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CHAIR'S COLUMN

Justice Virginia Long to Receive the Serpentelli Award

by Andrea Beth White

This year, on Friday morning, May 18, 2012, at the Family Law Bench/Bar Seminar during the New Jersey State Bar Association Annual Meeting in Atlantic City, the Serpentelli Award will be given to Justice Virginia Long. The presentation of the Serpentelli Award to Justice Long will link two jurists who have made enduring contributions to family law.

The Serpentelli Award is named after the Honorable Eugene D. Serpentelli. Prior to retiring from the bench, Judge Serpentelli served as a member of New Jersey's Superior Court for almost 29 years, acting as Ocean County's assignment judge for 22 of those years. Since its inception, Judge Serpentelli served as chair of the Supreme Court Committee on Family Practice. Judge Serpentelli was also the chair of the Statewide Domestic Violence Working Group from its inception through his retirement. The Serpentelli Award, was, therefore, established to commemorate these and Judge Serpentelli's other monumental contributions to the positive development of family law. It is given to a select and well-accredited few, who like Judge Serpentelli, improve our practice by being part of it.

Justice Long embodies the stringent standards of the Serpentelli Award, which requires that its recipients "will have made a significant contribution to the positive development of Family Law."

Justice Long enjoyed a prestigious academic career. She graduated from Dunbarton College of Holy Cross, where she made the dean's list. Justice Long then went on to Rutgers Law School, where she was captain of the appellate moot court team and received awards for best oralist and best brief. From those auspicious beginnings, Justice Long went on to enjoy a multi-faceted and exemplary career that has spanned more than 40 years. She served as deputy attorney general, and she was a litigation associate at Pitney, Hardin, Kipp and Szuch. From the private sector Justice Long returned to the public sector and continued to distinguish herself there. She served as the director of the New Jersey Division of Consumer Affairs and commissioner of the former New Jersey Department of Banking.

Governor Brendan T. Byrne appointed Justice Long to the superior court in 1978. Justice Robert Wilentz, then chief justice, elevated Justice Long to the Appellate Division in 1984. There, she wrote more than 2,000 opinions, and ultimately became presiding judge of the court in 1995. In 1999, she was appointed to the New Jersey Supreme Court, where she has served for 12 years.

The following quotation from Justice Helen Hoens best describes Justice Long as

> effortlessly brilliant, exceptionally clear and concise in her explanations, organized in her thinking, endlessly gracious…overflowing with concrete examples and solid advice based upon real world experience for those of us just starting to find our way. For me, she was the ultimate role model. A role model and a great example of how to be a Judge and a Justice…She was great example to a whole generation of trial Judges and Appellate Division Judges too...[1]

Unequivocally, Justice Long has forever imprinted all of us with her knowledge, poise and professionalism.

Of particular note in the context of family law is that Justice Long has brought her acumen to our practice by authoring many of the leading family law cases of our generation, and likely for generations to come.[2] To name a few:

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- *Corrente v. Corrente*[3] is a domestic violence case where Justice Long, writing for the Appellate Division, found that "ordinary domestic contretemps" are not what "[t]he domestic violence law was intended to address."[4] The alleged predicate for restraints was that the defendant called the plaintiff at work knowing she could not speak there.[5] Justice Long's reversal of the trial court's entry of restraints clarifies that the intention of the Domestic Violence Act is to safeguard genuine victims of domestic violence, and not to referee allegations grounded in "puny proofs" that undercut the intent of the act.[6]
- *VC v. MJB*[7] is the seminal case establishing the standard for a best interests analyses in custody/parenting time disputes where a third party claims to be "psychological parent."[8] In this opinion, Justice Long addresses the aftermath of a failed lesbian relationship as it pertained to the custody and parenting time arrangements of twins born during the relationship to M.J.B.[9] The decision is foundational to developing law, even today. Borrowing from a Wisconsin court, Justice Long adopted a four-prong test to determine whether a third party can be deemed a psychological parent to a child with whom the party does not have a direct biological tie.

  The four prongs are as follows, and are relevant where the petitioner has demonstrated a "parent-like" relationship with the child:

  > (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation [a petitioner's contribution need not be monetary]; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[10]

- *Baures v. Lewis*[11] sets the current standard for removal/relocation cases in New Jersey, which involves a 12-point analysis.[12] Perhaps more notable than that analysis is the fact that Justice Long emphasized the distinction between determining custody and parenting as an initial award (contemplative of all of the N.J.S.A. 9:2-4 factors) versus a removal hearing occurring after custody has been resolved.[13] In conclusion, Justice Long wrote:

  > [i]n a removal case, the burden is on the custodial parent, who seeks to relocate, to prove two things: a good faith motive and that the move will not be inimical to the interests of the child. Visitation in not an independent prong of the standard, but an important element of proof on the ultimate issue of whether the child's interest will suffer from the move.[14]

- *Moriarty v. Bradt*[15] sets the standard for grandparent visitation stating that a grandparent must prove that denial of visitation with their grandchild would result in "harm to the child," to establish an order for visitation.[16] The Court found that imposing this burden on the grandparent was the only way to protect the due process rights of competent parents to raise their child as they see fit.
- *Mani v. Mani*[17] holds that marital fault is irrelevant to alimony, except in two narrow circumstances: 1) where the fault negatively affects the economic status of the parties, and 2) cases where the fault, "so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice."[18] The Court further held that marital fault is irrelevant to a counsel fee award. In this manner, Justice Long takes the emphasis away from the more detracting elements of family law—who did what to whom—and in doing so compels us as practitioners to keep our clients focused on the more material and substantive considerations of the case. Yet, at the same time, Justice Long left the door open for litigants to seek recourse where the fact of their matter justifies it.
- In *Fawzy v. Fawzy*,[19] the Court held that the constitutionally protected right of parental autonomy includes the right of parents to choose the forum in which to resolve their dispute over child custody and parenting time, including arbitration.[20] This opinion gains even more import considering the growing emphasis on alternate dispute resolution in family law matters. In *Fawzy* the father claimed that he felt pressured to enter into arbitration and accept an arbitrated custody and parenting arrangement.[21] On appeal, he argued that binding issues of custody and parenting time cannot be submitted to an arbitrator, and thereby circumvent judicial review.[22] Acknowledging that her decision may well "arouse passionate responses,"[23] Justice Long determined that issues related to custody and parenting time could be arbitrated and reviewed only within the narrow confines permitted by arbitration statute. Justice Long, did however, carved out an exception: Where there is a finding of potential harm to the child, the trial court would have the ability to review the arbitrator's determination of custody and parenting time.[24] The *Fawzy* decision is also relevant as it addresses issues including records of arbitration hearings, and discusses who can act

as arbitrator in addition to the elements addressed above.

- *Johnson v. Johnson*[25] is an influential case where the Court confirmed that the principles established in *Fawzy* were intended to apply to all child custody arbitrations. This application includes those arbitrations conducted under the Alternative Procedure for Dispute Resolution Act. Importantly, the Court held that the record created by the arbitrator in the *Johnson* case, which included a recitation of all evidence considered, a recapitulation of every interview and observation conducted, a full explanation of the underpinnings of the award, and a separate opinion on reconsideration, satisfied the spirit of the *Fawzy* decision and is an acceptable substitute for a verbatim transcript.[26]

Justice Long has had a long and distinguished career, with enormous contributions to the practice of family law. She served 34 years overall in the New Jersey Judiciary.

It is my sincere hope that everyone will attend the Family Law Section seminars, as well as the presentation of the Serpentelli Award to Justice Long at the Family Law Bench/Bar Conference, on May 18, 2012. ■

ENDNOTES

1. This quote is from Justice Hoens's commentary during Justice Long's last appearance at oral argument as a jurist.
2. *See e.g.* Debra E. Guston's article in this issue relying on two of Justice Long's opinions, *V.C.* and *Moriarty*, to develop arguments in the context of open adoption.
3. *Corrente v. Corrente*, 281 N.J. Super. 243 (App. Div. 1995).
4. *Id*. at 250.
5. *Id.* at 441.
6. *Id.*
7. *V.C. v. M.J.B.,* 163 N.J. 200 (2000).
8. *Id. at* 230.
9. *Id.* at 206-7.
10. *Id*. at 223 (*citing Custody of H.S.H.-K.,* 193 Wis.2d 649 (1995).
11. *Baures v. Lewis,* 167 N.J. 91 (2001).
12. *Id*. at 116-7.
13. *Id*. at 115-6.
14. *Id*. at 122.
15. *Moriarty v. Bradt*, 177 N.J. 84 (2003)
16. *Moriarty* 177 N.J. at 88
17. *Mani v. Mani*, 183 N.J. 70 (2005).
18. *Id.*, at 72.
19. *Fawzy v. Fawzy*, 199 N.J. 456 (2009)
20. *Id.* at 461-62.
21. *Id.* at 465-6.
22. *Id*. at 466.
23. *Id.* at 565.
24. *Id*. at 461-2.
25. *Johnson v. Johnson*, 204 N.J. 529 (2010)
26. *Johnson*, 204 N.J. at 533-34.

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EDITOR-IN-CHIEF'S COLUMN

Divorce "On the Papers"

by Charles F. Vuotto Jr.

Have you ever awakened on a day you were scheduled to put through an uncontested divorce and thought, "why is this even necessary?" If you have, you are certainly not alone. It has come to my attention that putting divorces through 'on the papers' *in lieu* of an appearance is becoming more and more commonplace. After some research, I discovered this seemingly novel concept of permitting divorces to be granted solely on the papers has quite a history in New Jersey, which dates back 35 years, to 1976.

In *Manion v. Manion*,[1] the trial court denied a motion to enter a final judgment by default in a divorce action based on N.J.S.A. 2A:34-2(d) (18 months separation), where the request was supported solely by affidavits.

In *Manion*, the parties separated on Sept. 1, 1974, and the complaint for divorce was filed on March 3, 1976.[2] The defendant/husband was personally served with the summons and complaint on March 11, 1976, and default was entered on May 5, 1976.[3] On June 25, 1976, the plaintiff/wife filed a motion seeking summary judgment for the following: 1) dissolving the marriage; 2) incorporating a property settlement and support agreement entered into by the parties on April 12, 1976; and 3) permitting the wife to resume her maiden name.[4]

Since no answer or appearance had been filed, the court agreed to consider the plaintiff/wife's motion as one for the entry of final judgment by default, based on only affidavits pursuant to Rule 4:43-2.[5] The trial judge found that while cases disposed of pursuant to Rule 4:43-2 routinely followed such a procedure, those cases were typically for a sum certain or some other "easily liquidatable claim," and determined that a judgment for divorce does not clearly fall under the rule and "appear[ed] to be a hybrid falling into some gray zone in between."[6] The court reasoned that the state has a substantial interest in all divorce actions, and "that every divorce proceeding be treated individually and specially with a view towards the parties[']interest as well as the public interest."[7] The court stated that it is the duty of the trial judge, even in uncontested matters, to ensure that the severance of a marriage is not granted "except where warranted under applicable statutes…"[8] The court believed that to accomplish its goal "as the public's conscience and protector of state interests," it would be "beneficial, if not essential, that a court have the opportunity to hear the direct examination of the non-defaulting party and to have the party present and in a position to respond to any questions the court might desire to pose."[9] The court felt that the public would not be served by "turning our matrimonial courts into divorce mills where boiler plate forms are inserted in one end and divorce judgments are catapulted out the other," and therefore denied the plaintiff/wife's motion.[10]

Twenty-one years later, however, the Hon. William C. Todd III, J.S.C., in *Linbald v. Linbald,* came to a diametrically conflicting determination, and held that a final judgment of divorce could be entered based upon the entry of the defendant's default and submission of written documentation, without requiring the plaintiff to appear and offer oral testimony.[11]

In *Linbald*, the complaint filed on behalf of the plaintiff requested dissolution of the marriage and the incorporation of a property settlement agreement, executed by the parties, into the judgment of divorce.[12] Default was entered against the defendant, and the plaintiff's counsel requested that the court enter judgment based upon the written materials submitted, without requiring a personal appearance of the plaintiff. Relying on Rule 4:43-2(b), the court granted the request, finding that the court may enter judgment after the entry of the defendant's default, without holding a formal hearing.[13]

The court held that because there were no apparent disputes with respect to the facts necessary to sustain a cause of action for the dissolution of the parties' marriage, that no oral testimony or formal hearing was necessary.[14] Acknowledging this issue had been previously addressed in *Manion* (and the outcome was the exact opposite), the judge in *Linbald* specifically noted the following:

> Times have changed. For a variety of reasons, this court is satisfied it is no longer essential to require litigants to appear personally, simply to present the facts necessary to establish a cause of action for divorce. In a variety of circumstances it would seem appro-

priate to permit a litigant the option of proceeding without a formal hearing, assuming appropriate proofs can be submitted by way of certification, affidavit or other documentation.

For better or worse, divorce is now common in our society. The New Jersey court system now handles approximately 55,000 divorce actions each year. (*see Superior Court Case Load Reference Guide*, 1992-1996 compiled by the Administrative Office of the Courts).[15] Given the volume of cases coming before the court, it is reasonable to consider the costs involved in the scheduling of hearings, both in terms of litigants' time and resources, and the court's own resources. Requiring formal hearings can be costly and inconvenient. Of necessity, there will be short delays as matters are scheduled, considering the availability of the court, counsel and litigants. There will be occasional problems presented when one or more of the participants involved may not be able to attend a particular hearing. On a regular basis, litigants will be required to take time off from their employment or to adjust their personal schedules to be able to attend a hearing. Some litigants may be required to travel substantial distances and to incur substantial transportation expenses. Those individuals represented by counsel will be required to incur attorneys' fees. In many instances, those fees may be substantial, given the individual litigant's financial circumstances. Indeed, some litigants may be forced to forego retaining counsel to assist them in handling divorce proceedings because of the fees incurred in attending such hearings. In addition, it is likely that many litigants simply feel uncomfortable appearing in court and would prefer to avoid that experience if possible.

In short, there are very real costs involved in scheduling formal hearings. It is appropriate to be sensitive to those costs, particularly in dealing with family matters. Matrimonial litigation continues to be the subject of substantial controversy and much public dissatisfaction. On a regular basis concern has been expressed by the Bar, members of the general public, the legislature and the courts with respect to the cost of matrimonial litigation. There are compelling reasons to attempt to reduce the cost and inconvenience involved in the handling of matrimonial litigation, as long as that can be done on terms which are consistent with the State's interest in the matter and the court's responsibilities. In that context, it is difficult to justify requiring litigants to appear for formal hearings after a default has been entered, simply to present the facts necessary to establish a cause of action for divorce. In most cases, the facts necessary to establish a cause of action for divorce can be established through the submission of a verified complaint or an appropriate affidavit or certification. In many cases, the facts necessary to establish a cause of action will be relatively simple. In some instances, litigants may be able to present detailed and extensive proofs by certification. In any event, the court can always require personal appearances in specific cases when the written proofs presented are deficient.[16]

Judge Todd stated that there should not be any concerns that the procedure contemplated would somehow encourage divorces, as there are still procedural requirements that must be followed, and substantive facts that must be proven, before a divorce can be obtained.[17] The judge was careful to note that this process "would only be available in uncontested matters, where a defendant has failed to respond to the plaintiff's complaint, where default has been entered in accordance with our court rules, and where the facts necessary to justify the relief requested are easily confirmed through the submission of written documentation[18] and that formal hearing will need to be scheduled in any cases involving the service of a Notice for Equitable Distribution, Alimony, Child Support and Other Relief, pursuant to R. 5:5-2(e)."[19] With an eye toward the future, the court noted that more specific standards would be developed to implement this procedure to define the circumstances under which such applications would be considered a matter of course, noting that fairly detailed submissions would be required and the court would continue to schedule formal hearings when necessary.

Following the *Linbald* case, this procedure became part of a pilot program in the Atlantic/Cape May vicinage and the Somerset/Warren/Hunterdon vicinage, resulting in mixed reviews. In its final report, the Supreme Court Special Committee on Matrimonial Litigation recommended statewide adoption of the procedure; however, the special committee noted that the Supreme Court Family Practice Committee opposed it, citing that "to permit the procedure would be to denigrate the public perception of the importance the judiciary attaches to the institution of marriage" and had the potential to "foster collusive divorces."[20] In the interest of compromise, however, the Supreme Court adopted the minority position of the special committee and permitted the procedure as an ongoing pilot program limited to the Atlantic/Cape May vicinage and the Somerset/Warren/Hunterdon vicinage, with the direction that the practice committee was to assess the pilot program and report back to the Supreme Court in its 1998–2000 report.

The issue was assigned to the General Procedures Subcommittee (GPS). The GPS sought insight from two family part judges who were administering the procedure in their county and researching how other jurisdictions handled this issue. The GPS determined that based on the success of the program in the pilot vicinages, in addition to the existence of comparable procedures in other jurisdictions, the pilot should be expanded statewide. The GPS, however, specifically excluded cases involving

property settlement agreements, and limited the procedure to cases proceeding on default. This issue was then discussed at the Jan. 11, 2000, practice committee meeting, and a formal vote was held on whether to discontinue the practice in its entirety.[21] Due to 65 percent of the practice committee members voting yes, it was the committee's recommendation that the practice be discontinued in its entirety.

On March 21, 2003, however, Judge Richard J. Williams, J.A.D., as the administrative director of the courts, sent all assignment judges a memorandum authorizing Hudson County to join Atlantic County and Somerset County in the pilot program permitting the use of default dissolutions without an appearance. Judge Williams advised that the approval for Hudson County was based upon the success in Atlantic County and Somerset County. He also specifically noted that the memorandum was sent to bring this procedure to the attention of other vicinages, in the event other counties wanted to replicate the procedure. Shortly thereafter, with the approval of the Supreme Court, Middlesex County released a notice to the bar that it would also be permitting the entry of default judgments without personal appearance in certain dissolution proceedings, effective July 1, 2003, and provided extremely detailed requirements regarding the procedure. [22]

While a few counties in New Jersey have implemented the concept of divorce "on the papers,"[23] it is still evolving in our state, and raises many questions and concerns. The above history seems to only deal with situations where default has been entered. That, however, is inconsistent with my own personal experience, where recently a case I was handling proceeded on the papers, where no default had been entered, both parties were represented and it was requested that the marital settlement agreement be incorporated into the final judgment of divorce. The concept that default is necessary is also inconsistent with the information received from both the counties and colleagues alike, all of whom stated default is not necessary to utilize this procedure.

Unfortunately, there does not seem to be a uniform standard, or if there is, it is not being implemented uniformly. That being said, as a practice tip, a typical packet that would be submitted to the court in support of a request for a divorce to be granted on the papers is as follows:

1. Proposed final judgment of divorce, which specifically notes that such judgment was granted on the papers;
2. Fully executed marital settlement agreement, which includes (when applicable) child support guideline worksheets and reference to the marital standard of living as required under Rule 5:5-2(e);
3. Certifications from both parties (if one has not defaulted) attesting to the cause of action, residency requirements, and the voluntariness of the agreement;
4. Certification of the wife regarding the resumption of prior name (if requested);
5. In the case of default, proof of service of the summons and complaint and an affidavit of non-military service; and
6. Self-addressed stamped envelope (for the court to return filed documents)[24]

If the documents submitted are acceptable to the judge, he or she will sign the final judgment of divorce, and the court will provide copies to the attorneys. Regarding the contents you should include in the certification of your client, all the standard information you would typically solicit by way of *voir dire* during a standard uncontested hearing should be included. For example, the certification should include such provisions as the parties' intent to proceed on an uncontested basis without an appearance, facts that establish the cause of action, the party's residence, the voluntariness of the agreement, their desire to have the agreement incorporated into the final judgment of divorce, the party's waiver of their right to a trial, their satisfaction with your services, and most importantly, their understanding of the agreement as fair and equitable and their intent to be bound by same.

While the benefits of such a procedure are quite obvious, such as decreased counsel fees, convenience to the litigants, preserving judicial resources and decreased court backlog (in addition to the other sage reasons set forth by Judge Todd in *Linbald)*, are there any evident negatives? The only negatives that immediately come to mind are: 1) the perception by the public of the court's view of divorce; 2) those cases where the parties may require the symbolic closure of their relationship; 3) when you are faced with a difficult client/opposing litigant and want the opportunity to have everything placed on the record, before the judge, with the opportunity to cross-examine the opposing litigant if necessary; or 4) where the parties' agreement contains a provision for rehabilitative or permanent alimony, thereby requiring the court to take testimony regarding same and make specific findings pursuant to N.J.S.A. 2A:34-23(b) and *Carter v. Carter*.[25]

There are, of course, those cases where a reviewing court has utilized the testimony of a litigant (regarding the voluntariness or fairness of an agreement) to reject a subsequent attempt to overturn or modify the agreement in a legal malpractice setting.[26]

It seems that the option to obtain the entry of a divorce on the papers is a slowly evolving procedure in our state. While it may not be the desirable procedure for every divorce case, it is certainly good to know that this simple and

straightforward procedure is available. Judge Todd's well-reasoned decision supports the wisdom of this approach in the appropriate situation. The procedure should be implemented statewide, not require the entry of default where the parties have entered into a comprehensive agreement and be dictated by clear and uniform rules. ■

ENDNOTES

1. 143 N.J. Super. 499 (Ch. Div. 1976); *abrogated by Linblad v. Linblad*, 304 N.J. Super. 50 (Ch. Div. 1997).
2. *Id.* at 500.
3. *Id.*
4. *Id.*
5. During oral argument, counsel for the plaintiff/wife conceded that the a motion for summary judgment may have not been procedurally proper as summary judgment is typically reserved wherein both a complaint and an answer or appearance has been filed and the moving party is asserting that they are entitled to a judgment as a matter of law based on the fact that no genuine issues of material fact exist. *Manion*, 143 N.J. Super. at 501.
6. *Id.*
7. *Manion*, *supra* at 502.
8. *Id.*
9. *Id.* at 503.
10. *Id.*
11. 304 N.J. Super. 50 (Ch. Div. 1997).
12. *Id.* at 52.
13. *Id.* at 53.
14. *Id.*
15. This figure has actually dropped to about 30,000 for 2010 according to Mr. Cassidy. The management report lists 30,534 new cases, 30,036 were new dissolution filings, the balance of about 500 were reopened dismissals, transfers from other counties, and reactivated cases. Not all of the new cases were divorces, as some may have been divorces from bed & board or dissolution of civil unions/domestic partnerships. Nevertheless, he feels that it is safe to say that about 99 percent were divorces. These numbers have been very steady for the last decade. It should also be noted that the FM figures cited by Judge Todd included the post-judgment actions.
16. *Linbald*, *supra*, at 54-55. The judge in *Linbald* did note, however, that there are some benefits from a formal hearing that requires a personal appearance, such as confirming the importance and seriousness of dissolving a marriage.
17. *Id.* at 56.
18. The court notes other examples where our court system has been attempted to curtail the cost of litigation, such as permitting motions to be heard on the papers or telephonically rather than requiring an appearance, as well allowing the reports of court-appointed experts to be admitted on motion pursuant to Rule 5:3-3.
19. *Linbald*, *supra* at 56-57.
20. Discussion of recommendation *#32*, page 47.
21. The breakdown of the votes is as follows: 17 yes votes, 7 no votes and 2 abstentions.
22. The notice listed that the procedure would be available for the following cases: 1) where the relief requested is limited to the dissolution of the marriage; 2) where the relief is limited to the dissolution of the marriage and the incorporation in the judgment of divorce of a written property settlement agreement executed by both parties resolving all issues; 3) when the relief requested is the dissolution of the marriage the continuation of final orders entered in other proceedings resolving all issues of custody, visitation and support and where no other issues are presented; and 4) in any circumstances noted above, relief may also be requested, by either party to permit that person to resume/assume the use of a prior or other name, pursuant to N.J.S.A. 2A:34-21 (this notice can be found at www.judiciary.state.nj.us/notices/n030610a.pdf).
23. Attempts were made to contact all counties in New Jersey. From the information received, the following counties affirmatively stated that such a procedure is permitted: Atlantic County, Hudson County (*see* www.judiciary.state.nj.us/notices/2005/n050307a.htm), Hunterdon County, Mercer County, Middlesex County, Somerset County and Warren County. The following counties stated that the procedure was not permitted: Bergen County, Burlington County, Cumberland County, Essex County, Monmouth County, Salem County and Sussex County. After reaching out to the Family Law Section of the New Jersey State Bar Association *via* the Family Law Listserv, a response was received from one attorney indicating that this procedure is permitted in all counties (except Burlington County) on a judge-by-judge basis, specifically noting Essex County and Morris County. Therefore, it seems that there is a certain lack of clarity as to which counties permit this and which do not.
24. A checklist provided to the law clerks in Atlantic County listing all requirements has been set forth as Appendix A to this column.
25. 318 N.J. Super. 34 (App. Div. 1999).
26. *Newell v. Hudson*, 376 N.J. Super. 29 (2005); *Puder v. Buechel*, 183 N.J. 428 (2005).

The author wishes to thank ***Harry T. Cassidy,*** *assistant director of the family practice division, and* ***Lauren E. Koster,*** *associate with Tonneman, Vuotto & Enis, LLC, for their assistance with this column.*

Final Judgment of Divorce—On the Papers

Checklist for Law Clerk

[ ] Ascertain correct caption and docket no, using FACTS
[ ] Organize file—pleadings on the right side, in chronological order, complaint on the bottom
[ ] List all other cases/docket numbers involving the litigants using FACTS and pull files
[ ] Complete checklist below

Case Name:_____ Docket No._____

MARTIAL/RELATIONSHIP HISTORY

DCOHAB: DOM: DOS: DOC:

CHILDREN: NAMES and DOB

☐ Cause of Action_____. If adultery, dates Notice to Co-Respondent were Filed _____ and Served _____.

☐ Complaint sufficient: Residency_____ Venue_____

☐ Affidavit of Insurance Coverage filed (date):_____

☐ Service of Summons and Complaint (dates) Personal_____ Acknowledged_____ Substituted: _____ Publication Date:_____ Proof of Pub filed _____

☐ Original Summons or Affidavit of Publication filed (date):_____.

☐ Affidavit of Non-Military Service filed (date):_____.

☐ Request for Default and Certification filed (date):_____.

☐ Plaintiffs Certification in Support of Request for Judgment

☐ Affidavit/Cert for Resumption of Prior Name: Name specified_____

☐ DOB_____ ☐ Social Security #_____ ☐ no criminal charges ever filed in any jurisdiction ☐ no bankruptcy petition ever filed ☐ no outstanding judgments ☐ no litigation pending ☐ no delinquent debts or obligations ☐ no intent to evade or defraud creditors or others, except (list exceptions)

☐ Proposed FJD in order: ☐ Intro must state that case was submitted for disposition on the papers, w/o an appearance by Plaintiff ☐ relief may be granted only for divorce and resumption of a prior name except that ☐ PSA may be incorporated; and ☐ active Orders entered previously in this or another case may be incorporated; ☐ active FD orders are transferred, and the FD case consolidated, into the FM case

☐ Property Settlement Agreement submitted with and/or proposed to be incorporated in the Final Judgment of Divorce, or Consent Judgment containing Settlement Terms: must be ☐ signed and dated by both parties ☐ contain-R 5:5-2(1) Declaration of Marital Standard of Living when applicable ☐ contain Child Support Guideline Worksheets when applicable.

☐ Recommendation of Law Clerk: ☐ file and pleadings in order, OK to execute Judgment ☐ Matter cannot be resolved OTP; schedule for Hearing; or ☐ Plaintiff must cure the following deficiencies:

_____

_____

Date:_____

Law Clerk _____

SENIOR EDITOR'S COLUMN

No Counselor, You Must Turn Over the File

by Bonnie Frost

No one likes to receive a call from a client or receive a substitution of attorney from another attorney who tells you that your services are no longer wanted. The initial feeling of hurt is natural because we take it as a personal rejection, when, in fact, it is not. More often than not, it is a reflection of a client having unrealistic expectations regarding the litigation process or the outcome (*e.g.*, a failure to take ownership of the fact that the divorce has been delayed because of the client's own unreasonable expectations), or a client's life is playing out in ways that are inconsistent with the legal process. Some clients think the process (and therefore the lawyer) is not proceeding fast enough or, on the flip side, the process is going too fast. Also, there are times when the personalities of the client and the attorney do not mesh.

After an attorney is notified that his or her representation of a client has been terminated, the next step is turning over the file. While this should be an easy task, it can become problematic if certain procedures are not followed. First, the file belongs to the client. However, every attorney should, before turning over a file, copy the material as a protective measure, in case the client sues the attorney in the future (*e.g.*, for malpractice, ethical claims, or as part of a tax inquiry). If the file contains documents such as contracts, deeds, or a will, the original should be returned to the client and the lawyer should keep a copy.[1]

New Jersey Advisory Committee on Professional Ethics Opinion 554 states that "when a client changes attorneys, the burden to pay for the costs of copying a file should rest with the client and his attorney."[2] Therefore, the best approach for the relieved attorney is to advise that the file is available for review, and that the parts of the file requested will be copied at the superseding attorney's expense.

Nonetheless, many attorneys, rather than voluntarily relinquishing, assert an attorney's lien, and refuse to turn over the file because fees are owed.

In a 1991 matrimonial case, *Frenkel vs. Frenkel,*[3] the Appellate Division held that the lawyer had a common law retaining lien on the file that attached to all property of the client, but this lien was a passive one, which terminated upon an attorney's withdrawal from the case. The court stated that this retaining lien was a "general" lien, which was *not* enforceable through the courts.

Frenkel is informative in defining the difference between a "retaining" lien and a "charging" lien, which can be confusing. The court characterized the retaining lien as a "passive lien," which permits an attorney to keep the client's property (*i.e.* the file) until the bill is paid. In contrast, a charging lien attaches to a judgment for fees, *not* property, and can be pursued in court.

If an attorney refuses to turn over a file because money is owed, ethical problems result, since an attorney has an ethical duty to relinquish the file to his or her client or the superseding attorney. Although an attorney can retain a client's file until he or she pays the bill, once the client or another attorney asks for the file, the retaining lien gives way to the "administration of justice," which requires the new attorney to have the file in order to not "delay the underlying action."[4]

Rule of Professional Conduct (RPC) 1.16(d) provides that "upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as surrendering papers and property to which the client is entitled...the lawyer may retain papers relating to the client to the extent permitted by other law."

RPC 1.15(b) also requires that a lawyer promptly deliver to a client any funds or other property the client is to receive. Thus, even when an attorney is entitled to a fee for services, he or she may not refuse to surrender the file if it is necessary to continue the prosecution of the client's matter.

If a client files an ethics grievance against an attorney for a failure to turn over the file, there are ethical consequences. If an attorney is found guilty of simply failing to turn over a client's file, no other ethical infractions are present, and there is no discipline history, an admonition (the lowest form of discipline) would be ordered.

Two examples where such admonitions were entered follow:

First, in *In the matter of Brian J. Muhlbaier,*[5] the attorney refused to turn over files to subsequent counsel for a period of many months, despite requests for their return. His refusal was based on an attempt to compel payment of outstanding legal fees.

The other example is found *In the Matter of Vinaya Saijwani,*[6] where the attorney received five separate letters from subsequent counsel asking for the client's file. However, the attorney there did not read the letters carefully, and presumed it was unnecessary to send the limited materials she had in the file, thereby violating RPC 1:16(d).

However, in matters where *prior* discipline has been imposed upon an attorney, reprimands for failure to turn over a file have been imposed. For example:

In re Garbin[7] involves an attorney who failed to send the client a copy of a motion to enforce litigant's rights in a divorce action, and failed to inform the client of the filing of the motion, which proceeded unopposed without the client's participation. The trial court found the client in violation of litigant's rights for failure to comply with the terms of the final judgment of divorce. In that matter, the attorney also failed to return the file to either the client or new counsel, and the attorney had a prior admonition in her disciplinary history.

In the Matter of Eugene M. LaVergne[8] involves an attorney who was censured (one step below suspension and one step above a reprimand) for his failure to turn over a file as a result of his significant disciplinary history. In that matter he had: 1) in 2001, been reprimanded after a criminal conviction for theft for failing to make required disposition of certain property; 2) in July 2010, received a six-month suspension for misconduct in eight matters, which included gross neglect, lack of diligence, misrepresentation, and failure to return client files in three of the matters; and, 3) in February 2006, received a reprimand for failing to return a client's file and for improperly cashing legal fee checks instead of depositing them into his business account as required by the Rules.

In the *LaVergne* matter, two of the attorney's three prior disciplinary matters included failing to return client files upon the termination of representation. The Disciplinary Review Board found that LaVergne continued to believe he could hold client files hostage after the representation had concluded, even though he had previously been disciplined for those very same acts.

What enhanced the discipline in LaVergne's most recent matter before the Disciplinary Review Board was that, in the investigation stage of the grievance, LaVergne would not turn over the grievant file to the ethics investigator because it was "voluminous," a representation that later turned out not to be true. Thereafter, he failed to attend a mandatory hearing on the ethics matter.

In contrast, *In the Matter of James D. Brady,*[9] the attorney failed to conclude an estate matter and ignored several requests to turn over the client's file to new counsel. That attorney also committed recordkeeping violations in another client matter. In *Brady*, while other ethical infractions existed, because of the attorney's unblemished disciplinary history of more than 20 years, he was only admonished.

As the above matters show, it is well settled that upon termination of representation, an attorney must promptly deliver the file to the client. The attorney certainly is entitled to and should, as a matter of good practice, keep a copy of the file to guard against possible future malpractice suits, or ethics or tax inquiries. However, he or she cannot refuse to release it. The client's responsibility is to pay for the reproduction costs; and, if litigation is pending, there can be an agreement for payment out of the proceeds of the litigation.[10]

The failure to turn over a file to subsequent counsel in a misguided effort to pressure a client for payment of legal fees is done at one's peril. It is important for attorneys to be fully aware of the consequences of such acts, and to be guided accordingly. ■

ENDNOTES

1. *In re Borden*, 121 N.J. 520, 524 (1994).
2. Advisory Comm. Op. 554 (May 16, 1985).
3. *Frenkel vs. Frenkel,* 252 N.J. Super. 214 (App. Div. 1991).
4. *Id*. at 219.
5. DRB Docket No. DRB 08-165 (Oct. 1, 2008).
6. DRB Docket No. DRB07-211 (Nov. 13, 2007).
7. *In re Garbin,* 182 N.J. 432 (2005).
8. DRB Docket No. DRB 10-327 (Jan. 20, 2010).
9. DRB Docket No. DRB 03-176 (Sept. 26, 2003).
10. *See* N.J. Advisory Committee on Professional Ethics Opinion 554, 115 N.J.L.J. 565 (1985).

The Not-So-Basic Fundamentals of the Child Support Guidelines

by Maria A. Giammona

(Editor's Note: New Jersey currently is undergoing a quadrennial review process required by federal regulations to determine whether current child support guidelines awards accurately capture the costs of raising children in New Jersey. The review is mandated by the Family Support Act of 1988 (FSA).)

"How much child support is the court going to award?" This is perhaps the question most often posed to attorneys representing clients in matrimonial matters involving children. Given the enactment in 1986 of the child support guidelines, the answer presumably should be straightforward. The New Jersey Court Rules, specifically Rule 5:6A, provide the practitioner with the guidelines in Appendix IX[1] and directs that the guidelines be applied to all applications for establishment or modification of child support considered by the court.

But what is the right answer when a client seeks your advice and wants your assurance that the extracurricular activities his or her children have enjoyed during the marriage will continue without disturbance, and will be funded by both parents? Do the child support guidelines give any guidance to the client who is adamant about not wanting to continue to pay for the costs of his or her child's extracurricular activities, insisting the parties could barely afford them during the marriage? These are the practical questions asked of matrimonial practitioners daily.

This article will address the manner in which certain expenses regularly incurred on behalf of children, such as camp and extracurricular activities, including the equipment necessary to participate in these activities, are addressed in the guidelines. The article will also address the concomitant issues that arise when interpreting the guidelines, including above-guidelines support scenarios where the income level of the parties exceeds the threshold contemplated in the guidelines and the conflict that frequently arises between the noncustodial parent's desire and ability to exercise parenting time and the child's desire and ability to attend camps and participate in extracurricular activities. Lastly, the article will recommend ways to tackle these issues when negotiating a property settlement agreement.

WHAT EXPENSES DOES CHILD SUPPORT REALLY COVER?

The guidelines were developed by states after Congress passed the Child Support Enforcement Amendments of 1984[2] with the purpose that child support orders become more uniform and predictable, thereby limiting judicial discretion in the calculation of child support.[3] The guidelines were developed with consideration of certain economic principles and sociological assumptions. Particularly, the child support guidelines are premised upon the following axioms: that the financial support of children is the duty of both parents; children are entitled to share the current income of both parents; and finally, children should not be the victims of divorce or out-of-wedlock birth.[4] Further, the guidelines expressly state that children of divorce or out-of-wedlock relationships "should be afforded the same opportunities as children in intact families with parents of similar financial means."[5]

In New Jersey, the guidelines act as a rebuttable presumption[6] that awards child support set forth in appended child support schedules.[7] These awards represent the average amount that intact families spend on their children, based primarily upon various economic analyses and studies that incorporate national norms. These child support awards were designed to cover several expenses incurred on behalf of the children, specifically: housing; food; clothing; transportation; entertainment; and unreimbursed healthcare up to and including $250 per child per year, as well as some miscellaneous items such as personal care products, books and magazines.[8]

Closer inspection of the expenses listed in paragraph 8 of Appendix IX-A reveals that the costs for camps, extracurricular activities, and fees/equipment necessary for extracurricular activities seemingly are covered by child support. For example, a child support award includes all expenses for children's clothing, except "special footwear for sports."[9] On the other hand, the child support award is said to also cover the cost of lessons or instructions, and recreational, exercise or sports equipment. That begs the question of whether "special footwear for sports" can also be lumped into the category of "exercise or sports equipment."

Despite this all-inclusive reading of the guidelines, certain economic realities call for some degree of skepticism regarding the adequacy of the support award to cover all of these expenses. Specifically, pursuant to the guidelines, 25 percent of the child support award is intended to cover "controlled expenses," *i.e.*, the category of expenditures under which items like camp and activities would fall. Therefore, if the child support award is $451 per week, or approximately $1,939 per month, the controlled expense allocation of that award is approximately $485 per month. If the children of this marriage are enrolled in a gamut of activities, ranging from travel sports teams with lodging expenses to summer camp, the 25 percent allowance may be insufficient to cover those costs. In such a case, it would be helpful to illustrate any shortfall to the judge, and argue that the presumed support award is properly rebutted and requires supplementation.

This approach is not inconsistent with the letter of the guidelines. Recognizing that the child support award may not cover all expenses for children in some families, the guidelines permit[10] certain specific expenses to be added to the child support obligation. For example, the net cost of work-related child care expenses, including day camp utilized as child care, can be added to the child support obligation.[11] There is no provision made for non-work-related camps or overnight camps, although as stated above, arguments can be made to supplement the award if the 25 percent controlled expense allowance falls short.

Also, the cost of predictable and recurring expenses that may not be incurred by the average family can be added to the basic child support amount.[12] Some examples of these "predictable and recurring expenses" provided in paragraph 9 of Appendix IX-A are the cost of private elementary or secondary education, special needs of gifted or disabled children, and parenting time transportation expenses. Within this provision are various opportunities to advocate for higher support: What if the child is an elite athlete with Olympic-level aspirations, by way of example? Would not the costs of that sport and attendant training qualify as an expense that should be added on the award?

In any event, the addition of these expenses to the basic child support award must be approved by the court. Following is a review of how courts have handled these issues in both above-guidelines and guidelines-level income scenarios.

THE HIGH-INCOME HOUSEHOLD

The guidelines apply to families earning a combined net income of $3,600 per week, or $187,200 net per year.[13] They do not apply to families earning a combined net income in excess of $3,600 per week. For these families, Appendix IX-F instructs that the basic child support award is established based upon the $3,600 net income, and the court may add a supplemental amount to that award. Since the guidelines provide the courts with discretion to supplement child support in high-income families, as well as to add extraordinary expenses not covered by the basic child support award, disputes over the allocation of extracurricular activities, camps and equipment costs are inevitable.

In 2004, the Appellate Division decided the case of *Accardi v. Accardi,*[14] in which it analyzed when an expense should be considered "extraordinary" verses when an extracurricular activity should be paid from the basic child support award. In *Accardi*, the children participated in gymnastics, tennis lessons, art lessons, horseback riding lessons, drum lessons and cheerleading. The noncustodial parent, an attorney who had earned upwards of $350,000 at the time of divorce ,[15] argued that these particular expenses were included in Appendix IX-A, and therefore were already covered by the basic child support award. He also argued that the trial court erred when it ordered him to pay these costs entirely, rather than apportion them between the parties.[16] The custodial parent argued, however, that the expenses were additional extraordinary expenses, and that the children of higher-income households are entitled to these advantages.

After analyzing paragraph 8 of Appendix IX-A, which lists the "Entertainment" expenses covered by a child support award, the court agreed with the noncustodial parent that most of the children's extracurricular activity expenses fell within the description of entertainment expenses, and thereby were covered by the basic child support award.[17] The court also concluded that the lessons listed by the custodial parent did not qualify as extraordinary expenses to be shared between the parties, as provided for in the guidelines, since none of the lessons described were akin to "private elementary or secondary education, special needs of the gifted or disabled children and NCP/PAR transportation expenses."[18] Despite these findings, however, the court nonetheless concluded that since the parties were a high-income household, the cost of these extracurricular activities could be added to the basic child support award after consideration of the factors enumerated in N.J.S.A. 2A:34-23.

The Appellate Division remanded the matter back to the trial court for a plenary hearing, to determine which items were to be categorized as extracurricular activities; which were to be categorized as extraordinary; whether the extracurricular activities should be added to or considered included in the child support obligation; and finally, the allocation of extraordinary and extracurricular expenses between the parties.[19]

Therefore, despite the court's initial finding that the activities qualified as extracurricular activities, and

were not extraordinary expenses, the higher court still remanded the matter to the trial court for further findings, given the high income of the parents in the matter. The decision recognized the premise that in high-income households, the children should be entitled to enjoy the good fortune of their parents, and should be supported in their standard of living.[20]

Prior to *Accardi*, the Appellate Division decided *Issacson v. Issacson,*[21] in which the court also held that certain extracurricular activities and expenses for children in high-income households can be categorized as extraordinary, the costs of which should be added to the basic child support amount. In *Issacson*, the court provided numerous examples of additional expenses that may require additional contribution, including but not limited to private school tuition, music or art lessons, summer camps, sports clinics, vacations, clothing and incidentals for teens, renovations to the home of the custodial parent, provision of transportation for a child who drives, and study abroad.[22] Again, the court noted that the children in high-income households should be permitted to share in the noncustodial parent's good fortune.[23] The oft-encited *caveat* to the *Issacson* decision is that it relied on the "Three Pony Rule," which states, as a measure of proportionality, that no child is entitled to three ponies.[24]

EXTRACURRICULARS AND THE GUIDELINES INCOME FAMILY

Although courts have been more inclined to include additional expenses to the basic child support award in cases involving high-income households, courts have been more reticent to do so in cases where the guidelines apply based on the income levels of the parties. A review of the recent case law illustrates the court's hesitation to include additional expenses such as extracurricular activities, related equipment, or non-work-related camps, when the noncustodial parent is paying child support pursuant to the guidelines, is not a high-income wage earner and did not agree to contribute to these expenses at the time of the divorce. Moreover, the court has given deference to the noncustodial parent's position on participation in extracurricular activities in cases where the property settlement agreement includes consent provisions.

In *Rossi v. Rossi,*[25] after a divorce trial, the court ordered the noncustodial parent to pay 60 percent of the children's expenses for summer camps and extracurricular activities, including but not limited to lessons, tutors, soccer and school-related events for the children. The Appellate Division reversed the trial court's decision on the issue, concluding the lower court made an error of law.[26] It reasoned that since the parties in the matter agreed to have child support calculated according to the guidelines, the basic child support award already includes an amount for "fees, memberships and admissions to sports, recreational or social events, special lessons or instructions."[27] There was no error, however, when the trial court ordered the noncustodial parent to contribute to the cost of child care, including day camp, since those costs are not factored into the basic child support award.[28]

The Appellate Division did note that with adequate evidence and findings of fact, a trial court can identify extraordinary expenses incurred for activities on behalf of the children, but absent that, it should not require contribution. Further, the court recognized that parents themselves can agree to fund specific activities for their children above that required by the guidelines.

In *Callas v. Callas,*[29] the parties entered into a property settlement agreement, which included two separate provisions addressing extracurricular activities, computers and camps. With respect to extracurricular activities, the parties agreed that the noncustodial parent would pay all of the costs of *agreed upon* extracurricular activities, specifically sports, hobbies, tutors and lessons. The custodial parent was required to obtain the noncustodial parent's consent prior to enrolling the children in an activity or purchasing any computer equipment. With respect to camps, the property settlement agreement indicated that the noncustodial parent was responsible to pay the cost of camps or summer programs up to $1,000 per child.

The custodial parent filed a motion seeking to enforce reimbursement of the costs of the children's sports, hobbies, camps and other activities, as well as camp costs that exceed the agreed-upon $1,000.[30] The court entered an order directing the noncustodial parent to reimburse these costs to the custodial parent, reasoning that the noncustodial parent was aware during the marriage of the activities his children were enrolled in, and that there was no evidence presented that the children were engaging in "new, unusual or expensive" activities after the divorce.[31]

The Appellate Division reversed, reasoning that there was no evidence that the noncustodial parent consented to any of the activities or, furthermore, that he was even consulted prior to the children's enrollment in the activities.[32] The Appellate Division determined that the lower court's finding that the children were engaging in similar activities during the marriage was not supported by the record. The Appellate Division also reversed the trial court's order directing the noncustodial parent to reimburse camp costs in excess of the $1,000 per child limit agreed upon in the property settlement agreement.[33]

Of great concern to the Appellate Division in *Callas* was the fact that the property settlement agreement included a consent provision, which the custodial parent had violated. It reasoned that a consent provision, "is neither perfunctory nor surplusage; it must be afforded its intended

meaning."[34] The Appellate Division admonished that the trial court's decision to ignore terms expressly contained within a property settlement agreement "is an abuse of discretion."[35] Accordingly, the Appellate Division reversed the order, and remanded the matter to the trial court for further proceedings, directing the trial court to review the custodial parent's compliance with the property settlement agreement.

What happens when the parties do not include any language in their property settlement agreement addressing the children's extracurricular activities, equipment and camp? In *Werosta v. Werosta,*[36] the parties entered into a property settlement agreement and agreed to a child support amount, which deviated from the guidelines.[37] On motion filed by the custodial parent, the trial court ordered the noncustodial parent to contribute toward the costs of extracurricular activities engaged in by the parties' children that exceeded $250 in any calendar year, harkening to the guideline's treatment of unreimbursed medical expenses. It made specific reference to the costs of the eldest son's traveling ice hockey team sport.[38] The trial court reasoned that the costs of extracurricular activities exceeding $250 per year qualified as extraordinary expenses, which should be shared between the parties.

On appeal, the Appellate Division remanded the issue of each parent's financial responsibility to contribute to extracurricular activities for further consideration, noting that the parties' property settlement agreement was silent on the issue. The Appellate Division stated that, "[a] divorced parent is not bound indefinitely to pay the costs of all extracurricular activities that the other parent chooses for the children."[39] Although consent to the activity should not be unreasonably withheld, the Appellate Division recognized that a parent can rightfully object to an activity that is unusually costly or inappropriate for other reasons.

THE NON-GUIDELINES CASE

What happens in modification/enforcement proceedings when the underlying child support award was not established using the guidelines? At the time the parties in *Tuman v. Tuman*[40] were divorced, they entered into a property settlement agreement, wherein the noncustodial parent agreed to pay child support higher than the basic child support amount. Three years after the divorce, the custodial parent filed a motion seeking contribution toward the following extracurricular activities: day camp, Hebrew school tuition, synagogue dues, math tutoring and school supplies. The trial court ordered the noncustodial parent to pay 75 percent of these expenses. The decision was appealed, with the noncustodial parent arguing the expenses were included in the original child support amount.

The matter was remanded to the trial court to conduct a hearing based on the principles in *Accardi*. After the hearing, the noncustodial parent appealed again. On the second appeal, the Appellate Division indicated that since the parties in this matter did not utilize the child support guidelines, it would not consider the guidelines as the "dispositive mechanism"[41] or basis for resolving the issue presented before it, specifically those extracurricular activities to which the noncustodial parent should be ordered to contribute. The court reasoned that since this matter involved payment of extracurricular activity expenses, the court did not need to engage in a guidelines analysis. The core issue, rather, was whether the extracurricular activities qualified as extraordinary expenses, to which the noncustodial father should contribute.

The Appellate Division affirmed the trial court's finding that the costs of the children's Hebrew school, summer camp, after school activities and required school materials (a computer) were extraordinary expenses warranting additional contribution from the noncustodial parent. Since the property settlement agreement only stipulated that the parties agreed to a non-child support guidelines amount, the trial court referred to the case information statement filed by the parties at the time of divorce to determine whether those particular expenses were contemplated at the time of divorce. The custodial parent's case information statement included the costs of camp, private schooling, children's lessons and after school activities.

The court, however, discredited the defendant's argument that the child support figure was inclusive of these expenses, given the passage of five years and the fact that all three children did not participate in the activities at the time of the divorce settlement. Based upon a review of the noncustodial parent's income, he was ordered to contribute toward these expenses, which the court considered "extraordinary."[42]

In essence, these decisions support the proposition that parties in above-guidelines and non-guidelines cases will be ordered to contribute toward the costs of extracurricular activities, camps and equipment for their children, so the children may continue to benefit from the parents' lifestyle and earning capacity. In those cases in which the child support guidelines apply without cause for supplementation based on income levels, however, the court may be less inclined to order payment of extracurricular activities, camps and equipment, unless agreed to by the parties in their property settlement agreement, the children participated in the activities during the marriage, or the court makes a finding that the expense is extraordinary.

ACTIVITIES IN CONFLICT WITH PARENTING TIME

A related issue to those financial considerations regarding extraordinary expenses is the accompanying consideration of the noncustodial

parent's right to assert his or her position on those activities that occur during his or her parenting time. It is not surprising that as children get older, they become more involved in activities, participate in their local community and become more involved with their friends. A noncustodial parent, in most circumstances, however, has a defined period of time when he or she can exercise parenting time with the child. Unless the parties are in complete agreement with the child's participation in certain extracurricular activities, conflicts can and do arise when these activities occur during the noncustodial parent's parenting time.

In *Vidal v. Gelak,*[43] the custodial parent brought a motion seeking to change the parenting time schedule set forth in their parenting time plan. The parties' son was two years old at the time of their divorce. The parenting time schedule incorporated in the property settlement agreement gave the noncustodial parent parenting time every weekend. Approximately five years after the divorce, the custodial parent's work schedule changed, diminishing the actual time she could spend with the minor child, since the noncustodial parent exercised parenting time every weekend. The custodial parent also complained that under the current parenting time plan, their now eight-year-old son had to forgo activities, parties and extracurricular activities in the custodial parent's community during the weekends, because he was always with the noncustodial parent on weekends. The noncustodial parent, however, argued that despite the one-hour distance between their homes, he had accommodated the custodial parent's requests for modification to the parenting time plan. Furthermore, the child had made several friends in the noncustodial parent's neighborhood, and looked forward to seeing those friends near his home.

The trial court denied the motion to modify parenting time, concluding that despite the change in work schedules, there had been no substantial change of circumstance affecting the child's welfare.[44] The custodial parent appealed the denial of her motion. The Appellate Division reversed the denial of the custodial parent's motion, and remanded the matter to the trial court for a plenary hearing on the issue of the modification of the current parenting time scenario. In its decision, the Appellate Division gave weight to the custodial parent's arguments that the child was not able to engage in activities in which he wished to participate due to the parenting time schedule.

The court stated, "[a]t eight years old, their son is forming friendships, both at school and at his father's home. His interest in having a say in pursuing those friendships with both planned and spontaneous activities will only increase over time."[45]

The Appellate Division further recognized that even in intact families, the demands upon a child's time from authorities who direct various activities sometimes overrides even the parent's scheduling plans, thereby making adherence to a rigid parenting time plan unlikely.[46]

Accordingly, an analysis of the child's best interest in *Vidal* included consideration of the child's desire to participate in extracurricular activities taking place near the custodial parent's home. The court remanded the matter to the trial court for a modification of the noncustodial parent's parenting time schedule.

The family law practitioner needs to be cognizant of the conflict between the child's desire to participate in extracurricular activities that frequently occur during the noncustodial parent's time and the noncustodial parent's desire to exercise parenting time without adherence to conflicting obligations that diminish that time. Often, the noncustodial parent will assert that the activities are being intentionally scheduled during their time so that it is interfered with or curtailed. This may be true, for example, with a custodial parent who consistently enrolls the child for activities that only take place during the noncustodial parent's parenting time. There is a fine line, however, between purposeful interference and inadvertent scheduling conflicts arising when third parties make demands upon the child's time. It is the practitioner's responsibility to analyze the facts of the particular case, to determine how best to advocate the client's position with a view toward espousing the best interests of the child.

RECOMMENDATIONS

Clearly, it is axiomatic that an inquiry be made of the children's present and possible future extracurricular activities, including but not limited to classes, sports, camps, religious education training and courses, etc. As this article illustrates, the possible list of activities is endless. What is evident, however, is that in a case where the guidelines apply, additional contribution to extracurricular activities, camps and equipment should be specifically enumerated in the parties' agreements, so there is no issue regarding whether those specific costs are covered by child support already paid. Further, in those cases in which the parties' income exceed the guidelines, the parties would likewise benefit from an agreement listing the extracurricular activities, camps and equipment to which additional contribution will be made to preserve the *status quo* for the children.

With respect to the issue of parenting time, again it is the practitioner's responsibility to view the case not only through the eyes of the client, but through those of the child and set forth a solution which is truly in the child's best interest. Some cases where there is a conflict between extracurricular activities and parenting time may be resolved by transferring the actual residential custody of the child to

the noncustodial parent during the summer months. This solution works best when the parties live hours apart from each other. It avoids the conflicts between parenting time and activities, and affords both parents undisturbed time with the child.

In those cases where the parties have the benefit of living close to one another, the parties would benefit from reaching an agreement on those activities the child enjoys with the purpose of committing to those activities and avoiding future conflicts. The activities and approximate cost can be listed in the property settlement agreement with language acknowledging that while the exact activities may change year-to-year, the list represents an approximation of the cost and time commitment that each party agrees to support going forward.

Consent provisions in agreements work toward this end and have been upheld by the courts, as seen from the cases quoted within this article. Accordingly, even though application of the guidelines in not always a basic exercise, basic principles of common sense and careful drafting in agreements can help family lawyers represent their clients effectively. ■

ENDNOTES

1. 2012 N.J. Court Rules, R. 5:6A., p. 2107.
2. 42 U.S.C. § 651.
3. Tonya Brito, Child Support Guidelines and Complicated Families: An Analysis of Cross-State Variation in Legal Treatment of Multiple-Partner Fertility (2005). Report to the Wisconsin Department of Workforce Development by the Institute for Research on Poverty, University of Wisconsin, Madison (2005).
4. 2012 N.J. Court Rules, ¶1, App. IX-A, p. 2495.
5. *Id*.
6. 2012 N.J. Court Rules, ¶2, App. IX-A, p. 2495.
7. 2012 N.J. Court Rules, ¶8, App. IX-A, pp. 2500-02.
8. *Id*.
9. *Id.*
10. 2012 N.J. Court Rules, ¶9, App. IX-A, p. 2502.
11. *Id.*
12. *Id*.
13. 2012 N.J. Court Rules, App. IX-F, pp. 2567-78.
14. *Accardi v. Accardi*, 369 N.J. Super. 75 (App. Div. 2004).
15. At the time of the decision, the noncustodial father's income had reduced to $169,000 per annum.
16. *Id*. at 87-88.
17. *Id*. at 24.
18. *Id*.
19. *Id*. at 24-25.
20. *Zazzo v. Zazzo*, 245 N.J. Super. 124 (App. Div. 1990).
21. *Issacson v. Issacson*, 348 N.J. Super. 560 (App. Div. 2002).
22. *Id*. at 582-83.
23. *Id*. at 579.
24. *Id*. at 583 (*citing In re Patterson*, 22 Kan. App. 2d 522 (1996)).
25. *Rossi v. Rossi*, 2010 WL 4054317 (N.J. Super. A.D.).
26. *Id*. at 8.
27. *Id*. at 8 (quoting 2012 N.J. Court Rules, ¶8, App. IX-A, p. 2502).
28. *Id*. at 8.
29. *Callas v. Callas*, 2005 WL 3429345 (N.J. Super. A.D.).
30. *Id*. at 12.
31. *Id*. at 5.
32. *Id.*
33. *Id.* at 6.
34. *Id.*
35. *Id.*
36. *Werosta v. Werosta*, 2011 WL 3611335 (N.J. Super. A.D.).
37. The case does not explain in which manner the parties agreed to deviate from the child support guidelines.
38. *Werosta*, 2011 WL 3611335 at 6.
39. *Id.* at 4.
40. *Tuman v. Tuman*, 2011 WL 181303 (N.J. Super. A.D.). It appears from a reading of the case that child support was calculated through a means other than the guidelines resulting in an award higher than the maximum contemplated by the guidelines, or some other supplemented amount.
41. *Id.* at 3.
42. *Id.* at 3-4.
43. *Vidal v. Gelak*, 2011 WL 2314385 (N.J. Super. A.D.).
44. *Id.* at 3.
45. *Id.* at 6.
46. *Id.*

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An Illustration of Changed Circumstances in the Shadow of *Gonzalez-Posse*

by Cassie Ansello

In *Gonzalez-Posse v. Ricciardulli*,[1] the Appellate Division reversed a trial judge who, after finding a change in circumstances warranting the modification of a limited duration alimony obligation, decreased the amount of the alimony to be paid but also extended its term. While reducing the amount of alimony to be paid from $500 to $100 per week, the trial judge extended the term from five to 17 years, thereby keeping the total remaining amount of alimony contemplated in the property settlement agreement of $88,615 intact, but due over a longer period of time.

In reversing the trial judge, the Appellate Division noted the standard by which a limited duration alimony term may be extended: a showing of "unusual circumstances." However, *Gonzalez-Posse* leaves more questions than answers. When asked to review the support provisions of an agreement, to what extent should a trial judge attempt to uphold the terms of a negotiated settlement? Does the trial judge's examination change when the terms a supporting spouse is seeking to modify are the result of a judgment after trial, not an agreement? If a trial judge is effectively denied the right to extend a term of limited duration alimony under the unusual circumstances standard, is it fair for the standard of "changed" circumstances to apply to modification applications in which limited duration alimony is involved, as compared to permanent alimony? And what can we as practitioners do when faced with applications for a downward modification of an alimony obligation?

This article will attempt to address these questions in the shadow of *Gonzalez-Posse*.

GONZALEZ-POSSE V. RICCIARDULLI

In *Gonzalez-Posse v. Ricciardulli*, the parties were Argentinean citizens married for 10 years prior to separation and eventual execution of a property settlement agreement on Jan. 25, 2006. In the property settlement agreement, the parties agreed that the defendant, an employee of DirecTV Latin America on a work visa, would pay the plaintiff $500 per week for the first three years and $442.30 for the final two years in limited duration alimony. The parties also agreed that the defendant would pay $446 per week in child support for the three children. These alimony and child support amounts were based on the defendant's 2005 salary of $150,000 and the plaintiff's 2005 salary of $21,000.[2]

Around the same time the parties entered into their agreement, the defendant was laid off from DirecTV, lost his work visa, and was subsequently forced to either leave the United States voluntarily or be deported. Notably, the property settlement agreement specifically cited to these circumstances, stating that the defendant was "no longer free to remain in the United States and is compelled to return to Argentina."[3] Upon returning to Argentina, the defendant worked in part-time positions, before eventually obtaining employment with an annual compensation of approximately $26,000. Approximately eight months after entering into the property settlement agreement, the defendant moved to terminate his alimony obligation and reduce his child support obligation.[4]

After a 13-day hearing, the trial judge found an involuntary and substantial change in circumstances. Consequently, the trial judge decreased the defendant's child support obligation from $446 to $144 per week. Additionally, the trial judge reduced the defendant's alimony obligation to $100 per week. However, the judge left the total remaining balance of the alimony to be paid under the property settlement agreement intact, by extending the term of the alimony to be paid from five to 17 years. The court specifically found unusual circumstances under N.J.S.A. 2A:34-23 to justify the extension of the alimony obligation: the defendant's return to Argentina and inability to obtain proper immigration status to return to the United States. Both the defendant and the plaintiff subsequently appealed.[5]

The Appellate Division upheld the trial court's recalculation of the defendant's child support obligation. However, the Appellate Division reversed the trial court's modification of support, finding it was "based on misapplication of the law and mistaken facts."[6] Specifically, the Appellate Division found that unusual circumstances did not apply to this case to warrant an extension of the defendant's alimony obligation, as the defendant's changed circumstances were not "any more unusual than the ordinary case of diminished earnings capacity."[7]

The court noted the "presumption that the temporal aspect of [a limited duration alimony award is to] be preserved"[8] as well as the purpose of limited duration alimony: not to make the dependent spouse whole, but simply to address "those circumstances where an economic need for alimony is established, but the marriage was of short-term duration such that permanent alimony is not appropriate."[9] Specifically, "all other statutory factors being in equipoise, the duration of the marriage marks the defining distinction between whether permanent alimony or limited duration alimony is warranted and awarded."[10]

Thus, although the defendant met the *Lepis* standard of changed circumstances, the heightened standard of unusual circumstances was lacking; therefore, the length of the defendant's alimony obligation could not be changed.[11] The Appellate Division remanded the case to the trial court for "full consideration of the continuing need for limited duration alimony, or its modification, applying the standard of N.J.S.A. 2A:34-23, with full explication of the judge's reasoning."[12]

THE SANCTITY OF NEGOTIATED AGREEMENTS

Any family law practitioner knows that achieving a property settlement agreement can take months, even years, of negotiation and compromise. In particular, when contemplating payment of a quantifiable sum, such as a limited duration alimony award, the parties often engage in a back and forth on the amount to be paid. A party's bottom line is often based upon a calculation of the total sum required to meet reasonable living expenses. Though all future circumstances are not foreseeable, parties often accept (or reject) a limited duration alimony amount based upon projected need over a particular term of years. If this principle is accepted as true, shouldn't a trial court be permitted to uphold that negotiated sum when faced with legitimate changed circumstances? In other words, to what extent should there be a presumption that when assessing changed circumstances the goal is to uphold the initial settlement on support?

The weight New Jersey courts give to consensual agreements is not to be underestimated. Since the modern development of family law as we know it today, New Jersey courts have recognized the importance of upholding these agreements by enforcing them when they are fair and equitable.[13] New Jersey courts consistently identify and recognize a "strong public policy" favoring the stability of these consensual agreements.[14] As the parties are entitled to rely upon the agreements they crafted, "fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed."[15] This policy ensures that the parties may "order their personal lives consistently with their post-marital responsibilities;"[16] in other words, the parties are entitled to rely upon their agreements as they move on from their divorce.

Importantly, as *Glass v. Glass* provides, the supported spouse "cannot be faulted, penalized or prejudiced by making judicious choices as to the allocation of her income including alimony."[17] *Glass* underscores the significant weight to which spouses are entitled to give the terms of their property settlement agreement, particularly alimony.

As the New Jersey Supreme Court has stated:

> Divorce actions involve personal, even intimate, details of people's lives. The parties are often intensely emotional. Progress toward resolving disputes and reaching a speedy conclusion easily can deteriorate into contentious and difficult interactions that thwart settlement. Therefore, while settlement is an encouraged mode of resolving cases generally, the use of consensual agreements to resolve marital controversies is particularly favored in divorce matters.[18]

Moreover, the New Jersey Appellate Division has specifically recognized, in the post-judgment context, the ability of the parties to "bargain for a fixed payment…irrespective of circumstances that in the usual case would give rise to *Lepis* modifications of their agreement."[19] Although *Gonzalez-Posse* did not involve an anti-*Lepis* provision, New Jersey courts certainly honor the decision of the parties to remove a determination from the province of the court. In order to do so, they must recognize the weight negotiated arrangements must be afforded.

The aforementioned New Jersey case law does not provide that a property settlement agreement is to be cast aside upon a showing of changed circumstances. In a case such as *Gonzalez-Posse*, where there is a short-term, quantifiable sum that must be paid, the trial court should be permitted to examine the four corners of the property settlement agreement, and use its equitable powers to fashion a remedy that addresses both parties' needs. A trial court should attempt to give weight to the initial alimony amount, where possible. A settlement agreement is meaningless if it is not accorded sufficient deference, and parties have no incentive to negotiate terms they know can be easily cast aside. The family court is a court of equity, and equity requires that the court use its powers to promote the agreement of the parties.[20] By extension, this argument could apply to a host of provisions contained within the property settlement agreement, including deference to agreed-upon imputation of income, for example.

However, what about an alimony obligation established after a trial on the merits? When a matter is tried, New Jersey's strong public policy of settlement is not at stake. There is no bargained-for exchange, as is the case when negotiating a property settlement agreement. Negotiated settlements represent a careful compromise of all factors in a case, an

exchange of this for that. This is not so when the court determines the outcome of a divorce by trial. In such a case, the alimony awarded to a supported spouse may not, in fact, be the sum that either party was seeking to pay. Arguably, in these circumstances, there is less of an onus to uphold the terms of a judgment than there is to uphold the terms of a property settlement agreement, or that which the parties expressly agreed was in their best interests. Offsetting that argument, perhaps, are considerations grounded in reliance as articulated above in connection with *Glass*: Are parties with litigated alimony and child support awards less entitled to rely on these amounts post-judgment than parties with agreed-upon terms?

The visceral response to that inquiry is, no. However, in delving into the trial and appellate courts' analysis in *Gonzalez-Posse*, it is easy to see how the two camps are formed. On the one hand, negotiated support terms are supported by grand-sounding public policy considerations. Do litigation terms then become something less than and more malleable, despite having the *imprimatur* of the court? Based on an analysis of our law regarding the changed circumstances standard, the answer to that inquiry also is no. The law treats both negotiated and litigated agreements alike in terms of modifiability. In changed circumstances applications, the question then remaining is whether deference is to be afforded to the initial support award, whether it was litigated or negotiated.

THE EVOLVING CONCEPT OF CHANGED CIRCUMSTANCES

We are all familiar with the changed circumstances standard that is applied to all applications that request a modification to the amount paid in alimony. According to *Lepis v. Lepis*, a party requesting a modification must first make a *prima facie* showing of changed circumstances.[21] As *Lepis* makes clear, "[w]hen support of an economically dependent spouse is at issue, the general considerations are the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard."[22] It is only after such a showing that the court will order disclosure of both parties' financial circumstances.[23]

In *Lepis*, the court explicitly identified particular circumstances that could warrant a modification of a support obligation. These circumstances included: 1) an increase in the cost of living; 2) an increase or decrease in the supporting spouse's income; 3) illness, disability or infirmity arising after the original judgment; 4) the dependent spouse's loss of a house or apartment; 5) the dependent spouse's cohabitation with another; 6) subsequent employment by the dependent spouse; and 7) changes in the federal income tax laws.[24] Since the seminal case of *Lepis*, New Jersey courts have continued to define and hone the changed circumstances analysis under different circumstances.

For example, the court has recognized that changed circumstances must be material, substantial, and not temporary before an applicant will be afforded relief.[25] In *Bonanno v. Bonanno*, the Supreme Court of New Jersey was confronted with a movant who, although at that time was unemployed, had "at least $1,800 cash in a bank" (not a small sum in 1950), and who owned a 1948 Hudson four-door automobile.[26] In upholding the denial of the movant's application, the court recognized that the movant likely had acquired these assets due to his "industry" and abilities, and given his "ability to earn," his unemployment was likely temporary.[27] *Bonnano* is often cited as the controlling case law warranting rejection of a changed circumstances application made on circumstances that are only temporary.[28]

Similarly, New Jersey case law examines the length of time that has passed since the last order addressing support in a particular matter, in its changed circumstances analysis. By way of example, the Appellate Division in *Larbig v. Larbig* affirmed the trial court's denial of the supporting husband's application to reduce support due to the fact that his filing only 20 months after the divorce "strongly suggested [the husband's] reduced income had not become permanent."[29]

In that case, the parties divorced after 15 years of marriage, and the former husband agreed to pay $10,000 per month in alimony and $2,000 per month in child support to his former wife.[30] In bringing an application for a modification of his support obligation, the former husband claimed that his business was suffering from a decline, negatively affecting his income.[31] In response, the former wife contested that any changed circumstances had actually occurred, citing the fact that the former husband had "increased [his] office space, hired a new staff, [and] doubled his travel and entertainment expenses."[32] She pointed to these items as evidence of her former spouse's post-judgment prosperity and attendant continued ability to pay alimony at the original level. Importantly, the former wife pointed out that the property settlement agreement already alluded to a decline in the former husband's business in support of her argument that, in any event, the former husband's tale of economic decline was not new news substantiating a change in circumstances.[33]

In upholding the trial court's denial of the former husband's application, the Appellate Division stated:

> Instead of conducting a hearing to resolve the parties' factual disputes about [the business's] true condition and defendant's ability to pay his support obligations, Judge Dilts correctly focused on the fact that defendant's motion was filed a mere twenty months after the parties' execution of the PSA and the entry of the judgment

> of divorce. In light of the timing of defendant's motion, Judge Dilts concluded that defendant had failed to demonstrate that, even if [the business's] condition was as he alleged, the change was anything other than temporary.[34]

The court added that the concept of what is "temporary" should be generally viewed more expansively when asserted by a self-employed supporting spouse.[35]

Another line of New Jersey case law directs our courts to examine not only "the supporting spouse's earnings, but also how he has spent his income and utilized his assets."[36] In other words, to what extent are the supporting spouse's changed circumstances the result of his own doing? In *Donnelly v. Donnelly*, the Appellate Division affirmed a trial court's denial of a supporting spouse's request to decrease alimony, and held it would be inequitable for the supporting spouse's support obligation to be reduced while he maintained an unchanged lifestyle at the obligee's expense.[37] In that case, the supporting spouse moved for a reduction in his support obligation of $1,000 per week in permanent alimony and $350 per week in child support, terms he agreed to in a property settlement agreement entered less than two years earlier, after 19 years of marriage.[38]

The supporting spouse claimed that changes in the areas of law in which he practiced had caused a reduction in his income.[39] However, at the same time, he traded in his 2003 Lexus for a 2004 model, at a cost of $58,000; bought a new home for $785,000, taking a mortgage in excess of $600,000; spent $15,000 on a wedding and honeymoon; and continued to incur monthly expenses in excess of $11,000.[40] In affirming the trial court's denial of the supporting spouse's application, the Appellate Division noted that the application "was disconnected from the type of equitable underpinnings inherent in the right to relief established by *Lepis*."[41] The Appellate Division also noted the trial court's reference to the *Larbig* decision in its determination that the supporting spouse's alleged changed circumstances were not of a permanent nature, particularly given his position as a self-employed obligor.[42]

In a line of case law related to *Donnelly*, New Jersey courts have made clear that supporting spouses must show remedial efforts when seeking a modification or termination of a support obligation.[43] In *Arribi v. Arribi*, the judge refused to grant an unemployed supporting spouse relief from his child support obligation, when the unemployed supporting spouse had made no efforts to seek employment outside of his field of accounting.[44] In so holding, the court cited *Bonnano* for the principle that a court must consider not only assets and income, but also a supporting spouse's "earning capacity or prospective earnings," in setting a support award.[45]

Thus, the court concluded in its oft-quoted holding:

> …One cannot find himself in, and choose to remain in, a position where he has diminished or no earning capacity and expect to be relieved of or be able to ignore the obligations of support to one's family…this apparently able-bodied defendant cannot sit back and allow his child to go without support, while he somewhat complacently waits for a job only in his field.[46]

Similarly, in *Aronson v. Aronson*, the Appellate Division upheld the denial of a supporting spouse's application to reduce or terminate his alimony obligation of $350 per week to his former wife of 26 years.[47] At trial, the supporting spouse testified to several "external pressures" on his dental practice, including the changing nature of treatment and the lack of referrals from younger colleagues, which had caused his income to decrease.[48] Nonetheless, the trial court found that, in the face of such external pressures, the supporting spouse was obligated to "attempt to earn more money" and make "meaningful effort" to improve his circumstances.[49] What the supporting spouse could not do was "allow his practice to continue to diminish unchecked while bemoaning his fate."[50] The trial court also cited the fact that the property settlement agreement had already contemplated the supporting spouse's heightened mortgage obligations; therefore, this increased payment did not constitute changed circumstances.[51]

In sum, by emphasizing factors such as ability to pay and post-judgment increases in the lifestyle of the supporting spouse, the above cases arguably show an inclination toward upholding the original support award. In other words, the focus of these cases appears to be the question of why the supporting spouse cannot pay what was initially ordered. This is particularly so considering that we know from both *Lepis* and *Crews* that a pivotal benchmark for support is the former marital lifestyle—a criteria anchored more to the initial order of support than to a support amount based upon prospective circumstances.

CHANGED CIRCUMSTANCES AND *GONZALEZ-POSSE*

It is against the backdrop of the *Gonzalez-Posse* decision, which involves a limited duration alimony award, that we see more clearly the impact of deviating from the initial support award for the recipient spouse. In a permanent alimony obligation, support is foreseeably paid over a longer period of time, such that any post-judgment modification downward can be somewhat abated by the duration of the award. Similarly, in the instance of a permanent alimony obligation, a judge can consider a prior post-judgment downward modification upon the payor spouse's application to terminate or modify downward his or her alimony obligation due to retire-

ment. Also, if the permanent alimony obligation is paid over a long term, there is a higher likelihood the recipient spouse could return to court asserting a change of circumstances for an upward modification, if warranted, over the course of the term of the obligation. In sharp contrast, where a limited duration alimony obligation is involved and the bar is set high to extend the term of years of the obligation, the only foreseeable result of a successful application to modify support downward results in less support paid over the same amount of years. In the instance of a short-term alimony duration, such a reduction can be a difficult result for the recipient former spouse.

Based on the above, what arguments can be formulated to best serve clients who receive alimony, limited duration alimony in particular, when they face a post-judgment application to reduce support? Perhaps a back to basics approach is best. Specifically, *Lepis*, *Bonnano, Innes, Deegan, Larbig, Donnelly, Arribi, Aronson,* and *Crews* can all be used to emphasize deference to the initial amount of support as a bar to post-judgment modification.

It also helps to remind the court that the bar by which a supporting spouse's modification or termination application is judged is not low. In determining whether the supporting spouse is able "to maintain the dependent spouse at the former standard" of living, as *Lepis* dictates, the court must find that the supporting spouse's changed circumstances are material. They must be permanent. They cannot be the result of the supporting spouse's own doing. The supporting spouse must establish that he or she has made efforts to remediate these circumstances. Moreover, the supporting spouse will not be granted relief without sufficient time having passed to establish the circumstances alleged.[52] Indeed, as the New Jersey Supreme Court in *Crews v. Crews* has recognized, "[m]otion courts have rightfully taken a hard look at applications to modify previously-entered support awards *out of concern for promoting the fairness and finality of the bargained-for agreement* or the awards for support entered by the trial court."[53]

These concepts certainly should have carried more weight for the supported spouse in *Gonzalez-Posse*. In fact, in that case the court found changed circumstances to exist, despite several facts New Jersey courts have previously found to be dispositive of a lack of changed circumstances.

In *Gonzalez-Posse*, the supporting spouse moved for a change in his obligation only eight months after entry into the property settlement agreement. *Larbig* cautions against applications brought so soon after final judgment or agreement. Furthermore, in *Gonzalez-Posse* there is no discussion regarding the supporting spouse's efforts to improve his diminished earnings, as is required by both *Arribi* and *Aronson.* Arguably, without establishing these factors, it is impossible to determine if the supporting spouse's situation was temporary or permanent, as required by the *Bonnano* line of cases. Furthermore, the spouse's move to Argentina was specifically contemplated in the property settlement agreement, downgrading that factor as a change in circumstance.

Accordingly, it is questionable that there was any change since the entry of judgment in *Gonzalez-Posse.* Perhaps the trial judge did not develop these concepts further because the trial judge believed that circumstances existed such that the limited duration term could be extended. In doing so, the trial judge clearly thought he was able to establish equity for both parties.

CONCLUSION

As stated in *Crews,* the changed circumstances standard imposes a high burden on the moving spouse in light of the import placed both on litigated and negotiated support terms. When representing a supported spouse on the receiving end of an application to modify support downward, it is perhaps most effective to remind the court of the basic tenets of the law regarding change of circumstances. While the impact of downward reductions is perhaps most stark when viewed in the context of limited duration awards as in *Gonalez-Posse,* there is no bar to using these arguments with respect to applications to reduce or terminate permanent duration alimony obligations and, to an extent, child support obligations. ■

ENDNOTES

1. *Gonzalez-Posse v. Ricciardulli*, 410 N.J. Super. 340, 348 (App. Div. 2009).
2. *Id*. at 345-46.
3. *Id*. at 347 n.2.
4. *Id*. at 346-47.
5. The plaintiff challenged the trial court's denial of counsel fees to her, denial of full title to the Argentina property, and denial of a freeze on the defendant's pension accounts. The plaintiff also challenged the reduction in the defendant's support obligations, claiming that the defendant's circumstances were voluntary. The Appellate Division rejected these arguments on appeal. *Id*. at 349-50. Similarly, the Appellate Division rejected without comment the defendant's appeal of the trial court's denial of counsel fees to him, as well as the trial court's direction that he must reimburse the plaintiff for some of the children's expenses. *Id*. at 349.
6. *Id*. at 352. Although not the subject of this article, the Appellate Division found that the trial court miscalculated the defendant's legitimate living expenses, as well as the plaintiff's increased income. *Id*. at 454-455.
7. *Id*. at 357.
8. *Id*. at 356 (*citing Gordon v. Rozenwald*, 380 N.J. Super. 55,

70 (App. Div. 2005)).
9. *Id*. at 353-54 (*citing Cox v. Cox*, 335 N.J. Super. 465, 476 (App. Div. 2000)).
10. *Id*. at 354 (*citing Cox*, 355 N.J. Super. at 483).
11. *Id*. at 357.
12. *Id*.
13. *See Schlemm v. Schlemm*, 158 N.J. 557 (1960).
14. *See*, *e.g*. *Smith v. Smith*, 72 N.J. 350 (1977); *Lepis v. Lepis*, 83 N.J. 139 (1980); *Konzelman v. Konzelman*, 158 N.J. 185 (1999).
15. *Konzelman*, 158 N.J. at 193-94 (*citing Smith*, 72 N.J. at 358).
16. *Id*. at 193.
17. *Glass v. Glass*, 266 N.J. Super. 357, 278 (App. Div. 2004).
18. *Weishaus v. Weishaus*, 180 N.J. 131, 143 (2004) (internal citations omitted).
19. *Morris v. Morris*, 263 N.J. Super. 237, 241 (App. Div. 1993).
20. *See*, *e.g*. *Hoefers v. Jones*, 288 N.J. Super. 590, 605 (Ch. Div. 1994), *aff'd o.b*., 288 N.J. Super. 478 (App. Div. 1996) (stating that "[a] Court of Equity, as a Court of Conscience, cannot be used as a forum to advance or condone wrongdoing.").
21. *Lepis v. Lepis*, 83 N.J. 139, 157 (1980).
22. *Id*. at 152.
23. *Id*. at 157.
24. *Id*. at 151.
25. *See*, *e.g*. *id*. at 152; *Bonanno v. Bonanno*, 4 N.J. 268, 275 (1950); *Innes v. Innes*, 117 N.J. 496, 504 (1990); *Deegan v. Deegan*, 254 N.J. Super. 350, 355 (App. Div. 1992) (stating that the changed circumstances "analysis focuses on 'whether the change in circumstances is continuing and whether the agreement or decree has made explicit provision for the change') (*citing Lepis*, 83 N.J. at 152); *Larbig v. Larbig*, 384 N.J. Super. 17, 19 (App. Div. 2006) ("The trial judge did not abuse his discretion in leaving undisturbed the alimony and child support obligations because defendant's motion was filed only twenty months after entry of the judgment of divorce- a fact that strongly suggested defendant's reduced income had not become permanent."); *Donnelly v. Donnelly*, 405 N.J. Super. 117, 127-28 (App. Div. 2009) (stating that "the focus must…be on the length of time that had elapsed since the last milepost in [the] post-judgment proceedings").
26. *Bonanno*, 4 N.J. at 272.
27. *Id*. at 275.
28. *See*, *e.g*. *Innes*, 117 N.J. at 504 ("Temporary circumstances are an insufficient basis for modification") (*citing Bonanno*, 4 N.J. at 275).
29. *Larbig*, 384 N.J. Super. at 19.
30. *Id*. at 19-20.
31. *Id*. at 20.
32. *Id*. at 22.
33. *Id*.
34. *Id*.
35. *Id*. at 23.
36. *Donnelly v. Donnelly*, 405 N.J. Super. 117, 130 (App. Div. 2009).
37. *Id*.
38. *Id*. at 121.
39. *Id*. at 121-22.
40. *Id*. at 122-23, 130.
41. *Id*. at 130.
42. *Id*. at 123.
43. *See*, *e.g*. *Arribi v. Arribi*, 186 N.J. Super. 116 (Ch. Div. 1982); *Aronson v. Aronson*, 245 N.J. Super. 354 (App. Div. 1991).
44. *Arribi*, 186 N.J. Super. at 117-18.
45. *Id*. at 118 (*citing Bonnano v. Bonnano*, 4 N.J. 268, 275 (1950)).
46. *Id*.
47. *Aronson*, 245 N.J. Super. at 356-58.
48. *Id*. at 358-59.
49. *Id*. at 360-61.
50. *Id*. at 361.
51. *Id*. at 360.
52. *See*, *e.g*. *Lepis v. Lepis*, 83 N.J. 139 (1980); *Bonanno v. Bonanno*, 4 N.J. 268 (1950); *Innes v. Innes*, 117 N.J. 496 (1990); *Deegan v. Deegan*, 254 N.J. Super. 350 (App. Div. 1992); *Larbig v. Larbig*, 384 N.J. Super. 17 (App. Div. 2006); *Donnelly v. Donnelly*, 405 N.J. Super. 117 (App. Div. 2009); *Arribi v. Arribi*, 186 N.J. Super. 116 (Ch. Div. 1982); *Aronson v. Aronson*, 245 N.J. Super. 354 (App. Div. 1991).
53. *Crews v. Crews*, 164 N.J. 11, 27-28 (2000) (emphasis added).

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A Foot in the Door

Do Recent Adoption Cases Pave the Way for Enforceable Post-Adoption Contact?

by Debra E. Guston

For decades, New Jersey adoption attorneys have been advising their clients, whether birth parents or adoptive parents, that New Jersey is a 'closed' adoption state. Clients are lectured that no matter what their intentions or desires, the courts of this state will not enforce post-adoption contact agreements. The clients are further instructed that the autonomy of the adoptive parent is absolute in making decisions about post-adoption contact with birth parents or other blood relatives.

This advice has been, until now, well grounded in New Jersey law. Our adoption statute states: "The entry of a judgment for adoption shall…terminate all parental rights and responsibilities of the parent towards the adoptive child except for a parent who is the spouse of the petitioner and except those rights that have vested prior to entry of the judgment of adoption."[1] Further, the Supreme Court, in *In the Matter of the Adoption of a Child by W.P.,*[2] held that in the adoption of a child by non-relatives, biological grandparents seeking visitation under the grandparent visitation statute[3] were foreclosed by the adoption statute's creation of parental autonomy for the adoptive parents.[4] *W.P.* becomes a significant subject of discussion with the most recent cases to be reviewed below.

It should be noted that there are a handful of reported and unreported cases dating from both before and after the enactment of the present adoption statutes and the grandparent visitation statute that have addressed issues of the standing of grandparents to intervene in adoption cases.[5] The disparate outcomes and approaches of these cases seemed to be resolved by *W.P.*'s holding in 2000.[6] However, the courts have begun a narrowly construed erosion of parental autonomy that is now increasingly reaching into adoption law. Specifically, this article will explore two recent cases: *Matter of D.C. and D.C., Minors*[7] and *J.M.S. and G.S. v. J.W. and E.W.*[8] These cases have opened the door to enforceable post-adoption contact, and that may well begin the twilight of closed adoption in New Jersey.

In 2000, the New Jersey Supreme Court issued its opinion in *V.C. v. M.J.B.*[9] In this extraordinary case, the Court ruled that parental autonomy was not absolute,[10] and that a person without legal or biological ties to a child, who met certain criteria, could be found to be a psychological parent of that child, and entitled to consideration of custody and/or visitation. While the Court stated that its opinion "should not be viewed as an incursion on the general right of a fit parent to raise his or her child without outside interference,"[11] the *V.C.* Court's premise was that "at the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them."[12] As this concept is at the root of post-adoption contact cases as well, it is helpful to review the *V.C.* decision in this context.

In *V.C.*, the New Jersey Supreme Court first found that the state's courts had jurisdiction to hear the claims of a party asserting psychological parent status by looking at the statutes governing custody. Finding that the statutes did indeed have an expansive view of the term "parent,"[13] the Court found that a person who is neither a birth parent nor an adoptive parent may have standing to seek a legal parenting relationship with a child.

Next, the Court set forth the criteria that must be met to establish a psychological parent relationship. This four-prong test is as follows:

Prong One: The parent-like relationship between the claimant and child must have been fostered by the legal parent, wherein the legal parent ceded over to the claimant a "measure of parental authority and autonomy and granted to that third party rights and duties…"[14]

Prong Two: The claimant and child must have resided together for a period of time.

Prong Three: The claimant must have assumed parental obligations of support of the child, which need not have been purely financial.

Prong Four: A parent-child bond must have formed, which, if broken, would run against the child's best interests.

This brief overview of *V.C.* ties into the recent adoption cases in the recognition that a child's best interests often lie in expanding conventional notions of family by reforming normative views of parental authority and autonomy.

The second case that needs to be

reviewed as a precursor to the recent post-adoption contact cases is *Moriarity v. Bradt,*[15] the 'grandparent's rights' case, decided after the United States Supreme Court tackled the issue in *Troxel v.Granville*.[16] In *Moriarity*, the New Jersey Supreme Court recounted the historical and commonly accepted views that: 1) at common law, grandparents had no legal right to visitation, but that as grandparents began to live longer they clearly became a greater influence in the lives of grandchildren; and 2) "the right to rear one's children is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteen Amendment to the United States Constitution."[17]

Despite making these observations, Justice Virginia Long, writing for a unanimous Court, nonetheless concluded, as the Court had in *V.C.*, that parental autonomy was not absolute, and that a child's right to relationships with his or her grandparents could prevail over the objections of his or her parents.

What was to be decided next was the appropriate standard of review. Reviewing prior New Jersey, as well as other states' cases in the wake of *Troxel*, the *Moriarity* Court found that "in every case in which visitation is denied, the grandparents bear the burden of establishing by a preponderance of the evidence that visitation is necessary to avoid harm to the child."[18]

Against the backdrop of *V.C.* and *Moriarity,* the discussion now turns to the two recently reported adoption cases. In the *Matter of D.C. and D.C., Minors,*[19] infant twins were removed from their birth mother's care by the Division of Youth and Family Services (DYFS), along with their older brother, Hugo. The birth mother had another child, an adult daughter, Nellie, who resided out of state. DYFS originally placed Hugo in a group home and the twins in a foster home. Several months after the removal, Nellie sought to be qualified in her home state of Virginia as a foster parent, with the intention of seeking placement of all of her siblings with her. Nellie was approved as a foster parent, and Hugo was placed with her. Discussions then began about providing Nellie and Hugo with visitation with the infant twins. Visits commenced as a means of preparing all parties for placement of the twins with Nellie. However, because Hugo's grades declined and Nellie lost her job, the pre-approved plans to place the twins with Nellie were rescinded by DYFS and its sister Virginia agency.

Upon the termination of the birth mother's parental rights in late 2007, Nellie became Hugo's kinship legal guardian. DYFS next informed Nellie that a placement of the twins with her would not be approved. Instead, the twins would be adopted by their foster mother. All visitation between Nellie and the twins would be terminated with the adoption.

Nellie filed an action seeking placement of the twins with her, or in the alternative, to reestablish and continue visitation post-adoption. DYFS reiterated its objection to placement, citing the bonding of the twins to the foster mother. The court-appointed special advocate (CASA) reported that the twins were happy with their foster mother, who sought to finalize the adoption and move to Puerto Rico. Despite Nellie's close relationship with her siblings, the Court never ordered a bonding evaluation assessing Nellie's relationship with the twins. Instead, the trial court ruled that the twins would remain, for purposes of adoption, with the foster mother, who at that time was agreeable to visitation. The trial court did not provide specific visitation orders, but rather asked the foster mother and Nellie to cooperate with each other to facilitate visitation. DYFS was relieved of any further involvement in the visitation.

One month later, DYFS informed Nellie that the foster mother rescinded her willingness to participate in visitation. Nellie turned to the court for assistance. The trial court ruled that Nellie could not relitigate DYFS's decision to approve the adoption, and that under current law it could not order the foster mother, soon to be the adoptive mother, to permit visitation.

The Appellate Division affirmed, finding that DYFS's adoption plan could not be challenged. The appellate court agreed, however, to hear the visitation issue, eventually deciding that it was DYFS's obligation to decide the matter based on its view of the best interests of the children. The panel then found that DYFS had not, by its placement of the twins in foster care and recommendation of adoption, interrupted an existing sibling relationship, since at the time of the placement, Nellie had no relationship with the infant twins. Furthermore, the panel found that Nellie had not established that it was in the best interest of the twins for post-adoption visitation to be ordered. The New Jersey Supreme Court granted certification.[20]

The Supreme Court initially determined that the governing law was the Child Placement Bill of Rights Act.[21] The Court, as it did in *Moriarity*, next reviewed the history of sibling contact rights, analogizing those rights to grandparents' rights, in that when a child is removed from a parent, the child's only source of social support in the midst of the chaos of a removal may be its siblings. The Court then concluded that the act governs sibling contact during the entire period a child is outside the home, even including post-adoption periods.

The Court went on to clarify that pre-adoption, DYFS did indeed have the obligation to facilitate sibling contact for the child under its supervision, further declaring that unless the division could prove that visitation was impacting the health, safety and welfare of the child, visitation should occur. Finally, the Court, citing its prior ruling in *W.P.,*[22]

which recognized that an adoptive parent, like a biological parent, could not be compelled to permit third-party visitation based merely on a "best interests" analysis, adopted the *Moriarity* standards and remanded for Nellie to be given an opportunity to prove that by a preponderance of the evidence there would be harm to the twins if she were not permitted post-adoption visitation rights. The Court cautioned, somewhat defensively, that the *Moriarity* standard is a stringent one,[23] and that the standard is narrowly tailored under the Court's *parens patriae* obligations.[24] Yet, the door did remain ajar for Nellie to proceed with her claim for visitation. In fact, at a scheduling conference prior to the remand hearing, the parties settled the matter, and a consent order was enter granting Nellie limited ongoing contact rights.[25]

The second case that adds to the progressive erosion of adoptive parental autonomy is *J.M.S. and G.S. v. J.W. and E.W.*[26] In this matter, grandparents sought visitation with their grandchildren post-adoption. While highly fact sensitive, the tone of the Appellate Division's opinion suggests a more accepting view of post-adoption contact than one might have expected, given precedent.

In *J.M.S.*, the children were placed with foster parents after having lived with their grandparents for two years. The adoptive parents were related by blood to the biological mother. Most notably, the adoptive parents permitted the plaintiff grandparents to visit for two years post adoption. This matter was further complicated by jurisdictional issues between New Jersey and New York, and the entry in New York of the judgment for adoption and, under its post-adoption contact law, of a New York order allowing post-adoption visitation by the biological father.

Notwithstanding the unique facts of this case, the Appellate Division clearly opined that *W.P.*, having dealt with a non-relative adoption, was not dispositive on post-adoption grandparents claims for visitation where the adoptive parents are relatives, and rather testily (calling the analysis of *W.P.* by the court below "outcome determinative"[27]) remanded the matter for further proceedings.

The Appellate Division went on to require analysis beyond *W.P.*, not only of the unique facts, but of the fundamental rights addressed in *Moriarity*, the impact of the New York post-adoption order on the New Jersey dispute and a review of the grandparents' claims that they were also psychological parents to the children, and deserving of visitation rights.

Therefore, *J.M.S.* perhaps shows the door opening a bit wider. *J.M.S.* is a blueprint for pursuing post-adoption contact by grandparents and, perhaps, other close relatives and non-relatives claiming psychological parent status.

CONCLUSION

With the rulings in *D.C.* and *J.M.S.*, siblings and grandparents clearly have a foot in the door, albeit with a difficult burden of proof, to seek enforceable post-adoption contact. Whether these rulings may extend to non-relatives remains a possibility, with the *J.M.S.* court's remand instructions. Specifically, the directive to look into the possible status of the grandparents as psychological parents is an approach that reduces the burden of proof to a best interest test, as opposed to the more onerous "no harm" burden imposed under *Moriarity*.

Another open question is whether these rulings will be limited to DYFS or other state's agency placements, notwithstanding the fact that it would not seem appropriate to do so. Children in other adoption settings also may have older siblings or grandparents who have no control over the placement but have established relationships with the child to be placed. Further, the standards for seeking contact are focused on potential harm to the child being placed for adoption and not on the relative seeking visitation. Therefore, to treat a child differently based on the route that caused them to be placed for adoption would seemingly violate a child's rights to happiness under the New Jersey Constitution,[28] or his or her right to equal protection under the United States Constitution.[29]

Until the Legislature acts to create a post-adoption contact regime for New Jersey, these issues will continue to create opportunities for creative lawyering; pose factual and legal minefields for trial courts; leave adoptive parents with unclear mandates regarding their rights; frustrate loving relatives who have had little or no say in adoption placements; and leave children in the middle of disputes with no clear path to resolution.

These recent cases help bring us closer to understanding the dynamics of post-adoption contact disputes and planning a route through the maze of facts and application of law needed to resolve disputes with favorable outcomes for children. ■

ENDNOTES

1. N.J.S.A. 9:3-50(c)(1).
2. *In the Matter of the Adoption of a Child by W.P.,* 163 N.J. 158 (2000).
3. N.J.S.A. 9:2-7.1.
4. N.J.S.A. 9:3-37 to -56.
5. Notably, *Mimkon v. Ford*, 66 N.J. 426 (1975); *R.K. v. A.J.B.*, 284 N.J. Super. 687 (Ch. Div. 1995) and *Mizrahi v. Cannon*, 375 N.J. Super. 221 (App. Div. 2005).
6. *Matter of D.C. and D.C., Minors,* 203 N.J. 545 (2010).
7. *J.M.S. and G.S. v. J.W. and E.W.,* 420 N.J. Super. 242 (App. Div. 2011)
8. *V.C. v. M.J.B,* 163 N.J. 200 (2000).
9. *Id.* at 218.
10. *Id.* at 227.
11. *Id.* at 221.
12. Although the definition set forth in N.J.S.A. 9:2-13(f) focuses on natural and adoptive par-

ents, the statute also includes the phrase "when not otherwise described by the context." The *V.C.* court interpreted this phrase to signify the Legislature's intent not to proscribe the possibility that persons other than a birth parent or adoptive parent may be a parent to a child.

13. *Id.* at 224.
14. *Moriarity v. Bradt,* 177 N.J. 84 (2003), *certif. denied* , 540 U.S. 1177 (2004).
15. 530 U.S. 57 (2000).
16. *Moriarity, supra.* at 101.
17. *Id.* at 117.
18. *Matter of D.C. and D.C., Minors,* 203 N.J. 545 (2010).
19. 201 N.J. 273 (2010).
20. N.J.S.A. 9:6B-1, *et seq.*
21. *Id.*
22. *D.C. and D.C., supra.* at 575.
23. *Id.*
24. Information on settlement obtained on Feb. 14, 2012, from Mary M. McManus-Smith, chief section counsel, family law, Legal Services of New Jersey, who represented Nellie in her appeal to the New Jersey Supreme Court.
25. *J.M.S. and G.S. v. J.W. and E.W.,* 420 N.J. Super. 242 (App. Div. 2011).
26. *Id.* at 249.
27. New Jersey State Constitution, Article 1, Section 1.
28. United States Constitution, Amendment XIV, Section 1.

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Military Divorce

Returning Warriors and "The Home Front"

by Mark E. Sullivan

The final departure of American troops from Iraq and the winding down of operations in Afghanistan are both signs of a "new phase of relations" between the United States and these countries, to use Vice President Joe Biden's language. This comes with news of other force reductions. The Defense Department has announced a planned drawdown of American military forces in Europe in 2015, with the loss of one or two of the four combat brigades stationed in Germany and Italy. In short, empty outposts overseas means full billets and bedrooms back at home. Many service members (SMs) are returning to the United States.

Those who are returning from the Middle East are not only from the active-duty forces (Army, Navy, Air Force, Marines and Coast Guard), they are also from the reserve component, including the National Guard and the Reserves. Thus, the impact from these homecomings will be felt nationwide, not just in communities near military bases.

STRESSES AND RELATIONSHIPS

While reuniting with one's family will be a joyous experience for some SMs, it may create significant stresses for others. During the SM's deployment, their civilian family members were typically in charge of maintaining their homes without help, despite the heavy responsibilities. This includes managing the budget, taking care of children, and quite often holding down a job as well. Reintegrating SMs back into the decision-making mix can create tension. Moreover, the returning SM, having been overseas and in harm's way for a year or more, grapples with his or her own emotional, psychological and physical issues. These SMs often require time to decompress and adjust to new responsibilities, routines and duties—both at home and at work.

Adding to the normal stresses of reintegration at home, sometimes there is an 'interim relationship' that formed while the SM was deployed: potentially both for the SM and the civilian spouse at home. These new relationships will need to be addressed and dissolved, in order to allow the marriage to continue. When these new relationships are not easily or quickly terminated, the marriage is jeopardized.

When these stresses lead to the breakdown of the marriage, the result can lead to a confusing foray into rules, laws, cases and problems for the family attorney dealing with military families. Just a few of the issues many military families face upon separation are: interim support, domestic violence, and temporary custody. This article offers some practical resources for family law attorneys facing these thorny topics relevant to military families.

RULES AND RESOURCES

Family law practitioners will quickly discover that the resources for a military divorce case vary according to the issue involved. Typical issues presented in these cases involve custody and visitation for minor children; support for the spouse and children; the role of the Service Members Civil Relief Act in default rulings and motions to stay proceedings; and division of the military pensions. Domestic violence issues may also be involved. The well-read New Jersey practioner is the one best armed to represent their clients' interests. The law addressing SMs and their family relationships is complex, and frequently counter-intuitive. A mentor, consultant or expert will often be useful as a guide through the wilderness.

There are several sources of information for the attorney confronted with these problem areas.

THE SERVICE MEMBERS CIVIL RELIEF ACT (SCRA)

Formerly known as the Soldiers' and Sailors' Civil Relief Act, the SCRA is found at 50 U.S.C. App. § 501 *et seq.* The two most important areas in civil litigation are the rules for default judgments (when the SM has not entered an appearance) and the motion for stay of proceedings. The former section, found at 50 U.S.C. App. § 521, requires an affidavit regarding the SM's military status and the appointment of an attorney for the SM by the judge. The SCRA, however, does not specify the duties of the attorney, nor does it provide for the payment of the attorney.

The requirements for obtaining a 90-day continuance (called a "stay of proceedings" in the act) are clearly set forth in 50 U.S.C. App. § 522. The SM must provide the following: 1) a statement addressing how the SM's current military duties materially affect his or her ability to

appear; 2) a statement setting forth a starting date when the SM will be available to appear; and 3) a statement from the SM's commanding officer stating that the SM's current military duty prevents appearance, and that the military leave is not authorized for the SM at the time of the letter.

An overview of the act is found at, "A Judge's Guide to the Service members Civil Relief Act," located at www.abanet.org/family/military (the website of the American Bar Association (ABA) Family Law Section's Military Committee). The guide describes the rules and protections of the SCRA, and the steps one should take to comply with the act's requirements. It contains a sample motion for stay of proceedings, and what the appointed attorney needs to do to protect his or her client.

New Jersey has enacted its own equivalent of the SCRA, which can be found at N.J.S.A. 38:23C-4.

FAMILY SUPPORT: RULES AND REGULATIONS

Each of the military services has a regulation requiring adequate support of family members:

- The Air Force support policy is found at SECAF INST. (Secretary of the Air Force Instruction) 36-2906 and AFI 36-2906;
- The Marine Corps policy on support of dependents is found at Chapter 15, LEGALADMINMAN (Legal Administration Manual), found at www.marines.mil/unit/mcieast/sja/Pages/legal-assistance/domestic-relations/default.aspx;
- The Navy policy for support issues is at MILPERSMAN (Military Personnel Manual), arts. 1754-030 and 5800-10 (paternity);
- The policy of the U.S. Coast Guard is located at COMDTINST (Commandant Instruction) M1000.6A, ch. 8M; and
- The nonsupport policies and rules of the U.S. Army are found at AR (Army Regulation) 608-99.

There is also a "silent partner" info-letter on the subject of "child support options" at the ABA website mentioned earlier.[1]

In analyzing support issues, it is also helpful to understand how SMs are compensated. All SMs receive a twice-monthly leave-and-earnings statement (LES) detailing his or her compensation. There are several forms of compensation a SM may receive, including: base pay; basic allowance for housing (BAH); and basic allowance for subsistence (BAS), which are non-taxable. Those SMs stationed overseas and living off base receive a non-taxable overseas housing allowance (OHA). Details of these allowances are at http://militarypay.defense.gov/Pay/Allowances.html.

Income received in a combat zone is tax free, and the IRS publishes an excellent guide to the various forms of pay and allowances, as well as the tax benefits for SMs and family members, the *Armed Forces Tax Guide*, IRS Publication 3 (available at www.irs.gov).

In addition to determining the income available for support, the family law practioner may choose to seek support by way of wage garnishment. The statutory basis for garnishment is found at 42 U.S.C. §§ 659-662, and the administrative basis is at 5 C.F.R. Part 581.[2] Limits on garnishment are found in the Consumer Credit Protection Act.[3]

CUSTODY AND VISITATION

Whereas the litigation process and the obligation to pay support are governed by federal law, custody and visitation are guided by the New Jersey statutes and case law. There are no specific legislative enactments dealing with protection of service members and their children, as noted recently by the New Jersey Appellate Division in *Faucett v. Vasquez*.[4] The court in that case stated, "[d]espite the significant implication potential overseas deployment of New Jersey's National Guard and reservists has upon the welfare of the State's children, our legislature has not yet acted."[5]

The *Faucett* case provides useful guidance and new rules regarding military custody and visitation issues for New Jersey practitioners. In *Faucett*, the father, an Army Reserve member, was the parent of primary residence (PPR) of the parties' son. Six years after the initial parenting order, the mother requested custody of the parties' child, due to the father's upcoming deployment to Afghanistan. The trial court, noting that the father was at the time on active duty with the Army, stated that he was entitled to the protections given by N.J.S.A. 38:23C-4, the state's version of the SCRA.[6] Although the statute prohibits a judgment or final order being entered while a litigant is on active military duty, no final order was intended by the court.

The trial judge further concluded that, notwithstanding the father's deployment overseas, custody was to remain with the father allowing the child to remain living with the child's stepmother during the father's deployment. The court reasoned that the child would continue to live near his friends and attend the same school, the child's medical needs would continue to be met, and that there were no allegations the child would not be well cared for by the father's wife. The trial judge ultimately opined that it would not be in the child's best interests to disrupt the school year when he was with an "intact family unit" he'd been a part of for the last six years.[7]

On appeal, the trial court's denial of the mother's motion was reversed. The appellate court noted that the parental presumption (in favor of natural parents over third parties) does not apply when one parent seeks modification of a prior custody order solely because of the other parent's impending military absence.[8] The court further stated that when military deployment is likely to last a year or more, and the custody change motion is contested, the one seeking modification is

entitled to a plenary hearing if material facts remain in dispute.[9] At the hearing, the party requesting a change of custody must demonstrate that temporary modification of custody is in the best interest of the child. The applicant can demonstrate a *prima facie* case of changed circumstances that impact the child's welfare by showing that the PPR is facing deployment for a year or more.[10]

Although issues of custody and parenting time are governed by state law, the Department of Defense has promulgated regulations requiring the return of children stationed outside of the United States upon order of a court. Department of Defense (DoD) Instruction 5525.09, 32 C.F.R. Part 146 (Feb. 10, 2006), requires a SM to return children from a foreign country when ordered to do so in a custody proceeding.

MILITARY PENSION DIVISION

There are also several resources available when distribution of a military pension attendant to divorce is at issue:

- The rules on retired pay garnishment are found on the website of the Defense Finance and Accounting Service (DFAS), www.dfas.mil, > "Find Garnishment Information" > "Former Spouses' Protection Act." In addition to a legal overview, there is a section defining the maximum allowable payments and an attorney instruction guide on how to prepare pension division orders.
- There is also a survivor annuity available to former spouses, namely, the survivor benefit plan (SBP). Information on the SBP is at the same website referenced immediately above at the "Retired Military and Annuitants" tab (under "Survivors and Beneficiaries") and at the "Provide for Loved Ones" link at this tab.
- The federal statute that authorizes military pension division, the Uniformed Services Former Spouses' Protection Act, is set forth at 10 U.S.C. § 1408, and the survivor benefit plan is located at 10 U.S.C. § 1447 *et seq*. The Department of Defense rules for both are in the DoDFMR (Department of Defense Financial Management Regulation), http://comptroller.defense.gov/fmr/.

There are also seven silent partner info-letters on dividing military retired pay and SBP coverage. All of these are found at the ABA website at www.abanet.org/family/military.

DOMESTIC VIOLENCE

There are also several valuable references relating to domestic violence issues and military families. One such resource is the DoD Instruction on domestic violence, DoDI 6400.6 "Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (Aug. 21, 2007).

Other websites containing useful information about the rules and procedures in this area are:

- www.vawnet.org (National Online Resource Center on Violence Against Women);
- www.ncdsv.org/ncd_militaryresponse.html (National Center on Domestic and Sexual Violence); and
- www.bwjp.org (Battered Women's Justice Project).

An excellent summary of the remedies and responses is found in *Domestic Violence Report*, April/May 2001 by Christine Hansen, executive director of The Miles Foundation, which is at http://civicresearchinstitute.com/dvr_military.pdf.

CONCLUSION

Handling a military family law case can be a challenging experience for the New Jersey practitioner. By using these rules, resources and regulations, the attorney can do a better job of providing prompt and professional guidance and protections for the service member and the spouse. ■

ENDNOTES

1. The author has written numerous silent partner info-letters on all aspects of military family law, including single-parent enlistment, custody and deployment, separation agreements, the Servicemembers Civil Relief Act and overseas divorce.
2. A list of designated agents (and addresses) for military garnishment is at 5 C.F.R. Part 581, Appendix A. Military finance offices will honor a garnishment order that is "regular on its face." 42 U.S.C. § 659 (f). *See also United States v. Morton*, 467 U.S. 822 (1983) (holding that legal process regular on its face does not require the court have personal jurisdiction, only subject matter jurisdiction).
3. 15 U.S.C. § 1673.
4. 411 N.J. Super. 108 (App. Div. 2009) *certif. denied,* 203 N.J. 435 (2010).
5. *Id.* at 133.
6. *Id.* at 116.
7. *Id.* at 117.
8. *Id.* at 122.
9. *Id.* at 128.
10. *Id.* at 134.

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