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EDITOR-IN-CHIEF'S COLUMN

Automatic Order Entered Upon Filing Divorce

by Charles F. Vuotto Jr.

I believe it is time for an automatic standard order incorporating various 'common sense' restraints to be entered in every divorce action at the very inception of the case. Such an initial order would be automatically generated by the court when the complaint for divorce is filed.

At least 30 percent of states[1] across the United States already have such automatic orders in place. The restraints included in these orders become binding upon the plaintiff when the complaint for divorce is filed, and binding upon the defendant when the complaint is served. Most states that have such automatic orders have an accompanying statute, which sets forth specifically what is to be included in the order.[2]

While these orders vary from state to state, they all place restraints on the parties from transferring, encumbering, concealing or disposing of assets, with almost all making exceptions for the 'necessities of life' or 'in the ordinary course of business.' A few of the states even make exceptions for payment of reasonable attorney's fees in connection with the divorce action.[3]

The next most common restraints restrict the removal of a minor child from the jurisdiction, canceling/modifying any insurance policy (including medical, dental, disability, life, automobile, and homeowners), changing the beneficiary on a life insurance policy, incurring unreasonable debts, and threatening or harassing the other party and/or the children.[4]

Oklahoma, the state with the most comprehensive standard order, also includes restraints on opening/diverting mail addressed to the other party; signing the other party's name to any negotiable instrument (including tax refunds); and disrupting or withdrawing their children from any educational facility, program, or day care where their children have historically been enrolled.[5] Interestingly, Tennessee includes restraints on making disparaging comments to the other's employer and hiding, destroying or spoiling, in whole or in part, any evidence that is electronically stored on computer hard drives or any other memory storage devices.[6] In this digital age, such a provision is critical.

States such as Idaho and Nevada also allow for such automatic orders; however, they vary from county to county within the state. While it is obvious that courts have the equitable power to grant such temporary preliminary injunctions *sua sponte* or on motion from a litigant, states such as Georgia,[7] Virginia,[8] and Washington[9] have statutes that specifically permit litigants to request such reliefs via *pendente lite* motions or simultaneously with the filing of the complaint.

I suggest New Jersey follow suit and implement an automatic standard order upon the filing of each complaint for divorce. Such an order could be titled *coepi ordo* (Latin for initial order). Taking from the forms of many different states, I have compiled a comprehensive list of provisions that can be included in New Jersey's standard order, as follows:

COEPI ORDO

A. In all actions for dissolution of marriage or civil union, divorce from bed and board or annulment, the clerk of the court shall issue a preliminary injunction restraining the parties from:
   1. Selling, encumbering (except for the filing of a *lis pendens*), converting, liquidating, reinvesting (except for automatic reinvestment provisions in brokerage accounts in place prior to the initiation of the action), transferring, pledging, secreting,

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wasting, hypothecating, concealing, depleting or otherwise dissipating any assets (including, but not limited to, real estate, personal property, bank accounts, stocks, mutual funds, retirement accounts, vehicles) in which either party has a legal or beneficial interest, including any assets owned through a business or other entity in which he or she has an interest, without the written consent of the other party or an order of the court, except in the ordinary course of business, for the necessities of life or for reasonable attorney's fees in connection with this action. If assets are used in the permissible aforementioned ways, the spouse doing so must provide an accounting within 14 days.

2. Discontinuing payment of all reoccurring personal and household expenses. All personal and/or household bills, including all utilities, shall continue to be paid in the same manner and from the same source as had been paid immediately prior to the filing of the complaint for divorce.
3. Canceling, modifying, encumbering, discontinuing, allowing the policy to lapse for nonpayment of premiums or changing the beneficiary status or in any way altering any insurance policy existing as of the date of the filing of the complaint for divorce including but not limited to life, medical, dental, homeowners, automobile, disability or any other form of coverage. Both parties shall cooperate as necessary in the filing and processing of claims.
4. Except for the payment of reasonable professional fees incident to the action, incurring any unreasonable debts hereafter, including but not limited to, borrowing against any credit line secured by the family residence, further encumbering any assets or unreasonably using credit cards or cash advances against credit cards in which the other party is or may liable, without the prior written consent of the other party or an order of the court.
5. Removing a minor child (defined as changing a child's residence) of the parties, beyond the jurisdiction of the state of New Jersey or more than 25 miles from the marital residence, without the prior written consent of the other party or an order of the court, hiding or secreting their child(ren) from the other party, and disrupting or withdrawing the child(ren) from an educational facility, program or day care where the child(ren) have historically been enrolled.
6. Threatening, harassing, or disturbing the peace of the other party or of the child(ren) of the marriage or making disparaging remarks about the other to or in the presence of any child(ren) of the parties or to either party's employer.
7. Hiding, destroying or spoiling, in whole or in part, any personal or business records, including those located in the home, a business office, place of employment or otherwise and including all personal or business records stored electronically on computer hard drives or other memory storage devices.
8. Intentionally or knowingly damaging or destroying the tangible property of the parties, including, but not limited to, any document that represents or embodies anything of value.
9. Opening or diverting mail addressed to the other party.
10. Signing or endorsing the other party's name on any negotiable instrument, check, or draft, such as tax refunds, insurance payments, and dividends, or attempting to negotiate any negotiable instruments payable to either party without the personal signature of the other party.
11. If the parties are living together on the date of service of this order, restraining either party from denying the other party use of the current primary residence of the parties, whether it be owned or rented property, without court order. This provision shall not apply if there is a prior, contradictory court order.
12. If the parties share a child or children, requiring that a party vacating the family residence (consistent with the other terms hereof) shall notify the other party or the other party's attorney, in writing, within 48 hours of such move, of an address where the relocated party can receive communication. This provision shall not apply if there is a prior, contradictory court order.
13. If the parents of minor child(ren) live apart during this dissolution proceeding, requiring that they shall assist their child(ren) in having contact with both parties, which is consistent with the habits of the family, personally, by telephone, and in writing unless there is a prior, contradictory court order.

B. This automatic restraining order shall be effective with regard to the plaintiff upon the filing of the complaint and with regard to the defendant upon service of the summons and complaint with a copy of this order. The plaintiff shall certify that he or she has not taken action contrary to the above restraints for a period of 60 days prior to the filing of the complaint and if so, explain in detail what action has been taken.

C. Either party may file an appropriate application with this

court to modify any of the proceeding terms upon good cause in accordance with the law of this state. However, until such time as such an application is filed and ruled upon, the above provisions shall continue in full force and effect during the pendency of this action.

D. This restraining order is automatically vacated upon the entry of a judgment of divorce.

It is respectfully submitted that most if not all of these provisions (in one form or another) are included in almost every initial *pendente lite* application filed in a divorce action. In fact, these terms typically constitute the majority of relief initially sought by litigants. If these terms became standard and entered automatically upon the inception of the case, it would have a substantial impact in reducing motion practice, and therefore alleviate the court's docket. No party will be prejudiced by these initial orders since it is proposed that the initial order simply maintain the *status quo* and expressly states that its terms may be modified upon an application by either party upon a showing of good cause. ■

ENDNOTES

1. Such states include: Alaska (Alaska Civil Rule 65(e), Arizona (Ariz. Rev. Stat. §25-315(A), California (Cal. Fam. Code §2040), Colorado (Colo. Rev. Stat. §14-10-107), Connecticut (www.jud2.ct.gov Form JD-FM-158 Rev. 9/07), Delaware (Del. Code Tit. 13 §1509), Maine (Me. Rev. Stat. Ann tit. 19A . §903), Massachusetts (Supp. Probate Court Rule 411), New York (D.R.L. §236(B)(2)(b), North Dakota (N.D.R.Ct. 8.4), Oklahoma (Okla. Stat. Ann. §43-110), Oregon (Or. Rev. Stat. 107.093), Rhode Island (R.I. Gen .Laws §15-5-14.1), South Dakota (S.D. Codified Laws §25-4-33.1) and Tennessee (Tenn. Code Ann. §36-4-106(d)).
2. *See* endnote 1, *supra.*
3. Arizona, California, Connecticut, New York, North Dakota, Massachusetts, Oklahoma, Oregon and Rhode Island.
4. Of the 15 states referenced above, 12 have restraints on changing insurance policies, 11 have restraints on removing a minor child, 10 have restraints on changing beneficiaries on life insurance policies, eight have restraints on threatening/harassing the other party and/or the children and four have restraints on incurring debts.
5. Okla. Stat. Ann. §43-110.
6. Tenn. Code Ann. §36-4-106(d).
7. Ga. Code Ann. §19-1-1.
8. Va. Code §20-103.
9. RCW 26.09.060.

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SENIOR EDITOR'S COLUMN

Parenting Coordination in New Jersey

Time to Get Out of the Briar Patch

by John E. Finnerty Jr.

Everyone wants to help children of divorce. Mental health professionals almost uniformly agree that high-conflict divorces are bad for children. The higher the conflict, the more harm to children's psyches and their development. Legal interventions seek to control conflict, including mediation, parenting education classes, and regular admonitions from the bench during case management conferences throughout the divorce process.

In service of that goal, the label 'parenting coordinator' became affixed to a person involved in a process that in 2002 the Association of Family and Conciliation Courts Task Force on Parenting Coordination defined as:

> An innovative approach which has been repeatedly recommended in the professional literature as a means to deal with high conflict and alienating families in domestic relations proceedings before the court.[1]

In subsequent guidelines, developed in May 2005, that same task force described parenting coordination as:

> …a child focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract… Parenting coordination is a quasi-legal, mental health, alternative dispute resolution (ADR) process that combines assessment, education, case management, conflict management and sometimes decision-making functions.[2]

More recently, in February 2011, the American Psychological Association defined the role of the parenting coordinator as follows:

> Application: The PC's role is to reduce conflict between parents by providing parent education, guidance, and coaching; facilitating discussion about children's needs and parenting priorities; obtaining information for mediating disputes as they arise; arbitrating decisions as necessary; encouraging compliance with court orders; and developing methods to improve the communication between parents and facilitate constructive parenting, as appropriate.[3]

The association distinguished the role of the parenting coordinator from the clinical role of a psychologist. Under its guidelines, the association concluded:

> The role of a PC differs from the clinical role of a psychologist in various ways. *In the PC role, the psychologist does not provide formal psychological evaluations or testing, offer any psychological diagnoses, or render individual, family, or marital therapy or counseling services to the parents or children.*
> *The functions of a PC do not include forensic assessments of the parents or children with whom the PC is working.*[4] (emphasis supplied)

AROUND THE NATION

Unfortunately, although the process of parenting coordination appears to be referenced throughout the country, there is little uniformity in approach, and very little formal statutory or rule making authority proscribing parenting coordination programs.

Only eight states have adopted statutes regulating parenting coordination. Those states are Oklahoma, Idaho and Oregon,[5] which had statutes in place as of 2003, and Colorado, Texas, North Carolina, Louisiana, South Dakota, and Florida, which more recently adopted statutes.[6] Other states have dealt with parenting coordination through a court rule or pilot project, including Arizona, California, Georgia, Hawaii, Kansas, Minnesota, New Mexico, Ohio, New York, New Hampshire, Massachusetts, Missouri, Indiana, New Jersey, and Vermont.[7] In Canada, parenting coordination is implemented informally.[8]

THE NEW JERSEY EXPERIENCE

Early Use

Parenting coordination probably has been used in New Jersey in some form or another since the

early part of the last decade, perhaps earlier. A review of unreported and reported decisions in New Jersey, discloses the words "parenting coordinator" or "monitor" in multiple cases, commencing in 1999.[9]

Moreover, parenting coordination has been formally studied on at least four separate occasions. In the report of the Supreme Court Family Part Practice Committee for the 2002-2004 term, the committee recommended, after extensive study, that parenting coordination as a practice be standardized, and that there be a statewide rule to regulate it. The practice committee proposed a specific rule to the Supreme Court.[10] The rule was not adopted by the Supreme Court.

Public hearings on all proposed rules are preceded by a period of public comment, during which reaction is solicited after publication of the proposed amendment. At the public hearing, people may request permission to address the Court about the rule, and there is frequently dialogue between those speaking and the Court. However, there is no transcript prepared of the public hearing remarks, or of the Court's decision-making caucus discussions. Therefore, there is rarely a formal explanation by the Court regarding why a rule is or is not adopted. In this case, the Court, in declining to approve the parenting coordinator rule amendment, recommended that the issue be reconsidered and further studied by the practice committee during the next term. Anecdotally, there was a sense that the Court had concerns about the cost of the process for non-advantaged litigants, and further about the issue of whether authority was being improperly delegated.

In connection with the original proposal, it was perceived by many that the Conference of Presiding Judges was in favor of a rule institutionalizing parenting coordination because it would keep garden-variety parenting disputes out of the court system, and thereby save valuable judicial resources. It was thought by many that mundane disputes over such things as telephone call time, pick-up and drop-off locations, switching days and holidays to accommodate special needs, etc. were neither efficiently nor economically pursued in the family part. It was also thought that since parenting coordinators were used in varying ways throughout the state, a rule was appropriate to create statewide uniformity in the practice.

This 'remand' resulted in reconsideration, and this time a unanimous recommendation by the practice committee for a rule that also was backed by the Conference of Presiding Judges. The proposed rule was contained in the Out-of-Cycle Supreme Court Family Part Practice Committee Report.[11] The proposed rule identified the nature of the issues that could be addressed, the authority of the parenting coordinator vis-à-vis the court, defining those who could serve as a parenting coordinator, the protocol to follow if a domestic violence restraining order was in place, protocol for communications with the parties and counsel, and a creation of a form order of appointment.

Despite this recommendation, and the backing by the Conference of Presiding Judges, again the Court did not approve the proposed rule. However, it did commission a pilot project, about which the bar was notified on April 2, 2007.[12] The pilot project was adopted for use in the vicinages of Bergen, Middlesex, Morris/Sussex, and Union. The pilot project did not preclude the use of parenting coordinators in non-pilot counties pursuant to whatever standards and practices had developed from county to county around the state. However, in the four vicinages that comprised the pilot project, the program protocol was to be followed.

Three Years Later

In June 2010, the Conference of Presiding Judges reviewed a report on pilot county activities since the implementation of the pilot project. The report set forth the conference's conclusion "that the current PC Pilot Guidelines are too restrictive and operate to limit the program's effectiveness." The conference concluded that:

> Families would be better served if vicinage judges are free to make parent coordinator assignments based on the individual circumstances of the families, *rather than attempting to fit families into strict statewide guidelines.*[13] (emphasis supplied)

In reaching this conclusion, the conference recommended that the procedures, standards and guidelines in the pilot project not be implemented statewide, and that assignments of parenting coordinators be made by judges according to the practices that had continued in the non-pilot counties. The only concession to uniformity was the suggestion that a model order of initial appointment be promulgated statewide for mandatory use when assignments are made. Beyond that, the conference endorsed a county-by-county approach to use of parenting coordinators.

The evaluation prepared for the conference made clear there had been limited response to questionnaires regarding operation of the program. The Administrative Office of the Courts (AOC) mailed 76 questionnaires in July 2008, and received only 11 completed evaluations. Due to this low response rate, the AOC did a second mailing in September 2008, and received only six additional responses. The AOC concluded that there was insufficient data to evaluate the program.

Moreover, only 35 percent of the respondents agreed that the use of a parenting coordinator helped reduce conflicts; 64 percent of the respondents did not feel the parenting coordinator helped reduce parental conflict; 76 percent indicated they did not feel the parenting coordinator helped them develop skills needed to share parenting effectively, while 23 percent reported that the parenting coordinator

had assisted in development of these skills. Most significantly, only two parenting coordinators from the pilot counties completed case information statements, as required by the Supreme Court guidelines and, therefore, no information was obtained about the success or failure of the program through the experience of the coordinators. Between 54 and 55 percent of the respondents said they would not recommend the program to other parents; only 35 percent said they would make a positive recommendation.[14]

The Conference of Presiding Judges' recommendation was referred back to the Supreme Court Family Part Practice Committee for the 2009-2011 term. After considering the issue for yet a third time in the last decade, the practice committee issued a report that set forth concerns about:

1. The unregulated nature of parenting coordination;
2. Duration of parent coordinator assignments;
3. The scope of authority that parenting coordinators co-opted for themselves in engagement letters that were presented to litigants;
4. The powers of the parenting coordinator once appointed;
5. Financial burdens of parent coordinators;
6. Whether litigants should have parenting coordinators foisted upon them if they did not consent.

The practice committee's report made recommendations with respect to these issues, and concluded that parenting coordinators should not be used unless the parties' consented. However, the report did propose two new model orders of appointment, one to be used in connection with consent to a parenting coordinator and one to be used if the Supreme Court determined that courts should still be able to appoint coordinators even if the litigants do not consent.[15]

The rule amendments adopted by the Supreme Court in August do not reference parenting coordination, but no new rule was proposed. What was proposed by the practice committee was a series of standards and new proposed model orders of appointment, which incorporated these standards. The Court did not adopt, and made no comment about, the model orders. Anecdotally, it is understood these issues are again being studied by the Conference of Presiding Judges.

At the same time, the Supreme Court has accepted a petition for certification in the matter of *Segal v. Lynch*.[16] The issues certified deal with whether parenting coordinators can charge fees for responding to grievances brought by litigants, and whether counsel fees may be awarded to a parenting coordinator who appears *pro se* in connection with defending him or herself against a grievance or legal challenge.

What Next?

It is time for the wandering through the briar patch to come to an end. It is time for focus and resolution. We need to decide as a state whether we are going to allow parenting coordination, and, if so, how we are going to implement it, who should serve, and the powers parenting coordinators should have. In figuring out answers to these questions, multiple other issues need to be discussed and decided upon as policy.

ABOVE ALL, CAUSE NO HARM

It is axiomatic that a program that might aid children and spare them the dysfunction of their parents' divorce is worthwhile investigating and trying to implement. However, in the process of trying to save children we do not want to cause more dysfunction. "Above all, cause no harm" is the essence of the Hippocratic Oath, and we must not lose sight of that thought. We also need to be mindful that the higher the conflict between parents, the less likely the success of any program which has as its primary focus education and cooperation.[17] Successful education requires receptive students, and discordant matrimonial litigants who are fueled by one-sided righteousness do not place high as candidates for such instruction. A review of the record in *Segal v. Lynch* makes clear that the leaders of all the world's religions, if serving as the parenting coordinators to these litigants, would not be likely to effectuate civil and rational discourse and consensual agreement in that case.

A policy that recognizes the legitimacy of parenting coordination needs also to recognize that there is a limit to the uses of parenting coordinators. The routine *pro forma* designation or appointment of parenting coordinators to assist with resolution of disputes many times just adds another layer of conflict and expense, and, at the end of the day, postponement of determination of the disputed issue by the court, which would at least end the public wrangling. Meanwhile, during this extended period, conflict reigns supreme and the children's exposure to it continues. In many families, even a court decision will not end conflict. So we must accept that there are some children of some high-conflict families who will be scarred, and the system can do very little, so we must make good judgments about whom we should try to help.

My own position on parenting coordination has changed. Initially, I believed strongly that the use of the parenting coordination process was an appropriate vehicle to keep garden-variety disputes about implementation of parenting plans already ordered or agreed upon, as it pertained to pick-up and drop-off times or locations or telephone call times, or flexibility with respect to accommodating activities out of the court. My view was that such disputes did not belong in the court, and that parenting coordinators would be able to effectuate an efficient resolution simply because the litigants knew the parenting coordinator had power to make a recommendation that could be presented

to the court and would likely be rubberstamped.

But as time passed, the actual practice model seemed to exceed the original goal. Any dispute seemed to be an invitation to involve a parenting coordinator as an ombudsman third-party member of a family without time limitation. Different parenting coordinators have different engagement letters and requirements, some insisting that there be weekly meetings, even if there is no specific concrete dispute. The expense of the process also grew, and rather than reducing costs for litigation fees, the costs of parenting coordination seemed to at least parallel legal costs, if not exceed them. As a result, since legal costs did not disappear, overall costs frequently increased.

I am mindful that personal bad experiences with a concept or program should not, *per se,* resign that program to the scrap heap. A court should not be deprived of tools that may assist families and spare children conflict, but at the end of the day, whichever commission, committee or other body continues the study of parenting coordination, the following issues should be addressed:

1. Confidence in the Coordinator

For the process to have any chance of success, the parents must repose confidence in the parenting coordinator. The recommendation from the Supreme Court Practice Committee, after its 2009-2011 term, emphasized that it was unrealistic to expect litigants to repose confidence in a parenting coordinator foisted upon them with whom they had not interacted or met prior to retention. Before a coordinator is agreed upon, it would be helpful if each litigant had the opportunity to interact in some way with the coordinator. Litigants are more likely to be invested in giving the process a chance if each has the opportunity to sign off on the professional conducting it. Most people interview and meet lawyers, doctors, or therapists before selecting them. Litigants should be given the same opportunity with a parenting coordinator being considered for appointment.

Such interaction would help avoid dooming the relationship from the beginning because of bad chemistry that could instantly develop with one litigant feeling the coordinator does not like him or her. To the extent possible, litigants should be allowed to involve themselves and meet the coordinator, either in person or over the telephone, before they are asked to engage or to accept him or her. Although there are practical considerations attendant to arranging such an interaction, the potential value of it overshadows the burden of implementing such a protocol.

2. Credentials of Parenting Coordinators

The two rules proposed by the Family Part Practice Committee, following the 2002-2004 term, and in connection with the 2007 out-of-cycle recommendation, required parenting coordinators to be licensed in New Jersey, either as social workers, psychologists, psychiatrists or family therapists. Non-mental health laymen or attorneys licensed in New Jersey were allowed to be appointed only so long as the parties consented, but there was a *caveat* that they needed to be qualified by experience or training, which was not specifically defined. The pilot project also required individuals be qualified as family mediators pursuant to Rule 1:40-12, and have experience working with high-conflict families and knowledge of the impact of divorce on families and children.

If New Jersey is going to allow the judicially imposed designation of parenting coordinators, then certainly both mental health professionals and attorneys, to be qualified for consideration, should have mediation training sufficient to enable them to designate themselves as Rule 1:40-12 qualified mediators. Both mental health professionals and attorneys also should have some form of New Jersey licensures, similar to those proposed in the pilot project.

These requirements should not apply if the litigants independently, without pressure or coercion, select by consent an individual they have interviewed and in whom they repose confidence. If confidence is reposed for whatever reason by both parties in a third party, then there is no need to be concerned about the facilitator/coordinator's credentials or other background. If the practice is going to be employed on a non-voluntary basis and people are going to be compelled to participate, then whatever rules or standards are developed, if the litigants themselves can select someone, then they should be allowed to do so, even if the person selected does not formally fulfill or have whatever credentials are determined to be required.

A survey of required credentials for parenting coordinators in states that have formally adopted the practice, makes clear that substantial mental health training is required, as well as certification in a mental health profession and facility with mediation concepts and training.[18]

At the end of the day, the most important qualifications probably cannot really be defined by credentials. Personal maturity and psychological awareness are necessary for a parenting coordinator to remain impartial and non-reactive. After all, psychologists and psychiatrists usually have years of their own analysis to understand themselves, and to understand how their own psychodynamics impact their reactions to patients. A parenting coordinator needs to be aware of his or her own issues, and not get drawn into the family dynamics because of over-identification, either with one member of the family or an issue being discussed.

3. Powers of the Parenting Coordinator and Limitations

In their survey of those jurisdictions that have institutionalized par-

enting coordination through statutes or rules, Judges Letas Parks, Harry L. Tindall, and Lynelle C. Yingling[19] concluded that most of these jurisdictions will not allow parenting coordinators to make unchecked decisions unless the parties agreed to delegate that authority to the parenting coordinator.

This is consistent with New Jersey's family law history, which prohibits courts from delegating decisions affecting a child's status to third parties.

In *Parish v. Parish,*[20] the Appellate Division again emphasizes that a court must not abdicate its decision-making role to a parenting coordinator. Enforcement of orders regarding parenting time was again found to rest with the court, and to be outside the sphere of the parenting coordinator's authority.[21]

However, New Jersey also recognizes the fundamental right of parents to raise their children as they see fit, limited only by the court's *paren patrie* responsibility to safeguard the children within the jurisdiction.[22] After *Fawzy v. Fawzy,*[23] it is clear that parents may agree to submit issues of child custody and parenting to an arbitrator, subject only to the protocol for ascertaining whether the arbitration award creates harm or adverse impact to the child, requiring judicial determination of the child's best interest.[24]

If the Court concludes that judges should be allowed to appoint parent coordinators, then the coordinator appointed should not be given unbridled authority to make recommendations concerning custody, visitation and allocation of parenting time, or anything else that might come up in the family. A family should not simply be turned over to a parenting coordinator because judges or lawyers become frustrated by their conflicts, petty or not.

Consistent with the state's interim pilot project, parenting coordinators should become involved only after an order or agreement for custody and parenting time has been executed. The pilot project referenced parenting coordinators' involvement in issues such as time, place and manner of pick-up or drop-off; child care arrangements; minor alterations and parenting schedule with respect to week nights, week day or holiday parenting time; beginning and ending dates for vacation; scheduling of telephone communication and other activities. These are relatively straightforward implementation issues, and appropriate issues for parenting coordinating assistance.

If the Court decides that this state should allow appointment of parenting coordinators, then their involvement should be defined clearly in the order of appointment as it relates to specific implementation issues presented. Parenting coordinators should not become members of the family for the length of time of the children's unemancipated status. The order can provide that litigants are free to consent to the parenting coordinator on other issues, but it should be only if consent is provided, and there should be no adverse inference drawn against a litigant who does not want to expand the issues being considered.

First, parenting coordinators are expensive. They add a layer of expense to the process by processing of issues, which if unresolved by them, wind their way back into the courts. Not every family can afford parenting coordinators, and certainly a condition predicate to appointment of a parenting coordinator must be an assessment of the financial requirements of the coordinator and of the family's financial resources. Of the states that have implemented parenting coordination by statute or rule, Parks, Tindall, and Yingling[25] report that five require as a condition precedent to appointment that families must be able to pay for services.

Second, at the end of the day, parenting coordination is different from mediation in one poignant way: unlike mediators, who also try to conciliate and get people to work together, but whose views are forever *unable* to be communicated to a trier of fact, parenting coordinators have the ultimate leverage and authority because both they and the litigants know that if the dispute cannot be conciliated, the coordinator has the "power of a recommendation" that may be presented to a court.

This is a particularly powerful tool. Certainly in the context of coordinators being able to make recommendations about resolving garden-variety disputes, such as pick up times and locations, telephone times, etc., a publically disclosed recommendation is not all that daunting. The knowledge that a recommendation can be made should enable rational people to come to a commonsense conclusion, because there is just not that much at stake.

However, the more material the substantive issue that a parenting coordinator may comment about publically, the greater the risk of the litigant's due process rights being abridged by those recommendations being brought to the attention of the court. Resolution of an issue by a court after return to the court will be accompanied by only one mental health recommendation, that of the parenting coordinator. There is nothing built into the process previously proposed in New Jersey or elsewhere that enables litigants to present the opinion of a third-party mental health professional, or that permits litigants who are in conflict over a parenting coordinator's recommendation to obtain an opinion about the issue from another mental health professional, and requiring the other litigant to cooperate with that process.

4. Referrals to Other Professionals

The pilot project allowed the parenting coordinator to make referrals to other professionals to improve family functioning.[26] The project cautioned coordinators to "avoid actual or apparent conflicts

of interest." However, I have heard parenting coordinators actually suggest that a client's therapist was not sufficiently efficacious or successful, and that the client should see another therapist, a colleague of the coordinator's. That is simply wrong.

I do not believe parenting coordinators should be able to compel people to change psychologists, involve the children with therapists, or designate appropriate enrichment or enrollment activities or camps or extracurricular activities. These decisions are fundamental parental rights. If the parties agree to allow parenting coordinators to make recommendations about these issues, then, of course, they should be free to do so. If the parties are unable to agree, then either should be able to present the issue to the court for determination after whatever full study is required.

To allow parenting coordinators to make recommendations about extra services or use of third-party professionals for children creates a quasi-expert authority for them. They no longer are simply facilitators of conciliation. Their job is to facilitate resolution, if possible, on narrowly defined, circumscribed issues, not to become an expert about what is best for a particular child in a case, unless both parents, by consent, solicit that input.[27]

5. Coordinator's Access to Personal Information

The pilot project provided that the parenting coordinator may have access to any information or people necessary for defining or resolving a disputed issue, including but not limited to doctors, therapists, schools and extended family. The protocol further provided that the parties would be required to sign written releases for this purpose.[28]

In effect then, with such power, the parties' confidentiality rights, and their parenting authority to make decisions about disclosure of information regarding their children, could be overridden, and the procedural protections offered by *Kinsella v. Kinsella*[29] could be eviscerated. If parenting coordinators are going to be involved in helping the parties reach agreement or make recommendations about garden-variety implementation issues, then why do they need access to information about the family's or children's therapy, medical records, school records, and the like? Use of that information is required only if parenting coordinators are going to be involved in making recommendations about broader issues regarding education and care of children. But, by all definitions, that is not a coordinator's role.[30]

If the parties repose confidence in the coordinator and wish to provide this information voluntarily, then, of course, there can be no objection, because the parents, who have authority over their minor children, are allowed to make such decisions and to select those they wish to treat their children. However, if there is objection, there should be no right of the coordinator to involve him or herself in that process. If there is a dispute about turning over records, the issue needs to be resolved by a court, rather than a parenting coordinator. The very fact that such an issue could arise in connection with parenting coordination services suggests the coordinator is being utilized for more than facilitating resolution of garden-variety implementation issues. It suggests the coordinator is intruding into family functioning, despite not having an evaluative or counseling function.

6. Engagement Letters and Fees for Parenting Coordinators

If the Court is going to approve a policy that allows the appointment of parenting coordinators, the engagement letters of the coordinators should provide no greater authority than identified in the order of appointment. Moreover, the order of appointment should be a standard model that is used uniformly throughout the state. The practice committee approved two model forms, which have been fully vetted and seem appropriate if the policies incorporated in them are accepted.[31] If the policies in them are not fully accepted, then the orders would have to be altered to reflect policies that have been deemed acceptable. For example, if parenting coordinators are not to be allowed to have access to confidential information about children, over objection without court approval, then the forms would have to be revised. Engagement letters should parallel the order of appointment, or regulation will be confusing. Litigants and lawyers need to be vigilant to assure that engagement letters parallel and do not conflict with orders of appointment.

Before a parenting coordinator is involved, there must be a finding that the family's financial resources are adequate to fulfill the financial requirements of the coordinator. Parenting coordinators' fees must be clearly set forth in their engagement letters. Not only should hourly rates be clearly identified, but the nature of services that will be billed also should be identified. If a parenting coordinator is going to charge for responding to any grievance or objection submitted by a litigant or the litigant's counsel, then that service should be defined as a billable event in the coordinator's engagement letter. If a retainer is going to be charged, it should be spelled out in the engagement letter. If a refresher retainer is to be charged, it too should be spelled out in the retainer agreement, along with when it is due. The best practice would be for payments to be made per session, so that at the end of each session there is no outstanding account receivable. This requirement also might control over-involvement of the coordinator. Creation of a large account receivable potentially embroils the coordinator in the family dynamic because his or her service has to be affected by being owed a significant receivable.

The circumstances that led to litigation that is pending before the

Supreme Court in *Segal v. Lynch*, should not be allowed to occur again. Avoiding accrual of accounts receivables could be controlled by requiring payments to be made following each session. If payments are not made, then services can be discontinued. If payment is not being made by a litigant to avoid the coordinator's involvement, then that issue needs to be addressed by the other litigant's attorney in an application to the court on notice.

Regarding disputes about a parenting coordinator's fees, certainly they should not have a higher stature in terms of adjudication then a court expert or a mediator. If a parenting coordinator is considered a court expert, then the issue of his or her fees is governed by Rule 5:3-3(i). If a parenting coordinator is not considered a court expert, then issues of compensation or disputes about it, or refusal to pay compensation, would seem to be subject to guidelines recently adopted and set forth in Appendix XXVI(Paragraph 15) of the rules.[32]

The 2012 rule amendments made clear that the court, in connection with an unpaid mediator's bill, will no longer issue a *sua sponte* order to show cause regarding why the mediator's bills should not be paid, or as a consequence of non-payment, why imposition of court fees and costs should not be imposed. Instead, the new rule appendix provides that the mediator or party may bring an action to compel payment in the special civil part of the county in which the underlying case was filed.

In any event, and whatever the jurisdiction, it is clear that the parenting coordinator's fees will not be entitled to any presumption of validity. The dictates of *Johnson v. Johnson* (Rubin)[33] must be followed. If experts' fee disputes cannot be resolved on conflicting certifications, then the panoply of protections provided by the *Johnson* case must also exist in connection with any request or application by a parenting coordinator, or any objection by a litigant to a parenting coordinator's fees. That is why, to avoid difficulties and to avoid the problems that arose in the context of *Segal v. Lynch*, coordinators need to keep better control, not only of the fees they are charging, but also their collection on a timely basis. That control would be facilitated by requiring payment after each session.

7. Duration of Appointment

A primary purpose of a parenting coordinator is to help educate families, and, as Robin Deutsch said, "if they (parenting coordinators) are successful, they will eliminate the need for themselves in short order.[34] Either the process works or it does not. If one or both of the litigants lose confidence in the coordinator, then the coordinator's educative role will cease to have meaning. The initial order of appointment should impose a term or milestone, after which time the coordinator's involvement should terminate. If someone seeks to extend the term, the court must assess whether the process achieved the desired goal of resolving disputes and keeping the parties out of the system. If it did not, then there is no reason for the process to continue. The burden should be placed on the litigant seeking extension to demonstrate that it is appropriate to do so if there is an objection. One year is not an inappropriate length for an appointment term.

Parenting coordination should not go on forever. If resolution is not possible, then the dispute must be returned to the court for determination. The role of the family should not be put into the hands of a non-judicial officer third-party professional if consensual resolution becomes impossible.

8. Grievances

The pilot project set forth a specific grievance procedure.[35] It provided a grievance procedure protocol. The protocol required initial discussion with the parenting coordinator in an attempt to resolve the dispute, and then the submission of written letters to the parenting coordinator with specific details of the complaint, with a copy to the other litigant and counsel. The parenting coordinator was given 30 days to provide a written response to the parties and their attorneys. The coordinator was given the discretion to schedule a meeting or conference call in an attempt to resolve the complaint. If the grievance could not be resolved, the dissatisfied party could request a court hearing to make a determination on the issues.

A protocol should be established for a grievance. It is not illogical to think the number of grievances would be directly proportionate to the extent of the authority and the expanse of the issues that the parenting coordinator may consider. If parenting coordination involves assignment of a family for regular sessions about any issue either litigant wishes to raise at a particular moment, then it is reasonable to conclude that there will be more disputes. It is less likely that is to occur if specific issues were assigned in a limited fashion.

However, it is axiomatic that when the kind of conflict that manifests itself in the facts of *Segal v. Lynch* occurs, parenting coordination has failed. If the coordinator needs to spend $33,000 worth of time to respond to a grievance, then clearly there is a personal investment and adversarial relationship that makes any future success unlikely.[36] In fact, if one parent feels there is cause for a grievance, then the utility of the parenting coordinator as an educator or facilitator has probably come to an end.

Nevertheless, if there is going to be designation of parenting coordinators by judicial orders, then there needs to be a way to address a grievance during the time period of the coordination process.

9. Domestic Violence

If there is going to be a formal policy decision about parenting coordinators and/or standards pre-

scribed, then the issue of whether coordinators can become involved in cases where domestic violence restraining orders have been entered must be addressed.

The pilot project specifically precluded use of parenting coordinators if a temporary or final restraining order was in place pursuant to the Prevention of Domestic Violence Act.[37] However, the Family Part Practice Committee for out-of-cycle 2007 rule recommendation did not preclude the use of parenting coordinators if temporary or final domestic violence restraining orders were in place. Rather, the proposed rule set forth that the coordinator could not confer with the litigants together, and could meet with them only separately. It further provided that any parenting coordinator appointed to a case where a domestic violence restraining order was in effect must have training and/or experience in domestic violence counseling according to standards to be developed by the Administrative Office of the Courts. The proposed rule further provided that a domestic violence victim may opt out of the parenting coordination process.[38]

Parenting coordinators may have a special place in connection with disputes about children between people who are not allowed to communicate. But the circumstances of the coordinator's involvement in such cases is fraught with complexity and difficulty. Parenting coordination services are provided in private offices, and it is not clear how a parenting coordinator would assure a victim's security if both persons were present, even though in adjoining rooms.

In view of the security concern, appointments would have to be staggered and non-consecutive, to assure victims would not come in contact inadvertently with abusers. On its face, such work would be even more difficult than work with litigants who are simply in conflict, but who were not prevented from interacting with each other.

CONCLUSION

Parenting coordination offers promise and peril. It is probably entirely inappropriate unless the fee requirements of parenting coordinators parallel the financial resources of the family. Payment of bills session by session would be a regular check on this issue.

If parenting coordination is going to be used as a mandatory process in this state, then a uniform protocol and approach should be followed. There is not sufficient variation in the social fabric of different regions of the state that would justify different standards for parenting coordination being followed in the north as opposed to the south, or points in-between. New Jersey has been looking at this process for a long time (about a decade). Multiple policy issues have been identified and the rationale on each side of those issues has been—or is being—fully vetted. It is time now for the Court to speak with a clear voice that creates order and allows reliance. After all, only Braer Rabbit liked it in the briar patch. ■

ENDNOTES

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3. Guidelines for the Practice of Parenting Coordination, American Psychological Association, February 2011, p.3.
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5. Oregon did not use the title parenting coordinator in its statute.
6. As reported by Hon. Letas Parks, Harry L. Tindall, and Lynelle C. Yingling, in Defining Parenting Coordination with State Laws, *Family Court Review*, Volume 40, No. 3, July 2011, pp. 629-41.
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Rodriguez v. Crane, 2006 WL 59814; *Jergensen v. Jergensen*, 2006 WL 1749652; *Tafaro v. Tafaro*, 2006 WL 1911390; *Tommaso v. Topolski*, 2006 WL 243809; *Millan v. Fair*, 2007 WL 218778; *Muniz v. Castrillo*, WL 1836229; *Mack v. Hoffman*, 2008 WL 3939849; *Card v. Card*, 2008 WL 5170441; *Menzel v. Davis*, 2008 WL 4648361; *Vlad v. Grodsky*, 2009 WL 605335; *Votta v. Votta*, 2005 WL 4163697; *Cerza v. Fresco*, 2010 WL 4007544; *Orrico v. Orrico*, 2005 WL 3797696; *Segal v. Lynch*, 417 N.J. Super. 627 App. Div. (2011); *Parish v. Parish*, 412 N.J. Super. 39 App. Div. (2010)

10. Supreme Court Family Part Practice Committee Report, 2002-2004, pps. 79-81
11. Supreme Court Family Part Practice Committee, 2004-2007 Out of Cycle Report, pp. 31-33.
12. Notice to the Bar, Parenting Coordinator Pilot Project—Program Guidelines and Related Material, April 2, 2007.
13. Memorandum to Hon. Eugene D. Serpentelli (Ret.), Chair, Family Part Practice Committee, from Glenn A. Grant, JAD, Subject Parenting Coordination Pilot Program Evaluation–Referral to the Family Part Practice Committee, June 8, 2009.
14. *Ibid*.
15. Final Report of the Family Part Practice Committee, 2009-2011, pp. 93-101.
16. Supreme Court of New Jersey, Docket Number 067683
17. Notice to the Bar, Parenting Coordinator Pilot Project—Program Guidelines and Related Material, April 2, 2007, p.1; Julia Reischel, Parenting Coordinators, *Lawyers Weekly*, June 1, 2009, p. 2, *quoting* Robin Deutsche, psychologist at Massachusetts General Hospital and a leading authority in the field.
18. Hon. Letas Parks, Harry L. Tindall, and Lynelle C. Yingling, Defining Parenting Coordination with State Laws, *Family Court Review*, Volume 40, No. 3, July 2011, pp. 632-33.
19. Hon. Letas Parks, Harry L. Tindall, and Lynelle C. Yingling, Defining Parenting Coordination with State Laws, *Family Court Review*, Volume 40, No. 3, July 2011, p. 633.
20. *Parish v. Parish*, 412 N.J. Super. 39, 60 (App. Div. 2010).
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22. *Borys v. Borys*, 76 N.J. 103 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1980); *Parhan v. J.R.*, 442 U.S. 584, 602 (1979).
23. *Fawzy v. Fawzy*, 199 N.J. 456 (2009).
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25. Hon. Letas Parks, Harry L. Tindall, and Lynelle C. Yingling, Defining Parenting Coordination with State Laws, *Family Court Review*, Volume 40, No. 3, July 2011, p. 633.
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27. By analogy, the February 2011 Guidelines for Parenting Coordinators of the American Psychological Association provides that PCs are not to provide formal forensic psychological evaluation or testing or counseling services, p. 4.
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29. 150 N.J. 276 (1997).
30. *See*, February 2011 The Guidelines for Parenting Coordinators of the American Psychological Association, p. 4.
31. www.judiciary.state.nj.us/reports2011/family.pdf.
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A Balancing Act

The Extent to Which a Stepparent Should Be Held Responsible for a Stepchild's Post-Divorce Support

by Cheryl E. Connors

Family law practitioners are intimately familiar with the second family and the complications that accompany defining the responsibilities of this new family. The relationship between a stepparent and a stepchild can be rewarding and beneficial to all involved. Stepparents often take on the responsibility of supporting their stepchildren during the marriage, and our public policy should encourage such support. However, when the second marriage ends, the consequences to the children can be devastating, both emotionally and financially. Statistics show that approximately "60% of second marriages end in divorce, and about 43% of marriages are remarriages for at least one party."[1]

Under what circumstances should a stepparent be held responsible for a stepchild's support after the marriage is over? Our Supreme Court answered that question in the seminal decision of *Miller v. Miller*.[2]

The majority of states have either recognized under common law that a stepparent has no duty to support a stepchild post-divorce or have interpreted their statutes to exclude imposing a duty of support post-divorce on a stepparent.[3] Some states have imposed obligations on stepparents under the doctrine of equitable estoppel, and other states have imposed liability under implied, as well as express, contracts.

In *Miller*, the New Jersey Supreme Court held that a stepparent may be responsible to support a stepchild after a divorce under the doctrine of equitable estoppel.[4] The mother in that case sought child support, from her second husband during their divorce, for her children born of a previous marriage. The biological father had provided support after his divorce from the mother until he went to prison, during which time the mother married the stepfather. After the biological father's release from prison, he attempted to send child support but the stepfather tore up his checks. He eventually stopped trying to send child support payments.

During the seven-year marriage, the stepfather supported the children, declared them as dependents on his tax returns and developed a close relationship with them. Although the children knew their stepfather was not their biological father, they considered him as their father and began using his surname at school. The mother testified that the stepfather interfered with the children's ability to visit with their biological father.[5]

The Supreme Court noted that a stepparent's *in loco parentis* relationship with a stepchild only exists as long as the parties and the child desire that it exist.[6] However, a continuing obligation may be imposed under the principles of equitable estoppel.[7] The claiming party must show "that the alleged conduct was done, or representation made, intentionally or under such circumstances that it was both natural and probable that it would induce action."[8] In addition, the claiming party must prove that the conduct was "relied on, and the relying party must act so as to change his or her position to his or her detriment."[9] In short, the three elements of equitable estoppel must be established: 1) representation, 2) reliance, and 3) detriment.[10]

Although the Supreme Court decided that a permanent support obligation could be imposed on a stepparent on the basis of equitable estoppel, the Court declared that this doctrine should be applied with caution, so as not to discourage voluntary support by a stepparent during a marriage.[11] The natural parent should always be considered the primary source of support. "It is only when a stepparent by his or her conduct actively interferes with the children's support from their natural parent that he or she may be equitably estopped from denying his or her duty to support the children."[12] The stepparent must have made some representation of support to either the children or the natural parent, and the children must have relied on that representation.[13]

The Court rejected the notion that "emotional bonding" could be sufficient to invoke the doctrine of equitable estoppel.[14] It also must be shown that the "children will suffer future financial detriment as a result of the stepparent's representation or conduct that caused the children to be cut off from their natural parent's financial support."[15] An example of such financial detriment, the Court explained, includes a demonstration by the custodial parent that "he or she (1) does not know the whereabouts of the nat-

ural parent; (2) cannot locate the other natural parent; or (3) cannot secure jurisdiction over the natural parent for valid legal reasons, and that the natural parent's unavailability is due to the actions of the stepparent."[16]

The crucial inquiry is whether the stepparent has interfered with the natural parent's support obligation.[17]

The Court established a less stringent standard for an application for *pendente lite* support. Specifically, to obtain *pendente lite* child support the claiming party must demonstrate that "he or she is not receiving support for the children from their other natural parent," and that "the stepparent's conduct actively interfered with the children's support by their natural parent so that *pendente lite* support cannot be obtained from the natural parent."[18] The Court concluded that such a standard prevents immediate hardship to children who have relied on a stepparent as their main source of support.[19] Based on the two standards, the Supreme Court concluded that the facts were sufficient to impose a *pendente lite* support obligation, but remanded for the trial court to consider whether a permanent support obligation should be imposed.[20]

In Justice Alan B. Handler's concurrence in part and dissent in part, he opined that the facts were sufficient to impose a permanent duty of support. Justice Handler averred that the critical focus "should be whether, by word and deed, [the stepfather] affirmatively encouraged, and actually succeeded in attaining, the family's financial dependence upon him and, further, whether defendant deliberately and aggressively cut off the support that the children had been receiving or might have received from their natural father."[21] Justice Handler noted that emotional bonding with a stepparent could contribute to the alienation of the natural parent's relationship with the children, and thus may bear upon the natural parent's failure to support the children. With respect to public policy considerations, Justice Handler opined that public policy should not countenance the conduct of a stepfather who seeks to avoid a support obligation to his stepchildren where he "has aggressively alienated children from their natural father and vigorously discouraged any financial support from their father."[22]

Previous to the *Miller* decision and discussed at length in *Miller*, the Appellate Division affirmed the decisions of *Ross v. Ross*[23] and *A.S. v. B.S.,*[24] in which the court imposed a duty of support on the non-biological and non-adoptive fathers. In *Ross*, because the child always believed his stepfather to be his biological father, and the stepfather took steps to acknowledge paternity, he was estopped from denying his obligation to support the child.[25] Likewise, in *A.S.* the non-biological father was estopped from denying his duty to support the child. In that case, the child was delivered to the parties, a husband and wife, when he was one month old, and resided with both parties until their separation. The child used the parents' surname and never received support from the natural parents. The court concluded that "[t]o permit defendant to repudiate his intent to support the child and no longer stand *in loco parentis* to him would cause irreparable harm to the boy," and thus, equitable estoppel was applied to require the husband to pay child support.[26]

In an equally divided Court, the Supreme Court affirmed the Appellate Division's decision in *M.H.B. v. H.T.B*, which applied the doctrine of equitable estoppel under *Miller* to preclude a stepfather from denying the validity of a voluntary commitment to provide support post-divorce. [27] In *M.H.B.*, the child was born during the marriage, but shortly after her birth the stepfather learned that she might not be his natural child.[28] For five years following the divorce, the stepfather voluntarily provided emotional and financial support to the child. When the stepfather remarried, his relationship with his ex-wife deteriorated and he petitioned the court for custody of his two children and his stepdaughter.[29] The stepfather subsequently amended his request for relief and claimed, in the alternative, that he should have no duty to support his stepdaughter.

Relying on the principles of *Miller*, Justice Handler, writing the concurrence for three members of the Court, concluded that the stepfather's support throughout the marriage and following the divorce "constituted a continuous course of conduct toward the child that was tantamount to a knowing and affirmative representation that he would support her as would a natural father."[30] The child reasonably relied on the stepfather's representations, as the trial court found that the stepfather was her psychological parent.[31] If the stepfather were permitted to repudiate his prior actions, the concurrence reasoned that it would cause material and emotional harm to the child.

Justice Handler's opinion next examined the New Jersey Parentage Act,[32] determining that the Legislature did not intend to preclude imposing a duty on a stepparent where equity demands such a result. The concurrence further explicated that under the act the best interests of the child trump any determination of parentage with respect to the support of the child. Lastly, Justice Handler's concurrence makes clear that the obligation to pay support remains mutable.[33]

A stepparent may show changed circumstances warranting an assumption of liability for the support of the child by the biological parent. The assumption of support by the biological father "will be required if changed circumstances show that it would be in the best interest of the child, fair to the stepparent, and legally just as to the biological father."[34]

In Justice Stewart Pollock's dissent in part, he opined that the concurrence improperly expanded the principles of *Miller* because the stepfather in that case had not actively interfered with the natural father's relationship with the child.[35] As such, Justice Pollock, writing for three members of the Court, concluded that the stepfather in *M.H.B.* should be obligated to pay support only until a support order could be entered against the natural father.[36]

Following the principles of the *Miller* decision, the courts have proceeded with caution in this area, and have generally disfavored imposing a duty of support on stepparents. In *Camden County Bd. of Social Servs. v. Yocavitch*, a biological father tried to invoke the doctrine of equitable estoppel to avoid his support obligation.[37] In that case, the mother applied for public assistance, and the Board of Social Services sought support from the biological father, at which time he first learned that he could be the father of the child. The child had resided with the mother and her former husband, who had treated the child as his son.

In denying the biological father's equitable estoppel claim, the court reasoned that the stepfather made no representation to him, and he did not rely on any representation because he was not aware that he was the father.[38] The mere failure of the mother to inform the biological father of the possibility of the child being his son did not constitute "that type of 'positive action' interfering with the natural parent's support obligation" to impose a duty of support on the stepfather.[39]

The court explained that *Miller* does not allow a biological father to use equitable estoppel as a shield, and reaffirmed the principle that the natural parent should always be the primary source of support. Moreover, the desire to spare the child the knowledge that his stepfather is not his natural father is not a basis under the circumstances to decline to impose a support obligation on the biological father.[40]

Likewise, the family part denied the biological father's request to impose a support obligation on the stepfather in *J.W.P. v. W.W.*[41] In that case, the mother had an affair and conceived the child while married to the stepfather. The stepfather was listed on the child's birth certificate, and the child used his surname. The mother requested that the biological father relinquish his parental rights so the stepfather could adopt the child, and the biological father ceased visitation with the child. However, the adoption never occurred.

In rejecting the biological father's attempt to invoke the doctrine of equitable estoppel, the court explained that the doctrine provides "a safety net for the child whose stepfather…affirmatively interfered with his right to be supported by his natural father."[42] It is not intended to relieve a biological parent's obligation to support his child merely because a stepparent has cared for his child in his absence. The court explained that principles of equity do not allow a father who has failed to fulfill a legal duty to invoke an equitable doctrine for relief.[43] Like the circumstances in *Yocavitch*, the stepfather did not make any representation that he would assume the obligation of support, but merely voluntarily supported the child as a result of the default of that obligation by the natural father.[44]

In the decision of *Cumberland County Board of Social Services v. W.J.P.*, the Appellate Division considered the circumstances under which both the natural father and stepfather are available to support the child.[45] Eight months after the birth of the child, the mother married the stepfather. Upon the parties' separation, the stepfather acknowledged paternity and agreed to pay child support. Several years later, the mother told the child the true identity of her natural father, and the child ceased to have a relationship with her stepfather. The mother consented to a termination of his child support obligation for his stepchild, and subsequently filed an application for public assistance. The Board of Social Services filed an action against both the natural father and stepfather. The trial court imposed a support obligation on both the natural father and the stepfather.

The court examined whether the stepfather stood *in loco parentis* to the child, namely whether he intended to put himself in the situation of the lawful father of the child and assume the "office and duty of making provision for the child."[46] The court held that "once a natural parent has been identified, has been ordered to pay support and establishes a relationship with the minor, *in loco parentis* support cannot be compelled by a stepfather."[47] The court concluded that it would be inequitable to foist a continuing *in loco parentis* status on the stepfather given that the natural father was paying support and established a bond with the child, and given that the stepfather had terminated his relationship with the child.[48]

In contrast to the holding in *W.J.P.*, the trial court in *J.R. v. L.R.* imposed support obligations on the natural father and stepfather simultaneously.[49] In that case, the mother had an extramarital affair and conceived her daughter. Her husband believed he was the daughter's natural father until she was nine years old. The mother applied for public assistance, and the Ocean County Board of Social Services filed a complaint against the stepfather. The stepfather filed a motion for genetic testing, which revealed that he was not the biological father of the daughter, and child support was ordered only for the parties' biological son. Subsequently, the mother filed a paternity complaint against the biological father, which was consolidated with a motion filed by the stepfather for custody of his son and stepdaughter, and for an order compelling the biological father to

appear for a support hearing. After genetic testing revealed that the biological father was, in fact, the natural father of the child, the trial court determined that he would pay support. The court further ordered the stepfather, as the child's psychological parent, to pay the remaining support because the natural father was unable to pay the entire amount of support needed for the child.[50] The biological father appealed, and the Appellate Division concluded that the trial court reached an equitable result in imposing a burden on both the biological father and psychological father.[51]

In *Bencivenga v. Bencivenga*, the Appellate Division addressed the issue of a mother who was not gainfully employed because she was a stay-at-home mother with her children from her second marriage.[52] The father, who had primary physical custody of the children, filed a motion based on changed circumstances seeking child support from the mother, who previously had no child support obligation. Although the Appellate Division recognized that the mother's husband had no duty to support the children from her first marriage, the court noted that a mother's decision to stay at home may be made possible by the income and resources of her current husband. The court reasoned that "[i]t seems odd that the benefits of her decision to devote a share of the current family resources to her second family's care could work so much to the disadvantage of her first children."[53] On remand, the Appellate Division directed that such facts should be considered by the trial court in any award of support for the children.

The principles of *Miller* were not extended to the circumstance of unmarried cohabitants in *Zaragoza v. Capriola*.[54] The family part reasoned that extending the holding of *Miller* to the context of unmarried cohabitants would be "beyond the bounds of reasonableness and to make a mockery of the institution of marriage and interpersonal relationships."[55] Contrastingly, in *Monmouth County Division of Social Services v. R.K.*, the family part concluded that the *Miller* test applied to the parties despite the absence of any marital union between the natural mother and the man with whom she resided and lived as a family unit.[56] The court reached this conclusion because the man acted as a psychological parent to the child, and because the biological father was unknown.[57]

The case of *Skribner v. Skribner*,[58] which predates the *Miller* decision, squarely rejected the proposition that a child's needs should be considered in whether to impose a duty of support on a stepparent. In that case, the mother argued that her child support from her first husband was inadequate, particularly because her child had special needs. The court concluded that the mother "should not be permitted to obtain through the back door what she cannot obtain directly. The obligation is that of her first husband."[59] The analogy to the back door is interesting, in the sense that a stepparent may open doors that were never accessible before forming the second family. Should the door be shut to a special needs child who has received support that has helped him or her because the second family is dissolving? The trial court in *Skribner* did not have the benefit of the *Miller* decision, and thus did not examine whether there was representation, reliance or detriment under the circumstances.

In *Bengis v. Bengis*, the Appellate Division interpreted what is required to show financial detriment to the child, and specifically recognized the needs of the child as part of that inquiry.[60] In that case, the stepfather told the children they were to be adopted, and allowed the children to use his surname in several contexts. The children called their stepfather "dad," and called their natural father by his first name. As a result of an IRS audit, it was revealed that both the stepfather and the natural father were declaring the children as dependents. The stepfather, the mother, the natural father and his wife reached an agreement that the stepfather would adopt the children and the natural father would pay the back taxes resulting from the dependency exemptions and would be relieved of any further child support payments.[61] Although the trial court found that the stepfather made representations that he would support the children, and induced the children and the mother to rely on that representation sufficient to warrant an award of *pendente lite* child support, it concluded that such findings did not require the imposition of a support obligation post-divorce.[62] Because the natural father was available to provide support, the trial court determined that no financial detriment could be shown. In addition, the trial court determined that the agreement between the parties was not binding because an agreement that precludes children from seeking support from a natural parent is void as against public policy.[63]

Justice (then Judge) Virginia Long, writing for the court, determined that demonstrating financial detriment is not limited to a showing that the natural parent is unavailable to support the child. Rather, the question of future financial detriment is a fact-sensitive inquiry that involves a broad spectrum of possibilities.[64] The court further opined that the parties' full financial picture must be scrutinized, including "the actual needs of the children, the ability of both the natural parents and the stepparent to meet those needs and any financial change in the status of the parties which may be said to have come about as a result of reliance on the stepparent's misrepresentations."[65]

The court provides examples of circumstances under which finan-

cial detriment could be proven:

> [I]f a well-to-do stepparent promised future support to children of his or her spouses' prior marriage and, in reliance thereon, the children undertook a costly program and higher education which would have been out of the question in the absence of the stepparent's representations, financial detriment might be successfully claimed. Similarly, if a natural parent, relieved of his child support obligations because of the promise of a stepparent, gave up a lucrative profession or undertook new and financially burdensome responsibilities, his ability to support the children might well be considered to have been compromised to their detriment.[66]

Because the trial court made no findings regarding such financial detriment, the matter was remanded for further consideration. Lastly, the Appellate Division explicated that a contract between a natural parent and a third party assigning the duty of support to a financially responsible individual is not void against public policy.[67] On remand, the Appellate Division directed that the trial court consider the nature of the agreement, the consideration and whether the duty imposed on the stepfather was intended to survive dissolution of the marriage, and articulate why the agreement does not warrant judicial enforcement.[68]

There are two competing public policy considerations in the context of imposing a duty of support on a stepparent: 1) encouraging the voluntary assumption of support of a stepchild during a marriage; and 2) the best interests of the child after the dissolution of the second family. Should a stepparent who has established a certain lifestyle to which children have become accustomed be permitted to walk away to the detriment of the children? It may be that the biological parent is available to support the child but not nearly at the standard to which they have become accustomed. A child may be enrolled in exclusive private schools, which were accessible only because of a stepparent, and which are completely out of reach based on the support received from the biological parent. A child may likewise be enrolled in activities such as horseback riding or skiing, or may be heavily involved in cheerleading, dance or sports at a level that they cannot afford without the stepparent's support. Is it fair for that child to have to start over in a new school or give up an activity he or she loves because the second family is dissolving?

Where the natural parent is available to provide for some, but not all, of the support to meet the needs of the child, should there be simultaneous obligations on the biological father and on the stepfather? The Appellate Division declined to impose simultaneous obligations in *W.J.P.,* because the natural father was available to support the child, and because the child had ceased her relationship with her stepfather.[69] In contrast, the trial court in *J.R.* imposed a support obligation on both the biological father and the stepfather, where the stepfather was the psychological parent. The issue of simultaneous obligations, however, was not directly addressed by the Appellate Division in *J.R.* because the stepfather did not appeal the trial court's decision.[70] As such, this question remains open. Should the stepparent be able to walk away because no biological connection exists where the emotional bond between stepparent and stepchild could be far stronger than between biological parent and child?

Justice Alan Handler aptly noted in his concurrence in *Miller* that emotional bonding with a stepparent could contribute to the alienation of the natural parent's relationship with the children.[71]

The public policy consideration, as expressed by the majority in *Miller*, of encouraging stepparents to assume a role of both emotional and financial support when marrying a person with children from a previous relationship, lies on the other side of the coin. If we impose an obligation on these individuals who are doing the right thing for their stepchildren during the marriage, we punish them by imposing obligations post-divorce, while rewarding those stepparents who did not support their stepchildren during the marriage.[72] These concerns were at the forefront of the policies considered by the Supreme Court in *Miller*.

The question is whether *Miller* and the decisions that follow have found the right balance between these two policy considerations. This author proposes that Justice (then Judge) Long's opinion in *Bengis* weighed both sides of the argument most effectively, and that Justice Handler's concurrence in *Miller* rightly recognized that the emotional bond may have some bearing on the duty to support.

If a stepparent has represented an intent to support the children, by word and deed, and the children have relied on that representation, the crucial determination is what constitutes detriment, which is an extremely fact-sensitive inquiry. The children's needs should be of paramount concern in determining future financial detriment. The concerns for the stepparent are easily addressed by the Court's clear directive that a stepfather has the right to seek reimbursement from the biological father for the support paid to a stepchild.[73] Moreover, the Court has made clear that the stepparent's duty of support is mutable, and is always subject to a change in circumstances application.[74]

Given the ever-increasing number of second families, and that as many as one in three children can expect to spend some of their childhood living with a stepparent,[75] simultaneous obligations of natural parent and stepparent may be appropriate and should be considered by the court.

See ***A Balancing Act*** *on page 103*

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Untangling the Web

Discovery of the Finances of a Non-Party in Post-Divorce Economic Matters

by Ronald G. Lieberman

Few areas in family law are more intricate or sensitive than formal and informal third-party financial discovery involving a non-marital partner[1] or new spouse.[2] Such discovery is necessary, but requires careful planning and attention.

DIFFERENT SECOND FAMILY SCENARIOS

The remarriage of a parent or supporting spouse raises issues about the fairness and extent of the potential inclusion of the finances of the new spouse on obligations imposed upon the parent or supporting spouse stemming from his or her divorce. The obligations of a second family do not act to reduce the obligations of the supporting spouse. As was held in *Zazzo v.* Zazzo:[3] "[t]here is no divorce between parent and child." Except for the allowance of an "other dependent deduction," which is set forth in Appendix IX-A, paragraph 10, when the child support guidelines are used,[4] the obligations of a second family do not affect the ability of the parent to fulfill his or her obligations to his or her first family. At the same time, the income of a new spouse is not added to the income of the ex-spouse.[5]

There are three common scenarios when the finances of the new spouse will be relevant: 1) motions for modification of alimony filed by the supporting spouse who has since remarried; 2) motions to modify child support; and 3) motions to establish obligations to pay college expenses.

An alimony modification application generally arises when a client receives alimony stemming from his or her divorce and is served with a motion filed by the supporting spouse to reduce the alimony obligation alleging a change in his or her circumstances, and the supporting spouse has since remarried.

The second and third scenarios about child support and college costs are considered in connection with each other throughout this article because obligations for payment of child support and college expenses are intertwined and interrelated.[6] The principles that apply for inclusion of the finances of a new spouse in child support scenarios are the same principles that apply in scenarios involving college expenses. The child support or college expense issues generally arise in the following two factual situations:

Scenario A–Custodial Parent Remarries: A client remarries and is the custodial parent of a child from her prior marriage. The client now finds herself involved in litigation with her ex-spouse over the payment of college expenses. The client is surprised to learn that her new spouse's income is relevant to her case.

Scenario B–Noncustodial Parent Remarries: A client files a motion seeking the entry of an order compelling the non-custodial parent to contribute to college expenses. The non-custodial parent has remarried. The noncustodial parent argues that the court should consider the financial obligations and expenses of her second family in assessing her ability to contribute to the college expenses of her child from her first marriage.

When a custodial parent remarries, it is presumed that his or her new spouse will contribute income to the household where the custodial parent's child, born of the prior marriage, resides. A remarriage can improve the custodial parent's financial circumstances because of his or her new spouse's financial resources. The new spouse generally contributes toward the mortgage or rent and utilities, which represents a portion of the Schedule A needs of the child. Therefore, it is likely that the noncustodial parent will argue that the new spouse's financial contributions should be taken into account when determining each parent's payment toward the child's college education.

What if the remarried parent claims his or her own expenses are so great he or she has nothing left over for payment of child support or college expenses? Could that be a reason for a court to consider the income of the new spouse as a source available to the remarried parent to pay child support or college costs? Can a court consider the income of the new spouse if that income improves the parent's financial circumstances? How and to what extent can a court consider the new spouse's income? Does it matter if the ex-husband or ex-wife moved into the residence of the new spouse, as opposed to the two of them purchasing a residence together? Can a court impute a reasonable contribution rate toward shelter?

Discovery of the finances of the new spouse will help answer these questions.

By pooling financial resources with their new spouse, the remarried parent exposes him or herself to making a larger contribution to his or her child's college education than might otherwise be the case. To the extent the new spouse frees up cash flow of the parent or ex-spouse by contributing to expenses that would otherwise be covered by child support, the new spouse's income and assets are relevant and discoverable.

PREREQUISITES TO CONDUCTING POST-JUDGMENT DISCOVERY

A motion seeking a modification of either alimony or child support, or a determination of the contribution toward college expenses, must be ruled upon before discovery can commence. At least one family court has held that a practitioner cannot propound discovery in a post-judgment matter without a court order. In *Welch v. Welch*,[7] a trial court ruled upon the issue of "unauthorized discovery in post-judgment motion practice." A subpoena was issued by an attorney to a police department seeking police records relating to the parties and it was issued before the party filed a post-judgment motion seeking residential custody.[8] The attorney for the other party filed a cross-motion seeking sanctions against the attorney for issuing the subpoena.[9] The court ruled that it would not consider any of the documents obtained in connection with the subpoena.[10]

In so ruling, the motion judge held that "...discovery in family actions has, historically, been far more limited than in other areas of litigation."[11] Post-judgment matters have little discovery without a court order because the discovery devices that an attorney can use "apply to pretrial discovery."[12] The judge held that there must be a threshold showing before discovery will be conducted in post-judgment matrimonial matters.[13]

The motion judge held:

> The reason for this restriction is clear: if parties had the right to engage in unfettered discovery every time a post-judgment motion was brought, it would convert motion practice into unwieldy mini-trials resulting in lengthy delays which Rule 5:5-4 was specifically designed to avoid.[14]

After a motion is filed and post-judgment discovery is granted, the issue then becomes what is discoverable about the new spouse's finances. The income of a new spouse can be considered, and is relevant in deciding the ability of a parent to contribute to college costs. In *Hudson*,[15] the Appellate Division was determining "...the extent to which a current spouse's income may be considered in allocating a child's college expenses" between the parents.[16] The Appellate Division held that the current spouse's income is relevant to determining the remarried party's ability to pay college expenses.[17]

Although the current spouse's income is not to be included in calculating the parent's income, the *Hudson* court held that "...a current spouse's income is still relevant in the determination of the 'financial resources of a parent' and the impact of such resources on determining a parent's contribution to college expenses."[18] The new spouse's income is to be considered by a court "...to the extent that it provides a fiscal basis for meeting current living expenses or long-term financial obligations which, absent such income, would be borne by a parent individually."[19] This review of the new spouse's income is necessary because "...a court cannot consider issues such as college contribution in a vacuum and disregard the substantial economic benefits and financial resources inuring to the benefit of a parent as a result of remarriage."[20]

The new spouse will not be required to contribute financially toward college expenses because a parent's contribution toward college "...should not exceed that parent's income whether earned, unearned, or imputed."[21]

It is possible that parent's assets held jointly with their new spouse can be used or encumbered to pay for college expenses. In *Martin v. Dixon*,[22] the ex-wife appealed a trial court decision compelling her to pay one-half of college expenses.[23] The parties' settlement agreement made no mention of apportioning responsibility for post-secondary education, and both parties since remarried.[24] The ex-wife asserted that she was unable to work, had no assets, and thus was unable to contribute to her children's college education.[25]

In ruling upon the college cost issue, the motion judge held that a plenary hearing was unnecessary, and that the college expenses were to be equally divided between the parties even though the ex-wife "...does not have the financial income to cover these expenses," because she could borrow against assets she owned with her new husband in order to pay.[26] After a reconsideration motion was filed, the trial judge held that "...a parent's access to financial resources"[27] was a matter for determination in college contributions, and that the ex-wife could borrow against assets she owned with her new husband because "[s]he is a half owner of the property. And part of a marital lifestyle that frequently borrows against assets to obtain extra financial resources."[28] The ex-wife admitted that "...her current spouse contributes to all of her shelter, food and other necessary expenses. Were she not remarried, she would have to find the financial resources to pay for those necessary expenses."[29]

The ex-wife appealed the order for her to pay half of the college expenses, and the New Jersey Appellate Division reversed because the trial judge failed to hold a plenary hearing.[30] But, the Appellate Division did not reverse or even criticize the trial court's

decision that the ex-wife could be compelled to borrow against all of the assets she owned individually or jointly with her new husband.[31] Instead, the Appellate Division concluded that:

> ...there needs to be a complete factual record and analysis by the motion judge with respect to the financial situation of the parties and, to the extent appropriate, the support available to [ex-wife] from her current husband. *If the judge believes that all of [the ex-wife's] available assets are to be used to fund the college expenses, the judge must explain his reasons and ensure that [the ex-wife] has adequate support from other sources, including her current husband.* In addition, the judge must determine what happened to the assets received by [the ex-wife] in equitable distribution, as well as any separate assets. The judge must then determine whether any of those assets were used for purposes that would shield them from consideration in determining her ability to contribute to the children's educational expenses.[32] (Emphasis added.)

The decision in *Martin* appears to be an extension of the legal doctrine that a parent's financial wherewithal, regardless of the source, is to be shared with his or her children,[33] and should not exceed the party's income.

APPLICABLE DISCOVERY DEMANDS

Discovery is a creation of statutes and court rules supplemented by case law and limited by privileges, public policy, and constitutional provisions. The information sought is discoverable if it is relevant and is not privileged.[34]

Of the numerous discovery demands an attorney can use in litigation, most do not apply to non-parties. The following discusses the most common discovery devices in the context of second family situations:

1. **Depositions:** An attorney can conduct a deposition under Rule 4:14-1 or Rule 4:15-1 of any person, not just a party to the litigation.[35] The deponent may be commanded by subpoena to produce specified documents.[36] This is the only formal discovery device available to compel testimony or document production from a non-party. If the new spouse fails to answer a question, a court can compel either the new spouse or the non-moving party to pay reasonable expenses incurred to obtain compliance, including attorney's fees.[37]

   A non-party can be deposed if the information is relevant and "a non-party deponent may not assert lack of relevancy or materiality since he has no real interest in the outcome of the pending litigation."[38]
2. **Interrogatories and Notices to Produce:** The written discovery device of interrogatories under Rule 4:17-1(a) is limited to a party.[39] The written discovery device of a notice for production of documents and things is also limited to a party under Rule 4:18-1(a), even if the use of it is "permitted as of right."[40]
3. **Request for Admission:** An attorney cannot propound a request for admission upon a non-party.[41]
4. **Case Information Statements (CIS):** During a deposition, an attorney can produce a blank case information statement and ask for the deponent to "fill it out" with responses to questions. A close reading of Rule 5:5-2(b) reveals that only a party can be compelled to complete a CIS. So, the new spouse need not complete a case information statement at any point, even during a properly noticed deposition.
5. **Subpoena *Duces Tecum:*** An attorney could issue a subpoena for records pursuant to Rule 1:9-2. A subpoena commanding the attendance of a new spouse to give deposition testimony may be less problematic than issuing a subpoena *duces tecum*. Often, the only problem caused by the issuance of a subpoena is an extension of the return date for production of the subpoenaed records.
6. **Authorization Forms:** A notice of motion may seek for the non-party to execute authorization forms for the release of bank account statements, credit card statements, and financial documents to expedite discovery.

POTENTIAL DISCOVERY ISSUES

The non-party could object to discovery demands on the procedural grounds of improper service. He or she could object on substantive grounds, including privileged or confidential; irrelevant; vague, ambiguous, or overbroad; and undue burden. Requests for electronically stored information (ESI) have become the subject of much negotiation and litigation. A non-party could seek the entry of a protective order pursuant to Rule 4:10-3 alleging harassment or invasion of privacy.[42] Discovery is impermissible without a good faith basis for showing that the requested information will be useful to the litigation. Discovery is never permitted to be used as a "fishing expedition" to establish otherwise factually unsupported allegations.[43]

The issue of a non-party's objections to discovery demands was raised in *Gerson v. Gerson*.[44] A family judge ruled on the issue of non-party discovery in the equitable distribution of a closely held corporation and set forth the ways to protect a non-party's privacy rights. Three factors were to be considered when a court rules on such objections:

> ...(a) whether good cause has been shown for the examination; (b) whether one not a party to the suite may be unduly affected by revelation of its private affairs; and (c)whether

> the books and records are in the possession, custody and control of the other party. The general rule with regard to inspection of documents is that inspection orders should issue upon a showing that the desired inspection of the document or other property is relevant to the subject matter of the pending action and will aid the moving party in the preparation of his case, or otherwise facilitate proof of her progress at the trial, or the denial of prejudice to the moving party.[45]

The non-party has the right to file an application to quash the subpoena or to limit the scope of discovery and thereby "...afford adequate protection against unwarranted intrusion and invasion of the rights of such person."[46] Six years after *Gerson*, the *Berrie* court set forth five factors to be considered when ruling upon a non-party's motion to limit discovery:

> [T]he interests of the proposed deponents in the outcome of the litigation; the necessity or importance of the information sought in relation to the main case; the ease of supplying the information requested; the significance of the rights or interests which the non-party seeks to protect by limiting disclosure; and the availability of a less burdensome means of accomplishing the objective of the discovery sought.[47]

Nine years after *Berrie*, a motion judge set forth nine factors to be reviewed in deciding whether an individual seeking a protective order pursuant to Rule 4:10-3 had established good cause for the entry of a protective order. Those factors were:

1. The nature of the lawsuits and the issues raised by the pleadings; [sic]
2. The substantive law likely to be applied in the resolution of the issues raised by the pleadings.
3. The kind of evidence which could be introduced at the trial, and the likelihood of it being discovered by the pretrial discovery procedure which is the subject of the application for a protective order.
4. Whether trade secrets, confidential research, or commercial information are sought in the discovery procedure employed, whether they are material and relevant to the lawsuit, and whether a protective order will insure appropriate confidentiality. (Citations omitted.)
5. Whether the pretrial discovery seeks confidential information about persons who are not parties to the lawsuit. (Citations omitted.)
6. Whether the pretrial discovery sought involves privileged materials. (Citations omitted.)
7. Whether the pretrial discovery sought relates to matters which are or are not in dispute.
8. Whether the party seeking discovery already has the material sought.
9. The burden or expense to the party seeking the protective order.[48]

Among the most common financial records sought in a second family situation is the production of state and federal income tax returns filed jointly with the new spouse. The new spouse routinely objects to disclosure of those income tax returns based upon the argument that they would release his or her personal and confidential information. The vexing issue of how jointly filed income tax returns should be released was resolved by the Appellate Division in *DeGraaff v. DeGraaff*.[49]

The issue in *DeGraaff* was the amount of the child support obligation sought to be paid by the ex-husband.[50] The motion judge ordered the ex-husband to provide the ex-wife with a copy of his income tax returns jointly filed with his new wife, over his objections on the grounds that release of them would invade his new wife's privacy, and he appealed.[51] The following holdings in *DeGraaff* explained why the new spouse's income information would be redacted before producing the income tax returns to the ex-spouse:

> The average taxpayer is sensitive about his [or her] returns and wishes to keep it from publication. He [or she] is entitled to that privacy unless there is a strong need to invade it. If disclosure will not serve a substantial purpose, it should not be ordered at all. If ordered, disclosure should be no greater than justice requires. The disclosure of entire returns should never be ordered if partial disclosure will suffice, and in all the clearest cases, the return should be examined by the judge before any disclosure is ordered. Even then, the judge should impose such restrictions and limitations as may be necessary for the production of the taxpayer….[52]
>
> ...The trial judge should have called for defendant's federal tax return, reviewed it in camera, and excised any matters relating to the income or other finances of defendant's present wife. Only then should the return, as redacted, be given to plaintiff. Such a protective procedure will preserve defendant's present wife's legitimate expectation of privacy in the return and furnish plaintiff with the information necessary to pursue the child's right to support.[53]

As a result of *DeGraaff*, the jointly filed income tax returns are to be provided by the party to the trial judge for an *in camera* review, and any information relating to the new spouse will be redacted before production is made to the party ex-spouse.

A new spouse's objections to the production of information or records may affect the litigation position of a remarried party. A judge is required to appreciate the fact that critical evidence that is withheld and is in the possession of only one of the parties severely diminishes the opportunity of a court to rule in that party's favor.[54] A party's failure to produce evidence

that would assist the fact-finder in fact "...raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him."[55] The potential for those adverse inferences needs to be considered when a new spouse raises an objection to discovery demands made of him or her.

PRACTICE TIPS

A notice of motion must seek a demand for discovery, should detail which discovery demands are to be used, and should describe the documents or records sought from a new spouse. Regardless of which discovery demands are used, the client should have a budget for discovery, and the client should consent to conduct discovery after a careful cost/benefit analysis to avoid unnecessary expense or confusion.

If the moving party is the one who has remarried, that party's case information statement should clearly delineate his or her individual expenses and the expenses that may not have existed but for the remarriage. The moving party's contribution toward those new expenses should also be noted. Doing so will assist a judge in determining how the moving party's income is being spent. The columns in a case information statement can be modified to accommodate the battery of information a judge would need, potentially to read as follows:

- Joint Marital Lifestyle
- Party's Individual Expenses
- Additional Expenses Resulting from Remarriage

A fertile area for discovery would be a determination of how the additional expenses that resulted from the remarriage are being apportioned. Are those expenses being paid in proportion to the respective incomes of the party and his or her new spouse? Are those expenses being divided equally? Are there expenses not included for some reason, and if so why not?

What if there is a prenuptial agreement governing how the supporting spouse or parent governs his or her financial affairs with the new spouse? Would a court be bound by the terms of that prenuptial agreement in deciding issues involving the prior family? Discovery may be needed on the intent of the parties to the prenuptial agreement.

Other areas ripe for discovery would be the "substantial economic benefit and financial resources"[56] that the party received as a result of the marriage. If there is an allegation of an inability to contribute to college costs, discovery should be sought on the amount of support available to the party from the current spouse, what happened to the party's assets received in equitable distribution, the use of the assets jointly owned with the new spouse, and whether any of those assets were used in an attempt to insulate them from consideration in determining the ability to pay toward child support or college costs.

A motion to limit discovery should include a separate analysis of each of the factors set forth in the three cases of *Gerson*, *Berrie*, and *Catalpa*. Such analysis can be performed in three separate chart/table formats with the left-hand column setting forth each factor under each case and the right-hand column setting forth the factual analysis.

CONCLUSION

A new spouse has no legal obligation to provide financial support for a stepchild. A child does not suffer because of a parent's remarriage. A dependent spouse does not suffer or benefit because of a supporting spouse's remarriage. The issue of discovery of a new spouse's financial and economic circumstances is a sensitive one, and requires forethought under the facts of each case before a motion for modification or determination of any support obligation is filed. ■

ENDNOTES

1. The term "non-marital partner" refers to an individual who is part of an officially established civil union under the Civil Union Act, N.J.S.A. 37:1-28 to -36.
2. For the sake of brevity, this article uses the term "new spouse" interchangeably for either stepparents or non-marital partners who are members of civil unions.
3. *Zazzo v. Zazzo*, 245 N.J. Super. 124, 130 (App. Div. 1990).
4. Sylvia B. Pressler and Peter G. Verniero, *Rules Governing the Courts of the State of New Jersey,* 2011, p. 2436-2437.
5. *Id*. at p. 2457, 2474.
6. *Sharp v. Sharp*, 336 N.J. Super. 492, 503 (App. Div. 2001) finding that college costs and child support for an unemancipated child are related obligations. *Raynor v. Raynor*, 319 N.J. Super. 591, 613-14 (App. Div. 1999) holding that life insurance requirement in a divorce judgment was intended to provide security for the related obligations of child support and college costs. *Hudson v. Hudson*, 315 N.J. Super. 577, 584 (App. Div. 1998) finding that "[c]hild support and contribution to college expenses are two discrete yet related obligations imposed upon parents." *Beck v. Beck*, 239 N.J. Super. 183, 190 (App. Div. 1990) a substantial college tuition obligation could result in a reduction of child support.
7. *Welch v. Welch*, 401 N.J. Super. 438, 440 (Ch. Div. 2008).
8. *Id*. at 442.
9. *Id*. at 446.
10. *Id*. at 442.
11. *Id*. at 443.
12. *Id*. at 444.
13. *Id*. at 446.
14. *Ibid*.
15. *Hudson v. Hudson*, 315 N.J. Super. 577 (App. Div. 1998).
16. *Id*. at 579.
17. *Id*. at 582.
18. *Id*. at 583.
19. *Id*. at 583-84.

20. *Id*. at 584.
21. *Ibid*.
22. *Martin v. Dixon*, A-6344-07T3 (App. Div. 2009).
23. *Id*. at 1.
24. *Id*. at 2.
25. *Id*. at 3.
26. *Id*. at 6-7.
27. *Id*. at 9.
28. *Id*. at 9-10.
29. *Id*. at 10.
30. *Id*. at 13.
31. *Id*. at 17.
32. *Ibid*.
33. *Isaacson v. Isaacson*, 348 N.J. Super. 560, 579 (App. Div.), *certif. denied*, 174 N.J. 364 (2002)("where the parties have the financial where-withal to provide for their children, the children are entitled to the benefit of financial advantages available to them").
34. N.J.R.E. 401; *Catalpa v. Franklin Twp. Zoning Bd.*, 254 N.J. Super. 270, 273 (L. Div. 1991).
35. R. 5:5-1(c).
36. R. 4:14-7(a).
37. R. 4:23-1.
38. *Berrie v. Berrie*, 188 N.J. Super. 274, 279-80 (Ch. Div. 1983).
39. R. 5:5-1(a).
40. R. 5:5-1(d).
41. R. 4:22-1.
42. *Berrie*, *supra*, 188 N.J. Super. at 282.
43. *Axelrod v. CBS Pubs*., 185 N.J. Super. 359, 372 (App. Div. 1982).
44. *Gerson v. Gerson*, 148 N.J. Super. 194 (Ch. Div. 1977).
45. *Id*. at p. 198.
46. *Berrie*, *supra*, 188 N.J. Super. at 282.
47. *Id*. at p. 284.
48. *Catalpa*, *supra*, 254 N.J. Super. at 273-274.
49. *DeGraaff v. DeGraaff*, 163 N.J. Super. 578 (App. Div. 1978).
50. *Id*. at p. 579.
51. *Ibid*.
52. *Id*. at 582.
53. *Id*. at 583.
54. *Wilson v.Amerada Hess Corp.*, 168 N.J. 236, 253 (2001).
55. *State v. Clawans*, 38 N.J. 162, 170 (1962).
56. *Hudson*, *supra*, 315 N.J. Super. at 584.

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Hey That's Not My Kid!

College Costs—Whose Obligation Is It?

by Timothy F. McGoughran

The responsibility of parents to contribute toward the cost of higher education of their children, especially in post-judgment scenarios, can be quite difficult to define. In cases where either parent remarries after the divorce, defining contributions toward higher education can be even more complex. In those cases, the changed circumstance doctrine often comes into play as it relates to the re-marriage of one or both of the parties and the financial circumstances of their new spouse.

Consider the following factual scenario: The parties have been divorced for eight years, and now little Johnny is going off to college. The parties' property settlement agreement has standard language providing that "both parties shall contribute to the costs of college education in accordance with their ability to pay same at the time the child becomes a full-time matriculating student, diligently pursuing a degree on a continual four year basis."

At the time of the divorce, the wife had income imputed to her of $30,000 per year and the husband was earning $85,000 per year. The wife has subsequently remarried, and has another child from that relationship. Her current husband is a bond trader earning $750,000 per year and the wife does not need to work. Her former husband earns $102,000, having received small but steady increases in his income.

In light of her current husband's income, the wife's standard of living (and also little Johnny's) is far above that of the former husband. What weight will the court give to this factor in arriving at a fair distribution of Johnny's college expenses between the parents (*i.e.*, the former husband and wife)? Moreover, how does the court factor into this obligation the 'good fortune' of the wife based on her current marriage, without creating an obligation on a third party (the current husband) who has no legal obligation to support the child?

New Jersey is in the minority of states that require divorced parents to contribute to their children's college education. The seminal case in New Jersey relating to the obligation of divorced parents to contribute to their children's college education is *Newburgh v. Arrigo.*[1] The standard for review in these cases was established with the guiding principal that children of divorce are entitled to a college education. The Supreme Court in *Newburgh* reasoned as follows:

> In the past, a college education was reserved for the elite, but the vital impulse of egalitarianism has inspired the creation of a wide variety of educational institutions that provide post-secondary education for practically everyone. State, county and community colleges, as well as some private colleges and vocational schools provide educational opportunities at reasonable costs. Some parents cannot pay, some can pay in part, and still others can pay the entire cost of higher education for their children. In general, financially capable parents should contribute to the higher education of children who are qualified students. In appropriate circumstances, parental responsibility includes the duty to assure children of a college and even of a postgraduate education such as law school.[2]

Newburgh set forth the following criteria to be reviewed by the trial courts in making determinations regarding the contribution each parent should make while contributing to their children's college expenses:

> In evaluating the claim for contribution toward the cost of higher education, courts should consider all relevant factors, including (1) whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; (2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; (3) the amount of the contribution sought by the child for the cost of higher education; (4) the ability of the parent to pay that cost; (5) the relationship of the requested contribution to the kind of school or course of study sought by the child; (6) the financial resources of both parents; (7) the commitment to and aptitude of the child for the requested education; (8) the financial resources of the child, including assets owned individually or held in custodianship or trust; (9) the ability of the child to earn income during the school year or on vacation; (10) the availability of financial aid in the form of college grants and loans; (11) the child's relationship to the paying parent, including mutual affection and

shared goals as well as responsiveness to parental advice and guidance; and (12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.[3]

In analyzing the above factors, what can become problematic is the scenario set forth where one spouse, through re-marriage, has newfound wealth that is based upon their current spouse's income. In those cases, the question arises regarding whether the income from the new spouse is part of the "good fortune" of the divorced spouse that should be looked at for purposes of support and college contribution.

In *Hudson (n/k/a Drago) v. Hudson*,[4] the court discussed this very issue:

> In *Newburgh v. Arrigo*,[5] the Supreme Court identified the factors to be considered in evaluating a claim for college contribution. Among these factors was "the financial resources of both parents."[6] Our analysis of how to assess and measure these resources begins with a review of *Ribner*, recognizing that *Ribner* is not the controlling authority in this case to the extent that it dealt with an increase in child support rather than college contribution. Because there seems to be some rather widespread confusion about the meaning and applicability of *Ribner*, however, we will address that opinion here.
>
> In *Ribner*, plaintiff remarried and her new husband had income and assets which affected both her standard of living and her ability to meet current expenses. We suggested alternative considerations of a current spouse's income. We first noted that such income is relevant in determining whether there was "good cause" for disregarding or modifying the Child Support Guidelines. R. 5:6A; *Ribner*.[7] Second, if the guidelines do apply, we concluded that income received from the current spouse is to be included in the parent's income in a guidelines calculation of the support obligations of the parties. We expressed the caution that in making such a financial analysis, a "plaintiff's spouse [has no] duty to support her children from a prior marriage."[8] Thus any analysis under *Ribner*, whether applying the guidelines or not, requires a careful balance between consideration of the current spouse's income and not obligating that spouse to support a parent's child from a former marriage. Superimposed on this balance is the consideration that "[c]hildren are entitled to have their 'needs' accord with the current standard of living of both parents, which may reflect an increase in parental good fortune."[9]

Compare the court's view in *Hudson* to a different view taken by the courts when reviewing a direct child support obligation as compared to an indirect "college contribution" calculation. The following reflects the the appellate court's analysis of this issue in *Spiegler v. Spiegler*,[10] an unreported decision:

> Plaintiff also maintains that the trial court erred in failing to consider that defendant's current household benefits from his second wife's income, that his second wife pays in whole or in part the costs of his child with her, and that he and his second wife are able to pay all of their expenses and save money. We reject this argument as well. When a divorced parent remarries and has children, the court considers the addition of those children when adjusting the parent's support obligations. Child Support Guidelines, Pressler, *Current N.J. Court Rules*, Appendix 1X-A to R. 5:6A at 2322-23 (2009). In calculating such an adjustment, the court considers the income of the parent's second spouse. *Ibid.* However, the guidelines expressly provide that the income of other household members including current spouses, who are not legally responsible for supporting the child, is excluded from the calculation of the parent's income. Child Support Guidelines, Pressler, *Current N.J. Court Rules*, Appendix IX-B to R. 5:6A, at 2342-43, 2360-61 (2009). Here, the trial court did include the income of defendant's second wife when calculating defendant's deduction for his child with his second wife. *See* Child Support Guidelines, Pressler, *Current N.J. Court Rules*, Appendix IX-A to R. 5:6A at 2322-23 (2009). The trial court, however, correctly excluded the second wife's income when calculating defendant's income under the guideline formula. As the guidelines implicitly recognize, including the income of the new spouse in the guideline calculation would effectively result in a redistribution of the new spouse's income to her husband's former family. The financial status of defendant's second wife does not inure to the benefit of plaintiff or her children except to the extent the guidelines appropriately take into account the second wife's income when computing defendant's other dependent deduction for her child. Thus, the trial court properly considered the income of defendant's second wife only in its calculation of a deduction for his child with his second wife.

In *Spiegler*, the court provides a succinct analysis of the impact of the current spouse's income for purposes of calculating child support.[11] *Spiegler* made clear that in recalculating child support, the current spouse's income is to be used for the limited purpose of determining the other dependent deduction. It is not to be considered as income to the payor spouse for support purposes. The contrast between the court's analysis in *Hudson* versus the court's analysis in *Spiegler* suggests that the court views differently the payment of child support as a direct payment to the child as opposed to college contributions paid indirectly to an institution on behalf of the child.

Statutorily in New Jersey we are guided by N.J.S.A. 2A:34-23, which states in pertinent part the criteria for establishing child support and *maintenance* for children of divorce:

> Pending any matrimonial action or action for dissolution of a civil union

brought in this State or elsewhere, or after judgment of divorce or dissolution or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and *maintenance* of the children, …

a. In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors:
   1. Needs of the child;
   2. Standard of living and economic circumstances of each parent;
   3. *All sources of income and assets of each parent*;
   4. Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;
   5. Need and capacity of the child for education, including higher education;
   6. Age and health of the child and each parent;
   7. Income, assets and earning ability of the child;
   8. Responsibility of the parents for the court-ordered support of others;
   9. Reasonable debts and liabilities of each child and parent; and
   10. Any other factors the court may deem relevant.

[Emphasis added]

While the statute does not directly reference post-secondary education, it certainly has the all-encompassing word "maintenance" throughout the statute. The statute also makes clear that the court is to consider the "income and assets of each parent." However, the statute does not go on to explain the definition of "all sources of income and assets of each parent."

A VIEW FROM OTHER STATES

A review of case law from other states provides some guidance. In an Illinois case, *In a Marriage of Vicky C. Drysch n/k/a Vicky Rullo, and Mark J. Drysch,*[12] the plaintiff appealed the trial court's order, which required the respondent, Mark Drysch, to pay only 10 percent of the educational expenses of the parties' son, Adam. On appeal, the plaintiff argued that in determining this amount the trial court improperly considered the income of her current husband, Alex Rullo. In that matter, the parties were divorced in 1988, and the judgment of dissolution included a provision as follows:

> 12. Future Education Expenses: That the parties shall contribute to the future education expenses of the minor children based upon their respective financial abilities, considering the statutory standards when the children show the aptitude and desire to continue their education. If the parties cannot agree in this regard, a court of competent jurisdiction shall do so upon proper notice and petition, taking into consideration Section 513 of Chapter 40 of the Illinois Revised Statutes.[13]

In that case, it was argued that the child would be attending Purdue University for $20,000 per year, would not be receiving any scholarships, and that the respondent, Mark, was earning in excess of $80,000 per year from his employment and able to contribute to the child's educational expenses.

The plaintiff, Vicky, was employed by her present husband, earning $50,000 per year, but acknowledged that their expenses were co-mingled. A joint tax return was entered into evidence, over the objection of Vicky, indicating joint income to her and her current husband of $621,000 for that year. The findings of fact by the court indicated that Mark's standard of living had remained relatively similar since the time of the divorce, while Vicky enjoyed a higher standard of living now than when she was married to Mark. Further, the court found that the son enjoyed a more affluent lifestyle now than when his parents were married.

In Illinois, a relative factor to be considered by the court is "the financial resources of both parents." There, the court determined that a financial resource is defined as "money or any property that can be converted to meet needs" as well as the "available means or capability of any kind."[14]

Citing *Black's Law Dictionary*,[15] the court found that by utilizing the word "resources," rather than more narrow terms such as "income" or "salary," the Legislature intended the trial court to consider all of the money or property to which a parent has access. This could include "that parent's income, her property and investment holdings, as well as money and property that could be available to her through her new spouse."[16]

Citing *Greiman v. Friedman*,[17] that court stated:

> Realistically, it is likely that both parties pool their resources with those of their second spouses, so that their assets and liabilities are substantially intertwined. Allowing the parties to submit detailed information of their finances will permit the trial court to reach a more principled, and thus more equitable, determination of the share that each party should contribute.[18]

Unlike New Jersey, in Illinois there are specific statutory provisions governing college education as pointed out in *Drysch*:

> In entering its order, the trial court in *Drysch* noted that the relevant factors to be considered pursuant to section

> 513 of the Illinois Marriage and Dissolution of Marriage Act (the Dissolution Act)[19] were (1) the financial resources of both parents; (2) the standard of living the child enjoyed during the marriage; and (3) the financial resources of the child.

The appellate court in Illinois has also pointed to the growing trend toward inclusion of the current spouse's financial resources for purposes of calculating contribution toward a child's support and college education. In *Street. v. Street,*[20] the court stated:

> In reviewing the case law on this issue, there are no Illinois cases other than *Drysch* which have dealt directly with the issue at hand. However, as previously indicated, the traditional rule had been that the financial assets of the current spouse are not relevant in making a support determination. …controlling case law to the contrary, it is difficult to say that the trial court really abused its discretion in refusing to allow inquiry into Carl's assets in this case. However, there is clearly a current trend in the case law moving away from the traditional rule of law on this issue. The current trend began with *In re Support of Whitney,*[21] followed by *Greiman v. Friedman,*[22] which found that the trial court abused its discretion in not allowing testimony about the father's financial obligations to his second family. These cases have been followed by several others which have authorized a review of the noncustodial parent's current spouse's income.[23] In fact, this court found that the payor's monthly expenses are to be shared to the extent that the new spouse contributed to their living expenses in *Thurston v. Thurston.*[24] Although each of these cases dealt with the current spouse of the payor, the same underlying principle should apply to the current spouse of the payee. To the extent that the current spouse of the payee has income or assets which are or can be used to contribute to the living expenses of the payee, his or her income and assets should be considered by the court in making its determination regarding the amount the payee is able to contribute to the child's education. Certainly, we are not saying that the new spouse of a parent is obligated to pay for the child's education, but only that to the extent the new spouse contributes to the expenses which would otherwise be paid by the parent, the new spouse's income and assets are relevant. Given this analysis and the current trend of the law on this issue, we believe that the better rule of law is to follow the *Drysch* decision. Therefore, we find in the present case that failing to consider Carl's income and assets to the extent they are or can be used to contribute to Linda's expenses constitutes an abuse of discretion.[25]

As noted above, in New Jersey we have no such statute to specifically address the college contribution question.

Compare the criteria for support and contribution of a child under N.J.S.A. 2A:34-23 ["(3) All sources of income and assets of each parent"] and the criteria for contribution toward a child's education under *Newburgh* [specifically, "(4) the ability of the parent to pay that cost;… (6) the financial resources of both parents"][26] to the Illinois law, which requires a consideration of (1) "the financial resources of both parents."[27] The apparent intention of the courts to be expansive is clear from all three of these sources. Now, compare this to the language in the child support guidelines and the *Speigler*[28] unreported decision that excludes the subsequent spouse's income for direct child support purposes. There is good case law for both sides of this issue, depending on the facts of your individual case.

The trend appears to be a middle ground centered on the ambiguous concept of 'fairness.' At present, fairness appears to be interpreted by the courts to require an inclusive and expansive definition of the financial resources to be considered in college contribution matters. The concept of the current spouse having *carte blanche* immunity from supporting a step-child appears to be a notion of the past.

For practitioners, the best practice is to integrate language into the property settlement agreement that incorporates the intention of your client. If your client is on the verge of remarriage at the time of the divorce, you can add language eliminating consideration of a step-parent's income or financial resources, specifically discounting existing case law. Of course, the opposite is also true, as you can equally require the inclusion of all household financial resources to be considered in considering each party's contribution toward college expenses at a later date.

Other fact patterns arise where income and resources from third parties come into play, such as monies that may be held for the children by grandparents or other relatives. Remember, *Newburgh* was essentially an estate case with wide-ranging family law implications. Until the Supreme Court weighs in, there is room for craftsmanship by the lawyer in protecting his or her client's rights in these interesting scenarios. ■

ENDNOTES

1. *Newburgh v.Arrigo,* 88 N.J. 529 (1982).
2. *Id*. at 544.
3. *Id*. at 545.
4. *Hudson (n/k/a Drago) v. Hudson,* 315 N.J. Super. 577, at 588; 719 A.2d 211, at 214; (App. Div. 1998).
5. 88 N.J. 529, 443 A.2d 1031 (1982).
6. *Id*. at 545, 443 A.2d 1031.
7. *supra*, 290 N.J. Super. at 74, 674 A.2d 1021.
8. *Id*. at 75, 674 A.2d 1021.
9. *Zazzo v. Zazzo*, 245 N.J. Super. 124, 130, 584 A.2d 281 (App. Div. 1990), *certif. denied*, 126 N.J. 321, 598 A.2d 881 (1991), at 582.
10. *Spiegler v. Spiegler*, Docket No. A-4028-07T2, Superior Court of

New Jersey, Appellate Division, 2009 N.J. Super. Unpub. LEXIS 1109, May 8, 2009.

11. Child Support Guidelines, Pressler, Current N.J. Court Rules.
12. 314 Ill. App. 3rd 640; 732 N.E. 2nd 125 (2000).
13. Ill. Rev. Stat. 1987, ch. 40 par. 513 (now 750 ILCS 5/513 (West 1998)).
14. 314 Ill.App. 3rd 640.
15. 1179 at 645.
16. 90 Ill.App. 3d at 941, 949, 46 Ill. Dec. 355, 414 N.E. 2nd 77 (1980).
17. *Greiman*, 90 Ill. App. 3d at 949.
18. 750 ILCS 5/513 (West 1998).
19. *Newburgh v.Arrigo*, 88 N.J. 529 (1982), at 545.
20. 325 Ill.App. 3d 108; 756 N.E.2d 887; 2001.
21. 90 Ill. App. 3d 734, 413 N.E.2d 872, 46 Ill. Dec. 118 (1980).
22. 90 Ill. App. 3d 941, 414 N.E.2d 77, 46 Ill. Dec. 355 (1980).
23. *See e.g., In re Marriage of Garelick*, 168 Ill. App. 3d 321, 522 N.E.2d 738, 119 Ill. Dec. 76 (1988); *In re Marriage of Keown*, 225 Ill.App. 3d 808, 587 N.E.2d 644, 167 Ill. Dec. 375 (1992); and *In re Marriage of Riegel*, 242 Ill.App. 3d 496, 611 N.E.2d 21, 183 Ill. Dec. 168 (1993).
24. 260 Ill.App. 3d 731, 633 N.E.2d 118, 198 Ill. Dec. 656 (1994).
25. *Newburgh v.Arrigo*, 88 N.J. 529 (1982), at 545.
26. 260 Ill.App. 3d 731, 633 N.E.2d 118, 198 Ill. Dec. 656 (1994) at 114.
27. 750 ILCS 5/513 (West 1998).
28. *Spiegler v. Spiegler*, Docket No. A-4028-07T2, Superior Court of New Jersey, Appellate Division, 2009 N.J. Super. Unpub. LEXIS 1109, May 8, 2009.

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Just When You Thought the Case Was Over

by Susan M. Scarola

The divorce is concluded. You sent a closing letter to your client emphasizing all the critical provisions of the judgment. You advised of the necessity to have the qualified domestic relations order (QDRO) or the domestic relations order (DRO) finalized, to make a new last will and testament and to designate the appropriate beneficiaries for life insurance policies, annuities, IRAs, 401(k)s and other retirement plans. But how many of your clients comply? And do you follow up to ensure compliance?

How critical is this for the first family? And how much more critical is it for the second? How can needless litigation or malpractice be avoided?

LIFE INSURANCE

The First Family

If there are issues of support related to a spouse and children, the judgment of divorce likely includes terms in the settlement agreement regarding the continuation or designation of particular beneficiaries. This is the primary obligation of the payor. The first family is presumably relying on this benefit to maintain its lifestyle. You should urge the payor to review all life insurance designations upon entry of the judgment, and again when any major life event occurs. You should also remind your client to change the designations in accordance with the agreement, such as when children become emancipated or the former spouse remarries.

The Second Family

Unfortunately, the second family may be lulled into believing it is the beneficiary of a life insurance policy when it is not. You should advise your client of the necessity of providing coverage for family number two, and of not comingling these benefits with those for the first family.

For example, the husband has two children from his first marriage and two from his second marriage. The first two children have graduated from college, have post-graduate degrees and are married. The second two children are pre-teens. The husband decides to name all four children as equal beneficiaries of his $500,000 policy. (After all, he loves them equally and believes he is providing well for all of them). This policy may be sufficient for the first two children. The second two children, however, have yet to complete their educations, including post-graduate degrees, or have weddings or other major events that were traditionally celebrated in the household.

The second family must perform the necessary calculations to determine what its insurable needs are and what is needed to meet them. When your client comes to you with the pre-nuptial agreement in hand (for the second marriage), or consults with you about preparing or revising his or her will, remind the client of the importance of meeting obligations to both family units. It is also important to counsel your client regarding any work-related life insurance. With some clients, the beneficiary may not have been changed since before they were married for the first time, and "Mom" may still be listed as the beneficiary.

LAST WILL AND TESTAMENT

The importance of making a last will and testament to protect the second family cannot be understated. In the absence of a will, property held by that person is distributed by intestacy, and state law will designate who receives the assets.[1] For example, the husband has two children from his first marriage and has just recently married a woman with no children. The husband has life insurance for the first two children, as required by the judgment of divorce, to meet his support obligations. He also has $500,000 in various bank accounts, certificates of deposit and stocks, all held solely in his name. The husband does not make a will because he believes if anything happens to him his second wife will inherit all of his financial assets.

Wrong. The second wife will only receive the first 25 percent (but not less than $50,000 or more than $200,000), plus half of the balance. The result is that she receives $125,000 plus $187,500, for a total of $312,500. The surviving two children receive $187,500, which is equally divided between them. This is certainly not the result contemplated by either the husband or the second wife. If, however, the husband had two children from his first marriage and two surviving children from his second marriage, the second wife would still receive the $312,500. The four surviving children would then equally share the remaining $187,500, or $46,875 each.

A spouse or child omitted in a will is also protected by the intestacy laws unless a different intent can

be construed from the making of the instrument, such as it being in conformity with a pre-nuptial agreement.[2] Under almost all circumstances, it is preferable for spouses to set forth their testamentary intentions in a properly prepared will. Appropriate trusts can be created; personal property can be distributed; and bequests can be clearly indicated.

If you are not comfortable drafting a will for your client, you should cultivate a relationship with a firm that specializes in this area. Not only will your clients benefit, but you and your firm may find another source of referrals to your practice.

RETIREMENT PLANS

How many judgments have been entered without further action taken on the QDRO or the DRO? Perhaps the client was advised of the need for action but did not respond to your letter. Once again, to protect both the first and second families, the provisions of the divorce judgment must be implemented. This means the QDRO (or DRO) must be prepared, the beneficiaries of retirement plans must be designated, and annuities and other retirement assets must reflect proper ownership and beneficiary designation.

QDROs are covered by the Employee Retirement Income Security Act (ERISA), federal legislation designed to protect both the payee and the alternate payee of pensions, and are used for non-public pensions.[3] DROs are used for specific state and federal pensions. Without delineating the specific statutory requirements to be met for each type of order to be accepted and implemented by the plan administrator, it is critical that these orders be prepared and filed timely. This will help prevent the possible delay of benefits to the payee and the alternate payee, and the loss of benefits that might have been payable had the order been filed.

The same is true for annuities, 401(k)s, IRAs, and other forms of retirement benefits.The plan administrator or financial institution may freeze these accounts for a period of time to permit the entry of the necessary order. If the order is not entered in a timely manner, the funds may be released or withdrawn, and the beneficiary may be left without recourse. It is, therefore, critical for the first and second family to make sure the provisions set forth in the judgment regarding these assets are carried out as expeditiously as possible. Again, if this is an area in which you are not comfortable advising your client, find an expert who can assist you.

Substantial rights to inheritances, insurance proceeds and retirement benefits may be jeopardized if proper attention is not paid to the precise terms of the judgment of divorce and to ensuring those terms are promptly implemented. The case is not truly over until this has been accomplished. The financial security of both the first and second families may depend on your diligence. ■

ENDNOTES

1. N.J.S.A. 3B:5-3 *et seq*.
2. N.J.S.A. 3B:5-15.
3. Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §1001 *et seq*.

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Stepparents

The Unexpected Impact They Can Have on the Primary Parent's Decisions Regarding the Children

by Elizabeth M. Vinhal

Recently, this author heard a story from a colleague about a client who insisted on inserting language into his property settlement agreement that stated if his wife (who was appointed the primary parent in the agreement) remarried or cohabitated, custody and parenting time would be immediately revisited. The father's objective for including this language was to ensure that if a stepparent or significant other became part of his child's life, the father would continue to have more influence over decisions regarding his child than the stepparent.

Many times when drafting a property settlement agreement parties do not question who is going to be designated the primary parent or come to an understanding of the full impact the appointment of the primary parent can have on future decisions regarding the children's health, religion, education, and/or welfare. The purpose of this article is to discuss what type of decisions a court may defer to a primary parent, and how a stepparent can influence those decisions.

In 1981, the seminal case *Beck v. Beck*[1] addressed joint custody arrangements. In pertinent part, Justice Robert Clifford, writing for the Court, held:

> Joint custody attempts to solve some of the problems of sole custody by providing the child with access to both parents and *granting parents equal rights and responsibilities regarding their children*.... Under a joint custody arrangement, legal custody—the legal authority and *responsibility for making major decisions regarding the child's welfare—is shared at all times by both parties*. Physical custody, the logistical arrangement, whereby the parties shared the companionship of the child and are responsibility for 'minor' day-to-day decisions maybe alternated in accordance with the needs of the parties and their children.[2]

Clearly, it was the New Jersey Supreme Court's intention to ensure that both parents "remain decision-makers in the lives of their children."[3] "...[T]he court should consider awarding legal custody to both parents with physical custody to only one and liberal visitation rights to the other. *Such an award will preserve the decision-making role of both parents*..."[4]

Over a decade later, in the 1995 New Jersey Supreme Court case *Pascale v. Pascale,*[5] it appears at first glance that the Court echoed the philosophy in *Beck*. However, a closer look at *Pascale* reveals that the Court was slowly starting to change its view on the equal decision-making power of both parents. In *Pascale* the Court coined the phrases "primary caretaker" and "secondary caretaker."[6] This distinction can easily be perceived as the beginning of the Court diluting the secondary caretaker's status as a decision maker in the parties' children's lives.

Contrary to the *Beck* holding, over the course of the last 15 years case law has evolved that provides the primary parent with superior authority over the secondary parent when making major decisions regarding their children's health, education, religion and/or welfare, even if a joint custodial arrangement exists. What one parent believed to be joint decision-making power is slowly turning into an unequal playing field. More alarming, however, is that no one can predict how a third party (*i.e.*, a stepparent) can influence the primary parent's decisions.

Imagine this case scenario: The father (Catholic) and mother (Catholic) reach an amicable resolution regarding custody and parenting time of their daughter (age three). The parties agree to joint legal custody, and the mother is designated the primary parent. The parties' property settlement agreement is silent in regard to the child's religious upbringing, but both parties have no reason to believe their daughter would not be raised Catholic. Three years later, the mother marries a Jewish man and decides to convert to Judaism. She also wants her child to be raised as Jewish. The father strongly objects. Without researching the issue, it is likely that a practitioner would argue that the child would continue to be raised Catholic and the stepparent's religious influence would be irrelevant to the secondary parent's preference. However, this may not be the case.

In *Feldman v. Feldman*,[7] the Appellate Division held:

> We hold that the *primary caretaker has the sole authority to decide the religious upbringing of the children* and the secondary caretaker shall not enroll the children in training and education classes for programs in a different religion over the primary caretaker's objections when exercising visitation rights.[8]

"The law is clear that the primary caretaker has the right to determine the religious upbringing of the children in his or her charge."[9] "The courts will not interfere with the selection by the custodial parent on religious training."[10] Therefore, what would appear an amicable resolution at the time of the divorce could be drastically altered by the stepparent's future influence over the primary caretaker.

A stepparent's influence over the primary's parent's religious preference is not the only place where a secondary parent's input may be disregarded. It can happen when medical decisions need to be made for the parties' children as well. In *Brzozowski v. Brzozowski*,[11] the core issue before the court was whether a father, who shared joint legal custody of the child, could prevent the mother, who was the residential parent, from authorizing nonemergency surgery for the child.[12] The court found that the residential parent had superior decision-making authority over the nonresidential parent.[13]

Specifically, the court held:

> ...any court should be reluctant to substitute whatever limited expertise it may have for the empirical knowledge and day-to-day experience of the parent with whom the child lives, except where there is a clear showing that an act or remission will contravene the best interest of the child. Here, no such showing has been made.[14]

This decision raises an array of issues. First, why does a secondary caretaker have less input than the primary caretaker toward making medical decisions regarding their children? In this case, the secondary parent obtained a second opinion that undisputedly disagreed with the proposed surgery.[15] Why is that opinion given less weight? Second, assuming the primary parent was remarried, isn't it likely that the primary parent would rely on the stepparent's judgment in making medical decisions for the children rather than discuss the advantages and disadvantages of the proposed surgery with the biological parent. What if the stepparent has a completely different philosophy of medical care than the secondary parent? Why does the secondary parent's input, who is the child's biological parent, become subordinate?

Another practice point to consider when drafting a property settlement agreement is stipulating to the child's last name. Rarely do property settlement agreements state that a child's last name will not be changed. This can cause a great deal of heartbreak for the secondary parent in light of the line of cases that hold there is a presumption in favor of the primary parent choosing the surname of a child.[16]

In the New Jersey Supreme Court case *Ronan v. Adely,*[17] the Court held:

> When the primary caretaker seeks to name or adhere, change the surname of a child, there is presumption in favor of the primary caretaker that the name selected is in the best interest of the child.[18]

Therefore, if a party remarries and takes the name of the stepparent, and wants his or her child to also take the surname of the stepparent, the presumption is in favor of the primary parent that changing the child's name from the biological parent's surname to the stepparent's surname is in the child's best interest.

A stepparent's influence can also affect how a parent disciplines his or her child. In *Pogue v. Pogue*,[19] the trial court was asked to determine whether the parties' son should be enjoined from playing baseball as a result of his poor grades.[20] The trial court cited *Boerger v. Boerger,*[21] which held:

> The parent to whom custody is awarded must logically and naturally be the one who lawfully exercises the greater control and influence over the child. The [residential parent], who lives with the child more than six days a week, as contrasted with the [non-residential parent's] limited visitation...is the one who actually rears the child and shapes its moral, mental, emotion and physical nature.[22]

The *Pogue* court held that it "will not interfere, by hold a hearing or otherwise, with day-to-day discipline of the custodial parent unless some basic problem involving the welfare of the children is involved."[23]

As the case law has evolved, practitioners should think about language they may want to include when drafting property settlement agreements. Many times parents underestimate a third party's influence in their children's lives, or do not or cannot even consider it at the time of their divorce. Therefore, having an understanding of the law in regard to primary parent's decision making authority can help both parties have realistic expectations for what may lie ahead. ■

ENDNOTES

1. 86 N.J. 480 (1981).
2. *Id*. at 486-87 (emphasis added).
3. *Id*. at 487.
4. *Id*. at 500 (emphasis added).
5. 140 N.J. 583 (1995).
6. *Id*. at 597-98.
7. 378 N.J. Super. 83 (App. Div. 2005).
8. *Id*. at 85 (emphasis added).
9. *Id*. at 91 (citations omitted).
10. *Wojnarowicz v. Wojnarowicz*, 48 N.J. Super. 349, 354 (Ch. Div.1958)(citations omitted).
11. 265 N.J. Super. 141 (Ch. Div. 1993).
12. *Id*. at 142.
13. *Id*. at 147.

14. *Id.* at 147.
15. *Id.* at 143.
16. *Gubernat v. Deremer*, 140 N.J. 120 (1995); *Staradumsky v. Romanowski*, 300 N.J. Super, 618, 621 (App. Div 1997); *J.S. v. D.M.*, 285 N.J. Super, 498 (App. Div 1995); *Ronan v. Adely*, 182 N.J. 103 (2004).
17. 182 N.J. 103 (2004).
18. *Id.*
19. 147 N.J. Super. 61 (Ch. Div. 1976).
20. *Id.*
21. 26 N.J. Super. 90 (Ch. Div. 1953).
22. *Id.* at 104.
23. *Pogue v. Pogue, supra*, at 64.

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A Balancing Act

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The most significant public policy consideration is that the children's interests and needs should trump the interests of a stepparent who has induced, through his or her promises and conduct, the children to rely on him or her. ■

ENDNOTES

1. Susan L. Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Laws Regarding Stepparent Rights and Obligations*, 48 *Fam. Ct. Rev.* 528, 529 (2010).
2. 97 N.J. 154 (1984).
3. 44 A.L.R. 4th 520 (2010).
4. *Id.* at 167.
5. *Id.* at 158-61.
6. *Id.* at 162.
7. *Id.* at 163.
8. *Id.*
9. *Id.*
10. *Id.* at 167.
11. *Id.*
12. *Id.* at 169.
13. *Id.* at 168.
14. *Id.*
15. *Id.* at 168-69.
16. *Id.* at 169.
17. *Id.* at 170.
18. *Id.* at 167.
19. *Id.*
20. *Id.* at 159.
21. *Id.* at 174 (Handler, J., concurring in part and dissenting in part).
22. *Id.* at 176 (Handler, J., concurring in part and dissenting in part).
23. 126 N.J. Super. 394 (J. & D.R.Ct. 1973), *aff'd*, 135 N.J. Super. 35 (App. Div. 1975).
24. 139 N.J. Super. 366 (Ch. Div. 1976), *aff'd*, 150 N.J. Super. 122 (App. Div. 1977).
25. *Ross*, 126 N.J. Super. at 400.
26. *A.S.*, 139 N.J. Super. at 371-72.
27. 100 N.J. 567 (1985).
28. *Id.* at 568 (Handler, J., concurring).
29. *Id.* at 571 (Handler, J. concurring).
30. *Id.* at 573 (Handler, J. concurring).
31. *Id.* at 574 (Handler, J. concurring).
32. N.J.S.A. 9:17-38 to -59.
33. *M.H.B.*, 100 N.J. at 579 (Handler, J. concurring).
34. *Id.* at 579-80 (Handler, J. concurring).
35. *Id.* at 584 (Pollock, J., dissenting in part).
36. *Id.*
37. 251 N.J. Super. 24, 28 (Ch. Div. 1991)
38. *Id.* at 31.
39. *Id.* at 31-32 (*quoting Miller*, 97 *N.J.* at 170).
40. *Id.* at 32-33.
41. 255 N.J. Super. 185 (Ch. Div. 1990), *aff'd*, 255 N.J. Super. 1 (App. Div. 1991).
42. *Id.* at 191.
43. *Id.* at 191-92.
44. *Id.* at 193.
45. 333 N.J. Super. 362 (App. Div. 2000).
46. *Id.* at 366.
47. *Id.* at 363.
48. *Id.* at 369.
49. 386 N.J. Super. 475 (App. Div. 2006).
50. *Id.* at 481-82.
51. *Id.* at 484.
52. 254 N.J. Super. 328 (App. Div. 1992).
53. *Id.* at 332.
54. 201 N.J. Super. 55 (Ch. Div. 1985).
55. *Id.* at 60-61.
56. 334 N.J. Super. 177, 192 (Ch. Div. 2000).
57. *Id.* at 192-94.
58. 153 N.J. Super. 374 (Ch. Div. 1977).
59. *Id.* at 375-76.
60. 227 N.J. Super. 351 (App. Div. 1987).
61. *Id.* at 355.
62. *Id.* at 357-58.
63. *Id.* at 358.
64. *Id.* at 359-60.
65. *Id.* at 360.
66. *Id.*
67. *Id.* at 361.
68. *Id.* at 362.
69. *W.J.P.*, 333 N.J. Super. at 363.
70. *J.R.*, 386 N.J. Super. at 481-84.
71. *Miller*, 97 N.J. at 168.
72. *See Miller*, 97 N.J. at 168.
73. *Miller*, 97 N.J. at 170; *see also R.A.C. v. P.J.S.*, 192 N.J. 81, 94, 105 (noting the ability to seek reimbursement for child support from biological father under N.J.S.A. 9:17-55a but barring the instant suit under the Parentage Act's statute of repose, N.J.S.A. 9:17-45b).
74. *See M.H.B.*, 100 N.J. at 579 (Handler, J. concurring).
75. Pollett, 48 *Fam. Ct. Rev.* at 529.

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