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CHAIR'S COLUMN

What's Really in a Name Change?

by Andrea Beth White

A name change may be simple enough to obtain from the court in a divorce proceeding, but not so simple for our clients to implement. The purpose of this column is to highlight some of the problems, and provide some helpful practice tips for ourselves and our clients.

The right to a name change in a divorce or annulment action is specifically set forth in Comment 2.1 to Rule 4:72-4 and N.J.S.A. 2:34-21. The comment specifically provides that a name change may be sought and provided in a divorce judgment. In fact, the comment to Rule 4:72-4 provides, "the divorce proceeding should be liberally amended to permit adding that prayer for relief. *Cimiluca v. Cimiluca*, 245 N.J. Super 145 (App. Div. 1990)."[1] Aside from a conflicting decision,[2] the process to obtain an order for a name change incident to a divorce is fairly straightforward. What is not straightforward or simple, however, is the process thereafter.

Once your client has been granted permission to resume a prior name, you should be able to advise the client on what happens once they are successful in changing their name, and how to go about effectuating it. A client should understand what is required by them once permission to change the name is granted; that is, a road map for actually effectuating the name change, such as driver's license, Social Security, credit cards, and the like. This is certainly no easy task.

The truth is, once a name change is granted, there are a plethora of issues that need to be addressed. The first step is normally changing the name on a driver's license. To do so, the individual must go to the Motor Vehicle Commission, (formerly known as the Division of Motor Vehicle or DMV). Not only will your client need to present their judgment of divorce executed by the court, but they also need other points of identification, as well.[3] The next step, generally, is to proceed to the Social Security Administration in order to obtain a revised Social Security card. It might be easier to spend the time at the local office of Social Security than to forward all the documents, in order to avoid the documents being returned to your client for failure to complete the application properly. However, your client should be aware that the application itself is quite cumbersome.

Next, your client will have to change the title on various accounts. You would think it would be easy enough to change your name on a credit card. However, some credit card companies require a copy of the original judgment of divorce to change the name on a credit card. Similarly, an EZ-Pass account cannot be changed without sending them a copy of your judgment of divorce.

As a practical point, often judgments of divorce bearing the gold seal are attached to the marital settlement agreement (MSA). This can create a privacy issue, as the client will be disclosing the MSA to various third parties. In some counties, the court provides a separate order (with a gold seal) allowing for a name change. As a practice point, perhaps practitioners should begin preparing a separate proposed order providing for the name change, which could be submitted to the court concurrent with submission of the proposed judgment of divorce.

Another practical tip is to have the MSA incorporated by reference, but *not* attached nor part of the judgment of divorce. Otherwise, your client may be forwarding the settlement agreement to MVC, Social Security, EZ-Pass, their credit card companies, banks

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and any other entity requiring a judgment of divorce in order to effectuate their name change. No litigant could possibly want these entities to be privy to the terms and conditions of their written settlement agreement.

In conclusion, be sure to provide guidance to your client after the judgment of divorce is entered, and follow these practice tips when representing a client seeking a name change in their family part litigation. ■

ENDNOTES

1. Sylvia Pressler and Peter Verniero, Current N.J. Court Rules, Comment R. 4:72-4, (Gann) at 1934.
2. As an aside, the law is in conflict regarding a divorce litigant's request for a new name. In *Holsue v. Holsue*, 265 N.J. Super. 559 (Ch. Div. 1993) the trial court determined that a spouse or civil union partner seeking "to assume a surname not previously used must comply with the notice provisions of the general name change statute N.J.S.A. 2A:50-1."However, the trial court in *Raubar v. Raubar*, N.J. Super. 353 (Law Div. 1998), disagreed with the holding in *Holsue*, finding that a spouse could assume any name pursuant to N.J.S.A. 2A:34-21, subject only to notice to law enforcement authorities if the spouse had been previously convicted or criminal charges are pending and provided the spouse is not perpetrating a fraud upon creditors or others.
3. Information regarding identification requirements is available at www.state.nj.us/mvc/pdf/Licenses/ident_ver_posterpint. pdf.

EDITOR-IN-CHIEF'S COLUMN

A Rose by Any Other Name

by Charles F. Vuotto Jr.

What do we call the agreements by which we resolve all issues in a divorce case? Are these agreements referred to as a property settlement agreement (PSA), marital (or matrimonial) settlement agreement (MSA), divorce settlement agreement (DSA), family dissolution agreement (FDA) or some other similar name?

Although we know that the days of referring to such agreements as a PSA seem to be long past us, there was a reason why such agreements were originally referred to as PSAs. The first reported reference to a "property settlement agreement" in the context of a divorce case appears to be in 1953, when it was referred to as a "Separation and Property Settlement Agreement."[1] The relevance of the nature of the agreement (and thereby the importance of what it is called) arose about 27 years later, in the context of a case where the court was called upon to examine when the marriage terminates in order to place after-acquired property beyond the court's reach.[2] Since then, there have been hundreds of reported cases citing property settlement agreements in the context of divorce.

Most practitioners would agree that the use of the traditional label of "property settlement agreement" is no longer viable, similar to the way we no longer use the term "visitation" in the context of a noncustodial parent's time with his or her child. There are many other issues addressed in such an agreement, beyond property division, such as custody, time sharing, child support and alimony. Therefore, it is not just an agreement regarding property. However, there is no consistency among practitioners regarding what a divorce agreement should be named.

Although I do not believe that there should be an iron-clad rule without flexibility in appropriate circumstances (such as incident to the dissolution of civil unions and domestic partnerships), I do believe it makes sense for there to be consistency among matrimonial practitioners and courts in how we refer to these agreements in the typical divorce case.

The results of a recent survey of the New Jersey State Bar Association's Family Law Section show a general consensus that the phrase marital settlement agreement (MSA) is preferred by the majority (22.1 percent) of the 299 practitioners responding. However, a close second (20.7 percent) responded that there should be no uniform label for such agreements.

The full results of this survey are found in the following chart:

SURVEY RESULTS

	RESPONSE PERCENT	RESPONSE COUNT
Property Settlement Agreement (PSA)	14.0%	42
Marital Settlement Agreement (MSA)	**22.1%**	**66**
Matrimonial Settlement Agreement (MSA)	11.4%	34
Divorce Settlement Agreements (DSA)	7.7%	23
Family Dissolution Agreement (FDA)	10.0%	30
Domestic Settlement Agreement (DSA)	14.0%	42
There should be no uniform label	20.7%	62
Answered question		**299**
Skipped question		**0**

Personally, I would agree with the majority, and do use marital settlement agreement (MSA) in my cases, as appropriate. The goal of this column, however, is not to argue for or against any particular label, but to spark a discussion among practitioners regarding whether we should adopt a uniform name to our dissolution agreements and, if so, what it should be. ■

ENDNOTES

1. *Roskein v. Roskein,* 25 N.J. Super. (Ch. Div. 1953).
2. *Brandenburg v. Brandenburg,* 83 N.J. 198 (1980).

SENIOR EDITOR'S COLUMN

Encouraging Second Opinions

by Jane R. Altman

I have often been struck by the fact that, in medicine, it is fairly commonplace for doctors to recommend that a patient facing a serious illness seek a second opinion from another doctor who specializes in treating that illness. In fact, in some circumstances a patient routinely will seek out a second and even a third opinion, particularly if there is not one standard course of treatment for the illness. Yet, in the practice of family law, lawyers infrequently encourage their clients to get a second opinion.

I am not addressing the situation where a client is aggressively 'lawyer shopping'—searching for an attorney who will adopt *their* opinion of what would be a fair result legitimized by a lawyer. Often such 'clients' will misrepresent to you, during an initial consultation, what another lawyer has told them. My response is always the same: "If lawyer X thinks she can get you that result, you should hire her. Because I am quite certain that I cannot get you that result, nor am I willing to pursue it." I am also not addressing the situation where a client wishes to pursue a novel approach, one that has never been addressed in a published opinion, but may represent the cutting edge of new and evolving law. As long as you have been honest with your client about the likelihood of success, and the costs related to pursuing that approach (both financial and emotional), go for it.

There are, however, many cases that get 'stuck' when one or the other client, or attorney, takes an intractable position and will not make any further concessions on a certain point. The client may be perfectly reasonable about the majority of the issues, save one, and the sticking point may be emotional or economic.

I have great empathy for the very understandable human emotions that lead clients to take these positions. But I also believe it is our responsibility as lawyers to let clients know whether the position they wish to advance has any reasonable prospect of being a 'winnable' issue if the case goes to court.

In such cases, if it is my client who is intractable on such a point, I often urge the client to discuss it with his or her therapist; if the client doesn't have a therapist, I recommend one. If that doesn't work, I put my opinion of the chances of success in advancing an intractable position in writing to the client, pointing out that if and when the position does not prevail, the client has real exposure to an order directing that he or she contribute to the other party's counsel fees.

Often the client has had the benefit of hearing from neutral panel members on an early settlement panel that his or her position has no realistic chance of success. Sometimes a judge, during a settlement conference, will also make the same point, although always with the *caveat* that it is possible, during a trial, that facts will be presented that change the judge's opinion. Maybe an economic mediator has made the same point, but it falls on deaf ears.

Sometimes I bring in a partner or associate to emphasize that the client's position will not prevail; that a trial is costly, both emotionally and financially; and that compromise is advisable. However, some clients cannot, or will not, hear the message, and insist on pursuing their position. In that case, I often recommend that the client obtain a second opinion from another family law practitioner.

Sometimes clients are resistant to this suggestion. Typically they will argue that a second opinion will cost them money they don't want to spend (a ludicrous argument compared to what they will spend to try the case and lose). Others argue it is simply too painful to rehash the facts of their divorce with yet another lawyer. Still others say that they have every confidence in me and my ability to prevail in advancing their argument, even though I have told them that I cannot. What I suspect with these clients is that they are simply hoping to wear down the other side by not budging in their position. However, I choose not to practice law this way. There is a big difference between aggressively presenting a client's position that has a legitimate claim to validity and letting your client use you to achieve a result simply by being difficult and intractable.

I ask, and sometimes insist, that a client in this extreme situation obtain a second opinion from a lawyer whose practice is primarily or exclusively in the area of family law, and preferably from a lawyer

who regularly practices in the county in which the case is pending. It is certainly preferable that the client choose that lawyer him or herself, so there is no taint of your having influenced the outcome of the consultation. However, if the client says he or she doesn't know any other lawyers, or have the resources to locate another lawyer, and asks for a recommendation, I will provide two or three names of attorneys I respect professionally.

It is my impression that suggesting seeking a second, completely neutral, opinion is not common practice. Perhaps some practitioners fear the loss of the client to the lawyer giving the second opinion. I think this is an unrealistic concern, particularly if you generally have a good relationship with your client. That said, should you lose the client, is it not better for your client to advance a position that you cannot comfortably support with a lawyer who has some faith that the position can prevail? It is not a healthy or productive lawyer/client relationship to be butting heads with your client in these situations. I suppose clients have a right to take positions that are unrealistic and unreasonable based on the facts of their case and the applicable law. But *you* do not have to be the lawyer taking that position for them.

Suggesting a second opinion may be particularly useful if you are a sole practitioner. There are also occasions when your client might encourage his or her spouse to get a second opinion if the parties are receiving diametrically opposed information from their individual lawyers about how New Jersey law applies to the facts of their particular case. The second opinion can help break the deadlock.

It's easy to think that the client has already received a *de facto* second opinion from the early settlement panelists. But panelists who have spent perhaps 20 to 30 minutes with a case do not understand the nuances that are involved, nor can they be expected to address the psychological factors that led your client to the intractable position. Typically, when clients try to raise these issues, they are shut down by the panelists, who may have five other cases to hear that morning. By contrast, a lawyer giving a second opinion will presumably take the time to review the relevant documents and really listen to what your client is saying.

Actively encouraging a second opinion from a competent matrimonial lawyer is an underused tool by family law practitioners. I suspect some difficult cases could settle without the necessity of a trial if it was used more often. ■

2012 Amendments to the Rules Governing the Courts

A Summary for the Family Law Practitioner

by John E. Finnerty Jr. and Marilyn J. Canda

The Court Rules are a lawyers' lifeline. Trying to practice law without knowledge of the nooks and crannies of the rules and how they may impact your area of practice, is analogous to attempting to do surgery without having gone to medical school. Representing a client in family law litigation requires you to know what you can do, when you must do it by, and how appropriately to obtain extensions and other discretionary relief from a court in order to effectively process your case. This article is intended to introduce the family law practitioner to the 2012 New Jersey Court Rule Amendments that affect family law practice.

The 2012 edition of the *Rules Governing the Courts of the State of New Jersey,* as they pertain to the practice of family law, have been amended, based primarily on the recommendations set forth in the Family Part Practice Committee 2009–2011 Final Report dated Jan. 20, 2011. While many of these amendments are technical in nature, so that the rules comply with the Civil Union and Domestic Partnership Acts, there are several substantive amendments to the rules of which every family law practitioner must be aware. They include the following:

- Additional remedies for violation of restraining orders;
- Proper vicinage for enforcement of child support orders;
- Adoption rules;
- Court Rules appendix changes in connection with mediators and their fees;
- Standardization of non-dissolution and post-disposition practice in all family part summary actions;
- Probation-initiated status review of support orders;
- The deletion of certain forms from the appendix of the Court Rules; and
- Miscellaneous changes set forth in section nine of this article.

In order to better serve clients, not only should every family law practitioner read and understand the rules and the 2012 amendments, but practitioners also should read the Family Part Practice Committee Report in order to understand why many of these amendments were proposed. The report also provides insight into the rationale for proposed rules that were not adopted by the court, including one pertaining to taping of parenting and custody evaluation sessions conducted by mental health experts. The report also contains an in-depth discussion of current views regarding parenting coordination, which did not result in a rule proposal, but did result in a policy recommendation that presumably is still under review, since no pronouncement has been made by the Supreme Court.

TECHNICAL CHANGES TO THE COURT RULES PURSUANT TO THE CIVIL UNION AND DOMESTIC PARTNERSHIP ACT

Pursuant to the Civil Union Act and the Domestic Partnership Act, the Family Part Practice Committee recommended technical changes that were necessary to Part V of the Court Rules as a result of those acts. These technical rule changes are essentially comprised of a departure from terms that relate to husband/wife, marriage, spouse, matrimonial and divorce, and instead substitute more generic terms, which encompass civil unions and domestic partnerships such as: dissolution, termination, plaintiff/ defendant, civil union partner/ domestic partner and family. Moreover, the rules now refer, in addition to divorce, to *dissolution of civil union and termination of domestic partnership.*

ADDITIONAL REMEDIES FOR VIOLATION OF RESTRAINING ORDERS NOT SUBJECT TO CRIMINAL COMPLAINTS

5:3-7: Additional Remedies on Violation of Orders Relating to Parenting Time, Alimony or Support or Domestic Violence Restraining Orders

Amendments to this rule include important relief that will substantially assist the victim of domestic violence, since the offending party can now be punished by the court, *on its own motion*, as the court is

permitted to do in connection with Rule 5:3-7 (child support enforcement), without requiring the victim to retain an attorney to file his or her own motion (Rule 1:10-3) and/or to rely on a contempt complaint that must be filed by the attorney general or county prosecutor's office (Rule 1:10-2).

The changes to this rule approved by the Supreme Court deal with the court's ability to enforce those provisions of the restraining order that previously were *not punished by criminal sanctions*. Violations of Part I relief under the statute, contact with the victim, are punishable by criminal contempt charges against the offending party. The new rule now allows the court to compel compliance with Part II relief (*i.e.*, non-compliance with court-ordered social services, support, or custody set forth in the restraining order) by allowing the court to impose the relief set forth in the rule below.

Specifically, if the court finds that a party has failed to comply with the provisions of an issued restraining order, and the non-compliance is not subject to criminal contempt (Part II relief excluded under N.J.S.A. 2C:25-30), the court may, on notice to the defendant, in addition to the relief provided by 1:10-3, grant any or all of the following:

1) economic sanctions;
2) *incarceration with or without work release* (emphasis supplied);
3) issuance of a warrant to be executed upon further violation or non-compliance with the order;
4) any appropriate remedy under paragraph (a) or (b) which is applicable to custody or parenting time issues or alimony or child support issues; and
5) any other appropriate equitable remedy.

Therefore, if a violator failed to attend court-ordered anger management or other counseling services, he or she could be incarcerated.

PROPER VICINAGE FOR ENFORCEMENT OF CHILD SUPPORT ORDERS

5:7-4 Alimony and Child Support Payments

The amendments to this rule were made in order to insure uniformity of child support enforcement in all New Jersey vicinages. Specifically, pursuant to the rule amendment, venue and enforcement must now be in the same county, regardless of where the obligor resides. In other words, the court that issued the order will be the place where the order will be enforced.

In Jan. 2005, an Adiminstrative Office of the Courts directive established uniform standards regarding transfer of child support cases between vicinages, which required child support cases to be assigned to the Probation Child Support Enforcement Unit (PCSE) where the order was established, regardless of where the obligor resided. However, despite that directive, this practice was not uniformly filed, and enforcement sometimes occurred in counties where the obligor resided.

In order to ensure that the *venue* and *enforcement* are in the same county in every vicinage in New Jersey, the rule has been amended to provide that *enforcement* of child support orders shall now be presumptively in the county in which the child support order is first established *(county of venue),* unless the case is transferred for cause. When venue of a support case is transferred, probation supervision of the case shall also be transferred, unless the court otherwise orders for cause.

While the reason for the rule amendment is clear, it also presents some practical difficulty, especially if there is a significant distance between the county of venue/enforcement and where the obligor resides. For example, if the county of venue/enforcement is Bergen and the obligor resides in Cape May, will it not pose an economic burden for Bergen to arrange for an arrest of the obligor in Cape May? This is a practical concern in this time of economic distress, and in light of New Jersey's budgetary concerns.

AMENDMENTS TO EXISTING ADOPTION RULES

There have been significant amendments to the Court Rule governing adoptions that are extensive and detailed. For example, prior to even filing a complaint for adoption, the family law practitioner must now insure that the proper searches are conducted, and that critical information is gathered and submitted with the complaint. If the proper information is not provided at this early stage in the process, the complaint will be rejected. Therefore, the family law practitioner who handles adoption matters must read and master the amended rules.

The following is a summary of those rules:

One Adoptee Per Complaint/Judgment

Rules 5:10 and 5:11 have been amended to insure that there is a separate complaint filed for each child to be adopted. However, the supporting documents for a sibling group adopted by a single family may be submitted as one set of documents. This way, it is easier to track each individual adoptee, particularly foster children in the care of the Division of Family Development. In recognition of the financial burden that this might impose on families who seek to adopt more than one child, the surrogate may, in cases when multiple children are adopted, waive the fee for additional children. In addition, Rule 5:10-11(judgment of adoption) now requires that a separate judgment of adoption be entered for each adoptee.

Minimum Requirements for all Adoption Complaints

Before an adoption complaint is filed and docketed with the surrogate, there must be at least a minimum standard level of review of the complaint and its attachments. If required documents are not attached, then the complaint will not

be filed and will be returned to the plaintiff. The new required additional information that must be provided for adoptions of children placed for an adoption for an approved agency can be found in Rule 5:10-3(a) and (b). For all other adoptions of children who have not been placed for adoption by an adoption agency of the Division of Youth and Family Services (DYFS), changes can be found in Rule 5:10-3(c). These changes are summarized as follows:

5:10-3 Contents of Complaint (Adoption)

(a) In addition to technical amendments as a result of the civil union and domestic partner acts, the rule requires miscellaneous changes with regard to the adoption complaint, the goal of which is for the plaintiff to supply more information in the initial stages of the action. The child's date of birth must be included, the date of the child's placement in the adoptive home, the name of the approved agency or other source from which the plaintiff(s) received the child to be adopted. The plaintiff must also include proof of the manner in which the child became legally free for adoption or a statement that paternal rights have not been terminated. It must be certified in the complaint that neither the child nor the child's biological parents are members or eligible to be members of a federally recognized Indian tribe in accordance with the requirements set forth in Rule 5:10-6 (see newly adopted rule) and the federal Indian Child Welfare Act.

Additional Requirements for Domestic Agency Adoptions

Subsection (b) has been added to the rule to address additional requirements for domestic agency adoptions. In addition to the requirements for all adoption complaints set forth in (a) of the rule, the following documents must also be attached to these complaints: a report of consideration and expenses in accordance with N.J.S.A. 9:3-55a, a home study report, the result of a criminal history and child abuse record information requests, and the signed original agency consent to the adoption.

In addition, in these cases the agency shall also certify as to the following: an explanation and evaluation of the results of fingerprint checks, that a termination of parental rights judgment is not pending appeal,[1] that the agency is unaware of any pending concurrent adoption action existing in another county, that the adoptive parents have been provided with full disclosure of the adoptee's known life and medical history, as well as the birth parents' known medical history, whether the adoptive parents have entered into a subsidy agreement, that no adult member of the adoptive household has been convicted of a crime that bars adoption pursuant to the Adoption and Safe Families Act (ASFA) and in DYFS cases, the adoptee's verified current Social Security number and the card shall be supplied to the adoptive parents, if available.

Also attached to every action for domestic agency adoption shall be a form of order fixing a hearing date, interstate compact on the placement of children authorization form that approves the placement, if applicable, an affidavit of non-military service if the there has been no termination of parental rights and that the birth parents have not surrendered their rights.

Additional Requirements for Private Adoptions

In addition to the requirements of the adoption complaint set forth in (a), the complaint for a private adoption pursuant to this rule shall also include: a report for consideration and expenses pursuant to N.J.S.A. 9:3-55(a), except if the plaintiff is a stepparent, brother, sister, grandparent, aunt, uncle, or birth father of the child, affidavit of the circumstances under which the child was received in the adoptive home, in the case of a second-parent or co-parent adoption, the complaint shall be the same as that of a stepparent adoption, when termination of parental rights has not been granted to the birth parents and they have not surrendered their rights, the complaint must have attached to an affidavit of non-military service and a form of order setting a date for a preliminary or final hearing.

In all complaints for adoptions an affidavit of verification and non-collusion must be attached in which the plaintiff affirms that the allegations in the complaint are true to the best of the party's knowledge, information and belief.

Surrogate Action on Complaint

Rule 5:10-4 (surrogate action, formerly action on complaint) has been amended to require the surrogate to review complaints to insure that all of the necessary information and documentation has been filed with the court. *Prior to docketing the complaint*, the surrogate is now required to determine the following: that venue is proper, that all information has been included pursuant to Rule 5:10-3 set forth in detail above, that a current address and all prior addresses of each plaintiff are provided for the last five years, the names, dates of birth and all residences within the past five years of all other adults in the adoptive home, the marital, domestic union, or civil union status of each plaintiff and the name of the spouse or partner, if each such person is also not a plaintiff, a home study report consistent with the information contained in the complaint.

Added to Section (b) (jurisdiction) is the requirement that if it appears from the information contained in the complaint that jurisdiction is proper and that the complaint is complete in all respects, the complaint shall be docketed. At that time, the surrogate's staff shall conduct a judicial look up, and if any of the parties exist in the system, the parties' demographic information shall be copied into the adoption case using the process in the Judiciary's case management system. There is also a new requirement that the surrogate provide the entire adoption file to

the court for review no later than five business days before the first adoption proceeding.

5:10-5 Preliminary Hearing (Formerly Rule 5:10-5)

The new provisions to this rule were designed to address concerns regarding the necessary safeguards required to protect adoptees. Therefore, this rule has been amended to require the agency (rather than DYFS, the court or adoptive parents) to conduct the searches for all criminal history record information, domestic violence and child abuse record information on both the adoptive parents as well as individuals over 18 in the household. If DYFS has placed the child for adoption, DYFS must disclose to the court information discovered during its investigation relating to a pattern of arrests or domestic violence restraining orders against the adoptive parents, and make recommendations regarding whether such acts should preclude the adoption. Finally, the rule has been amended to require that the medical information of the biological parents be held in the court's file. Therefore, in the event the adoptee seeks this information, it can be obtained from the court file. If this requirement was not in place, and the adoptee was required to secure critical medical information from an adoption agency that is no longer in existence, the lack of access to the information could be life threatening in some cases.

A summary of these rule changes are as follow: After the order for a preliminary hearing is entered, the plaintiff is required to mail a copy of the order and the complaint to the approved agency appointed by the order to make an investigation report. At least five days prior to the hearing, the approved agency is required to file its report with the court and mail a copy to the plaintiff. Now, the rule has been amended to require that the medical histories of the biological parents shall be submitted to the court, and shall be retained in the court's file. If the medical history is unavailable, or the biological parents refuse to provide it, the agency shall make note of this information in the report submitted to the court.

A new Section (b) has been added to the rule, titled *Background Checklist and Certification by Approved Agency*. The approved agency is now required to supply to the court with a background checklist and certification, which includes information relevant to criminal history and child abuse record information. If the agency discovers a pattern of arrests or domestic violence restraining orders against the adoptive parents or household members over the age of 18 in the household, this information must be submitted to the court. The agency shall also be required to certify that it is in the best interest of the child to finalize the adoption after consideration of the background information known to the agency.

5:10-12 Judgment of Adoption; Procedures for Closing and Sealing Adoption Records (formerly 5:10-9)

This rule was amended to insure that procedures to close and seal an adoption are consistent throughout the state.

Upon receipt of a check, the surrogate shall submit the report of adoption, as well as the certified judgment of the adoption, to the Bureau of Vital Statistics and Registration. All records and indexes of proceedings pertaining to adoptions shall be filed under seal, and shall at no time be open to inspection unless the court orders for good cause shown. Finally, when an adoption case is sealed and there is a related child placement case (FC docket), the child placement case shall be closed to reflect the adoption, but only when the DYFS provides the court with a notice of change. If the adoption occurs out of state, DYFS shall provide the court with both the judgment of adoption and the notice of change to close the child placement case. The documents shall be provided to the court no later than 30 days after the adoption is entered.

5:11 Action for Adoption of Adult

The rule governing the adoption of an adult was also expanded to require at least a minimum level of review of the complaint and its attachment before the complaint is filed and docketed. If the rules are not followed and the information is not provided, the complaint will not be filed and will be returned to the plaintiff. The additional requirements that have been included are: the spouse, civil union or domestic partner of the plaintiff must consent to the adoption, and an affidavit of verification and non-collusion must be attached.

ADOPTION PRACTICE: NEW RULES

Rule 5:10-5 Post-Complaint Submissions[2]

This rule requires that a number of documents be submitted to the court 10 business days before a preliminary hearing, as well as numerous documents 10 days prior to the final hearing. See Rule 5:10-5 for the detailed list of the required documents.

Rule 5:10-7 Judicial Surrender of Parental Rights[3]

The new rule sets the procedures for a biological parent to surrender his or her parental rights before the court by filing a request with the court. The rule requires a hearing to be scheduled on an expedited basis. In addition, the rules provide for what the contents of the request should include, such as certification of the biological parents consenting to adoption, good faith representation of the biological parents that the child is not a member of or eligible to be a member of a federally recognized Native American tribe, dates of availability to appear for a hearing within seven days of filing and a proposed form of order.

The closed hearing shall take place in seven days to determine if the surrender is voluntary, at which time the surrendering parent shall be advised of his or her rights, which are set forth in detail in the

rule. The rule also provides that approved adoption agencies and DYFS shall continue to be permitted to accept surrenders of parental rights pursuant to N.J.S.A. 9:3-41.

5:10-13 Requests to Unseal Adoption Cases; Procedure[4]

In an attempt to insure uniformity through the state, the Supreme Court has adopted a procedure to unseal adoption cases, which is set forth in Rule 5:10-13. Such a request must be made via motion or notarized request, and the court may, if necessary, schedule a hearing. After the court decides there is good cause to unseal the record, it shall provide the signed order to the surrogate. If the request is granted, the surrogate shall provide the order to the requesting party, and make the copies available as directed by the court's order. If the court denies the request, the requesting party shall receive a copy of the order and a copy of the written request, and the order shall be included in the sealed file.

Additional Miscellaneous New Rules

- Rule 5:10-14 Domestic Adoptions and Re-adoptions of Foreign Citizens
- Rule 5:10-15 Adoptions of Unites States Citizens by Residents of Foreign Countries That are Signatories to the Hague Convention
- Rule 5:10-16 Adoptions of United States Citizens by Residents of Foreign Countries That are Not Signatories of the Hague Adoptive Convention
- Rule 5:10A Adoption of a Child or an Adult; Use of Automated System; Name Checks

Directives

In addition to the rule amendments and the new rules that have been enacted with regard to termination of parental rights and adoption matters, there is also Directive #06-11 (modifies Directive #17-06) dated Aug. 23, 2011, (effective Sept. 1, 2011) issued by Glenn A. Grant, J.A.D., acting administrative director of the courts, which can be found at http://www.judiciary.state.nj.us/directive/ipdate11.html.

The purpose of the directive is to insure compliance with the new rules and the rule amendments, and to improve the circumstances for children who are placed for adoption either by DYFS, an approved adoption agency, or a private party adoption.

The rules and directives are also designed to provide guidance to those who are involved in the adoption process, such as the DYFS staff preparing adoption matters, practitioners who file adoption cases, surrogates who review and process adoptions and the judges and their staff who review and manage the cases. The directives can be found in detail at the above link.

To insure compliance with the directives, each vicinage is required to develop a detailed plan (which must include steps taken to implement each policy, a description of any anticipated barriers and a proposed resolution to the barrier) in collaboration with the surrogate, which was to be submitted to the Administrative Office of the Courts by the assignment judge by Oct. 17, 2011. The plan must also include details of actions taken to collaborate with local DYFS leadership and with the bar on these issues.

CHANGES TO COURT RULES/APPENDIX IN CONNECTION WITH MEDIATORS

Rule 1:40-12 Mediators and Arbitrators in Court-Annexed Programs Continuing Training

In connection with the four hours of continuing education required annually by the mediator, the rule amendment includes a *requirement* for instruction regarding *ethical* issues associated with mediation practice, program guidelines and/or case management, instead of allowing ethical issues associated with mediation practice to be only one option. It is now mandatory.

Appendix XXVI Guidelines for Compensation of Mediators Serving in the Civil and Family Economic Mediation Programs

The rules governing fees charged by mediators have been more narrowly defined to protect litigants who are participating in the alternate dispute resolution process by keeping them informed throughout the process, to insure the mediators participating in the process are legitimately providing the two free hours required of them, and also to insure that the mediators do not charge excessive fees.

The changes are as follows:

- The "two free hours requirement" applies only to mediators on the court's roster of civil and family mediators in a mediation that is court ordered;
- Unless otherwise provided in the guidelines for compensating mediators, no fee, retainer or other payment may be charged or paid prior to the conclusion of the two free hours;
- At the beginning of the initial mediation session, the mediator is required to provide, in a form prescribed by the administrative director of the courts, the amount of preparation time the mediator has spent to that point;
- If the mediator spent more than one hour in preparation time, and intends to charge the parties for that additional time if they continue with the mediator on a paying basis, this must be disclosed by the mediator in a writing prior to commencing the initial session;
- Any such additional time must be charged in accordance with the rate set forth on the court's roster;
- At the beginning of the in-person mediation session, the mediator shall disclose in writing, in a form prescribed by the administrative director of the courts, specific time left in provision of free mediation services. The form must also state that mediation

beyond that time will be billed at the rate set forth on the roster;
- Deleted from the rule is the provision that states "no retainer fee or advance may be requested by the mediator at any time;" and
- If a mediator has not been timely paid, or a mediator and/or party has incurred unnecessary costs or expenses because of a failure of a party and/or counsel to participate in the process in accordance with the order, the mediator and/or party may bring an action to compel payment in the special civil part. The prior practice of the court issuing a *sua sponte* order to show cause as to why the fees should not be paid has been revoked. The court is no longer an initiating arm for enforcement of fee obligations to the mediator.

PROBATION-INITIATED STATUS REVIEW OF SUPPORT ORDERS

Rule 5:6-6 Probation-Initiated Status Review of Support Orders

Rule 5:6-6 has been amended to clarify that the probation department is not intended to be the primary initiator of applications to modify support, even though the language of the rule permits this. The Supreme Court approved the Family Part Practice Committee recommendations that make clear in the amendment that the obligations of the department is authorized to initiate *status reviews* before the court under circumstances when the parties cannot or do not file for court action. Pursuant to the amended rule, the probation department is permitted to initiate *status review* before the court for parties who cannot or do not file for a court action that results in probation's inability to properly manage the case.

For example, the probation department would take action if an officer learned of cases where: 1) child support was being paid for a 26-year-old child who was emancipated; 2) an obligor dies and child support must be terminated; or 3) an obligee is receiving direct payments and failing to report the payments to the probation department that is responsible for enforcement of a child support order. Without taking the appropriate action in cases such as these, the probation department cannot effectively manage the case.

Formerly titled as Modification of Title IV-D Child Support Orders, specifically, the rule has been amended to clarify that, *for case management purposes only*, probation may, subject to procedural due process requirements, present cases to the court for *status review* to either suspend or terminate a support order, to close a case supervised by probation, or to take any such action as the court may deem appropriate and just. The rule amendment is intended to make clear that primary responsibility for review of substantive material change lies primarily with the parties.

Finally, the rule was further amended to provide that the forms and procedures to implement the provisions of the rule shall be prescribed by the administrative director of the courts, in conformity to and consistent with Rule 5:6B(e).

STANDARDIZATION OF NON-DISSOLUTION AND POST-DISPOSITION PRACTICE IN ALL FAMILY PART SUMMARY ACTIONS

Rule 5:4-4 "Service of Process in Paternity and Support Proceedings; Kinship Legal Guardianship," has been changed to "Service of Process in Family Part Actions; Initial Complaints and Applications for Post-Dispositional Relief."

The Family Practice Committee recommended that certain summary matters should be standardized, specifically non-dissolution matters (FD docket), domestic violence and kinship legal guardianship post-dispositional matters. The Supreme Court accepted the proposed rule amendment to provide uniformity in areas such as manner of service and "diligent inquiry" searches.

In addition to the rule amendments, it is important for the practitioner to be aware of and to review in detail Directive #08-11, dated Sept. 2, 2011, (effective Sept. 1, 2011) issued by Glenn A. Grant, J.A.D., acting administrative director of the courts, which can be found at www.judiciary.state.nj.us/directive/ipdate11.html.

The directive promulgates revised filing and post-dispositional procedures for the non-dissolution (FD) docket because it was determined essential to provide the public with efficient methods to process these types of cases (never-married parents seeking custody, parenting time, paternity, child support and medical support). Standard statewide practices must be implemented to enable the public to effectively resolve their disputes. The specific statewide procedures can be found using the above link.

In connection with this directive, to insure compliance, the Administrative Office of the Courts (AOC) is requesting that each vicinage review its procedures and prepare an appropriate plan for implementation to be submitted to the AOC for review. In addition, new forms and instructions are posted on the Internet for easy access to the public.

In connection with change of beneficiary of child support orders, in the Temporary Aid to Need Families (TANF) Program, also see the above link, specifically Directive #02-11 (which supersedes Directive #4-93).

THE DELETION OF CERTAIN FORMS FROM THE APPENDIX OF THE COURT RULES

The Supreme Court appeared to adopt the recommendation of the Family Part Practice Committee and the Conference of Family Presiding Judges that certain forms should be deleted from appendix to the rules, and instead be promulgated by the administrative director of the courts.

1:5-6 Filing

The confidential litigants sheet in the form prescribed "by the Administrative Director of the Courts" instead of "in Appendix XXIV."

5:5-3 Financial Statement in Summary Support Actions

The financial statement and the confidential litigant's sheet that must be provided must be in accordance with what is proscribed by the administrative director of the courts as opposed to appendix of the rules. Appendix XIV was deleted.

4:101-5 Assignments of, Postponement of Lien of, or Warrant to Satisfy Judgments; Entry of Satisfaction – Child Support Judgments and Orders

If payment is made to an obligee by an obligor, and the order requires payment through "probation" instead of "a probation department," the chief probation officer shall issue a certification of the amount in a form (instead of "the form") prescribed by the administrative director of the courts, as opposed to Appendix XIII to these rules. That appendix has been deleted.

In all, the following appendices have been deleted: Appendix XXIV; Appendix XIV; Appendix III; Appendix XIV (financial statement in summary actions); Appendix XXIV (confidential litigant's sheet); Appendix XVI (uniform summary support orders 5:74); and Appendix XVII (family part temporary support order).

MISCELLANEOUS RULE CHANGES

1:5-6 Filing

The Supreme Court also adopted a rule recommendation from the Family Part Practice Committee that a complaint submitted without a certification and verification of non-collusion will be marked received but not filed. Failure to attach that certification to an attempt to file a complaint renders the complaint non-conforming. It will be returned, stamped "received" but not "filed."

4:101-1 Abstracts to be Entered

Reference to the Automated Child Support Enforcement System (ACSES) has now been amended to the New Jersey Automated Child Support System.

5:7-2 Application Pendente Lite

This rule has been extended to address "enforcement" applications. The rule also eliminated reference to a "petition," since it is no longer the practice of an attorney to file a petition. Instead, the practice is to file a motion, and the rule accordingly has been amended.

5:7A Domestic Violence: Restraining Orders

Prior to the rule revision, when hearing an application for a restraining order if the applicant was not physically present before the court, the court was required to memorialize the terms of the order and direct the law enforcement officer assisting the applicant to enter the judge's order on an appropriate papers designated as the duplicate original temporary restraining order, which would be deemed a temporary restraining order (TRO). Since many municipalities and vicinages have begun issuing orders electronically (also known as e-TROs), there is no need for a conforming order. The amendment now permits, in vicinages where an approved form of electronic preparation of restraining orders is available, that the order may be transmitted electronically without the need for a duplicate written order.

5:8-2 Direction for Periodic Reports

In a case in which a court has entered an order for custody, a court may file a certified copy of that order or judgment in the county in which the children or child resides with a direction that periodic reports be made to the status of the custody. Prior to the rule amendment, the entity involved was the probation office, which has now been changed to the Family Division.

When dealing with copies of custody decrees of another state, instead of being filed with the clerk of the superior court of this state and sent to the probation office of the county in which the children or child resides, the custody decree of another state *shall now be filed pursuant to procedures promulgated by the AOC*.

5:8-4 Filing of Reports

Investigation reports made pursuant to this rule shall now be filed in the *Family Division* as opposed to the *chief probation officer*. The Family Division personnel shall also now be charged with conducting the investigation rather than the probation officer. ■

ENDNOTES

1. The Family Part Practice Committee determined that in DYFS cases, adoption represents permanency for a child. Therefore, in a case where parental rights have been terminated, before an adoption complaint is filed, it is preferred that the termination process be finalized. *See* R. 5:10-3 (a)(7) and R. 5:10-3(b)(5)(B).
2. R. 5:10-5 was formerly preliminary hearing, which is now R. 5:10-8).
3. R. 5:10-7 was formerly petition for modification of circumstances of order, which is now R. 5:10-10.
4. R. 5:10-13 did not previously exist under the rules.

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Ethical Considerations in Collaborative Practice

Understanding Collaborative Practice

by Risa A. Kleiner

Collaborative practice is a form of alternate dispute resolution that utilizes a team approach to resolving disputes. There are now collaborative professionals in virtually every state in the U.S., every province in Canada and 22 other countries around the world. In New Jersey, more than 250 collaborative practitioners have been trained, and there are six regional practice groups that participate in the statewide New Jersey Council of Collaborative Practice Groups. Each group serves its own geographical area, but members may participate on a team with any other collaborative professional in the state.

Perhaps collaborative practice is best summarized in a 2005 Kentucky Bar Association ethics opinion, which stated, in relevant part:

> The goal of the collaborative law process is to reach an agreement through a cooperative process. It is based upon a problem-solving model rather than an adversarial model and tends to focus on the future, rather than the past; on relationships rather than facts; and on rebuilding relationship rather than finding fault.[1]

In collaborative practice, each party is separately represented by a collaboratively trained attorney, and collaboratively trained financial and custody experts are brought onto the team as needed. In addition to signing separate retainer agreements with each professional, the clients and both attorneys execute a participation agreement in which they consent to engage in full, open and good faith disclosure. The agreement also confirms that if court proceedings are threatened or started by either side, the collaborative process must terminate and the attorneys must withdraw. It is made clear that, notwithstanding the cooperative nature of the process, each attorney will diligently represent the interests of his or her client in accord with the Rules of Professional Conduct. Even though the clients are thoroughly briefed about the nature of this process and how it differs from traditional litigation, the nature of the participation agreement and the requirement that attorneys must withdraw if the process breaks down, have led to ethical concerns about collaborative practice.

ETHICAL DILEMMAS FOR ATTORNEYS IN COLLABORATIVE PRACTICE

Since its inception, collaborative practice has challenged traditional ideas about the role of an attorney. Over the past 14 years, several state bar associations and the American Bar Association have grappled with the possible conflicts an attorney may encounter in representing a client in a collaborative divorce. These issues have arisen, in part, because collaborative practice brings together in a team both attorneys and other professionals, to focus on the needs of both parties and their children. This has raised ethical questions and engendered skepticism among experienced litigators, who fear that the rights of individual clients are not being adequately protected.

Further, the concept that parties must commit to open disclosure in an informal discovery process based on good faith has been a source of concern. Can attorneys assure their clients that all necessary information is being brought to the table? Attorneys unfamiliar with collaborative practice also question the necessity of making a commitment to resolve the dispute outside of court, and to withdraw as counsel if that goal cannot be met and force the parties to terminate the process and start anew with new litigation counsel. As of this writing, only one bar association (Colorado) has examined the collaborative process and found it to be inconsistent with the standards attorneys must follow, while the American Bar Association and 11 state bar associations have approved of collaborative practice and at least three states (California, Texas and North Carolina) have incorporated it into their family law statutes.

THE STATE BAR ASSOCIATIONS SPEAK

The American Bar Association, along with the bar associations of the following states have issued ethics opinions approving the practice of collaborative divorce: New Jersey, Pennsylvania, Maryland, California, Texas, Kentucky, North Carolina, Minnesota, Missouri, South Carolina and Washington.

On March 12, 1997, the Minnesota Office of Lawyers of Professional Responsibility issued the first advisory opinion approving the use of collaborative practice as a form of

limited representation that does not violate the Minnesota Rules of Professional Conduct. The Collaborative Law Institute of Minneapolis had requested an opinion regarding the application of the Minnesota Rules of Professional Conduct (MRPC) to the collaborative practice of law model.

The opinion held that a review of the collaborative manual "does not reveal any significant source of concern regarding inherent violations of the MRPC in the practice of collaborative law." The opinion does, however, stress the need for clients to be alerted to the risks and benefits of the process, including the fact that each attorney represents only their own client, and that the discovery process will not be conducted through the court. The opinion stated that the requirement for attorneys to withdraw if the collaborative process breaks down is not inconsistent with the MRPC, so long as the client is given an adequate opportunity to obtain new counsel.[2]

Four years later, on Sept. 1, 2001, Texas approved the collaborative model and modified its family code to include collaborative law as an alternate dispute resolution option for the dissolution of marriage. The statute requires "full and candid exchange of information between the parties and their attorneys," and reinforces the confidentiality of alternate dispute resolution procedures. The statute also permits parties who have filed for divorce to ask the court to suspend their proceedings for up to two years while they attempt to resolve their issues through the collaborative process. During this suspension, the attorneys must provide a status report to the court on the six-month anniversary of the filing of the complaint and on the one-year anniversary of the filing, at which time the attorneys may file a motion for a continuance if the collaborative process is continuing. If the case has not concluded by the second anniversary, the court may elect to set it down for trial or dismiss the complaint.[3]

The following year, on April 19, 2002, the North Carolina State Bar Association grappled with two questions: 1) whether a lawyer's participation in a nonprofit organization that promotes a cooperative method for resolving family law disputes would create a conflict that precludes him or her from acting as opposing counsel in a collaborative divorce; and 2) whether it is a violation of the lawyer's duty of competent representation to encourage a client to participate in the process and to disclose information voluntarily. (Note that in North Carolina, adultery has a bearing on an alimony award, so full disclosure was a particular concern.)

The North Carolina Bar ultimately found no conflict with the Rules of Professional Conduct, and concluded that: "A lawyer may represent a client in the collaborative family law process if it is in the best interest of the client, the client has made informed decisions about the representation, the disclosure requirements do not involve dishonesty or fraud, and all parties understand and agree to the specific disclosure requirements."[4]

In 2003, North Carolina added a provision in its general statutes to include recognition of the collaborative process.[5]

In 2004, the Maryland State Bar Association issued an ethics opinion in response to an attorney's question about the propriety of participating in a collaborative practice group with non-attorneys. The subsequent ethics opinion cautioned against using the group as a lawyer referral system, but opined that "…there is nothing improper with members of the Bar being involved in an organization such as the one you described whose purpose is educational…."The opinion did not address any substantive issues concerning collaborative practice itself, but referred the writer to an opinion of "our sister Committee in North Carolina."[6]

On May 11, 2004, the Committee on Legal Ethics and Professional Responsibility of the Pennsylvania Bar Association added its endorsement to the practice of collaborative law. In its Informal Opinion 2004-24, the committee found no *per se* violation of the Pennsylvania Rules of Professional Conduct in the use of collaborative practice so long as the attorney complied with the Rules of Professional Conduct. Analyzing the possible conflict with the duty of competence that the RPC's impose, the committee noted:

> …competent representation does not necessarily mean that you have to assist your client, the divorcing spouse, to receive the maximum dollar settlement possible. Clients often have interests and goals that are non-financial. The Pennsylvania Rules of Professional Conduct recognize that it is perfectly proper for a lawyer to advise a client about issues other than wealth maximization….[7]

Joining the ever-increasing number of approvals, in early 2005, the Advisory Committee on Professional Ethics of the Supreme Court of New Jersey approved the use of collaborative practice in the state. First, the committee addressed the issue of permitting lawyers and non-lawyers to join together in a nonprofit association committed to the principles of collaborative law. The committee answered in the affirmative "assuming that the activities of the association do not themselves amount to the Practice of law."[8] Next, the committee considered the question of whether collaborative practice is consistent with the Rules of Professional Conduct insofar as it requires the attorneys to withdraw if the process fails and one of the parties turns to litigation. The committee held that, since the client is aware of the scope of the representation at the outset, the limitations on the attorney should not be viewed as a withdrawal under RPC 1.16, but simply as an outgrowth of the limited

scope of representation to which the client has consented.

In relevant part, the opinion states:

> The requirement that a lawyer withdraw if the collaborative process fails, however is not necessarily derived from a lack of competence to engage in traditional adversarial litigation, but rather is compelled in order to prevent misuse of the collaborative process to garner unfair advantage, both in terms of shared information and resources expended on legal services. The parties know that neither attorney is secretly building a case against them during the collaborative process for use in a later adversarial proceeding, thus providing a necessary confidence and incentive to cooperate fully in the process.[9]

The committee cautioned that the lawyers must determine whether each client and each case is appropriate for collaborative practice, and must adequately inform the client about the process and secure his or her informed consent. It noted that some disputes in which the relationship of the parties is "so irretrievably beyond repair that cooperative dialogue between them…is impossible" are ill-suited to this process.[10]

In summary, the committee held that the limited representation must meet the "reasonable" standard of RPC 1.2(c), and must disclose the potential risks and benefits of the collaborative process as compared to the risks and benefits of other methods of alternate dispute resolution and of traditional litigation.[11]

In 2005, the Kentucky Bar Association responded to the following question from the Collaborative Law Group of Central Kentucky: Whether a lawyer may participate in a collaborative law process: a) that requires the parties to negotiate in good faith and voluntarily disclose all relevant information, b) that encourages the lawyer to withdraw if the client fails to negotiate in good faith or make the agreed upon disclosures, and c) that prohibits the lawyer from continuing his or her representation of the client if the parties are unable to reach a settlement. The resulting well-reasoned opinion gave a "qualified" yes to each of these questions, emphasizing that the lawyer must abide by the Kentucky Rules of Professional Conduct and must fully explain the collaborative law process to allow the client to make an informed decision about participating in the process.

Kentucky permits attorneys to withdraw from the process if their client fails to make adequate disclosure, makes fraudulent disclosure or otherwise fails to act in good faith. The client, however, must understand and agree to accept the limited representation. Recognizing that the lawyer's ultimate duty is to assist the client, the Kentucky Bar Association's opinion states: "If one of the client's objectives is to obtain a divorce in the most amicable way possible, then it is incumbent upon the lawyer to help the client find the means to accomplish that goal."[12]

On Feb. 24, 2007, the Ethics Committee of the Colorado Bar Association issued Advisory Opinion 115, holding that the signing of a participation agreement by attorneys is a violation of the Colorado Rules of Professional Conduct. The Colorado opinion states that the collaborative participation agreement creates a non-waivable conflict that impairs the lawyer's ability to adequately represent the client. This is based on a section of the Colorado RPCs that describes certain circumstances in which a client's valid consent cannot be obtained, language that is unique to Colorado and does not appear in the American Bar Association Model Rules. In a footnote, the opinion notes that clients may sign an agreement to confirm their commitment to the collaborative process in which they *may* agree to terminate their lawyers if the process terminates. Thus, lawyers may assist these clients in a collaborative divorce under these circumstances.

Calling the Colorado opinion an "aberration" among ethics opinions, various legislative acts approving collaborative practice and local rules in several states that authorize the use of participation agreements, the Advisory Committee of the Supreme Court of Missouri issued Formal Opinion 124 approving collaborative practice in that state. Finding no basis for Colorado's conclusion, Missouri's opinion states:

> As a matter of professional ethics, it is difficult to reconcile the Colorado Opinion with the fundamental principle that clients have the right to control the role of their lawyers (including requiring them to withdraw), the scope of the lawyer's work, and the resolution of their own disputes.[13]

A decade after Minnesota's first ethics opinion, on Aug. 9, 2007, the American Bar Association issued Formal Opinion 07-447 on the ethical considerations in collaborative law. The ABA noted that collaborative practice has "spread rapidly throughout the United States and into Canada, Australia and Western Europe" and that the process "…creates a problem-solving atmosphere with a focus on interest-based negotiation and client empowerment."[14]

In pertinent part, Opinion 07-447 states:

> …we agree that collaborative law Practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence and communication. We reject the suggestion that collaborative law Practice sets up a non-waivable conflict under Rule 1.7(a)(2).[15]

Basing its opinion on the Model Rules of Professional Conduct, the ABA confirmed that a lawyer may

represent a client in the collaborative law process as long as the lawyer complies with the Rules of Professional Conduct and the lawyer advises the client of the benefits and risks of participation and the client provides informed consent. The ABA noted that, with the exception of the Colorado Bar Association, all of the bar associations that have considered endorsing collaborative practice have done so. The ABA rejected Colorado's view that the participation agreement the parties and their counsel sign creates a non-waivable conflict.

> Responsibilities to third parties constitute conflicts with one's own client only if there is a significant risk that those responsibilities will materially limit the lawyer's representation of the client. It has been suggested that a lawyer's agreement to withdraw is essentially an agreement by the lawyer to impair her ability to represent the client. [Colorado Bar Ass'n Eth. Op. 115] We disagree, because we view participation in the collaborative process as a limited scope representation. [ABA Op. 07-447, p. 4]
>
> A client's agreement to a limited scope representation does not exempt the lawyer from the duties of competence and diligence…. *Ibid.*

In reaching its opinion, the ABA referenced *Lerner v. Laufer,*[16] in which the court stated that "the law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them." In addition, the ABA noted that the Alaska Bar Association, the Arizona State Bar Association and even the Colorado State Bar Association have all issued ethics opinions approving limited scope representation in these states.[17]

MOVING FORWARD: THE UNIFORM COLLABORATIVE LAW ACT

The Uniform Collaborative Law Act (UCLA), drafted in 2009 and amended in 2010, has, to date, been adopted in Texas, Utah and Nevada. Approval is pending in Ohio, and the law has been introduced in Alabama, Massachusetts, Hawaii and the District of Columbia. The New Jersey Law Revision Commission is currently reviewing the act. At its annual convention in August 2011, however, the ABA delegates failed to approve the adoption of the UCLA with strong opposition coming from the Litigation and Young Lawyers sections. It will undoubtedly be placed before the ABA delegates again next year, with further support from the growing numbers of collaboratively trained attorneys pressing for recognition and acceptance.

As collaborative practice becomes ever more widespread, the need to create uniformity in the process increases. Ultimately, look for collaborative practice to take its place with other forms of alternate dispute resolution as an option for parties who seek to have a less adversarial divorce and more input into the process. ■

ENDNOTES

1. Kentucky Bar Association, Ethics Opinion KBA E-425 (June 2005).
2. Office of Lawyers Professional Responsibility, Minnesota Judicial Center, Advisory Opinion, March 12, 1997.
3. Texas Family Code, Title 1. Ch. 6. Sec. 6.603. C., Subchapter G.
4. Nat'l Rep. on Legal Ethics & Professional Responsibility, N.C. 2002 Formal Ethics Opinion 1 (April 19, 2002).
5. General Statutes of North Carolina, Chapter 50, Art. 4, Sec. 50-70 *et seq*.
6. Maryland State Bar Association, Docket 2004-23, Ethics Opinion.
7. Maryland State Bar Association, Docket 2004-23, Ethics Opinion, p. 6.
8. Maryland State Bar Association, Docket 2004-23, Ethics Opinion, p. 4.
9. Maryland State Bar Association, Docket 2004-23, Ethics Opinion, p. 6.
10. Maryland State Bar Association, Docket 2004-23, Ethics Opinion, p. 8.
11. Maryland State Bar Association, Docket 2004-23, Ethics Opinion. p. 9.
12. Kentucky Bar Association, Ethics Opinion KBA E-425 (June 2005), p. 5.
13. Advisory Committee of the Supreme Court of Missouri, Formal Opinion 123, Collaborative Law, p. 3.
14. Ethical Considerations in Collaborative Law Practice, American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-447, Aug. 9, 2007, p. 1-2.
15. Ethical Considerations in Collaborative Law Practice, American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-447, Aug. 9, 2007, p.3.
16. 482 N.J. Super. ____ (App. Div. __), *cert denied*, ___N.J. ___ (2003)
17. Alaska Bar Association Ethics Opinion No. 93-1 (May 25, 1993); Arizona State Bar Association Ethics Opinion 93-03 (Jan. 15, 1991); Colorado Bar Association Ethics Committee Formal Opinion 101 (Jan. 17, 1998.)

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QDRO Pitfalls

What Questions Should You Be Asking When Drafting QDRO Provisions?

by John Nachlinger

We have all been through it. You are finishing up a long and stressful negotiation by drafting a property settlement agreement on the eve before your first scheduled day of trial. The parties are trying to change positions at the last minute, and you are desperately trying to hold your hard-fought agreement together. Trying to not create any additional issues that will prolong the case, you address the retirement account division as follows: *"Husband has a retirement account through his place of employment. The parties agree that the marital portion of the account shall be equally divided by way of Qualified Domestic Relations Order within thirty (30) days of the Judgment of Divorce."*

This provision, or some similar version, is how most settlement agreements dispose of retirement accounts. Often, attorneys do not do any discovery about the parties' retirement assets beyond having them identified by the parties on their respective case information statements. Most of us decide to not spend time on retirement assets because it is a foregone conclusion that the marital portion will be equally divided.

Unfortunately, by taking the approach just discussed, you are opening yourself up to another six months to a year of having this particular client in your life and choking up your switchboard. As your client's bill and frustration level increases, he or she begins to think you are the one dragging the case out. You have to repeatedly deal with either one of the parties' employers or with a qualified domestic relations order (QDRO) specialist. Worst of all, you may be committing malpractice.

In an effort to provide a working framework for thinking about retirement accounts, there are eight straightforward questions you should ask yourself when a case comes across your desk that has a retirement account subject to equitable distribution. The purpose of these eight basic questions is to get you thinking about practical issues before that final hour, when you are trying to get an executed agreement and neither party nor the attorneys can absorb an additional issue raised at the 11th hour.

The questions you should be asking and/or addressing are as follows:

1. WHO WILL BE RESPONSIBLE FOR HANDLING THE DIVISION OF RETIREMENT ASSETS, INCLUDING THE DRAFTING OF ANY NECESSARY QDROS, AND WHO WILL PAY FOR THE QDROS?

Before even getting into the specifics of dividing the plan, you need to answer the threshold question of who is going to divide the plan. This is not a question to ask and answer after the date of the uncontested hearing or the final day of trial. Determining who will be responsible and, more importantly, who will pay for the division of the retirement assets is an essential part of resolving the case.

There are two things to keep in mind when addressing this question. First, have you protected yourself from being obligated to ensure that retirement assets are divided? Considering the length of time it takes some QDROs to be drafted, and the way some litigants drag their feet after the divorce is finalized, attorneys need to think hard about whether they want to be responsible. Consider putting a clause in your retainer agreement stating that you are not responsible for any post-judgment work, such as the drafting of QDROs, absent a separate written retainer. It is recommended that you consider placing a provision in your settlement agreements that specifically delineates responsibility for obtaining QDROs. Given the substantial potential of malpractice claims surrounding retirement accounts that were either never drafted or drafted incorrectly, it is important that you shield yourself from liability, unless you want to be responsible for making sure your client's retirement account is divided.

Second, if you have agreed to take on the task of dividing the account, are you going to draft the QDRO yourself or are you going to hire a company to do it? Regardless of which road you elect to take, you are ultimately responsible to ensure the QDRO is correctly drafted by placing your signature on it.

2. WHAT KIND OF PLAN DO THE PARTIES HAVE?

When you draft your client's case information statement (CIS) or review the other party's CIS, you should immediately determine if the plan is a defined benefit or defined

contribution plan. Generally, a defined contribution plan is one in which the employer, the employee, or both, contribute money into the account, and there is always a cash balance. The most common of these plans are 401ks and individual retirement accounts (IRAs). The amount in the plan fluctuates daily due to market forces, and there is no guarantee of how much will be in the plan in the future. A defined benefit plan is commonly referred to as a pension, where the employee has a guaranteed benefit in the future, usually based upon the number of years of employment. While most defined benefit plans pay out a specific monthly figure upon retirement, some have other options, such as a lump sum payment.

Understanding what type of plan you are dealing with is very important, because you have to understand what you are dividing. All of the other issues you need to address are interrelated with the type of plan, such as market fluctuations, loans, cost of living adjustments and surviving spouse benefits. For example, you should not divide a pension without taking into account gains and/or losses. However, it is not surprising that many attorneys will draft inconsistent retirement provisions. Additionally, be sure to put the full, correct name for each plan in the settlement agreement. Merely referencing a "401k plan" may present problems and be fertile ground for post-judgment litigation.

3. CAN THE PLAN BE DIVIDED AND, IF SO, IS A QDRO NECESSARY?

There are some plans that cannot be divided with a QDRO, and others that can be divided without the necessity of a QDRO. Engaging in discovery before finalizing the divorce, and determining whether and through what method the retirement account can be divided, is essential.

If you are dealing with a military or government pension, you can divide the account, but the requirements of the court order differ significantly from that of a typical QDRO, especially depending on whether the individual is still active or retired. These orders are typically called retired pay court orders, as opposed to QDROs. Keep in mind, the Defense Finance and Accounting Service will not make payments directly to the non-military spouse who was married to the military spouse for less than 10 years. Additionally, the titled spouse must have been performing military duty during the entire 10 years (or more). If you are dealing with a military pension, you may have to be creative when dividing the marital portion if the military will not divide it.

When dividing an IRA or simplified employee plan (SEP), a QDRO is not necessary. By inserting stock language into a settlement agreement that an IRA will be divided by QDRO, unneeded confusion will ensue. Typically, division of an IRA only requires a letter of instruction from the titled spouse, along with a copy of the final judgment of divorce and settlement agreement, providing that a portion of one party's IRA will be rolled over into the other party's IRA.

If you are dealing with a non-ERISA plan,[1] a QDRO may not be sufficient to divide the account, since the plan administrator is not required to honor them. This is why you should discover whether a QDRO is necessary before finalizing the divorce. If, for some reason, you cannot determine how a plan can be divided prior to the divorce, be sure to put alternative language in the settlement agreement in the event a QDRO cannot be drafted and/or enforced.

A side issue to consider is whether the cost of the QDRO is justified in light of the size of the retirement account. For example, if there is $2,000 in a 401k, it makes little sense for a party to pay $500 (or more) in fees to have a QDRO drafted to provide him or her with half of the account. A good rule of thumb is that any defined contribution plan with less than $10,000 should simply be tax affected, divided on paper, and credited to the non-titled spouse against another asset subject to equitable distribution.

4. WHAT PORTION OF THE PLAN WILL THE NON-TITLED SPOUSE BE ENTITLED TO, AND WHAT WILL BE THE DATE OF DIVISION?

At first glance, this inquiry may seem simple. However, many settlement agreements fail to specifically explain what portion of the retirement account will be awarded to the non-titled spouse. In addition, many agreements do not set forth a precise date for the division of assets. There is actually quite a bit of post-judgment litigation on these issues.

Unless you are giving a specific dollar figure that is not being adjusted for passive gains or losses to the non-titled spouse, it is important to always state the date of division in the agreement. For example, the agreement could say: *"Wife shall receive one-half of Husband's XYZ Company 401k account balance as of the date the complaint of divorce was filed, specifically January 1, 2010."* Without this information, post-judgment litigation might ensue to determine if the date of the complaint, the date the agreement was signed, the date of the judgment, or some other date should be the date of division. The stakes could be very high if you are dealing with a 401k or IRA during a substantial change in the stock market. Failing to be specific could cost your client thousands of dollars.

5. WILL THE DISTRIBUTION BE ADJUSTED FOR MARKET GAINS AND/OR LOSSES?

The process of dividing retirement accounts post-judgment can take a long time. During the wait, the market can do many things. For example, the U.S. may almost default on its debt and sustain a stock market tumble of 10 percent. If you do not adjust the distribution for passive gains and/or losses, that 10 percent tumble will only be absorbed by one party. Determining the date of division is merely the first step in ensuring an equitable distribution.

Whether you want the distribution adjusted for gains and losses depends on which party you represent. How-

ever, if you agree that the amount will be adjusted, neither party's interest will be adversely affected by the delay in drafting a QDRO and dividing the account. It is strongly urged that gains/losses should always be included to ensure an equitable distribution given the realities of preparing and enforcing QDROs. However, without specific language referencing gains and losses, your client will not be entitled to share the benefit of gains or pain of losses.

6. WILL THE NON-TITLED SPOUSE BE ENTITLED TO SUBSEQUENT CONTRIBUTIONS BY THE TITLED SPOUSE/EMPLOYEE OR THEIR EMPLOYER?

At first glance, this question may seem simple. If you represent the titled spouse, why would you ever agree for the non-titled spouse to benefit from post-complaint contributions to an account? However, by not doing sufficient discovery and carefully drafting the settlement agreement or making the correct arguments at trial, you could be giving a substantial benefit to the non-titled spouse. This is one area where attorneys must be very careful.

Our courts have routinely ruled that when dividing a defined benefit plan at the time of the titled spouse's retirement, the value of the plan "necessarily reflect[s], to some degree, post-divorce work effort[s]."[2] Given the complicated methods one would have to employ to not only apply a coveture fraction to retirement benefit (number of years married/number of years employed), but to also discount the benefit for post-complaint efforts, it is no wonder that this issue does not come up often. With most pensions, the benefit is tied to the number of years employed at the company, which means that the non-titled spouse will not share in post-complaint efforts.

A great example of the dangers in drafting retirement provisions came to light in the recent case of *Barr v. Barr*.[3] In the settlement agreement, the parties agreed "[t]he Wife will receive 50% of Husband's pension benefits attributed to his 11 years in the military service only. Such benefits are to be distributed when Husband commences receiving same."[4] The husband held the rank of captain at the time of the divorce.[5] However, 19 years after the parties divorced, he retired after obtaining the rank of major.[6] Post-judgment litigation ensued about how much the wife was actually entitled to from the monthly benefit, since the husband's total payment increased substantially due solely to his post-divorce promotion.[7]

The court reviewed the provision, and determined it was ambiguous regarding whether the provision, as drafted, gave the wife an interest in 50 percent of the total payment adjusted only by a coveture fraction or whether, due to the phrase "military service only," she only has an interest in the benefits accruing during the 11 years at his rank of captain.[8] Therefore, the court remanded for a plenary hearing to determine the intent of the parties when they entered into this agreement over 20 years ago, as well as "whether the increase in [Husband's] pension resulted from separate post-divorce work."[9] This case provides a clear illustration of what happens when retirement provisions are not drafted with a sufficient degree of care and specificity.

In dealing with defined contribution plans, there are many instances where the employer and/or employee make contributions to the plan only once a year, such as after Dec. 31. It is important to discover how the contributions are made, so your client does not lose out on money. For example, if you set a division date of Oct. 1, 2011, but the employer contribution will not be made until Jan. 15, 2012, for calendar year 2011, the non-titled spouse will lose out on money. In fact, that spouse will lose out on nine months of retirement contributions that were made in a lump sum in Jan. 2012. If this situation arises in your case, be sure to specify in the settlement agreement that the non-titled spouse will receive a proportionate share of contributions made to the plan for 2011, attributable to the period ending Oct. 1, 2011.

7. IS THERE A LOAN AGAINST THE PLAN THAT IS MARITAL IN NATURE? IF SO, HOW WILL THAT BE DEALT WITH IN THE DIVISION OF THE PLAN?

Often retirement accounts, whether defined benefit or defined contribution, have one or more loans outstanding against them. Given the hardships most people have in obtaining credit in this economy, loans against retirement assets are a simple way to obtain necessary funds. The first step is to determine if there is a loan, which is sometimes harder than it sounds. The plan documents themselves may have the loan listed as an asset against the account, or not even list the loan at all. Typically, the best way to determine that a loan exists is to look at the titled spouse's pay stubs, which will likely show repayment. In general, this is an area where you must be very diligent about conducting discovery.

Once you determine there is a loan, determine if it is marital pursuant to N.J.S.A. 2A:34-23.1 and relevant case law. As that is not the focus of this article, it will not be discussed here. If the loan is marital, it must be dealt with in the context of dividing the account.

When dealing with a defined contribution account, a loan reduces the divisible value of the account. If the loan is marital, it may be appropriate to reduce the account balance by the amount of the loan, so both parties share in the cost of the loan. If the loan is not marital, it may be appropriate to add the value of the loan to the account balance prior to dividing the retirement account to ensure the non-titled spouse obtains the full benefit of the account.

You should conduct discovery to determine if the plan will allow non-liquid assets, such as a loan, to be divided. Many plans will not allow a loan to be assigned to the non-titled spouse. One obvious reason is that the repayment of the loan is typically automatic through

wage garnishment from the titled spouse's paycheck. If the plan will allow a loan to be divided, then the QDRO can be drafted to divide the loan per your agreement. However, if the loan cannot be divided, as is normally the case, you must find another way to deal with the loan.

One thing to pay special attention to is a loan, or withdrawal, taken after the settlement agreement is executed before a retirement account is divided. Be sure to include language that the non-titled spouse's interest in the account is to be calculated without regard to any loans or withdrawals made by the titled spouse before the date of distribution (unless, of course, you agree that a loan will be divided). You may also want to include language prohibiting the titled spouse from taking out any loans or making any withdrawals until the QDRO has been effectuated. The key is to protect your client from all possible methods of diluting his or her interest in the account.

8. CAN THE NON-TITLED SPOUSE'S INTEREST IN THE PLAN BE GUARANTEED?

Finding a way to guarantee the non-titled spouse's interest in a retirement plan is often one of the most overlooked, yet important, aspects of distributing an account. There are many ways to address this issue in a settlement agreement to avoid post-judgment litigation. The most common way to guarantee the interest is through the designation of a surviving spouse.

The most complicated area is naming a surviving spouse in defined benefit plans. Failure to understand how to handle this designation can cost your client dearly, and can open you up to a massive malpractice claim. Put simply, if the non-titled spouse is not designated as the surviving spouse, that spouse will get absolutely nothing if the titled spouse dies prior to retirement. This article does not have sufficient space to discuss all of the issues involved with naming the surviving spouse, but in general terms, if the titled spouse dies prior to retirement, the surviving spouse will receive a qualified pre-retirement survivor annuity (QPSA).

If the non-titled spouse is not named as the surviving spouse, he or she will get nothing if the titled spouse dies. Assuming the non-titled spouse was supposed to receive one-half of the pension, he or she will only get 25 percent if he or she is only named as the surviving spouse on his or her portion of the pension. If that spouse is named a surviving spouse for the entire QPSA, he or she will receive the full 50 percent of the pension, upon the titled spouse's death. It is very important that you are specific, and ensure that the QDRO is drafted correctly to protect your client.

On the other hand, most defined benefit plans physically divide the account upon retirement pursuant to a QDRO and, therefore, the death of a titled spouse, post-retirement, has no effect on the non-titled spouse's interest. There are some exceptions to this general statement, so it is important to conduct discovery and obtain the plan documents.

When dividing a defined contribution plan, naming the non-titled spouse as surviving spouse will simply ensure he or she receives the portion of the account agreed to in the settlement agreement. It is essential that the designation of surviving spouse only applies to the non-titled spouse's share of the account. If you name the non-titled spouse as surviving spouse for the entire account and the titled spouse dies prior to distribution, the non-titled spouse may receive the entire account. As with all the topics covered here, it is imperative that you make sure the settlement agreement and QDRO are carefully drafted to ensure the intent of the parties is correctly reflected.

If you cannot name a surviving spouse for some reason, such as the plan will not allow an ex-spouse to be named, look into life insurance policies to secure the retirement asset. Specifically, it is defined benefit plans that are being referred to in this context. These benefits are often a great deal of money, and a non-titled spouse is often relying upon the benefits, so ensuring he or she receives money during retirement is imperative.

In conclusion, there are many issues to keep in mind while negotiating settlement agreements or trying a case where retirement accounts exist. This article is not intended to serve as a comprehensive discussion of all these issues. The purpose here is to get you thinking about retirement accounts and help you recognize that dividing them is more complicated than merely stating that the account(s) will be divided by a QDRO. Keeping these points in mind can help you avoid opening yourself up to post-judgment litigation that will upset your client, try your nerves, and keep your file open for many months to come. ■

ENDNOTES

1. The Employee Retirement Income Security Act of 1974 (ERISA) (Pub. L. 93-406, 88 Stat. 829, enacted Sept. 2, 1974) is an federal statute that establishes minimum standards for pension plans in private industry, and provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans.
2. *Menake v. Menake*, 348 N.J. Super. 442, 454 (App. Div. 2002).
3. *Barr v. Barr*, 418 N.J. Super. 18 (App. Div. 2011).
4. *Id*. at 29.
5. *Id*.
6. *Id*.
7. *Id*. at 30.
8. *Id*. at 37-38.
9. *Id*. at 38-39.

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Discovery—It's Time to Turn the Tables

by Bonnie Reiss

The rules have always been different for family lawyers. We cannot take mortgages.[1] We cannot pay referral fees.[2] There are page limitations on our client's certifications.[3] Our billings and requests for counsel fees *pendente lite* must be scrupulously specific. Even so, we often collect far less than the value of our services, and are compelled to carry large receivables. We are treated differently than other litigators, since the funds spent on the litigation process reduce the income and assets available to help family members meet necessary expenses, both before and after divorce. Yet, while family lawyers, particularly those representing the spouse who is not in control of the family funds, bear this burden, there is much that can, and should, be done by the courts, particularly during the discovery phase of the case, to maintain the proverbial even playing field.[4]

Forty years of case law tells us that the income and assets subject to distribution belong to both parties.[5] The discovery process is intended to place both litigants on level ground in litigation.[6] Too frequently, however, this principle is merely afforded lip service. A non-owner, supported spouse can easily exhaust limited resources trying to obtain information that should be readily available. The result is often a lop-sided settlement, and drastically diminished economic security for the parent who has the day-to-day responsibility for meeting the children's needs.

In most marriages where there is a business or professional practice, the party who controls the economic information also controls the economic resources. The supported spouse is forced to incur counsel fees to obtain information on his or her own assets, and invariably is required to deplete assets which are meant for his or her future security.

Perhaps the following scenario is familiar:

You represent Joan who has been married to Hank for 11 years. They have children. Joan, previously divorced, has not worked outside the home since she was 18, when she worked as a waitress. Hank owns a closely held business with his cousin, Vinnie.

Hank pays the family bills and controls the investments. It is a matter of extreme pride to Hank that he 'takes care of the family.' For Joan to ask questions about accounts or tax returns would be viewed as an affront to his role as 'provider.' Joan has free use of charge cards and all the cash she needs. They have one joint checking account, used primarily by Joan, into which Hank deposits money 'as needed.' The business pays for Joan's BMW SUV, Hank's Range Rover and Hank's mother's car, as well as the home phone, all family cell phones and cable TV, which is also in Hank's office.

They go to Cancun every April, stay in the presidential suite at a five-star hotel, and fly first class. Long weekends are spent in Las Vegas, Atlantic City and Aruba, where their room is often comped. Meals, cigars, vacations, gasoline, car repairs and other personal expenses are charged on credit cards in the name of Hank's business. Joan is a secondary card holder on one of these cards, which she uses for her gas purchases.

They live in a 6,000-square-foot home, which is beautifully landscaped. The value is $800,000, and it is encumbered by first and second mortgages totaling $650,000. A portion of the debt went to place the down payment on a beach house, which was owned for several years but sold to pay damages in a lawsuit filed against Hank's business and Hank personally.

The parties have cleaning help twice a week, and the two children attend private school. Hank's mother is half owner of the marital residence, as she contributed to the initial down payment. The parties have paid the mortgage without assistance from Hank's mother. Hank owns 50 percent of his mother's home. Joan has no exempt assets.

The parties have more than $50,000 in credit card debt, and Hank has not made estimated tax payments on the current or last years' tax returns. Hank's reported income is $165,000 per year. Joan has no clue what she spends, so her case information statement consists entirely of estimates. Hank is 48, and Joan is 45.

As Joan's attorney, you find yourself in the position where determining the value of the business and its real cash flow is critical. Joan's interest in the marital residence is small, and it appears that she will be liable on the debt. She will need whatever cash she can realize from her interest in the business to acquire a residence, and she will need substantial alimony in order to maintain a lifestyle substantially similar to the way the couple lived during the marriage.

You are proactive, and send interrogatories and a notice to pro-

duce requesting five years of business and personal financial records to adverse counsel, as soon as he advises you he will be representing Hank. They are ignored. Letters and phone calls follow, generating fees. You attend the first case management conference 70 days after you propounded your notice to produce. The timeframes set by the rules for compliance with discovery demands are ignored, and the resulting order allows 60 days for Hank to furnish answers.[7]

Hank's attorney represents that his client is willing to pay the retainer for a joint forensic accountant to value the business, but not a separate accountant for Joan. Faced with the prospect of filing a motion before a judge who will ask why you want your own 'hired gun,' you agree to engage a joint expert.

At the second case management conference, 60 days later, Hank's attorney says they need an additional two weeks to provide the discovery you requested. Of course, the request is granted. The case is now more than four months old.

When the response to your discovery demands arrives, it is incomplete and disorganized. There is no written response to the notice to produce, only a box of documents that are not labeled as corresponding to the numbered demands on the interrogatories or notice to produce. Records that have been scrupulously maintained throughout the marriage are suddenly missing. Personal bank statements are spotty. There are no cancelled checks. You are provided with a few random months of credit card statements. Some are from the same issuer, but bear different account numbers. There is no indication whether they relate to the same account, whether the account number has been changed because of a merger or takeover of the financial institution, or if there are multiple accounts. There is no indication when the accounts were opened, since all reflect balances.

The response to the demand in your notice to produce for business checks and credit cards indicates that "all business records have been provided to the accountant." You call the accountant and find that they do not have cancelled checks or credit card statements. "Not in litigant's possession" is another response to many of the demands in the notice to produce.

You also receive a typed document titled "Answers to Interrogatories." It is not signed. "See Notice to Produce" is the response to many questions, without reference to what demand in the notice is being referenced.[8] Where the interrogatory asks for a narrative response, there is none. Many interrogatories are answered with "To be supplied."

Your client must pay for hours spent inventorying documents and preparing a deficiency letter in which you tell the business owner, who gathered the documents, what he has failed to provide (as if he did not already know). The deficiency letter is ignored. N.J.R. 5:5-1 provides that, in pre-judgment cases, discovery of income and assets that are not otherwise exempt are subject to the same rules of discovery that govern other civil litigation.[9] If a party objects to the production of any requested item, the burden is on that party to raise a specific objection within 35 days, and state the basis of the objection. If no objection is made within that time period, and the item is not produced, the party submitting the discovery demand may move for an order of suppression or dismissal pursuant to Rule 4:23-5, which provides, "[u]nless good cause for other relief is shown the court *shall* enter an order of dismissal or suppression without prejudice."[10] The recalcitrant party must pay a restoration fee of $100 if a motion to vacate is made within 30 days of the entry of the order of dismissal or suppression, and $300 if such a motion is filed thereafter.[11] If an application to reinstate is made within 90 days, the court may require the payment of sanctions, counsel fees or both, as a condition for restoration. If the failure to comply with a discovery demand persists, pleadings may be stricken, with prejudice.[12]

The dismissal of the pleadings in a divorce case is not even a pyrrhic victory. In most cases, the parties' initial pleadings seek a divorce, both seek equitable distribution and the information necessary to enter a support award is in the possession of the party withholding the discovery. Thus, striking the pleadings of the recalcitrant party is useless. Pleadings are always reinstated. Even if a court declined to reinstate, the dependent spouse cannot receive his or her fair share of the marital estate without the economic information the supporting spouse controls.

Knowing that dismissal will do nothing to move the case forward, you file a motion to compel responses.[13] These are the kinds of motions judges dread, since they are time consuming. The business owner's defenses to your motion include "business disruption," that it is "too burdensome" to gather the records or that the records are lost.

A common defense is that the demand is overly burdensome, as evidenced by the fact that the records requested were not required by the joint forensic accountant. This argument ignores the critical difference between the role of the joint expert and an attorney for a party. The accountant usually sends a 'preliminary' demand. The forensic accountant may be satisfied to use QuickBooks® to conduct a valuation and rely on the business owner's own QuickBooks® categorization of expenses, adding back those he finds to be miscategorized. However, this approach may miss company paid expenses from which the parties have derived personal benefit. QuickBooks® are often months behind, and rarely reflect current spending.

Equitable distribution of a family business or professional practice involves exactly the same issues, and

requires the same discovery as an action between warring shareholders. The claim that documents need not be provided because the court's expert has not similarly deemed them critical to his or her valuation or an analysis of cash flow is a baseless objection. The expert's opinion is not etched in stone. He or she is subject to cross-examination. Without documents that may challenge representations the owner has made to his or her accountant or the expert, the dependent spouse's ability to conduct cross-examination of the expert or the adverse party is hamstrung. Nevertheless, judges often give this 'defense' to a discovery motion serious consideration, since, at this point in the litigation; he or she is dealing with an old case, which is clogging the calendar.

The employment of a joint accountant often places the non-moneyed spouse at a disadvantage. His or her employment is usually the result of a desire to save on litigation expenses. The accountant is typically paid by the business owner, often from the accounts of the business itself. Characteristically, the business owner will assert that the business is experiencing a reduction in revenues or increase in expenses. Justifiably concerned about having his or her own bill paid, the forensic accountant may be hesitant to provide a lifestyle analysis after being told that the business owner doesn't want to pay for it.

As Joan's attorney, you need to address issues of credibility that are of lesser consequence to the 'joint' expert.

Where the business owner claims not to retain checking or credit card records, the offer of a signed authorization allowing counsel or the supported spouse to secure the records directly from the financial institutions may be the best result obtainable. However, here too, counsel still faces hurdles. Credit cards and cash or brokerage accounts 'inadvertently' may not have been disclosed in answers to interrogatories or a case information statement. Many institutions, even if provided with an authorization, still require a subpoena. If the institution is out of state, the process is particularly burdensome. At the very least, the authorization procedure carries delays and is costly, since a bank may charge a *per* check and *per* statement photocopying fee, which, again, imposes the cost on the party who has the least access to economic resources.

The remedies provided under the court rules are inadequate, and most often impose an enormous financial burden on the dependent spouse forcing the litigant with limited funds to dissipate assets just to get the basic information necessary to assert their rights.

In reality, these 'defenses' asserted by the business owner are aimed at more than frustrating discovery. The spouse controlling the money and the information uses his or her status as keeper of the keys to the kingdom to manipulate the litigation process and wear down the party with limited economic resources. In order for the dependent spouse to get to the point where meaningful negotiations can take place, he or she is faced with the prospect of spending thousands of dollars in legal fees, and accounting and reproduction costs to have a business or financial institution provide necessary records.

Moreover, the protocol set forth in the court rules, aside from being cumbersome and ineffective in family law matters, runs contrary to the rules' stated purpose. The comment to N.J.R. 4:18-1 makes clear that the "evident purpose" of the rule is "to remedy the practice,… of providing documents in a helter skelter fashion, placing upon the demander of documents the onus, with its attendant expense and delay of sorting through the material produced, much of which is often irrelevant to the demand."[14] Yet, from the outset the onus *is* on the demander of the documents, the spouse without access to family income or assets, to incur the expense of creating the demand, following up, sorting through documents, preparing deficiency letters, filing motions and/or ultimately paying to obtain the documents from the institutions via authorizations or subpoenas.

While the business owner's 'litigation strategy' of ignoring, opposing and delaying discovery may be a cost of doing business in a corporate chancery action, in the family court, it frustrates the dual objective of evening the playing field and maximizing the resources available to meet the needs of two households post-divorce. This 'strategy' drains economic resources and deprives children of camp, lessons, and enrichment programs, perhaps even college. Ultimately, it fuels animosity between parents and risks the emotional well being of their children.

The problem is exacerbated because parties do not have equal access to the funds with which to pay counsel fees. Even though the burden of obtaining discovery and securing support, enforcement and other relief require counsel for the supported spouse to put in many more hours than counsel for the party who controls the information and economic resources, frequently the supported spouse's attorney is not being paid on an ongoing basis. As a receivable grows, it becomes increasingly difficult to justify to the court. The consequences of the supporting spouse's delays in providing necessary documents inevitably harms the dependent spouse, who is more likely to incur the displeasure of the trial judge when the case ages, but is not trial ready.

Too often, the dependent spouse, whose fees have become unaffordable, is faced with the Hobson's choice of settling a case with inadequate discovery or going forward to assert legitimate financial claims, knowing that whatever is gained will be offset by the increased fees. Yet, where the parties lived a lifestyle whose expenses

were paid by the family business, there may be no choice if the supported spouse is to receive a fair share of the assets and maintain any semblance of the marital lifestyle.

Often, the only way the dependent spouse can gain access to family funds to pay his or her fees is by filing a motion. This is also an expensive endeavor. Under Rule 5:3-5, it is not sufficient for an attorney to simply submit a paragraph detailing his or her experience, and attach billing records. The certification must also address the factors in Rules 5:3-5, 5:42-9 (b), N.J.S.A. 2A:34-23 and N.J.S.A. 2A:34-23 (a), in particular:

a. Whether his or her hourly rate is in line with other attorneys in the same locality with a comparable level of experience.
b. The nature and length of the professional relationship with the client.
c. The breadth and complexity of the issues.
d. Whether accepting this client's representation has resulted in the attorney turning down other work, and whether the client is aware of that.
e. The financial circumstances of the parties and their ability to pay their own fees.
f. Any fees previously awarded.
g. Fees previously paid to counsel for each party.
h. The results obtained.
i. The extent to which counsel fees have been incurred in the enforcement of discovery or other court orders. To properly address this factor counsel must go through the file and pull all the requests and follow up letters.
j. The reasonableness of the positions of the parties.

Preparing such a document is a time-consuming and costly endeavor. The Rules of Court do not require any less information in a certification of services seeking a *pendente lite* counsel fee than one where fees are sought at the completion of a trial. The billing records must be scrutinized and redacted, so that strategy is not disclosed. A chronological detail of time expended cannot possibly communicate the degree to which discovery has been frustrated, or the efforts expended by counsel.

Moreover, despite the fact that one of the considerations in a counsel fee award is the amount of counsel fees paid by the adverse party, this is a rule that is honored in its breach. Typically, what the court receives in defense of the application is a razor-sharp dissection of the assertions in the certification of services, coupled with the assertion that the business is experiencing difficulties and income is reduced. If the court believes the business owner's tale of woe, the counsel fee application may be denied 'without prejudice,' even though all the factors articulated in the statute and the rule mandate an award. The uneven playing field between spouses is thus perpetuated.

If counsel fees are awarded, they rarely bring the bill current. Often, the court takes funds from savings and investments and distributes them equally. Thus, not only does the business owner and his or her attorney maintain a decided advantage in the ability to pay fees, the non-owner spouse has been forced to pay his or her attorney to prepare a certification of services merely to gain access to his or her own assets, over which the spouse has had unfettered access throughout the litigation. The effect on the dependent spouse is even more draconian when one considers that it is the liquid assets that are the source of the dependent spouse's equitable distribution for the business and other assets controlled by the business owner, and that they are being depleted to fund both parties' litigation expenses.

While there may not be a complete solution, the following procedure is proposed in any complex track case where there is a closely held business or professional practice subject to equitable distribution:

1. The first case management order shall have annexed to it a comprehensive list of documents to be provided within a fixed period of time. These would include all bank statements and cancelled checks, credit card statements, financial statements and loan applications, retirement statements, personal and business tax returns, receipts and disbursement ledgers in the form they are maintained. Both parties would be required to update their documents on a quarterly basis, until the trial is complete or the matter is settled. (A proposed form notice to produce can be obtained from the author.)
2. Additional documents may be added at the conference. Rather than generate a complete notice to produce, the dependent spouse's attorney need only supply a list of additional documents not part of the court notice. Documents that the attorneys agree are not applicable can be stricken from the form notice at the conference.
3. The burden would be on the business 'owner' to make any objection and raise all problems in obtaining the documents in the 'standard' notice to produce *at the first case management conference.* Since the list attached to the case management order is *pro forma*, each party should be prepared at the conference to address problems and objections.
4. If new documents are added at the conference, there would be a 14-day period to raise any objection. If an objection is not raised within this period, it is presumptively waived. A court, within its discretion, may hear

late objections upon a showing of good cause. However, the costs of these hearings would be paid by the party raising the objection.

5. Rather than be made available to inspect at the location where they are maintained in the ordinary course of business, copies of the documents in the *pro forma* notice to produce would be provided to both counsel and all forensic experts. This may be done by scanning them and delivering them labeled and organized in an electronic format, or by providing photocopies.
6. In cases that are particularly document intensive, a discovery fund would be established. Judges might also consider the appointment of a discovery master to address discovery disputes, propose orders and report to the court at each case management conference. There would be no defense to failure to provide documents in the notice to produce that emanate from the case management conferences. Failure of the business owner to provide the documents would carry mandatory counsel fee sanctions and any costs incurred to obtain the documents not produced.
7. Included in the case management order, there would be a requirement that both parties provide current credit reports from three credit-reporting agencies. The recommendation would be a further requirement that these be updated before ESP/mediation, and again before trial. These would reveal accounts that may have been omitted from the case information statement.
8. The business would be required to provide a Dunn and Bradstreet report, if one exists, and copies of all documents submitted to lenders for the prior three years. These, too, would be updated before ESP/mediation and trial.
9. The case management order would also include a provision restraining the disposition of savings and investment accounts without consent or a court order.
10. Initially, the business owner must obtain or finance the costs of obtaining documents not in his or her immediate possession. Thus, if the business owner believes that he or she can fulfill discovery obligations merely by providing an authorization, he or she will bear the financial burden of that decision. If there is a cost to obtaining those documents and the business owner cannot or does not pay that cost, there will be a rebuttable presumption that the non-owner spouse will receive a credit against equitable distribution for all reasonable costs incurred to obtain and reproduce the documents.
11. A second case management conference occurs two weeks after the documents are due. If they have not been provided, and good cause has not been shown for the delay, monetary sanctions would be mandatory. If the material is provided expeditiously, thereafter the court may consider vacating the sanctions. Second and third violations will carry increasingly heavy sanctions and mandatory counsel fee awards. If cash is not available, such fees would be reduced to judgment and payable out of the supporting spouse's assets.
12. The second case management conference would provide an opportunity to add document demands, the need for which has been revealed by the first set of documents provided.
13. Standard long form matrimonial interrogatories would not be permitted. Rather, the notice to produce would be the key to the discovery protocol. Requests for admissions, limited interrogatories and depositions are used to fill in the blanks. This addresses the tactic often employed by the supported spouse of deluging the business owner with more than 100 interrogatories with multiple sub-parts and the tedious motions that inevitably follow.
14. At the first case management conference and each subsequent court proceeding, each attorney would be required to disclose how much he or she has been paid, the source of funds, and the amount of any outstanding bill. Subject to a review of reasonableness and need at final hearing, the court will make an award of fees to achieve parity between the parties without the necessity of a certification of services. This would also occur at the pre-trial settlement conference. If the court finds that one party was required to accrue larger attorneys fees to secure information or enforce orders, additional fees should be awarded on an ongoing basis, as the litigation proceeds. If fee orders are ignored or there is no present ability to pay, there will be a presumed credit against equitable distribution.
15. All fee awards and sanctions would be reviewable at final hearing with any adjustments being made via credits. The burden would be upon the party who opposes the awards and/or sanctions to prove that the court's determination was improper. Frivolous requests for review, or those made in bad faith, would be subject to counsel fee awards.

Unquestionably, this scenario imposes substantial changes on the way we do business in the family part. Yet, such changes are completely justified if the goals of evening the playing field, while expediting the process, are real. Invariably, the party with control over the assets is also the keeper of the keys to the economic information. Statistics show that supported

spouses and their children invariably suffer.

> Women are at a particular economic disadvantage in divorce because they typically do not control family assets at the end of a marriage. A study that measured the economic consequences of divorce for women... found that standard of living drops 30 percent for women and rises 10–15 percent for men in the one year following divorce."[15] The decline in standard of living for women in upper income families and those in long term marriages (where spouses are presumably older) are the greatest.[16]

Absent such reforms, supported spouses will continue to be forced to choose between a fair settlement and cutting one's losses. We can do better. It is wholly appropriate and consistent with the goals of our statutes that the tables be turned and the burdens shifted. The change is bold and drastic, but without it our goal of evening the playing field is nothing more than an empty platitude. ■

ENDNOTES

1. N.J. Ct. R. 5:3-5(b).
2. N.J. Ct. R. 1:39.6(d).
3. N.J. Ct. R. 5:5-4, Pressler, 2010 N.J, Court Rules (Gann).
4. *See Painter v. Painter,* 65 N.J. 196 (1974).
5. *Id*.
6. *See Finnegan v. Coli, et al.*, 59 N.J. Super. 353 (Law Div. 1960); *Davis Acoustical Corp., v. Skulnik,* 131 N.J. Super. 87 (App. Div. 1974); *Merns v. Merns,* 185 N.J. Super. 529, (Ch. Div. 1977); *Gerson v. Gerson,* 148 N.J. Super. 194 (Ch. Div. 1977).
7. R. 4:18-1 provides that the response must be served 35 days after service of the request or 50 days after service of the summons and complaint. Rule 4:17-4(b) gives 60 days for response to Interrogatories.
8. Rule 4:17-4(d) permits reference to a document in response to an interrogatory where "the answer to an interrogatory may be derived or ascertained from or requires annexation or copies of the business records…or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, or from electronically stored information and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served…" The respondent must specify in detail the record from which the answer can be obtained. See Pressler, *Id*. at page 1506.
9. N.J. Ct. R. 5:5-1(a), Pressler, 2003 N.J. Court Rules, (Gann) R.5:5-1(a) refers to R. 4:17; R. 5:5-1(c) refers to R. 4:11 et seq. and R. 4:10-2(dX2) and R. 5:5-1(d) refers to R. 4:18-1, R. 4:18-2 and R.4:22-1. Pressler 2003 N.J. Court Rules, Comment R. 5:5-1 (Gann).
10. N.J. Ct. R.4:23-5(a)(1), Pressler, 2003 N.J. Court Rules, (Gann) (emphasis added). *See Id.*
11. *See Id*.
12. N.J. Ct. R. 4:23-5(a)(2), Pressler, 2003 N.J. Court Rules, (Gann). The rule states that if an order of dismissal or prejudice has been entered pursuant to (a)(1) of this rule and such order has not been vacated, the party seeking discovery may move for an order of dismissal or suppression with prejudice 90 days after the entry of original order.
13. The comment to Rule 4:23-1 permits an aggrieved party whose notice to produce has not been complied with to seek relief either by filing a motion to compel or proceeding under the two-step process in 4:23-5. Proceeding under 4:23-1(c) *requires* an award of counsel fees "after the opportunity for a hearing…unless the court finds that the opposition to the motion was substantially justified or other circumstances make an award of expenses unjust." Similarly, if the motion to compel production is unsuccessful, the same standard applies for an award of fees.
14. Pressler, *supra* at 1522-1523.
15. *Konzelman v. Konzelman,* 158 N.J. 185,205 (1999) (O'Hearn, dissenting) (*citing Women in Divorce: Lawyers, Ethics, Fees & Fairness: A Study by the City of New York Department of Consumer Affairs at* 8-9 (March 1992)). *See* e.g. Peter Leehy, Note, The Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution, 56 *Brook. L. Rev*. 1299, 1305-1307 (1991); Carol Bruch, Developing Standards for Child Support Payments: A Critique of Current Practice, 16 *U.C. Davis L. Rev.* 49, 50-54 (1982) (discussing the negative effects of divorce on children and custodial households); Sally F. Goldfarb, Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Ed1Lcationa/ Expenses, 21 *Fam. L.Q.* 325, 349 (1987); Marsha Garrison, Child Support and Children's Poverty, 28 *Fam. L.Q.* 475 (1994). *See also Pascale v. Pascale,* 660 A.2d 485, 492-93 (N.J. 1995) (*citing* Suzanne Bianchi and Edith McArthur, U.S. Bureau of the Census, *Family Disruption and Economic Hardship, The Short-run Picture for Children* 1-2 (1991); U.S. Bureau of the Census, *Child Support for Custodial Mothers and Fathers* 2(1995)).
16. A. Stewart and C. Brentano, (2006) *Divorce Causes and Consequences* (p 98) New Haven: Yale University Press. G.J. Duncan and S.D. Hoffman (1985) *Economic Consequences of Marital Instability*. In M. David and T. Smeeding (eds.) *Horizontal Equity Uncertainty and Economic Wellbeing (pp.427–467)* Chicago: University of Chicago Press.

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