.

The evening was a celebration of John's distinguished career, with 250 attendees honoring him. Among those present were Lt. Governor Kim Guadagno (accompanied by her husband, the Hon. Michael Guadagno, the presiding judge of the family part in Monmouth County), several members of the Monmouth County bench, then-New Jersey State Bar Association (NJSBA) President Rick Steen and the officers of the NJSBA.

The Tischler Award is the Family Law Section's recognition of its best and brightest members. The selection of John as the 2011 recipient continues that fine tradition. He is a partner and co-founder of the firm of Atkinson & DeBartolo, P.C. in Red Bank. He is a past chair of the Family Law Section and past president of the Monmouth Bar Association. He served as the first New Jersey State Bar Association representative on the newly created New Jersey Supreme Court Board on Mandatory Continuing Legal Education. He previously served as a co-chair of the Monmouth Bar Association/Family Law Committee and member of the District IX Ethics Committee.

Most of us know John as the person who successfully argued the NJSBA's *amicus* brief before the Supreme Court in *Weishaus v. Weishaus*, and the person who has run the successful Friday night program at the annual Family Law Symposium.

The evening included remarks from Lizanne J. Ceconi (who also served as master of ceremonies), Frank A. Louis and the Hon. Eugene A. Iadanza. John was touched by a heartfelt presentation from his daughter, Elena. John and his lovely wife Carol are active in their parish, St. Rose of Belmar. It was, therefore, appropriate that their pastor, Rev. Father Douglas A. Freer, gave the invocation.

If you practice in Monmouth County, you know that John has the respect and admiration of the entire Monmouth legal community. And so it was fitting that John elected to celebrate his special night in his home county (a first for the Tischler dinner). On March 14, Asbury Park shined brightly, harkening back to the special destination it once was and is fast becoming again. Forget the Boss or Bon Jovi, for this night at least, Asbury Park was put back on the map by another favorite son, John DeBartolo. ■

Is it All About the Award?

by Bonnie Reiss

At the annual Family Law Section dinner on March 14, Tom Snyder, the section chair at the time, related a discussion he had with an older practitioner. The senior lawyer insisted that this was the "annual Family Law Section Dinner," while in Tom's experience it was the "Tischler Dinner."

At the dinner, John DeBartolo received the Saul A. Tischler Award. Father Doug; John and Carol's daughter, Elena; Hon. Eugene Iadanza; Lizanne Ceconi and Frank Louis all conferred well-deserved accolades on John that spoke of his service to both the state bar and the section, his legal ability and his integrity. In my mind, the best description of John's approach to life and the practice of family law is *menschlichtkeit*. John stands on his own two feet, even against the odds. He doesn't do it for his own self-aggrandizement, but because it's the right thing to do. He takes his responsibility to do the right thing by his clients, his colleagues and his friends far more seriously than he takes himself, or any award.

John's receiving the Tischler Award reminded me of the time when this dinner, held each spring, was the annual Family Law Section Dinner, not the Tischler Dinner. It was the prom, the go-to event for any young lawyer who hoped to build a career as a family law practitioner. It was a chance to meet and talk with the masters—the likes of Gary Skoloff, Barry Croland and Frank Louis—the matrimonial rock stars who always had time for a word of advice or an introduction to a judge. These practitioners were much more interested in mentoring younger lawyers than having their pictures taken with their peers. It wasn't about the award. It was about the unique role we share in being part psychologist, part lawyer, bastion of commonsense and practicality, student of law, accounting and child development. John was a regular attendee. He has now become one of those mentors, but I doubt he ever envisioned his name in the same sentence with "Tischler Award."

If you ask John, I think he would tell you that on March 14 he went to the annual Family Law Section Dinner, which he persuaded the section to have in Asbury Park. At that dinner, he got to see a lot of his friends and colleagues and his daughter made a beautiful speech. And, by the way, they honored him with the Tischler Award. ■

N.J.S.A. 25:1-5(h)

The New Law of Palimony and Its Effect on Pending Palimony Complaints

by Bea Kandell and Megan S. Murray

(Editor's Note: *After this article was written, on April 21, 2011, the Appellate Division decided the matter of* Botis v. Estate of Gary Kudrick __ *N.J. Super. ___ (App. Div. 2011). In a decision delivered by the Hon. Laura LeWinn, the Appellate Division affirmed the decision of the trial court in* Botis*, and held that N.J.S.A. 25:1-5(h) should be applied prospectively, not retroactively, to palimony cases filed prior to the passage of the statute. In other words, the new law should have no effect on those cases where a complaint for palimony was filed prior to the passage of N.J.S.A. 25:1-5(h). However, no decision was made with regard to palimony cases wherein the alleged contract for support was entered prior to the passage of N.J.S.A. 25:1-5(h), but the complaint for palimony was not filed prior to the passage of the statute.)*

Claims for support between unmarried persons, denominated "palimony," were first recognized as a cause of action in *Kozlowski v. Kozlowski.*[1] In *Kozlowski*, the parties lived together for 15 years in a relationship akin to marriage, during which time the plaintiff provided for the defendant both emotionally and physically and performed all of the household chores. In exchange, the plaintiff relied on the defendant for financial support and was assured by the plaintiff throughout the course of their relationship that he would support her for life. However, the defendant eventually left the plaintiff and broke his promise to provide her with continued support.

In *Kozlowski*, the Supreme Court held that "an agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law, or on a promise to marry."[2] The Court further held that such an agreement is enforceable as a valid contact, whether the agreement was express or implied by the conduct of the parties, noting the "[p]arties entering this type of relationship usually do not record their understanding in specific legalese."[3]

In the over 30 years since *Kozlowski*, the Court has relied upon the principles of contract and equity established in that case to expand upon the law of palimony. For example, in *Crowe v. DeGioia*[4] the Supreme Court applied the *Kozlowski* principles in holding that *pendente lite* relief, pending final hearing, may be granted in palimony actions to the extent it is necessary to prevent irreparable harm to one party. Thereafter, in the 2002 case of *In re Estate of Roccamonte,*[5] the Court further expanded palimony claims by holding that a promise of support for life between unmarried cohabitants is binding on the promisor's estate to the extent the contract is not fulfilled prior to the promisor's death. More recently, the Appellate Division in *Connell v. Diehl,*[6] made clear that lifetime support is not the only remedy available to cohabitants seeking to enforce a promise made by another cohabitant. Rather, in addition to lifetime support, a cohabitant could be entitled to assets in the name of the other cohabitant based on the theory of joint venture.

On Jan. 18, 2010, outgoing Governor Jon Corzine signed into law an amendment to the statute of frauds (N.J.S.A. 25:1-5), which changed palimony law as established by the courts of this state over the past 30 years. For the first time, the new law provides that contracts for support between unmarried cohabitants are unenforceable unless they are memorialized in writing. Specifically, new subsection (h) of the statute of frauds precludes, unless in writing:

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

The new statutory language is precisely the "legalese" that the *Kozlowski* Court found to be counterintuitive to parties who elected to enter and sustain a relationship without the entrapments of legal mandates.

The legislative history of the new amendment to the statute makes clear that by enacting N.J.S.A. 25-

1(h), the Legislature intended to overturn New Jersey palimony law, which recognizes as enforceable, contracts for support between unmarried cohabitants that were never reduced to writing. Citing to more recent palimony decisions that recognize these unwritten claims for support, the stated legislative intent provides as follows:

> This bill is intended to these "palimony" decisions by requiring that such contract be in writing and signed by the person making the promise. [emphasis provided].

Moreover, as the bill passed through the Legislature toward its eventual passage, referencing Senate No. 2091, the Senate Judiciary Committee statement, dated Feb. 9, 2009, gives the rationale for the amendment then proposed:

> This Bill is intended to overturn recent "palimony" decisions by the New Jersey Courts by requiring that any such contract must be in writing and signed by the person making the promise. More specifically, the Bill provides that a promise by one party to a non-marital personal relationship to provide support for the other party, either during the course of such relationship or after its termination, is not binding unless it is in writing and signed.

The Assembly Judiciary Committee statement with regard to the bill states the following:

> This Bill is intended to overturn recent "palimony" decisions by New Jersey Courts by requiring that any such contract must be in writing and signed by the person making the promise. More specifically, the Bill provides that a promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination, is not binding unless it is in writing and signed. The Bill provides that no such written promise is binding unless it was made with independent advice of counsel for both parties.

An objective reading of the legislative history confirms that the new statute was enacted to eradicate the cause of action known for more than 30 years as palimony under New Jersey law. However, the amendment is not clear regarding how the statute should be applied to pending palimony claims. While the language of the statute demands the "immediate" application of the law, the unresolved issue for the courts, practitioners and their clients is how the new law, as written, applies to those cases already filed and in the pipeline. Is the new law retroactive, applying to pending cases, or must it be applied prospectively only? Without clear guidance from the Legislature, trial courts across the state have analyzed the statute without uniformity and the issue is currently pending before the Appellate Division. The key arguments on both sides of the issue are varied, and this overview will lend a greater perspective to the legal considerations the Appellate Division will likely face in rendering its decision.

STATUTORY CONSTRUCTION: EXPRESS LANGUAGE AND LEGISLATIVE HISTORY

In an effort to ensure an individual's right to fair notice of the law, the New Jersey courts "have long followed a general rule of statutory construction that favors prospective application of statutes."[7] With this principle in mind, the Supreme Court has made clear that newly enacted legislation should be applied prospectively unless the Legislature expresses an intent that the statute is to be applied retroactively.

The amendment to N.J.S.A. 25:1-5(h) dictates that the statute shall "take effect immediately," without any language to indicate whether an immediate application calls for prospective or retroactive application of the statute. The interpretation of the single word, "immediately," will ultimately result in completely opposing results—either the confirmation or the invalidation of every palimony claim currently filed in this state.

There is significant precedent from the Supreme Court that would lead to the conclusion that the Legislature's intent, in calling for N.J.S.A. 25:1-5(h) to be applied immediately without additional qualifying language, is that the statute be applied prospectively. In the matter of *Cruz v. Central Jersey Landscaping Inc.,*[8] the Court was faced with a statute, with language identical to the amendment to the statute of frauds in that the law mandated its immediate application. In holding that the statute should apply prospectively, not retroactively, to pending cases affected by the statute, the Court held that the words "take effect immediately" confirm the Legislature's intent to apply the statute from the date of its enactment going forward. The Court rejected the theory that this language could imply an intention by the Legislature to have the statute apply retroactively, noting:

> Nor is there anything in the directive that the act "shall take effect immediately" to suggest retroactivity. On the contrary, these words bespeak an intent contrary to, and not supportive of retroactive application.[9]

Although the language of N.J.S.A. 25:1-5(h) seems to support a prospective application of the statute, the legislative history does not rule out the possibility that retroactive application was intended. As set forth above, the statute's legislative history makes absolutely clear that the intention of the amendment is to overturn existing palimony law. Given that the prospective application of the statute would allow the continued litigation of a multitude of previously filed palimony claims under the very law the Legislature sought

to overturn, it is arguable to conclude that the Legislature intended to eliminate all cases that relied on prior case law to support the underlying claim. However, without the Legislature's specific directive that the statute be applied retroactively, the Legislature's intention remains uncertain.

In *Cruz*, the Court held that if the language and legislative history of a statute are ambiguous, the statute should not be applied prospectively when its retroactive application is necessary to make the statute workable or to give it the most sensible interpretation. Practitioners representing litigants seeking to have the palimony cases against them dismissed argue that the statute should be applied retroactively or it will be unworkable. They argue that if the statute is applied prospectively, it will require the court to decide palimony cases based on two different sets of law: 1) the common law for those cases filed prior to enactment of the statute based on *Kozlowski* and its progeny; and 2) the new law, which requires a writing, for those cases filed after the enactment of the statute. On the other hand, practitioners seeking to preserve their client's pre-statute palimony claims, argue that prospective application of the new law would be uncomplicated, simply requiring that the court first determine whether the promise for support took place prior to or after Jan. 18, 2010, the date the new law was enacted.[10]

CURATIVE NATURE OF THE STATUTE

Another consideration the Appellate Division will likely face in determining whether to apply N.J.S.A. 25:1-5(h) prospectively is whether the statute can be defined as curative in nature. New Jersey case law makes clear that a statute should be applied retroactively when it is curative in nature, meaning that the statute's purpose is to correct a judicial misinterpretation or misapplication of an existing statute.[11] In other words, the statute is enacted to avoid further misapplication of the statute by the courts.

It would be difficult to argue that the amendment to the statute has any curative connotation, since there was no prior legislation governing palimony. Rather, the basis of the cause of action was strictly case law. Indeed, paragraph (h) of N.J.S.A. 25:1-5 provides an entirely new and independent provision of the statute of frauds, which is unrelated to any other subsection of the statute. To be sure, no interpretation of other subsections under N.J.S.A. 25:1-5 could be read to apply to contracts for support between non-married individuals. Rather, the courts must apply an entirely new law, which provides specific parameters that must be met before a litigant can claim he or she is entitled to palimony.

NOTICE OF THE LAW AND ARGUMENTS OF MANIFEST INJUSTICE

In *Cruz*, the Court held that retroactive application of newly enacted legislation may infringe upon an individual's right to fair notice and repose under the due process clause of the Constitution.[12] In determining whether the amendment to the statute of frauds should be applied retroactively, the Appellate Division will likely consider whether the retroactive application of this law would result in an unconstitutional infringement on an individual's right to fair notice of the law.

Hand-in-hand with issues of due process and notice of the law is the doctrine of manifest injustice, which is designed to prevent unfair results that do not necessarily violate any constitutional provision. A manifest injustice results when an "affected party relied, to his or her prejudice, on the law that is now to be changed as the result of the retroactive application of [a] statute," and where "the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively."[13]

A primary consideration in assessing whether the retroactive application of N.J.S.A. 25:1-5(h) is unconstitutional, and/or would result in the imposition of manifest injustice, is a determination of whether those who filed palimony claims prior to the passage of N.J.S.A. 25:1-5(h) could have reasonably relied upon palimony law that existed prior to the enactment of the statute, wherein a writing was not required to support a valid palimony claim.

On the one hand, it can be argued that there could not be reliance on a pre-N.J.S.A. 25:1-5(h) right to palimony because a right to palimony never existed. Rather, while a right to seek palimony has always existed, an automatic entitlement to palimony never did.

On the other hand, the complete elimination of a previously enforceable right to seek palimony based on an unwritten promise may, in and of itself, be sufficient to suggest an infringement on due process rights to fair notice of the law.

Those who argue in favor of a prospective application of N.J.S.A. 25:1-5(h) note that the retroactive application of the statute could lead to a result wherein individuals who have relied upon a contractual promise for support based on substantial consideration will be left without anything, notwithstanding that these individuals have fulfilled their end of the contract.

PARTIAL PERFORMANCE AS A BAR TO THE STATUTE OF FRAUDS

Even in the event the Appellate Division determines that new law was intended to apply retroactively, partial performance may act as a defense to the application of the statute. Indeed, oral contracts that have been performed by one party are frequently enforced under New Jersey law when to do otherwise would work an inequity for the party who has performed.[14] In those cases, the courts have found that performance of an exceptional character takes the contract out of the

statute of frauds. Thus, if it has been shown that the dependant party has, in fact, been financially supported while performing his or her end of the bargain by caring for a home, children and the like, the court could deem these actions to constitute partial performance sufficient to override the requirement of a writing under the statute of frauds.

Regardless of whether the new law is ultimately held to be applied retroactively or prospectively, partial performance as a defense to the statute of frauds may be a way for litigants who believe they have an entitlement to palimony to enforce their claims, notwithstanding the absence of a writing memorializing the underlying promise. However, whether the performance of the promisee in a palimony case will be deemed sufficient to act as a bar to the statute of frauds will likely require a fact-sensitive inquiry, requiring a full trial on the merits of the case.

CASES PENDING

Litigants who opted to challenge the viability of pending palimony litigation received inconsistent results from trial courts across the state.

In Atlantic County, Judge Patricia M. Wild dismissed the plaintiff's complaint for palimony and lifetime support, finding that it was the Legislature's intent in passing the amendment to the statute of frauds to eliminate the ability of a court to provide the relief previously afforded by *Kozlowski* and its progeny. She further considered the *Gibbons* analysis and concluded that there was no valid constitutional issue, as there was no prior statutory authority on which palimony claims were premised. Moreover, Judge Wild held that the principles of manifest injustice would not prevent retroactive application of the new law because there was no prior legislation on which the plaintiff could have relied to her detriment. The court also noted that there were six additional counts on which the plaintiff was seeking relief, so that the invalidation of her palimony claim would not prevent her from seeking recovery under those alternative theories.[15]

The Honorable Thomas H. Dilts reached a different conclusion when he entered an order in June 2010 denying a defendant's request to dismiss a plaintiff's nine-count palimony complaint filed after the parties' decades-long relationship, during which they raised three children. During the relationship, the parties did, in fact, enter a written agreement that precluded any responsibility of the defendant to pay support on behalf of the plaintiff. The plaintiff was seeking an award of palimony and the enforcement of certain terms of the written agreement. Judge Dilts found no legislative intent to compel retroactive application of the statute in its use of the phrase "shall take effect immediately." Rather, he held that the court would follow the precedent established in *Gibbons*, which favors the prospective application of new laws to prevent prejudice to litigants who relied on the prior law to their detriment. Judge Dilts did not distinguish between case law and statutory law.[16]

Judge Donald Kessler, in holding that N.J.S.A. 25:1-5(h) should be applied prospectively, emphasized that initial language of the statute of frauds itself, which provides that "No action *shall* be brought …." Judge Kessler held that the language "shall be brought" confirms that claims to which the statute refers are those that will be filed in the future, not those previously filed with the court. The judge relied on federal court decisions, which found that the language "shall be brought" barred only those actions filed subsequent to the date the statute was enacted.

In Monmouth County, the plaintiff's action is against the estate of her former cohabitant of over 30 years, who fell ill during the relationship and passed away. After his death, the plaintiff was evicted from the home they shared, which was titled in the decedent's name. The estate has refused all of the plaintiff's claims for financial relief and denied the oral agreement for support and other assets, which the plaintiff alleges existed between her and her companion.

Judge Joseph P. Quinn denied the estate's request to dismiss the action based on the passage of N.J.S.A. 25:1-5 (h). Judge Quinn placed his decision on the record on June 9, 2010, in which he respectfully disagreed with Judge Wild's statutory analysis and found the plaintiff was entitled to pursue her claims defined by *Kozlowski*. The court reviewed the prongs of *Gibbons* and *Cruz,* and held that the new statutory amendment should not be applied retroactively. Moreover, relying on the precedent established in *Cruz*, the court found that the use of the word "immediate" in the new statute requires the prospective application of the statute.

In sum, Judge Quinn found the plaintiff had the right to a trial on the issues during which the facts would be presented and her claims for relief adjudicated. The estate sought and was granted leave to appeal with regard to the singular issue of whether N.J.S.A. 25:1-5(h) should be applied prospectively or retroactively. Oral argument on this issue was heard on Dec. 13, 2010, and a decision is currently pending.

CONCLUSION

After an initial reading of the amendment to the statute of frauds (signed in the 11th hour of the Corzine administration) and its accompanying legislative history, it is clear that the intent of the Legislature in enacting the statute was to eliminate the right to assert a claim for lifetime support based on an unwritten promise for support. After all, the body of case law governing the cause of action of palimony was effectively reversed by the enactment of the statute, the first in the state to address the issue. However, the Legislature was

not clear with regard to its intention as to the application of the law to palimony cases filed prior to its enactment. As such, jurists and experienced attorneys alike continue to debate the question of whether the law, which took away a long-established right under New Jersey law, should be applied retroactively, to cases filed prior to Jan. 18, 2010, or prospectively to only those cases filed after the law was enacted. ■

ENDNOTES

1. 80 N.J. 378 (1979).
2. *Id*. at 387.
3. *Id*. at 384.
4. 90 N.J. 126 (1982).
5. 174 N.J. 381 (2002).
6. 397 N.J. Super. 477 (App. Div. 2008) *certif. denied* 195 N.J. 518 (2008).
7. *Gibbons v. Gibbons*, 86 N.J. 515, 521 (1981).
8. 195 N.J. 33 (2008).
9. *Id*. at 48.
10. It should be noted that the Appellate Division is currently deciding whether N.J.S.A. 25:1-5(h) should be applied retroactively to invalidate complaints for palimony based on unwritten promises, filed prior to the passage of N.J.S.A. 25:1-5(h). The Appellate Division will likely be faced in the near future with determining how to deal with cases where the relationship upon which the palimony claim is based was formed prior to the enactment of the statute, but the complaint for palimony was not filed prior to the enactment of the statute.
11. *See, Olkusz v. Brown*, 401 N.J. Super. 496, 503 (App. Div. 2008).
12. *Cruz*, 195 N.J. at 45 (*citing to Landgraf v. USI Film Prods,* 511 *U.S.* 244 (1994)).
13. *Gibbons, supra.,* 86 N.J. at 523, 524.
14. *See e.g., Klockner v. Green*, 54 N.J. 230, 236 (1969) (enforcing the decedent's promise to bequeath her estate to the plaintiffs, notwithstanding that the decedent died intestate and without a will naming the plaintiffs her estate, due to the plaintiffs performance of substantial services to the decedent during her lifetime.
15. *Boney v. Kerstetter*, Dec. March 26, 2010.
16. The defendant's application for leave to appeal to the Appellate Division was denied. (*Galinas v. Conti*, Dec. June 11, 2010)

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The Use of Protective Orders in Matrimonial Litigation

by Christopher R. Musulin and Christina M. Fulton

Protective orders, orders designed to define the scope or use of discovery, present limitless opportunities for creative application in matrimonial litigation. Family law attorneys are not restricted to the somewhat narrow scope of Rule 5:3-2; rather, the full range of applications and relief under Rule 4:10-3 exists, including significant case law directly relevant to matrimonial practice. When used properly, a multitude of critical objectives can be achieved, including protecting children, controlling the release of proprietary or personal information and significantly defining the parameters of permissible trial evidence.

COMPETING POLICIES

Protective orders have existed in some form or another since the inception of common law.

In American jurisprudence, protective orders balance two fundamental yet competing legal traditions: the search for the truth to ensure justice (*Hickman v. Taylor*)[1] versus the protection of legitimate privacy interests (*Seattle Times Co. v. Rhinehart*).[2]

This dichotomy echoes an even more fundamental core American legal tradition: open versus closed judicial proceedings.

> The public availability of court records has long been the policy of both state and federal courts, and it is this transparency that enhances fairness and public trust in our system of justice. Secret judicial proceedings are apparently deemed untrustworthy, and they have historically been a means for punishing those people unacceptable to those in power. Opening judicial proceedings helps to keep them fair, and it allows citizens to observe and monitor the workings of its system of justice.[3]

Theoretically, a protective order limits public access to court proceedings, contrary to American founding traditions.

These competing legal traditions are manifested in the Rules Governing the Courts of the State of New Jersey. Rule 1:21 requires open, public judicial proceedings. Rules contained in all chapters of civil, criminal and chancery practice permit liberal investigation and discovery to facilitate the search for the truth. On the other hand, Rule 3:13-1, Rule 4:10 and Rule 5:3-2 permit a court to enter protective orders to limit the collection and dissemination of information and address legitimate privacy interests.

APPLICABLE RULES

Protective orders are utilized in criminal, civil and chancery division proceedings. The judicial authority for the entry of a protective order in civil actions is found in Rule 4:10-3; in criminal actions, Rule 3:13-3; and in the family part, Rule 5:3-2.

Pursuant to Rule 5:3-2:

> Hearings on Welfare or Status of a Child. Except as otherwise provided by rule or statute requiring full or partial in camera proceedings, the court, in its discretion, may on its own or party's motion direct that any proceeding or severable part thereof involving the welfare or status of a child be conducted in private. In the child's best interests, the court may further order that a child not be present at a hearing or trial unless the testimony, which may be taken privately in chambers or under such protective orders as the court may provide, is necessary for the determination of the matter. A verbatim record shall, however, be made of all in camera proceedings, including in-chamber testimony by or interrogation of a child.
>
> Sealing of Records. The court, upon demonstration of good cause and notice to all interested parties, shall have the authority to order that a Family Part file, or any portion thereof, be sealed.

PROTECTING CHILDREN

Under Rule 5:3-2 a proceeding shall be closed, held in camera, or sealed if required by statute, Court Rule or upon the exercise of judicial discretion in situations involving the status or welfare of a child. The trial court is vested with extraordinary power to carefully control and monitor all aspects of family law proceedings involving children. Rule 5:3-2, therefore, runs contrary to the core American legal tradition of open court proceedings, a sacrifice clearly acceptable to protect children, who are particularly vulnerable during contentious matrimonial proceedings.

Significant concerns have always existed about the involvement or participation of children in matrimonial litigation. The primary objective is to insulate children from parental conflict. When children become involved in providing

information to the court, they may be subject to influence or other pressures from their parents. As stated by Richard A. Warshak, "The more weight accorded children's stated preferences, the greater the risk of children being manipulated or pressured by parents."[4]

Attempts to influence children place them in the center of parental conflict. This may distress children, adversely impact their relationships with parents or siblings, or undermine the ability of children to form healthy relationships at a future time.[5]

Rule 5:3-2 is most familiar to family court practitioners as the source rule justifying the entry of a protective order upon the release of a forensic custody evaluation, guardian *ad litem* report, Division of Youth and Family Services records, or other documents pertaining to children. It also provides specific authority for the entry of an order restraining parties from discussing divorce matters with children or alienating their affections. In highly emotionalized custody or abuse and neglect litigation, a real possibility exists that a parent may confront a child or engage in more subtle forms of emotional retribution after reviewing an adverse report or findings.

The rule also authorizes the use of in camera proceedings for child testimony, interviews or interrogation which must be memorialized in a verbatim record.[6]

Attempts to discover the test data gathered as part of a custody evaluation have consistently resulted in the entry of protective orders. According to psychologist Daniel Tranel, there are important reasons for limiting the release of raw data. First, there is the possibility of misinterpretation by laypersons who may reach incorrect conclusions about the testing process. Of greater significance is the release of psychological test stimuli into the public domain, making it accessible to nearly everyone. It would then become virtually impossible to find anyone naive to test content, making it necessary to discard and constantly re-author valid test criteria, a virtually impossible task.[7]

PROTECTING LITIGANTS

In addition to specifically protecting children, protective orders can be utilized in a wide variety of other contexts in family court actions. For example, the records of domestic violence proceedings are rendered confidential by virtue of N.J.S.A. 2C:25-33(a). In *Pepe v. Pepe*,[8] Judge Alvin Milberg ruled that the confidentiality provisions of Title 2C apply to judicial records including domestic violence pleadings. In *Pepe*, the *Asbury Park Press* sought the release of certain domestic violence pleadings, an application denied by the trial court.

Pursuant to Paragraph (e) of Rule 4:10-3, a protective order may be entered sequestrating witnesses at the time of depositions. In the case of *Mugrage v. Mugrage*,[9] in which there was a history of domestic violence and an active restraining order between the parties, Judge Thomas Dilts entered a protective order dictating the conditions of deposition. Specifically, the court directed that deposition occur at the court facility, and that there be no communication between the parties before, during or after the deposition. The court further implemented a seating chart.

A *Tevis*[10] claim alleging the transmission of a sexually transmitted disease should normally be subject to the entry of a protective order. In fact, any reference to physical or psychological conditions should be subject to a protective order as disclosure may impact employment opportunities, qualification for insurance or dozens of other equally important matters. All discovery and litigation should be carefully controlled as few parties wish the information to becoming public, or become an obstacle to future employment or licensing opportunities.

In *Smith v. Smith*,[11] the parents of the plaintiff, prominent in social circles, intervened in the divorce proceeding seeking a protective order restricting the disclosure of allegations of excessive alcohol use. The issue was raised in relation to the plaintiff's application to relocate to her parents' residence in South Carolina. Judge Jack Sabitino denied the application, finding that the judicial policy of open proceedings outweighed any fear of potential reputation damage.

In *D v. D*,[12] the husband sought the release of medical records resulting from a period of psychiatric treatment the wife received at Greystone Park State Hospital two years before the divorce proceeding. Both parties sought residential custody. The wife invoked the patient-physician privilege. Judge Bertram Polow ruled that the records would be produced to the court for an in camera inspection. If her present medical or psychological condition could be established through other means such as a current independent medical examination, sufficient good cause may exist for the entry of a protective order barring the production of her previous medical records or the deposition of her previous treating physician.[13]

PROTECTING THIRD-PARTY BUSINESS INTERESTS

Rule 4:10-3 related to the entry of protective orders in civil actions provides as follows:

> On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:
>
> That the discovery not be had;
>
> That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.

That discovery be conducted with no one present except persons designated by the Court:

That a deposition after being sealed be opened only by order of the Court;

That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

When a protective order has been entered pursuant to this rule, either by stipulation of the parties or after a finding of good cause, a non-party may, on a proper showing pursuant to R. 4:33-1 or R. 4:33-2, intervene for the purpose of challenging the protective order on the ground that there is no good cause for the continuation of the order or portions thereof. Neither vacation nor modification of the protective order, however, establishes a public right of access to unfiled discovery materials.

A moving party must establish a *prima facie* showing of good cause for the entry of a protective order.[14] Judge Leonard Arnold, sitting in the general equity part of the Somerset County Superior Court, issued the first reported New Jersey opinion discussing what factors should be considered in determining whether "good cause" has been shown.[15] These factors are still in use today:

1. The nature of the lawsuit and the issues raised by the pleadings;
2. The substantive law likely to be applied in the resolution;
3. The kind of evidence which could be introduced at the trial, and the likelihood of it being discovered by the pretrial discovery procedure which is the subject of the application for a protective order;
4. Whether trade secrets, confidential research, or commercial information are sought in the discovery procedure employed, whether they are material and relevant to the lawsuit, and whether a protective order will insure appropriate confidentiality; (citations omitted)
5. Whether the pretrial discovery seeks confidential information about persons who are not parties to the lawsuit; (citations omitted)
6. Whether the pretrial discovery sought involves privileged material; (citations omitted)
7. Whether the pretrial discovery sought relates to matters which are or are not in dispute;
8. Whether the party seeking discovery already has the materials sought; (footnote omitted)
9. The burden or expense to the party seeking the protective order.[16]

In attempting to establish good cause, the most commonly used justification in civil matters relates to the burden, trouble or expense of producing requested discovery materials.[17] In *Isetts*, Judge Clarkson Fisher ruled that a general release of liability, which did not expressly include a waiver of disclosure cannot serve to limit the scope of discovery in a subsequent action involving similar parties. The litigation arose in the context of a second Conscientious Employee Protection Act claim by a police officer against his department for continued retaliation and harassment. The court denied the application of the defendants for a protective order limiting the scope of discovery to events occurring after the date of the general release.

In *Trump's Castle Assoc. v. Tallone*,[18] a non-party appealed the trial court's decision denying the entry of a protective order. Judge Michael P. King ruled that, where a non-party objects to a subpoena seeking disclosure of trade secrets or proprietary information, the trial court should conduct an in camera review to determine if the subpoenaed information is protected from routine discovery disclosure.

The protection of confidential financial information, intellectual property or trade secrets has also been advanced as a justification for entry of a protective order.[19]

The rule also permits the entry of a protective order upon application by a non-party. A non-party may intervene in an action for the purpose of supporting or challenging the entry of a protective order. Such an application would be common in cases involving an ownership interest in a business, the existence of parental or third-party loans, the comingling of marital funds with assets of third parties or attempts to release confidential business information through the use of subpoenas.

Upon entry of a protective order, a court may direct that an application for certain discovery be denied, as well as the imposition of terms and conditions for effectuating such discovery, the exclusion of specified matters, limitations on disclosure of the information to third parties or entities, the protection of privileged information or trade secrets or the sealing of specified documents.[20] This presents enormous concerns for the family law attorney as, absent the entry of a protective order or a stipulation, parties must provide the requested discovery and are free to disclose discovered information as they deem appropriate. In other words, after being made part of a matrimonial litigation, without the entry of a protective order, trade secrets, tax documents and medical records can theoretically be freely disseminated.

In *Berrie v. Berrie*,[21] the trial court quashed a subpoena seeking to take the deposition of the plain-

tiff's brother, who owned and operated a business similar to a business operated by the plaintiff that was subject to equitable distribution. The plaintiff argued that information pertaining to his brother's business would constitute the closest and most useful comparable for purposes of determining fair market value. The plaintiff's brother objected as the information sought was both confidential and proprietary. The letter concluded that the right of privacy with respect to personal financial affairs and confidential business records far outweighed the necessity of disclosure; other means existed to establish the value of the plaintiff's business, including a forensic business valuation.

In *Gerson v. Gerson*,[22] Judge Harvey Sorkow denied a request for the entry of a protective order sought by the husband. The wife moved for an order permitting her forensic accountant to inspect the books and records of a New York-based corporation in which the husband was a 50 percent shareholder. The corporation intervened in the action and objected to the inspection on the basis of the Fifth Amendment privilege, as both the shareholders and the corporation were under investigation by the IRS. These objections were rejected by the court, and the books and records were provided for inspection.

Judge Conrad Krafte reached a similar decision in *Merns v. Merns*.[23] The court permitted depositions and the examination of corporation records by a forensic accountant conditioned upon a protective order limiting the disclosure of any information to anyone except the parties, their experts or the court.

PROTECTING ATTORNEYS

In *Torraco v. Torraco*,[24] Judge Sorkow held that a detective hired by the attorney for the wife acted as an agent for the attorney and could not be subject to a deposition pursuant to the attorney-client and work product privileges. It is important to note that, for this privilege to apply, the attorney, not the litigant, must hire the detective.

Pursuant to Rule 4:10-2(g), a party may apply for a protective order seeking the return of inadvertently released material during the discovery process. For example, accidently producing an email attachment to discoverable materials can result in the entry of a protective order prohibiting the use of the information at trial.

Any application for the entry of a protective order may include an application for an award of expenses, including attorney fees, pursuant to the provisions of Rule 4:23-1(c). This includes an award of expenses against a party to the litigation or a third party intervening in the matter.

CONCLUSION

Prior to 1969, the court rules permitted no discovery in divorce or nullity actions without court order. The predecessor to Rule 5:5-1 modified the pre-1969 practice but recognized that, in the context of matrimonial litigation, discovery is subject to abuse as a device by which spouses may harass one another. On balance, over the years, the Supreme Court committees on matrimonial litigation have determined that the benefits of discovery outweigh the potential detriments, while keeping in place throughout the court rules availability of protective orders. ■

ENDNOTES

1. 329 U.S. 495, 507 (1947).
2. 467 U.S. 20, 34-35 (1984).
3. Hon. Margaret D. McGarity, Privacy and Litigation, *Journal of the American Academy of Matrimonial Lawyers* 23 (2010): 101.
4. Richard A. Warshak, Payoffs and Pitfalls of Listening to Children, *Journal of Family Relations* 52 (2003): 373-75.
5. Gould and Martindale, Including Children in Decision Making about Custodial Placement, *Journal of the AAML* 22: 303-09.
6. *Lavene v. Lavene,* 148 N.J. Super. 267, 272 (App. Div.), *certif. denied* 75 N.J. 28 (1977).
7. Daniel Tranel, The Release of Psychological Data to Non Experts: Ethical and Legal Considerations, *Professional Psychological Research and Practice* 25 (1994): 33-38.
8. 258 N.J. Super. 157 (Ch. Div. 1979).
9. 335 N.J. Super. 653 (Ch. Div. 2000).
10. *Tevis v. Tevis*, 79 N.J. 422 (1979).
11. 379 N.J. Super. 447 (Ch. Div. 2004).
12. 108 N.J. Super. 149 (Ch. Div. 1969).
13. *See also Kinsella v. Kinsella*.150 N.J. 276 (1997).
14. *Kerr v. Able Sanitary and Envtl. Serv., Inc.*, 295 N.J. Super. 147 (App. Div. 1996).
15. *Catalpa Inv. Group, Inc. v. Franklin Twp. Zoning Bd. of Adjustment*, 254 N.J. Super. 270 (Ch. Div. 1991).
16. 254 N.J. Super. at 273-74
17. *See, e.g.*, *Isetts v. Borough of Roseland*.364 N.J. Super. 247, 262 (App. Div. 2003).
18. 275 N.J. Super. 159 (App. Div. 1994).
19. *Hammock by Hammock v. Hoffman-Laroche, Inc.,* 142 N.J. 356 (1995); *see also Herman v. Sunshine Chemical Specialties, Inc.* 133 N.J. 329 (1993).
20. 295 N.J. Super. at 155 (App. Div. 1996).
21. 188 N.J. Super. 274 (Ch. Div. 1983).
22. 148 N.J. Super. 194 (Ch. Div. 1977).
23. 185 N.J. Super. 529 (Ch. Div. 1982).
24. 236 N.J. Super. 500 (Ch. Div. 1989).

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Resolving the Apparent Inconsistency of *Claffey* and *Larrison* as to Pension Death Benefits and Extending the Resolution Beyond PFRS Plans

by J. Patrick McShane III

Is a pension distributed as a means of continued support or an asset? The hybrid nature of pension benefits is perhaps best illustrated in analyzing the cases regarding the New Jersey Police and Fireman Retirement Systems (PFRS). PFRS is a defined benefit pension plan that in part only allows the surviving spouse of a deceased plan participant to receive a survivor's benefit. How then do you protect the interest of the spouse at the time of divorce from being divested of his or her entitlement to the pension interest in the event the participant's spouse remarries?

Claffey v. Claffey[1] and *Larrison v. Larrison*[2] address this very question.

At first blush it may appear that the cases espouse contradicting approaches. *Claffey* required life insurance; *Larrison* did not. However, a closer reading reveals that the apparent contradictions are instead rooted in the fact that the *Claffey* court deals with the pension benefit as a continued means of support for the non-participant spouse. The *Larrison* court viewed the pension asset—there a disability pension—as an asset subject to equitable distribution considerations. Therefore, the apparent conflict is instead a reflection of each court's practical consideration of what the benefit actually represented in each case.

This article focuses on the approach taken by each court and offers some practice tips for overcoming the limitations presented by PFRS.

PFRS SURVIVORSHIP CONCERNS

Both *Claffey* and *Larrison* deal with death event security issues where one spouse participates in a PFRS pension plan. In *Claffey*, the Appellate Division upheld the trial court's implementation of life insurance as a means of securing the non-participating spouse's interest in the plan in the event she was not considered the surviving spouse at the time of the participant's death.[3] In *Larrison*, the Appellate Division found the trial court's use of life insurance to secure the non-participant's interest in the PFRS plan was unwarranted.[4]

The holdings clearly and unequivocally suggest a conflict: Judge Robert Fall, in *Claffey,* finding that life insurance was required to provide security for the wife's interest in the pension plan and Judge Jose Fuentes, in *Larrison,* apparently holding that there is no legal support for that position.

The apparent conflict is not real. Relying upon Judge Fall's decision in *Claffey*, Judge Fuentes stated in *Larrison* as follows:

> We begin our analysis of this issue by noting that "[a] deferred distribution...amounts to a contingency distribution dependent upon the survival of the pensioner spouse." *Claffey, supra.* 360 N.J. Super. at 261. Accordingly, if the pension does not provide survivor benefits to an ex-spouse, then her benefits cease when defendant dies. *Id.* As this court stated: When he gets it, she gets it. When he dies, so does her benefit. *Id.*
>
> Here, defendant's pension plan does not provide for survivor benefits to an ex-spouse. Therefore, if defendant pre-deceases plaintiff, she will no longer receive her share of his pension benefit. In this light, there is no legal support for the trial court's order directing [life insurance].[5]

Claffey, upon a close reading, is *not* about securing the pension interest, but is about securing alimony. Note, immediately after the cited language by Judge Fuentes, Judge Fall states as follows with respect to the PFRS benefit:

> Since the benefit terminates at plaintiff's death, it is not an asset that can be part of plaintiff's estate. Because of its nature, plaintiff's equitable distribution interest in defendant's pension is nothing more than a contingent benefit that evaporates at the death of either party.[6]

Thus, *Claffey* requires the participant spouse to obtain and provide life insurance as security for his potential obligations. In reaching its decision as to the appropriate use of

life insurance as a means of security, the Appellate Division explained:

> Here the issues presented to the trial judge were a mix of equitable distribution and alimony. Recognizing plaintiff's dependency, the clear and admirable intent of the trial judge was to provide plaintiff security for her receipt of pension benefits that she would lose in the event of defendant's death. In realty, the judge was properly concerned that upon defendant's death, plaintiff would be unable to adequately support herself and would have no stream of income from the "equitably distributed" pension to asset her in that effort.[7]

In contrast, *Larrison* involves an analysis of a police disability pension (within PFRS). The Appellate Division, therefore, was faced with a different component of the plan than in *Claffey*. Specifically, the issue presented in *Larrison* was "whether a police disability pension is subject to equitable distribution without any exemption for that portion of the pension benefit intended as compensation for a disability."[8] Applying an equitable distribution analysis, the Appellate Division found that such a differentiation was appropriate, and that the plan participant was entitled to an offset for that portion of the pension representing "compensation for defendant's personal disability and personal economic loss" separate and apart from the retirement component of the plan.[9]

Therefore, the facially inconsistent holdings in *Claffey* and *Larrison* are illusory. Each case applies an analysis that speaks to the essential nature of the plan or rights in controversy.

DEATH EVENT SECURITY/ SURVIVORSHIP ISSUES OTHER PLANS

The lessons of *Claffey* and *Larrison* have application beyond PFRS. The problem presented by the New Jersey Retirement Systems, whether it be the Public Employee Retirement System, Teachers Pension Annuity Fund, or other state pension plans, is a perception of fairness. As illustrated by *Claffey* and *Larrison*, the perception of fairness changes according to the point of view.

One problem presented with state plans is that unlike private Employee Retirement Income Security Act (ERISA)[10] qualified plans, a separate interest qualified domestic relations order (QDRO) of the defined benefit plan cannot be entered. What this means is that typically, in a private plan, the alternate payee is paid the *actuarial equivalent* of his or her share of the participant's benefit for the alternate payee's lifetime. Adjustments for life expectancy are based upon the alternate payee's life, and the alternate payee's portion of the benefit is increased or decreased depending upon his or her actuarial life expectancy. Stated another way, the burden of the expense of payment for the alternate payee's life is placed upon the alternate payee's benefit. Because he or she benefits, he or she pays by the actuarial determination of his or her benefit. Particularly for younger spouses, there is usually a reduction of the monthly benefit because it is likely to be paid for a longer period of time.

New Jersey state plans do not provide for separate interest QDROs. All state QDROs *share* the interest of the participant. Unlike PFRS, other state pensions provide a death benefit (*i.e.*, payment options permit payment upon the participant's death to a named beneficiary). However, unless the participant affirmatively provides a survivorship option, the benefit dies with the participant. The problem is compounded by the fact that notwithstanding good faith efforts to secure compliance with QDRO provisions and/or provisions of judgments entered *years before the retirement*, the state of New Jersey has taken the position that it has no alternative but to honor the beneficiary designations made by the retiree at the time of retirement, leaving the alternate payee to litigate the issue of fair compensation pursuant to the terms of the earlier entered agreement or judgment.

The issue is coming to fruition because we are now at the 20th year of the availability of deferred equitable distribution payments pursuant to court orders of New Jersey retirement benefits.[11] The problems of conflicting survivor beneficiary designations will become more prevalent, as will contests over the perception of fairness. For example, assume a public employee with 15-plus years of service in his or her late 30s or early 40s obtains a divorce. A QDRO is entered affecting his or her New Jersey Public Employee Retirement System or Teachers Pension and Annuity Fund payments. If the judgment is silent on the survivorship issue, this issue will arise to the detriment of the first spouse. Even if he or she is supposed to be named a survivor beneficiary to the extent of his or her interest, vigilance is required. Assume two or three years post-divorce the employed spouse remarries. Now 15-plus years later, having been married to his or her second spouse, and whether or not the first spouse remarried, the employed spouse applies for retirement.

His or her second spouse is incredulous at the requirement that the plan participant must name the former spouse as survivor beneficiary of the state pension plan, even though they have not been married for more than 15 years immediately preceding the retirement. The subsequent spouse has tolerated the aging worker's complaints about going to work every day. They have looked forward to that retirement together and now have to provide the death benefit to the former spouse.

How is that fair from the second spouse's viewpoint? Faced with that pressure, the participant provides the benefit to his or her cur-

rent spouse leading to litigation with the former spouse.

These issues can be avoided by a commonsense solution. Similar to the actuarial reduction in private pension plans, the solution allocates the burden to the party obtaining the benefit. The suggestion is as follows:

1. In any New Jersey retirement plan, require the participant, at the date of retirement, to obtain from the Division of Pensions and disclose to the alternate payee the maximum benefit or single life annuity.
2. Provide that the alternate payee's percentage of the coverture fraction is applied to that maximum amount in the judgment.

   Note: The Division of Pensions will only divide the actual benefit resulting from the survivor beneficiary option elected by the participant. Thus, if the participant selects an option that results in a reduction of the participant's benefit, it is the resultant reduced benefit to which the domestic relations order applies. A concrete example: A teacher or public employee (other than a policeman or fireman) has 36 years experience in the system. He or she was married to spouse #1 for 24 years. The domestic relations order simply provides for the coverture fraction to be applied against the participant's benefit. The participant has a maximum benefit of $4,000 a month at his or her retirement age 60, at 36 years of service. His or her current spouse is age 60. He or she elects the current spouse as the beneficiary of a 50 percent survivor annuity payment. The participant's maximum benefit is, therefore, reduced to $3,600. The benefit that the state of New Jersey divides is *not* two-thirds of $4,000, which would produce to the alternate payee on an equal division of the coverture fraction ($4,000 x .67 x .50) $1,333 a month, but would pay the alternate payee only one-third of $3,600 or $1,200. Not fair, not anticipated, but that is the reality of the actual division pursuant to many of the domestic relations orders. From the first/divorced spouse's point of view, he or she should ask: What was the maximum allowance or single life annuity and was that divided if the alternate payee is not named beneficiary of a survivor option as available under the state plan? If the maximum benefit was not selected, and the alternate payee *is not* named survivor to the extent of his or her benefit, that person must be compensated/ made whole. How does the compensation occur?
3. The answer is found in the amount of life insurance that the difference, in our example $133 a month, ($1,333-$1,200) would buy. Recently, a 54-year-old nonsmoker was able to buy a 20-year-level term of life insurance for $300,000 for a 20-year term at approximately $75 a month. If health is an issue, other security, such as mortgage security, might be required. Ownership of the policy of life insurance can be placed in the name of the alternate payee, who would have the premium obligation but control the policy.
4. If the participant makes an election to a new spouse or a child that reduces the maximum allowance he or she receives for his or her lifetime, the difference between the coverture fraction of the maximum benefit and the amount received, in our example $133 per month, should be paid to the alternate payee as an all events alimony payment, by separate check or by separate wage execution in the event of default. The payment is specifically designated as alimony, taxable to the payee and deductible by the payor so that the tax impact is the same as though the equitable distribution of a maximum allowance was selected. In cases of economic dependency and no remarriage, when the term of life insurance terminates, a present dollar value determination/actuarial determination can be made and, if possible, other security devised and provided such as mortgage or other liens against other assets.

CONCLUSION/*KENNEDY* ISSUE

The above suggestions are offered to fairly allocate the burdens and benefits of the survivorship issues presented under the New Jersey retirement plans. It isn't perfect. It points out the over-simplification of the thought that a domestic relations order, while resolving present valuation problems, resolves all of the pending issues. It highlights the need for the continuing contact and maintenance of fiduciary obligations between former spouses that are avoided by the present offset method endorsed by *Moore v. Moore*.[12]

However, even the present offset does not always end the case. Careful planning and advice to plan participants is as essential as careful thought to the protection of alternate payees. *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, et al*,[13] involved a 1974 marriage and 1994 divorce pursuant to which the husband retained his pension and a separate savings and investment plan (SIP). The divorce judgment contained a waiver by the ex-wife to the plans. The husband executed the prescribed form to change the beneficiary of his pension plan to his children. However, he failed to

execute the prescribed form to change the death beneficiary of his SIP from his ex-wife, who had been named the beneficiary on the appropriate form during the marriage.

The husband died in 2001. The ex-wife received the SIP balance at the date of death, about $400,000, pursuant to the beneficiary form executed during the marriage. The divorce judgment waiver was held to be ineffective pursuant to the anti-alienation provisions of ERISA. The specific Supreme Court holding is that because the plan documents required the plan to pay the designated beneficiary on the prescribed form, pursuant to ERISA, the ex-wife received the benefit. Simplicity of administration was thereby served.

In a footnote, the Supreme Court stated that it was not expressing a view on whether the estate could bring an action in state or federal court against the ex-wife to obtain the benefits after they were distributed to her. To avoid such litigation and attendant tax problems years after the divorce, the lesson is clear: Advise clients who have retained retirement plans in a present offset or have retained the balance of a retirement plan after equitable distribution to the former spouse, to change the beneficiary designation on each and every qualified plan on each plan's prescribed form to conform with the agreement and judgment. ■

ENDNOTES

1. 360 N.J. Super. 240 (App. Div. 2003).
2. 392 N.J. Super. 1 (App. Div. 2007).
3. *Caffey*, 360 N.J. Super. at 262. The Appellate Division did correct the trial court's methodology for calculating the amount of life insurance to be used for security. *Id.* The Appellate Division found that the trial court inappropriately applied a present value discount to the deferred pension interest. *Id*. at 257.
4. *Larrison*, 392 N.J. Super. at 18-19.
5. *Id*.
6. *Claffey*, 360 N.J. Super. at 262.
7. *Id*.
8. *Larrison*, 392 N.J. Super. at 6-7.
9. *Id*. *citing Avallone v. Avallone*, 275 N.J. Super. 575 (App. Div. 1994).
10. 29 U.S.C.A. 1001, *et. seq*.
11. *Cleveland v. Board of Trustees, PFRS*, 229 N.J. Super. 156 (App. Div. 1988).
12. 114 N.J. 147, 162 (1989).
13. 19 S. Ct. 865 (2009).

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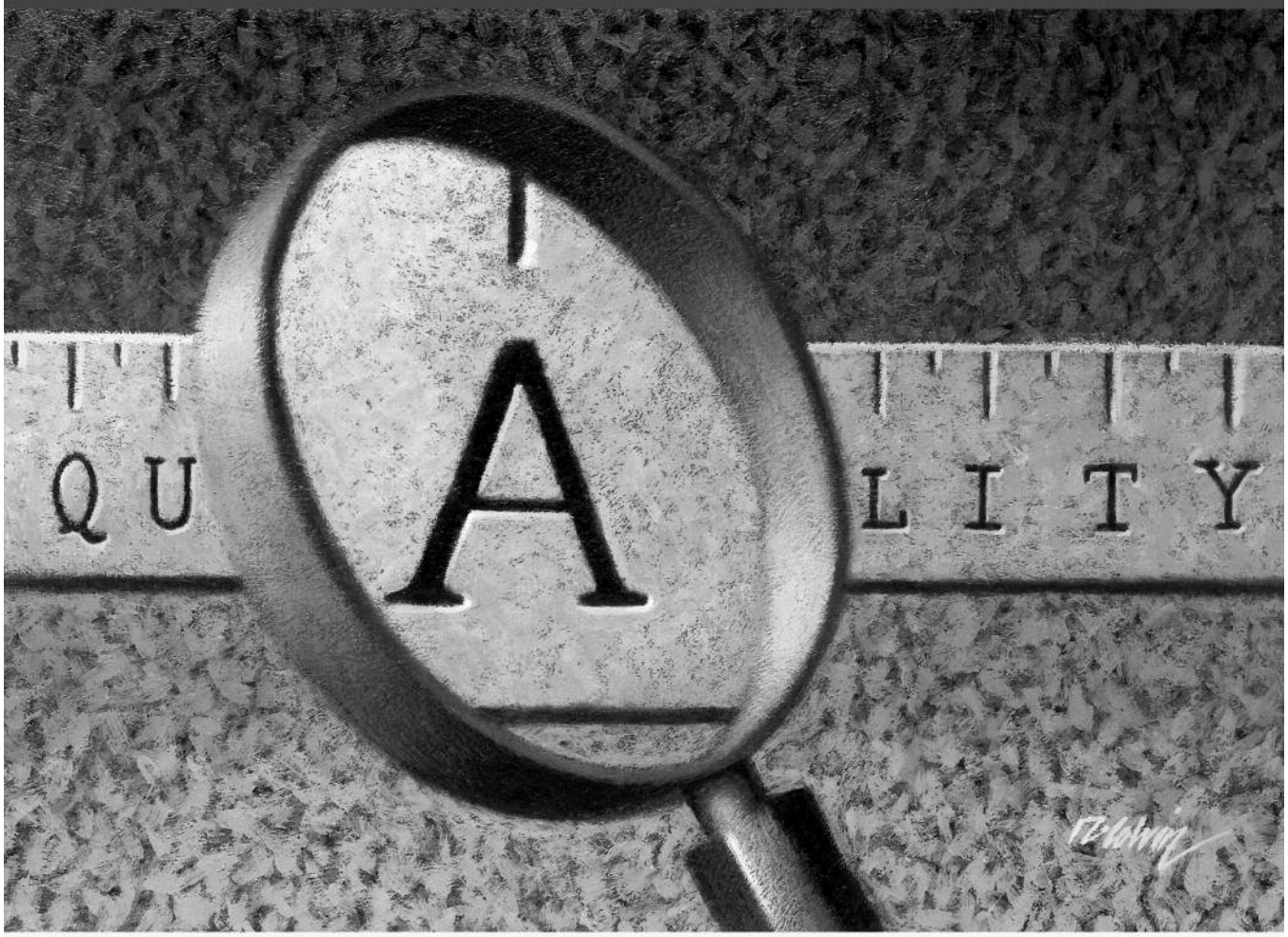

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Essential Elements of Premarital and Pre-Civil Union Agreements

Areas of Concern and Practice Pointers

by Jennifer Lazor and Erin Rantas

Drafting premarital agreements and (as of Feb. 19, 2007)[1] pre-civil union agreements is at times an awkward exercise. The parties to the agreement are likely occupied with the more optimistic elements of planning a life together. Discussing the hypothetical end of their relationship understandably operates as something of a dark cloud. This article attempts to address some methods for navigating the sometimes dicey road to an agreement.

It should be noted at the outset that New Jersey's Legislature has expanded the law regarding premarital agreements (also called prenuptial agreements) to include pre-civil union agreements. N.J.S.A. 37: 2-31 is specifically titled the Uniform Premarital and Pre-Civil Union Agreement Act. Accordingly, the same elements and principles apply to parties to a pre-civil union agreement as well.

One significant *caveat*: When representing a party to a pre-civil union agreement, it is even more imperative to have a tax and trust and estates attorney review the final agreement. This is wise because parties who are not married do not always receive the same treatment on issues of taxation and trusts and estates as married couples. Accordingly, the document should be reviewed to ensure that the client's special needs are met.

THE INITIAL MEETING: CONSULTATION WITH COUNSEL AND VOLUNTARINESS

Like all family law matters, the first step to achieving an agreement is meeting with the client for an initial consultation. The consultation should be conducted in a manner that ensures the attorney will have the information necessary to address the required elements of the agreement. Specifically, N.J.S.A. 37:2-38 identifies the following four elements that must exist in order for the agreement to be enforceable:

1. that a premarital or pre-civil union agreement be entered into voluntarily;
2. that the agreement not be considered unconscionable at the time of enforcement;
3. that prior to entering into the agreement the party had full and fair disclosure of the earnings, property and financial obligations of the other party, or has expressly waived that right to disclosure in writing, or had a reasonable and adequate knowledge of the property or financial obligations of the other party; and
4. that prior to entering into the agreement the party had the opportunity to consult with independent legal counsel, or has waived voluntarily and expressly in writing the opportunity for consultation with counsel.

For agreements executed prior to Nov. 3, 1988, the effective date of the act, the party seeking to enforce the agreement bears the burden of proof that the agreement is valid.[2]

Establishing that the agreement complies with the requisite elements of N.J.S.A. 37:2-38 can be a subjective exercise. Perhaps the two less gray areas of inquiry are: a) whether a party to an agreement has had the opportunity to consult with counsel, and b) whether the agreement was reached voluntarily.

Regarding the former, the act itself requires only "consultation" with counsel. Accordingly, it is possible that after meeting with an individual for a comparatively brief period of time, counsel could play a significant role in any future contest over the agreement. Did the attorney meet with the client for an hour and identify any concerns regarding the draft? Or within that meeting did counsel decide that the draft was facially acceptable or objectionable? Those communications, no matter how fleeting they may seem at the time, can, in effect, contribute to the validity of the agreement by fulfilling the consultation with counsel requirement—a potentially daunting prospect that an initial meeting can bestow an imprimatur of that magnitude.[3]

Therefore, an attorney needs to assess whether he or she wants to become involved with the agreement. Part of that answer depends

on timing issues. It can take significant time to ensure that the elements of an agreement are in place. If the wedding or civil union is imminent, counsel may not have the time to do the job properly, which is never an optimal position. So, first, as basic as it may seem, identify what is expected to be done: Is counsel providing an opinion on a draft agreement and answering the client's questions regarding the agreement? Is counsel expected to negotiate terms of the agreement on behalf of the client? Is counsel drafting the agreement?

Once counsel's role has been identified, another basic but important practice note is to make sure the retainer agreement clearly defines that role in favor of a more generalized statement of services. This can be a protection for counsel: Envision a scenario where a client later contests the agreement. The attorney wants to be clear on exactly what role he or she played. Once the client's expectations regarding counsel's role are defined, the attorney can make a determination on whether there is sufficient time and cooperation to complete the assignment.

It is notable that N.J.S.A. 37:2-38 requires either the opportunity to consult with counsel *or* a written waiver of that opportunity. If the attorney is representing a party who wants to do everything within his or her power to ensure the agreement is enforced as valid, then the adage 'better safe than sorry' has particular application. In other words, make certain that each side has consulted with counsel prior to signing.[4]

As with the above-cited timing issues, coercion or duress can operate as the coffin nail to a valid agreement. This is so because the agreement must be entered into voluntarily. How does counsel properly assess an individual's voluntariness in entering the agreement? There can be many answers to that question, beginning with the most obvious—the client affirms to counsel that he or she wishes to be bound by the agreement and executes the document. However, such affirmations can ring hollow if counsel observes signs of physical abuse or even less obvious signs of coercion. If the attorney questions whether an individual is a voluntary party to an agreement, that is another check point for counsel to determine whether he or she wishes to take on the assignment.

After clearing the hurdles of timing and voluntariness, the focus shifts to the details of what the client is trying to achieve. Is there a specific asset he or she wishes to address in the agreement? Is safeguarding assets for children from a prior relationship a priority? Is the client wary of any support obligation that might ensue in the event of a hypothetical divorce from his or her intended spouse or partner? Any or all of these issues, and then some, may prompt the client to have scheduled a meeting with counsel. It is important to understand what motivated the client to retain counsel so these points can be properly addressed in the agreement.

The following are some helpful areas to explore, but the list is by no means exhaustive:

- What is the age of the client and his or her intended spouse or partner? Is this a first marriage for one or both parties? These questions consider where each party is in life. For example, would implementation of the agreement leave someone on the cusp of retirement without means for basic necessities? Or does it ask someone very young to waive assets and support without knowing key details about the future, like whether children will limit his or her employability in the future? These circumstances are not necessarily deal breakers, but should be an area of focus with the client. They touch upon issues related to the unconscionability element discussed in more detail below.
- Are both parties employed to the extent that each is self-supporting? Counsel want to understand how level the playing field is.
- Are the parties intending to have children with one another if they do not already? Again, counsel may wish to address the impact of deferring career goals due to obligations to children.
- Do the parties have a child or children together or from prior relationships? In this instance counsel may wish to identify what support obligations or other financial circumstances surround that child/or the children.
- Is the agreement prompted due to the fact that a party anticipates an inheritance or gift in the future? Aside from identifying the inheritance/gift as a separate asset, counsel may wish to enter into certain stipulations regarding the impact of the gift/inheritance on lifestyle. For example, counsel may wish to make clear that any enhancements to the marital lifestyle due to the inheritance/gift shall not be considered for the purpose of determining whether the agreement is unconscionable for any other reason.
- Are the parties residing together now, and if so, what financial arrangements are in place? The parties may wish to continue their present arrangements during the marriage or civil union.
- Do they own any assets jointly? If so, is either being credited for a separate down payment? Will they own the asset equally in the event of divorce, etc.?

DISCLOSURE, DISCLOSURE, DISCLOSURE

The act addresses the disclosure requirement in two areas. First, N.J.S.A. 37:2-33 directs, in part, that a "written statement of assets" be annexed to the agreement. Second, as discussed above, N.J.S.A. 37:2-28

specifically provides that an agreement is invalid if a party was not provided full and fair disclosure of the earnings, property and financial obligations of the other party; did not waive in writing the rights to that disclosure; or "did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party."[5] Note in considering these provisions that according to N.J.S.A. 37:2-32 the definition of "property" in the act includes "income and earnings."

An in tandem review of these provisions raises some questions. First, the only required disclosure on the schedules is of "assets." Yet, in order to satisfy the enforcement elements, there needs to be disclosure of "earnings, property and financial obligations," or a written waiver of that disclosure of "earnings, property and financial obligations," or, in effect, adequate knowledge of "property or financial obligations." So what constitutes disclosure under the act? Is it assets;"earnings, property and financial obligations;" or a choice between "property or financial obligations?"

In striving for an enforceable agreement, it is perhaps better to err on the side of the most inclusive standard. Even though the schedules may only technically need to list assets, there is no bar to including the incomes of the parties (at the time of the agreement and even a few years prior, if illustrative), liabilities, and any other financial circumstance that can impact the agreement. Although not required by the letter of the statute, the values of the assets and amount of liabilities should also be included on the schedules.

Valuation may be a straightforward matter when reading values of accounts from statements. However, valuation can be more complicated when assets, including closely held business entities, are involved. Will the entire value of that asset be excluded from distribution under the agreement, or just the value at the time of the agreement or yet some other arrangement? In whichever instance, certain stipulations, or even a formal business valuation, may need to be performed in order to value the asset on the schedule or address it properly in the agreement.

Additionally, in the agreement itself counsel can itemize the methods of disclosure undertaken and whether either party has availed themselves of financial planners, accountants or other experts in connection with the agreement. These items illustrate the detail and due diligence involved in negotiating the terms. There can even be a separate schedule or provision identifying the documents and information exchanged.

It is also a good idea to have the parties initial or sign the schedules of the agreement, and to number the pages of the document, inclusive of schedules, "1 of x," "2 of x," and so on. Then there is less potential for dispute over what information was disclosed and reviewed. Toward that same goal, it is good practice to reference and identify the schedules in the body of the agreement.

One final note on disclosure, under the same better safe than sorry philosophy discussed in connection with the consultation with counsel element: Rather than waive rights to disclosure it is probably better practice to engage in the exchange of information.

THE CRYSTAL BALL FACTOR: UNCONSCIONABILITY

Here are the unconscionability basics addressed in the act:

- N.J.S.A. 37:2-8(b) provides that a challenger of the premarital or pre-civil union agreement show that the agreement was unconscionable at the time of enforcement. (Hence, the need for the crystal ball for the present-day drafters and parties…).
- N.J.S.A. 37:2-32(c) defines an "unconscionable premarital or pre-civil union agreement" as one where either a lack of property or unemployability renders a spouse or partner (1) without means of reasonable support; (2) a public charge; (3) subject to a standard of living "far below that which was enjoyed before the marriage or civil union." Therefore, the level of review based on this definition is certainly more than the equitable requirement for agreements made attendant to dissolution.[6] There is also no goal of support at the marital standard.[7] So what circumstances rise to a level of unconscionability?
- N.J.S.A. 37:2-38(a) directs that "[t]he issues of unconscionability of a premarital or pre-civil union agreement shall be determined by the court as a matter of law."

As is clear at least in the matter *In re Estate of Shinn*, concepts of disclosure, unconscionability and duress are not easily severed.[8] In negotiating the premarital agreement in *Shinn*, the husband partially and somewhat arbitrarily valued his assets, which included business interests and real estate. In fact, it appeared that his valuations were understated by millions.[9] In negotiating the premarital agreement, the husband refused to incorporate any of the wife's requested terms or provide the additional information requested by the wife's attorney.[10] It was a definite take it or leave it proposition, with the husband refusing to go through with the wedding if the wife did not sign the agreement as is.[11] For her part, the wife had a negative financial statement at the time of the agreement.[12]

The husband died during the marriage, and as the premarital agreement included a waiver of the wife's entitlement to an elective share, she had little to show financially from her marriage to the husband.[13] In the litigation that ensued, the wife sought to set aside the agreement and pursue her elective

share of the estate. The trial court denied her application, finding that the circumstances of the agreement did not rise to the level of unconscionability, but acknowledging that there had not been disclosure within the meaning of the act or the elective share statute.[14] The Appellate Division reversed, focusing mainly on the disclosure deficiencies.[15] However, the decision makes clear that overreaching, unbalanced agreements are vulnerable to judicial review and reconstruction.

PEN TO PAPER: DRAFTING THE AGREEMENT

Although the terms of the agreement can be complex, counsel should strive for simplicity in drafting. Keep the language clear and to the point; the exercise of executing this type of agreement while simultaneously trying to plan a life together is stressful enough without the added component of wading though legalese.

N.J.S.A. 37:2-34 provides a checklist of sorts, itemizing issues that may be addressed in an agreement:

a. The rights and obligations of each of the parties in any property of either or both of them whenever and wherever acquired or located;
b. The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
c. The disposition of property upon separation, marital dissolution, dissolution of a civil union, death, or the occurrence or nonoccurrence of any other event;
d. The modification or elimination of spousal or one partner in a civil union couple support;
e. The making of a will, trust, or other arrangement to carry out the provisions of this agreement;
f. The ownership rights in and disposition of the death benefit from a life insurance policy;
g. The choice of law governing the construction of the agreement; and
h. Any other matter, including their personal rights and obligations, not in violation of public policy.

Subpart e, in particular, requires emphasis. It is important to make clear in the agreement that the estate planning of the parties is consistent with the agreement. In perhaps a more equitable fashion than in *Shinn*, limitations on rights to elective share should also be addressed. On a related note, if existing or contemplated separate assets include Employee Retirement Income Security Act-covered plans, retirement accounts, and/or life insurance policies, counsel needs to ensure the party's waiver of interest in them conforms to the requirements of the plan, account and/or policy.[16]

MISCELLANEOUS CONSIDERATIONS

N.J.S.A. 37:2-33 makes clear that premarital and pre-civil union agreements be written. N.J.S.A. 37:2-36 states that the agreement becomes effective on the date of marrying or establishing the civil union. Pursuant to N.J.S.A. 37:2-35, the agreement shall not adversely affect the right of a child to support.

After all of the effort undertaken in drafting and executing the agreement, there may come a point in time when the parties wish to revoke or amend their agreement. N.J.S.A. 37:2-37 contemplates that situation and requires that the revocation or amendment be in writing. As with the original agreement, the amendment is enforceable without consideration.

Finally, N.J.S.A. 37:2-39 contemplates the scenario where the marriage or civil union is declared void. The act provides that the agreement shall be enforced only "to the extent necessary to avoid an inequitable result."

CONCLUSION

The above serves as a checklist of just some of the main elements and considerations to be undertaken in representing clients regarding premarital and pre-civil union agreements. As with other family law matters, a multitude of other issues, both foreseen and unforeseen, can arise along the road to agreement. ■

ENDNOTES

1. N.J.S.A. 37:2-41.
2. N.J.S.A. 37:2-38. *Marschall v. Marschall*, 195 N.J. Super. 16, 33 (Ch. Div. 1984).
3. *See e.g.*, *DeLorean v. DeLorean*, 211 N.J. Super. 432, 436 (Ch. Div. 1986) (The wife was considered to have consulted with counsel when presented with the agreement on her wedding day and was given the opportunity to meet with an attorney of her fiancé's selection, who advised her not to sign.).
4. *See e.g.*, *Addessa v. Addessa*, 392 N.J. Super. 58, 65, 72-3 (App. Div. 2007.) (setting aside provisions of a mediated property settlement agreement where each party had waived his and her respective rights to counsel and conducted discovery only as sought by the mediator).
5. *See e.g.*, *Hiemstra v. Hiemstra*, 2010 WL 1433880 (wherein the trial judge made certain findings in this pre-statute matter that the wife knew significant aspects of the husband's financial circumstances due to the extent of their premarital dating relationship).
6. *Peterson v. Peterson*, 85 N.J. 638, 642 (1981).
7. *Contra Crews v. Crews*, 174 N.J. 546 (2000) as it relates to marital agreements attendant to a dissolution.
8. *In re Estate of Shinn*, 394 N.J. Super. 55 (App. Div. 2007).
9. *Id.* at 60.
10. *Id.* at 65.
11. *Id.* at 60-61.

12. *Id.* at n. 4.
13. *Id.* at 58.
14. *Id.* at 62-68 (*citing* N.J.S.A. 3B:8-10).
15. *Id.* at 70-71
16. *See e.g.*, *Hawxhurst v. Hawxhurst*, 318 N.J. Super.72 (App. Div. 1998); Jonathan E. Fields, Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer, 21 *J. Am. Acad. Matrim. Law.* 413, 415-423 (2008); Linda J. Ravdin, Making Pension Promises in a Prenup: The Impact of ERISA, *Family Advocate* Vol. 33, No. 3 (Winter 2008, ABA.)

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