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Chair's Column

Rethinking Co-Parenting: My Brief Experiment

by Amanda S. Trigg

Due to an unusual travel schedule, when my husband and I alternated weekly trips for more than a month, I found myself forced to function as a single parent for a few weeks. Much to my surprise, I constantly wondered about the limits of my authority to make decisions for our child when I was, effectively, single parenting. I also noticed with new clarity the challenges faced by any parent who settled his or her divorce with a generic and broad, although well-intentioned, parenting plan and definition of 'joint' custody.

As full disclosure, I have only one child, and he is 13 years old. He proves himself to be so self-sufficient that my husband and I often joke that he would not need us much at all if we could hand him the car keys. Neither of us thought our unusual travel schedule would be problematic. It wasn't really, but walking and working for a month in the shoes of a mostly single parent proved to be unexpectedly challenging and interesting. Could this experience make me a better lawyer?

The Sick Kid

As I returned from one trip, and my husband packed his bag for another, our son fell ill and missed school for three days. We played 'tag' on those days, so we each went to our offices for half of a day. Then, my husband departed as planned. I never questioned my authority to arrange for medical attention for our son, or to incur the related costs for his appointment and medication. I did, however, wonder about the practical implications of being compelled, by the circumstances, to provide for his care by myself. This was the first time I was the parent who slept with her fingers crossed that tomorrow he would be sufficiently recovered to return to school. Otherwise, I would be forced to start another day by sending emails to clients informing them they would have to reschedule appointments or, worse, by begging a judge for an adjournment of a court appearance.

In most of the parenting plans I prepare and review, it is implied, if not expressly stated, that when a child falls ill, or school closes due to inclement weather, the parent exercising parenting time on that day is responsible for covering the child's care. Joint parenting suggests cooperation and balancing of obligations when a child is sick or in need of unexpected supervision. Parenting plans that fail to mention the issue also fail to help the parent who has the sick child in his or her home. If those uncontrollable events disproportionately impact one parent, causing him or her to miss work, pay for childcare or call in favors with significantly more frequency than the other parent, it hardly seems like the parents are bearing responsibilities jointly. Although it may not be necessary to specify how a child's sick/snow day will be borne by the parents in every situation, it certainly should be considered in cases with multiple children; in cases where there is a child with special health needs; when one parent's employment situation cannot tolerate much flexibility; or in any contentious, albeit joint, parenting arrangement.

The Hungry Kid

For my 13-year-old son, food is a high priority. As every meal approached, I considered whether to take the easy way out by heading to our favorite neighborhood restaurants. Usually, nutrition falls within the scope of a daily decision made by each parent in his or her own home. Occasionally, for certain families or certain children, nutrition falls within the scope of a medical decision (for children with allergies, or special diets related to health) or the children's religious upbringing. Mentioning it in a parenting plan is the exception, rather than the rule. Perhaps that is our mistake. We have all heard complaints from clients about a co-parent's failure to properly promote nutrition and regularly scheduled meals, and to personally prepare meals for children. Adequate and balanced nutrition is fundamental to growth, endurance and life-long health. Providing it is arguably one of the most important contributions a parent makes to his or her child's health on a daily basis. Some parents will trust the other to provide; others may not. Those concerns should not be dismissed or omitted from a parenting plan designed to promote the children's best interests.

The Party Kid

It should have been a bonus when my son asked if he could attend a friend's party on a Friday night, especially when there was a different party I wanted to attend on the same night. I have met the child who was hosting the party, when she came to our home. My husband has met that child's mother, and we all have mutual friends. The glitch, however, was that I have never personally met, or spoken to, either of the hosting parents. I thought the responsible thing to do would be to introduce myself to the parents when I dropped off my child. But, to make a long story short, it did not work out that way. I dropped off my child at a party without ever having had direct personal contact with the parents. In the moment, I decided my husband was a sufficient proxy. If he were my ex-husband, would I feel differently?

Even the most communicative divorced parents cannot reasonably be expected to share every detail, or to unconditionally trust information provided by the other. They may rely upon each other's research or opinions some of the time, or not at all. Even in joint parenting arrangements, day-to-day decisions are made unilaterally. Whether to allow a child to attend a local party seems to fall within the authority of either parent. Absent exceptional circumstances, one may not veto social plans made by the other for a child. Providing information about the child's whereabouts is not, I now believe, sufficient to satisfy an obligation to co-parent. Either parent should have an obligation, if asked, to provide information about who is effectively caring for a child during the other party's parenting time, including, but not limited to, who the supervising parent is at a party, and to share full contact information for that supervisor. Treat the children's social events more like vacations (for which we routinely require full details about the trip), and we will foster better co-parenting and safeguards for children.

Conclusion

Every family law attorney has answered a client's question of whether we have children of our own, and we all have our opinions about how having our own children changed our point of view as lawyers. My brief experience in single parenting broadened my perspective, gave me even more respect for the breathing tenets of N.J.S.A. 9:2-4 concerning joint parenting and brought up new ideas about how to build a better parenting plan when the situation seems to require it.

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Editor-in-Chief's Column

Referencing Criminal Action in a Family Law Matter

by Charles F. Vuotto Jr.

The purpose of this column is to discuss whether the bench and bar require further clarification of the Rules of Professional Conduct to guide professionals with regard to the precarious situation when criminal law intersects a civil law matter. There are various factual circumstances where the criminal code intersects the practice of family law. I believe it is fair to say that we confront these circumstances most often when a litigant violates an order for timesharing or a domestic violence restraining order. When an adverse party takes, or threatens to take, such an action, to what extent can an attorney for the aggrieved party reference the applicable criminal ramifications to such actions?

The Rules of Professional Conduct and case law prohibit attorneys from threatening criminal action in a civil matter. Specifically, RPC 3.4(g) provides that a lawyer shall not "present, participate in presenting, or threaten to present criminal charges to obtain an *improper* advantage in a civil matter." (Emphasis added) RPC 3.1 further limits attorneys to asserting only those issues they know, or reasonably believe, to have a basis in law and fact.

While the Rules of Professional Conduct prohibit attorneys from threatening criminal action to gain an improper advantage in a civil litigation, the New Jersey Code of Criminal Justice regulates certain conduct that intersects with aspects of family law.

For example, N.J.S.A. 2C:13-4 provides:

> Custody of children. A person, including a parent, guardian or other lawful custodian, is guilty of interference with custody if he:
>
> (1) Takes or detains a minor child with the purpose of concealing the minor child and thereby depriving the child's other parent of custody or parenting time with the minor child; or
>
> (2) After being served with process or having actual knowledge of an action affecting marriage or custody but prior to the issuance of a temporary or final order determining custody and parenting time rights to a minor child, takes, detains, entices or conceals the child within or outside the State for the purpose of depriving the child's other parent of custody or parenting time, or to evade the jurisdiction of the courts of this State; or
>
> (3) After being served with process or having actual knowledge of an action affecting the protective services needs of a child pursuant to Title 9 of the Revised Statutes in an action affecting custody, but prior to the issuance of a temporary or final order determining custody rights of a minor child, takes, detains, entices or conceals the child within or outside the State for the purpose of evading the jurisdiction of the courts of this State; or
>
> (4) After the issuance of a temporary or final order specifying custody, joint custody rights or parenting time, takes, detains, entices or conceals a minor child from the other parent in violation of the custody or parenting time order.
>
> Interference with custody is a crime of the second degree if the child is taken, detained, enticed or concealed: (i) outside the United States[1] or (ii) for more than 24 hours. Otherwise, interference with custody is a crime of the third degree but the presumption of non-imprisonment set forth in subsection e. of N.J.S.2C:44-1for a first offense of a crime of the third degree shall not apply.[2]

Further, N.J.S.A. 2C:29-9 provides the following consequences for noncompliance with a court order:

> a. A person is guilty of a crime of the fourth degree if he purposely or knowingly disobeys a judicial order or protective order, pursuant

to section 1 of P.L.1985, c.250 (C.2C:28-5.1), or hinders, obstructs or impedes the effectuation of a judicial order or the exercise of jurisdiction over any person, thing or controversy by a court, administrative body or investigative entity.

b. Except as provided below, a person is guilty of a crime of the fourth degree if that person purposely or knowingly violates any provision in an order entered under the provisions of the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et al.) or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States when the conduct which constitutes the violation could also constitute a crime or a disorderly persons offense. In all other cases a person is guilty of a disorderly persons offense if that person knowingly violates an order entered under the provisions of this act or an order entered under the provisions of a substantially similar statute under the laws of another state or the United States. Orders entered pursuant to paragraphs (3), (4), (5), (8) and (9) of subsection b. of section 13 of P.L.1991, c.261 (C.2C:25-29) or substantially similar orders entered under the laws of another state or the United States shall be excluded from the provisions of this subsection.[3]

As another example, N.J.S.A. 2C: 24-4 prohibits a person having a legal duty for the care of a child (or assuming the responsibility for such care) from endangering the welfare of a child by engaging in certain sexual conduct that would impair or debauch the morals of the child.

As yet another example of the criminal code's intersection with family law, N.J.S.A. 2C:20-2(d) addresses "theft from spouse," stating "[i]t is no defense that theft or computer criminal activity was from or committed against the actor's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft or computer criminal activity only if it occurs after the parties have ceased living together."

In applying RPC 3.4(g), the courts have disciplined attorneys who threatened criminal action, but in other cases have held the attorneys' actions not to be unethical. For example, the New Jersey Supreme Court Disciplinary Review Board recommended, and the Supreme Court ordered, censure for an attorney who threatened to pursue criminal charges of fraud to demonstrate parental unfitness in a custody matter.[4] The attorney threatened to file charges with the Internal Revenue Service, the Welfare Board, Rental Assistance and the New Jersey Department of Taxation unless the adverse party accepted the custody settlement proposal. The New Jersey Supreme Court Disciplinary Review Board held the attorney's conduct to be in clear violation of RPC 3.4(g).

Likewise, the Supreme Court imposed a one-year suspension on an attorney who assisted in the preparation and filing of criminal charges for bigamy against the adverse party in a personal injury lawsuit.[5] The adverse party, who had joined her alleged husband in a *per quod* claim, admitted her divorce in Mexico from her first husband was not valid. The attorney assisted his client in filing a criminal complaint, hoping she would drop the civil lawsuit.

In *Paterno v. Paterno*,[6] Judge Conrad Krafte concluded that interference with custody and parenting time could be pursued simultaneously in the criminal context under N.J.S.A. 2C:13-4, and in the family part for violation of litigant's rights. This holding suggests there is no bar to a client pursuing all available remedies under the law. There still remains a question, however, regarding how far an attorney may go in referencing his or her intent to pursue criminal charges.

Some practitioners believe RPC 3.4(g) is violated when the assertion of potential criminal charges is essentially a *quid pro quo*. Some believe this would be so even if the attorney stopped short of affirmatively advising he or she intended to pursue criminal action. In other words, for an attorney to suggest that he or she is "considering" criminal action or "intends to discuss pursuing criminal action" with that attorney's client, or that he or she "may be pursuing criminal action" would all seem to run afoul of the prohibitions of RPC 3.4(g).

On the other hand, some attorneys believe the trap may be avoided if the attorney asserts something like the following: 1) "We believe you have acted in direct violation of a criminal statute," or 2) "arguably you are in violation of a criminal statute," or 3) "my client intends to pursue all remedies available to him or her pursuant to a (criminal statute)."

Therefore, one school of thought is that there is no prohibition about being transparent and advising one's

client of an intention to do so, so long as it is not an attempt to extract an advantageous result. Of course, if an attorney alleges his or her client intends to pursue criminal charges, there must be a basis in law and fact for making such an assertion.[7]

Others feel that attorneys may run afoul of RPC 3.4(g) when the criminal proceedings that are threatened or actually undertaken are unrelated to the matter at hand. In those cases, it simply appears to be extortion. Pursuing criminal sanctions related to a matter is viewed by some as the right of citizen and, if it is in good faith, it is not done in order to "obtain an improper advantage."

There is no question that a practitioner walks a fine line in referencing a criminal statute in the context of any civil litigation. Is there a gray area where an attorney can discuss the possibility of pursuing criminal action in a non-coercive way that is not 'improper' or necessarily for the purpose of gaining an advantage in a case? Put differently, is it permissible for a practitioner to generally inform an adversary when a client intends to seek all of the remedies available to him or her under the law, including criminal action, if the facts as alleged constitute a crime, and that is, in fact, the client's intention? Is it permissible as long as the notification is not threatening or coercive in any way? Does the answer change when an adversary is a self-represented litigant? In light of all of these questions, do we require further clarification in the Rules of Professional Conduct? ■

The author would like to give special thanks to Cheryl E. Connors, Ashley N. Richardson, Stacey L. Miller, and other members of the NJFL Editorial Board for their assistance with this column.

Endnotes

1. In the highly publicized case, *Innes v. Carrascosa*, 391 N.J. Super. 453 (App. Div. 2007), the mother was incarcerated after refusing to return the child to New Jersey from Spain in violation of specific court orders.
2. N.J.S.A. 2C:13-4 (a).
3. N.J.S.A. 2C:29-9.
4. *In re Balliette*, Docket No. DRB 13-287 (April 10, 2014), *censure ordered*, 217 N.J. 277 (2014).
5. *In re Cohn*, 46 N.J. 202 (1966); *see also In re Dworkin*, 16 N.J. 455 (1954) (imposing a one-year suspension on an attorney who threatened criminal charges against a man who forged a government check for $70 to gain an additional fee of $100 to resolve the case); *In re Krieger*, 48 N.J. 186 (1966) (suspending an attorney for three months after he initiated criminal prosecution alleging perjury against a key witness for the purpose of achieving a favorable result in a civil action).
6. 254 N.J. Super. 190 (Ch. Div. 1991).
7. The author thanks Mark Biel Esq. for these insightful comments.

Executive Editor's Column

An Observation on Credibility: Impeachment of a Witness on One or More Conflicting Case Information Statements

by Ronald G. Lieberman

Practitioners believe there is a 'gotcha' moment if a litigant provides conflicting or different case information statements, but is that really true? If the litigant is forced to provide the information, does it remain a substantial area for cross-examination or is that 'gotcha' moment tempered by the fact that the litigant him or herself made the disclosure?

Practitioners are aware that with regard to case information statements filed by the client, pursuant to Rule 5:5-2(c):

> Parties are under a continuing duty in all cases to inform the court of any material changes in the information supplied on a Case Information Statement. All amendments to the statement must be filed with the court no later than 20 days before the final hearing. The court may prohibit a party from introducing into evidence any information not disclosed or it may enter such other order as it deems appropriate.

Practitioners rightly believe that in a trial or hearing the case information statements filed by the other party can be fertile ground for cross-examination. Extrinsic evidence relevant to the issue of credibility can be relied upon to affect the credibility of a witness.[1] An opponent, or even the party calling the witness, can use this documentation to question the witness's version of the facts.[2] If the witness testifies to a different presentation of facts in multiple case information statements, often the witness is believed to have provided 'prior inconsistent statements.' It has been stated that using prior inconsistent statements to discredit the witness is "one of the most valued tools of litigation."[3]

The information contained in the case information statement also is important under the Rules of Evidence because it was the declarant/party who made the statement.[4] The practitioner should also know that the case information statement need not be contrary to the other party's interests at the time it was made.[5]

With this background in mind, conflicting or different case information statements seem to be easy fodder for cross-examination. But, the question becomes whether it is more prejudicial than probative to allow a party to be cross-examined based on conflicting case information statements when the party is under an affirmative obligation to acknowledge and to make amendments to his or her case information statement or potentially face the barring of information from admission under court rules. In other words, the litigant, not the skilled attorney, is the one who brings out the discrepancies, updates, or amendments.

This is not to say that the credibility of witnesses and an evaluation of their testimony should be ignored. Of course, it is important for a court to permit cross-examination in order to flesh out the truth, because it has been held that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[6] The function of a witness is to provide communications on matters within his or her personal knowledge. The accuracy and value of his or her testimony depends upon the opportunity to observe facts, and his or her capacity to accurately recall things that occurred. So, the quality of a witness is his or her ability to perceive the events and recall them.

So, the practitioner who is cross-examining a witness based on conflicting case information statements may not really have the 'gotcha' moment after all. No doubt the credibility of a witness can be affected by intentional false swearing and the overall unreliability of testimony, yet the conflicts or changes contained in multiple case information statements were brought out because the

party had to do so pursuant to Rule 5:5-2(c). Is the self-imposed effect on credibility fair?

The problems of credibility involve more than just direct attacks on the character of a witness. Credibility of a witness constitutes the disclosure of the probability of accuracy or error in the witnesses' testimony.[7] Yet in this situation, the disclosure is in essence self-reporting by the litigant. Should the litigant receive a pass or 'points' by the judge in acknowledging any errors?

There are restrictions in the criminal law arena on the admissibility of compulsory incriminating statements. But, here a witness is directed by court rules to disclose conflicting information about him or herself.[8] Should there be restrictions on the admissibility of compulsory and potentially self-defeating statements made in the family law arena?

The United States Constitution has been held to prevent self-incrimination by defendants in the criminal law arena.[9] Even though the New Jersey Constitution does not have a counterpart to the Fifth Amendment to the United States Constitution, the privilege against self-incrimination does exist under New Jersey's common law.[10]

So, we are back to the argument about whether it is fair to a party to be compelled to provide damaging information that could affect his or her credibility because of a compulsory amendment requirement in a court rule. A skilled practitioner could try to turn this question around and say it is incumbent upon the litigant to ensure information he or she provides is always accurate. But that is not necessarily a fair way of viewing things, given that courts already recognize divorce cases develop in a way where new or conflicting information is revealed as the litigation unfolds.[11]

The mandated requirement to correct mistakes or make amendments in additional case information statements set forth in Rule 5:5-2(c) brings to light matters that should cause the practitioner to consider whether his or her client really is in a bad position if the client has conflicting or different case information statements. The difficulty lies in determining what the facts are and how it takes time for them to develop in certain divorce matters. In the adversarial system, each attorney, in an effort to prevail for his or her client, is expected to bring to light every relevant fact in consideration, so judges will have the opportunity to exercise wise judgment in rendering a decision.

But, in the case of conflicting or different case information statements, the issue of whether they affect credibility should be tempered, recognizing that human behavior does not call for a perfect recollection each and every time, especially when the person is being compelled to point out any changes or amendments. ■

Endnotes

1. N.J.R.E. 607, Credibility and Neutralization.
2. *Green v. New Jersey Mfrs. Ins. Co.*, 160 N.J. 480, 495 (1999).
3. *In re Wolf*, 231 N.J. Super. 365, 371 (App. Div.) *certif. den.* 117 N.J. 138 (1999).
4. N.J.R.E. 803(b)(1).
5. *State v. Covell*, 157 N.J. 554, 572 (1999).
6. 5 J. Wigmore, Evidence Sec. 1367, p. 32 (J. Chadbourn Rev. 1974).
7. *United States v. Foster*, 9 FRD 367, 388-90 (S.D.N.Y. 1949).
8. *Escobedeo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).
9. *Ibid.*
10. *State v. Stas*, 212 N.J. 37, 50-51 (2012).
11. *Mallamo v. Mallamo*, 280 N.J. Super. 8, 16 (App. Div. 1995) ("...a judge will not receive a reasonably complete picture of the financial status of the parties until a full trial is conducted. Only then can the Judge evaluate the evidence, oral and documentary, and weigh the credibility of the parties.").

The Foundations of Qualified Domestic Relations Orders

by Cynthia Ann Brassington, Allison J. Fried and Lois S. Fried

Retirement accounts remain a central focus of almost every divorce case, and are sometimes the only significant asset subject to equitable distribution. Therefore, the time to start addressing the qualified domestic relations order (QDRO) is at the first consultation with your client. Ideally, the terms of the distribution should be resolved early in the process, as the goal is to have the drafted QDRO ready before the terms of the settlement are placed on the record, in the marital settlement agreement, or in a divorce decree with stipulations. Therefore, if there is a retirement account, the first analysis is whether you need a QDRO. Always include the cost of the expert to draft the QDRO in your retainer, and never use an old QDRO believing you can modify it. Retirement plans are like snowflakes; they are all different, and each has its own requirements. Your expert will have your QDRO preapproved by the plan administrator, if possible, and you will avoid major headaches down the road.

It is also imperative that every time your client has an interest in a retirement plan you obtain the employee benefit handbook for each plan. It is crucial that your client understand the terms of the plan, and how an order will affect the benefits paid to both parties.

This article will address both defined contribution plans (IRAs, 401(k)s, deferred compensation plans, tax-sheltered annuities, union annuities, etc.) and defined benefit plans (pensions). An easy way to distinguish between defined contribution plans and defined benefit plans is: With a defined contribution plan your client can see an account balance based on accumulated investments and investment experience, while with a defined benefit plan the benefit is generally expressed as an estimated monthly allowance based on the terms of the plan. Remember, however, that every plan is different in terms of when and in what form the benefit will be paid.

Is the Defined Contribution Retirement Account Part of a Qualified Plan?

If the defined contribution retirement account is an individual retirement account (IRA), you technically do not need a QDRO. IRAs are not 'qualified;' they are not subject to the Employee Retirement Income Security Act (ERISA). IRAs have their own challenges, and it is important to understand the distinction between a qualified plan and a plan that is not qualified, like an IRA or a 'top hat' plan.[1]

Under Section 408(d)(6) of the Internal Revenue Code (IRC), an IRA can only be divided upon divorce or legal separation (including, in New Jersey, a divorce from bed and board). On the other hand, a qualified defined contribution plan can be divided *pendente lite*, as Section 206(d)(3) of ERISA provides that payments under a QDRO are available to a spouse as well as a former spouse, child, or other dependent of a participant.

Another important distinction between a qualified plan and an IRA is the tax penalty. Both an IRA and a qualified plan, such as a 401(k), may be divided with a rollover incident to a divorce with deferred tax consequences and no penalty. With both, the alternate payee must include in taxable income any portion of the assigned share that is not rolled over. The plan should withhold 20 percent of the distribution for federal income tax, which in many cases will not be sufficient. Unless state withholding is requested, none will be made. The alternate payee, if under age 59 ½, also incurs an additional 10 percent tax penalty if the distribution comes from an IRA, unless one of the exceptions applies.[2] However, the alternate payee incurs no tax penalty if the distribution comes directly from a qualified plan pursuant to a QDRO.[3] This is an important distinction, and affects your client's bottom line.

Suppose a party transfers the retirement savings from a qualified retirement account to a non-qualified retirement account; for example, due to a change in employment the retirement account is transferred from a 401(k), an employer-sponsored qualified plan, to an IRA during the

pendente lite period. The special tax treatment of a distribution under a QDRO is lost and the 10 percent penalty could result. Keep an eye on the retirement benefits *pendente lite* and negotiate the division of the retirement accounts with specificity before you finalize the terms of the divorce. It should be noted that some IRA custodians will require an order that they term a 'QDRO,' but using an order to divide a non-qualified plan, such as an IRA, will not change the tax treatment of the distribution.

Always Be Specific in the Terms of Your Agreement to Protect the Alternate Payee

Regardless of whether you are dividing a defined benefit plan or a defined contribution plan, it is imperative that the factual foundation of the division of the retirement account is clearly stated on the record and incorporated into your marital settlement agreement or divorce decree with stipulations. You should:

1. Include the name of the participant and the alternate payee;
2. Designate the amount or percentage of the participant's benefits to be paid to the alternate payee;[4]
3. Specify the number of payments to the alternate payee or the period to which the order applies;
4. Designate each plan subject to equitable distribution specifically by name, and include any successor plan;
5. Properly identify the instrument that will be utilized to divide the benefit. For example, with a 401(k), 403(b), profit-sharing, tax-deferred annuity, etc., you will utilize a QDRO. However, a federal civil service employee's thrift savings plan utilizes a retirement benefits court order (RBCO). Always confirm with your expert what instrument is required by your plan before you place the terms of your agreement on the record, in the marital settlement agreement, or divorce decree with stipulations.

Neglecting to reference a specific plan in the marital settlement agreement or divorce decree with stipulations can have dire consequences for a potential alternate payee. For example, in the matter of *Ross v. Ross*, Mr. Ross separated from his wife and moved in with his girlfriend years before the finalization of the divorce.[5] Attached to the judgment, upon finalization, was an agreement stating that Mrs. Ross was to prepare QDROs to effectuate the division of retirement accounts. Mr. Ross remarried right after the divorce, and named his new wife as the beneficiary of his defined benefit plan, defined contribution plan, and an annuity contract. He died one month later. Mrs. Ross moved for entry of QDROs, or for the agreement to be deemed a QDRO for all three entitlements. The agreement named one plan with enough specificity for the court to determine that the agreement satisfied the QDRO requirement that an order must designate each plan to which the order applies, but not the others. Thus, Mrs. Ross received her share of the plan identified in the agreement, but not her share of the two other entitlements that were not referred to in the agreement, and to which the new Mrs. Ross had been named the beneficiary.

Always include in your agreement, whether in writing or on the record, that the value of the defined contribution plan subject to equitable distribution shall be adjusted for income experience to the date of distribution. If you represent the participant and the market goes down, your client will be protected, as the alternate payee will share the results of the decline in the market. On the other hand, if the market goes up and you represent the alternate payee, your client will have the benefit of the increase when the distribution occurs. Also remember, not all plans allow for an immediate distribution. In some cases it can be years before an alternate payee may apply for the assigned portion of the account.

If there is a chance there is a loan against the account, that possibility should be addressed in your agreement. While the participant is always responsible for the repayment of the loan, the alternate payee can receive less from the plan if the loan is considered marital. Accordingly, when the account consists of $100,000 of mutual funds and a $20,000 loan, the agreement should make it clear whether the alternate payee who is receiving 50 percent of the account will receive $60,000 (50 percent of the gross balance) or $50,000 (50 percent of the account balance net of the loan). In addition, it is not unusual for the assigned amount to be adjusted by any number of credits or offsets. When the account is increasing or decreasing in value due to investment experience, the date of the adjustment for the offset (*e.g.*, as of the date of complaint or as of the date of transfer) could make a material difference in the amount that is ultimately transferred.

For a Defined Benefit Plan, Should the Order be a Separate Interest Order or a Shared Interest Order?

When a participant is not yet in pay status and a defined benefit plan is governed by ERISA, a QDRO can be drafted to be a separate interest order or a shared

interest order. Your agreement should specify whether the order is to be a separate interest or shared interest and include the relevant dates for the coverture fraction.

What is the Difference Between a Separate Interest Order and Shared Interest Order?

A separate interest order carves out from the participant's benefit a separate benefit for the alternate payee. This means that the alternate payee has options in terms of when to start collecting a benefit (as early as the participant's earliest retirement age under a plan) and what form of benefit to collect. With a shared interest order, when the alternate payee collects a benefit and in what form is dictated by the participant's choice, because each of the participant's checks is literally shared with the alternate payee.

Perhaps the distinction between separate interest orders and shared interest orders the practitioner should be most mindful of is the measuring life. The measuring life for a separate interest order is the alternate payee's life. This means that the benefit will be actuarially adjusted so the alternate payee collects for his or her lifetime. The measuring life for a shared interest order is the participant's life, meaning the benefit the alternate payee collects terminates upon the participant's death. However, if the participant is not yet in pay status, a shared interest order can still allow the alternate payee to collect a benefit after the participant's death, with the provision of a qualified joint and survivor annuity. The downside of a qualified joint and survivor annuity is that the benefit that is being divided will be reduced so the same benefit that was going to be paid for only the participant's lifetime will instead be paid for the lives of the participant and alternate payee. The majority of the time this reduction cannot be subtracted only from the alternate payee's share of the benefit. Instead, the benefits of both the participant and the alternate payee would be reduced so the alternate payee could collect a benefit after the participant's death.

When a participant is in pay status, a plan has already actuarially determined the participant's benefit. Generally, the plan will not at that point carve out a separate interest for the alternate payee because the participant's benefit has already begun to be paid based only on the participant's lifetime. For that reason, usually only a shared interest order is available when the participant is already in pay status. Almost always, when a participant has elected a form of benefit at commencement, this election will be irrevocable. If a participant did not elect for a spouse or former spouse to be a survivor upon retirement, that option in all likelihood will not be available via the QDRO.

As every plan has its own rules, it is imperative that the practitioner, especially if representing the alternate payee, learn the intricacies of the particular plan. For example, if a participant is already collecting a benefit at the time of divorce, some plans will remove the former spouse as the participant's surviving spouse, even if the participant elected a survivor option at retirement. This is most often seen in pensions sponsored by unions. If the alternate payee is no longer a surviving spouse, and a qualified joint and survivor annuity is also not available via the QDRO, then the alternate payee's attorney needs another method for the client to be protected after the participant's death. If the pension is already in pay status, one way to do that would be through life insurance with a declining amount of coverage.

Pre-retirement survivor annuities are available under both separate and shared interest orders for plans governed by ERISA. ERISA requires a retirement plan to allow a survivor to collect a benefit should the participant die before entering pay status.[6] While there is often quibbling about who is responsible for the reduction in benefit caused by providing a qualified *post*-retirement joint and survivor annuity, almost always there is no need to make that determination with a qualified *pre*-retirement survivor annuity (QPSA), since in most plans there is no cost to the participant associated with the QPSA.

In most cases, a separate interest order will maximize the benefits for both the participant and the alternate payee. When could a shared interest order be advantageous for a participant not yet in pay status? With a shared interest order, if the alternate payee predeceases the participant, the alternate payee's benefit reverts to the participant. If a participant were much younger than an alternate payee, or if the alternate payee were in ill health, then a shared interest order should be considered because of the high likelihood of the alternate payee predeceasing the participant. If the alternate payee did predecease the participant, the participant then would become whole upon the alternate payee's death. With a separate interest order, the alternate payee's benefit is sometimes forfeited if the alternate payee predeceases the participant before benefit commencement, and is always forfeited or paid to an elected survivor upon the alternate payee's death after benefit commencement.

From the perspective of the attorney for the alternate payee, a separate interest order usually should be favored because there is no need for a reduction for a survivor benefit and the alternate payee will have ultimate control over when the benefit will commence and in what form. Because a participant may be motivated by the potential to be made whole by outliving the former spouse, and the alternate payee may be motivated by being able to collect for life, the type of order to use should be specified in the parties' agreement rather than left open for potential litigation when the order is drafted. Whether the order is a separate interest order or a shared interest order, and what, if any, survivor benefits are to be provided, should be addressed in the parties' agreement, along with if the alternate payee is entitled to a share of cost-of-living adjustments and early-retirement subsidies/supplements paid to the participant.

How Does this Work in Layman's Terms?

Assume a benefit is 60 percent marital and the participant's benefit is $1,000 per month at the participant's earliest retirement age, which is 55 under the participant's plan, and $2,000 per month at the participant's normal retirement age, which is 65 under the participant's plan. Also assume the alternate payee and participant are the same age. If a separate interest order is entered and the alternate payee decides to collect at the participant's age 55, the alternate payee's benefit would be $300 per month, because that is 50 percent of the martial portion of the benefit (the marital portion being 60 percent of $1,000) on the alternate payee's benefit commencement date, actuarially adjusted for payment over the alternate payee's lifetime. If the alternate payee is a female, the actuarial tables will show that she should live longer than the participant. Therefore, the $300 per month would have to be reduced so the amount that would have been collected had the participant collected for life beginning at age 55 would be equivalent to what the alternate payee would collect beginning at participant's age 55 until her death.

Suppose the reduced amount is $250 per month. The alternate payee could collect $250 per month at the participant's age 55, regardless of when the participant elects to commence benefits, or the alternate payee's age at benefit commencement. If the participant waited to commence benefits until the participant's normal retirement age under the plan and did not earn further service under the plan, the participant would receive $2,000 per month, less the 30 percent assigned to the alternate payee, or $1,400.

If the parties divorce after the participant has opted to commence benefits at the earliest retirement age under the plan, in all likelihood a shared interest order would be required. If that order assigned the alternate payee half of the marital portion of the benefit, the alternate payee would be assigned $300 per month, but that $300 per month would terminate upon the earlier of the death of the participant or the death of the alternate payee.

How Do Defined Benefit Plans Not Governed by ERISA Differ from ERISA-Governed Plans, and What Points about Them Should be Addressed in an Agreement?

Retirement entitlements through the military, the federal government, and the government of the state of New Jersey have their own rules for how a domestic relations order is able to be drafted. Government plans do not need to comply with ERISA. This means that such plans are not required to provide pre-retirement survivor annuities, and pensions for state of New Jersey employees do not allow a beneficiary to collect a survivor benefit should a participant die before retirement. Another distinction between these plans and the ERISA-governed plans is that the alternate payee must commence benefits at the time the participant commences benefits.

For the state of New Jersey retirement systems, employees and employers contribute to a retirement system in order to ensure sufficient funding of the retirement systems. The employee's contributions are not voluntary, and the amount contributed is usually set by law. The contributions are usually deducted from pay before federal taxes. The most a beneficiary can receive should a participant die before commencing benefits is a return of the contributions with interest. A former spouse can be named as a beneficiary for these contributions on a beneficiary form completed after the date of divorce. However, under the Police and Firemen's Retirement System (PFRS) and the State Police Retirement System (SPRS) the designation is moot unless there is no statutory survivor. For post-death retirement benefits, again PFRS and SPRS are distinct. Survivor benefits under PFRS and SPRS are statutory and cannot be paid to a former spouse. All other retirement systems allow a former spouse to be named as a survivor under the available survivor options. It should also be noted that life insurance is available to members of the state of

New Jersey retirement systems and there is no restriction on who can be named a beneficiary, but the amount of coverage decreases dramatically after retirement.

In addition to addressing the return of contributions and naming of a survivor, the parties' agreement should detail whether the alternate payee would be entitled to cost-of-living adjustments, should they return. It should not include a provision about who is responsible for the cost of the survivor benefit because the state will not allocate the deduction solely to one party; the only option is for the deduction to come 'off the top' before the entitlement is divided, meaning the deduction is shared *pro rata*. If the intent is for the alternate payee to be responsible for the cost of the survivor benefit, the only way to accomplish this is by adjusting the benefit the alternate payee will collect for the cost of the survivor benefit. The problem with this method, though, is the cost can only be known when the participant is ready to retire.

Orders for military members differ slightly depending on whether the plan participant is active duty or a reservist. A reservist's length of service is measured in points, while an active-duty participant's length of service is measured in months. Defense Financing and Accounting Services (DFAS) requires that a military member have 10 years of service overlapped with 10 years of marriage (the 10/10 rule) for it to pay a benefit directly to the alternate payee for equitable distribution. This does not apply if the benefit is paid for alimony or child support. Without DFAS's direct payment, the participant would need to pay the alternate payee a portion of each retirement check, and the participant would also be responsible for the taxes on the entire benefit. For marriages that do not satisfy the 10/10 rule, the practitioner may be wise to value the pension and offset it against another available asset.

To be a survivor for the military Survivor Benefit Plan (SBP), a former spouse must be elected by the participant or deemed to be the survivor within one year of the first mention of survivor benefits, whether in a marital settlement agreement or a subsequent order. To assure there will be a survivor benefit, a practitioner should use both methods of electing a survivor by having the alternate payee make a deemed election and ordering the participant to name the alternate payee a survivor. A survivor benefit elected before a divorce is revoked upon divorce so parties must be mindful of changing the SBP coverage to former spouse SBP coverage. Reservists have the opportunity to elect SBP coverage when they are notified they are retirement-eligible (by way of the 20-year letter) or decline coverage until retirement. If a reservist defers the SBP coverage and dies before reaching retirement age, then a survivor benefit will not be payable. The alternate payee's representative should thus incorporate into the agreement that the reservist cannot decline SBP coverage until retirement. A current spouse cannot be a survivor under the SBP if a former spouse is already elected, and vice versa, so timeliness is key to preserving the SBP coverage.

As with the state of New Jersey retirement systems, military pensions will not allocate the cost of the survivor benefit between parties, so they will share the cost *pro rata*. The cost is set by statute. If an alternate payee collecting the SBP remarries before age 55, then the entitlement to the alternate payee ends but can resume if that marriage later ends in divorce or death. In addition to the survivor issues, an agreement for a military pension should address the method for calculating the alternate payee's benefit and the cost-of-living adjustments. The military requires that no more than 50 percent of the pension be assigned in equitable distribution to the former spouse through DFAS.

Orders for federal government employees are the most flexible of the government plans. The amount of the survivor benefit, if any, and from whose portion of the benefit the cost of the survivor benefit will be deducted, should be addressed in the parties' agreement, as well as: 1) cost-of-living adjustments; 2) whether the participant should be able to withdraw contributions (thereby forfeiting the pension for both parties); and 3) what should occur if the alternate payee dies (options include reversion of the benefit to the participant, payment to the alternate payee's estate, and payment to children of the marriage).

Federal employees who entered covered service on and after Jan. 1, 1987, are enrolled in FERS (Federal Employees Retirement System). Before Jan. 1, 1987, employees were enrolled in CSRS (Civil Service Retirement System), but later had the option of converting to FERS. Like PFRS and SPRS, CSRS usually does not withhold for Social Security (more on this below). The maximum former spouse survivor annuity under CSRS is 55 percent, but is 50 percent under FERS. Like the military SBP, a former spouse's survivor benefit will terminate if the former spouse remarries before age 55 unless that marriage ends in divorce, annulment, or death. A divorce nullifies a survivor benefit that was previously elected. Additionally, there can be more than one survivor under FERS and CSRS, but the total survivor benefit elected may not exceed the maximum 55 percent of the benefit

under CSRS, or the maximum 50 percent of the benefit under FERS. A practitioner should also be aware that the alternate payee must have survivor benefits to maintain coverage under the FEHB (Federal Employees Health Benefits) program after the participant's death.

What Happens If the Participant Becomes Disabled?

Avallone v. Avallone recognized that sometimes a disability retirement allowance has one component that represents a retirement allowance, thereby making it subject to equitable distribution to the extent attributable to marital efforts, and another component that represents compensation for disability, which belongs to the disabled spouse alone.[7] For the state of New Jersey retirement systems, the Division of Pensions and Benefits cannot distinguish each component for the court. So, in *Sternesky v. Salcie-Sternesky*, the court devised a formula to identify the retirement component versus the disability component by isolating the ordinary retirement allowance from the excess representing compensation for a disabling injury.[8] For a PFRS accidental disability benefit for a participant not yet eligible for ordinary retirement, the formula is to multiply the ordinary retirement allowance at 20 years of service by a fraction with a numerator equaling service during the marriage and a denominator equaling 20 years. A representative for a PFRS participant who is not yet eligible for ordinary retirement may want to address a potential disability in an agreement to ensure the alternate payee does not share in the entire disability pension. *Sternesky* applied to a PFRS participant with an accidental disability benefit. How *Sternesky* applies to the other retirement systems and ordinary disability benefits has not yet been addressed by the courts.

Disability under private pension plans is not much clearer, because each plan is unique. Some private pension plans offer a disability benefit for a certain period of time that will turn into the regular retirement benefit at the participant's normal retirement age. Others will allow a benefit to be computed based solely on longevity. This is plan-dependent, and the practitioner can attempt to address a possible disability scenario in an agreement or a QDRO. But when a disability actually arises, the QDRO as written may not capture the parties' true intent. A practitioner may need to enter a revised order at that time, so the alternate payee is not sharing in the benefit attributable solely to the disability.

Post-Complaint Issues: Social Security and the Effect of Post-Divorce Efforts on a Defined Benefit Plan

There are some employees who are not subject to deductions for the Federal Insurance Contributions Act (FICA or Social Security) who will therefore receive no Social Security benefits based on that employment. This includes some participants in the Police and Firemen's Retirement System, as well as the Civil Service Retirement System (but not the Federal Employees' Retirement System). This exclusion will result in an inequitable distribution of pension benefits, as the alternate payee will receive the assigned portion of the participant's government pension in equitable distribution and will also receive a Social Security benefit in which the participant (government employee) cannot share.[9] The appellate court addressed this inequity in the case of *Panetta v. Panetta*, where the husband, a federal employee, had a small Social Security benefit earned prior to his CSRS employment and the wife had worked in the private sector throughout the marriage.[10] Specifically, the *Panetta* court provided that:

> We are, nevertheless, left with the question of how to balance the benefits earned by a spouse who participated in social security all of her working life with those of a spouse who participated for only a portion of his working life. The fairest and most equitable means is to deduct plaintiff's actual social security benefit... from defendant's actual social security benefit when she begins to collect it, and then offset the remainder, subject to the *Marx* formula, against defendant's share of plaintiff's pension.[11] In other words, the partial participant's actual social security benefit is deducted from the full participant's benefit and the remainder, subject to the *Marx* formula, is offset against the full participant's share of the partial participant's pension.[12]

To accomplish that which is prescribed in *Panetta*, the practitioner should provide in the settlement agreement that the parties will enter into an amended order with full disclosure of their respective retirement benefits and Social Security benefits upon retirement. If an order for a plan with this issue is filed before the parties are collecting their pensions and Social Security, include in the order that an amended order will be executed and

submitted to recalculate the alternate payee's share of the government employee's defined benefit plan in an equitable fashion pursuant to *Panetta*.

Another issue is the participant's post-divorce efforts in increasing the pension, exclusive of marital efforts. For example, assume that after the divorce the employee went back to school, earned a master's degree, and as a result of these post-dissolution efforts the pension payment was $5,000 per month instead of the $3,000 per month the participant would have received absent those post-divorce efforts. Is the alternate payee entitled to share in the $2,000 per month differential? If the employee spouse can show the increase in the pension is due to post-dissolution efforts that were exclusive of the joint efforts of the marital enterprise, then the answer could be no.

In the matter of *Barr v. Barr*, the Appellate Division held:

> [T]here are some extraordinary post-judgment increases that may be proven to be attributable to post-dissolution efforts of the employee-spouse and not dependent on the prior joint efforts of the parties during the marriage. In such instances, these sums must be excluded from equitable distribution and the application of the coverture fraction may be insufficient to accomplish this purpose.[13]

The Appellate Division again addressed the issue of 'post-divorce enhancing factors' in the matter of *Krupinski v. Krupinski*, where the participant returned to school and, as a result of his post-dissolution education, significantly increased his pension benefit.[14] He argued his alimony should be terminated at his retirement because, by reason of his post-divorce efforts, the alternate payee enjoyed an enhanced pension. The appellate court ruled that if he were to succeed in his application to terminate alimony, he would need to prove his post-divorce efforts enhanced the value of his overall pension benefits.[15] Therefore, if bringing this application to the court or opposing such an application, remember that it is the participant's burden to prove the post-dissolution efforts enhanced the pension benefits, keeping in mind that "simply put, future benefits should not be paid in present dollars without a discount and present benefits should not be discounted to the value of past dollars."[16] In other words, the plan participant must consider that a portion of the increased benefit represents inflationary increases and, therefore, must make a compelling argument to quantify the portion that does not.

In conclusion, the equitable distribution of retirement benefits is complicated and case law is evolving. This warrants counsel's full attention to the terms of any retirement plan that is being divided, since the terms of the order could have a material effect on what the participant gives up and what the alternate payee receives. ■

Cynthia Ann Brassington is in solo practice in Linwood. Allison J. Fried is with the Northfield accounting firm of Capaldi, Reynolds & Pelosi, P.A. Lois S. Fried is a partner at Capaldi, Reynolds & Pelosi, P.A.

Endnotes

1. A top hat plan is a plan that is unfunded and is maintained by the employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. ERISA §§ 201(2),(301)(a)(2), and 401(a)(1).
2. The exceptions to this 10 percent penalty are for early distributions from an IRA that are: 1) made to a beneficiary or estate on account of the IRA owner's death; 2) made on account of disability; 3) made as part of a series of substantially equal periodic payments for life (or life expectancy) or the joint lives (or joint life expectancies) of the IRA owner and the IRA owner's designated beneficiary; 4) qualified first-time homebuyer distributions; 5) not in excess of the IRA owner's qualified higher education expenses; 6) not in excess of certain medical insurance premiums paid while unemployed; 7) not in excess of unreimbursed medical expenses that are more than a certain percentage of the IRA owner's adjusted gross income; 8) due to an IRS levy; or 9) a qualified reservist distribution. *See* IRS Topic 557 at irs.gov/taxtopics/tc557.html.
3. IRC § 72(t)(2)(C).

4. When the parties divide a defined benefit plan, reference the coverture fraction. The numerator of the fraction is the number of months the parties were married, calculated from the date of the marriage or plan participation, if later, to the date of the filing of the complaint for divorce. The denominator of the fraction is the number of months of employment through the alternate payee's commencement date. For example, the parties were married while the participant was covered by the plan for 15 years, which is 180 months, and the participant was employed for 25 years, which is 300 months. Therefore, the coverture fraction is 60 percent and the alternate payee is awarded 30 percent if the marital portion is divided equally.
5. 308 N.J. Super. 132 (App. Div. 1998).
6. ERISA § 205.
7. 275 N.J. Super. 576 (App. Div. 1994).
8. 396 N.J. Super. 290 (App. Div. 2007).
9. The government pension offset will reduce the amount of Social Security spouse's benefits by two-thirds of the amount of the government pension being received.
10. 370, N.J. Super. 486, 499 (App. Div. 2004).
11. 1. The total accrued benefit is to be determined when plaintiff is permitted to move her share of the benefit to pay status pursuant to the plan requirements; 2. The plan administrator is to determine the coverture fraction and multiply the total accrued benefit by the coverture fraction; 3. The product of the total accrued benefit times the coverture fraction is to be divided in half in accordance with plaintiff's equitable share. Plaintiff's form of the qualified domestic relations order shall be entered. *Marx v. Marx*, 265 N.J. Super. 418, 428 (Ch. Div. 1993).
12. *Panetta*, *supra*, at 500.
13. 418 N.J. Super. 18, 41 (App. Div. 2011).
14. 437 N.J. Super. 159 (App. Div. 2014).
15. Notably, Mr. Krupinski also had to prove that the enhanced portion of the pension was income to his former wife and that as a result of the additional income, his former spouse would still be able to have a lifestyle equal to or better than that which she enjoyed during the marriage without the alimony payment. This is so the pension would not be both an asset subject to equitable distribution and income pursuant to 2A:34-23(b), which provides, "when a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony."
16. *Risoldi v. Risoldi*, 320 N.J. Super. 524, 545-546 (App. Div. 1999).

May It Please the Court, or Not: Obtaining Oral Argument after *Palombi*

by Rosanne S. DeTorres and Caitlin DeGuilo Toker

This article will examine case law in light of the decision in *Palombi v. Palombi,* and provide practice tips on how to best position your case to obtain oral argument.

You Must Ask for It

Under Rule 1:6-2(c), a "…movant's request for oral argument *shall* be made either in the moving papers or reply; a respondent's request for oral argument *shall* be made in the answering papers." (Emphasis added). Under Rule 1:6-2(d), "[e]xcept as provided in R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs." The import of these rules is clear: If you want oral argument, you must ask for it.

If It is Not a Substantive or a Non-Routine Discovery Motion, Forget It

Oral argument for motions in the civil part is "… granted as of right" unless it "… involves pretrial discovery or is directly addressed to the calendar…."[1] Unfortunately, family part motions are not afforded the same assurance. Even if you ask for oral argument in a family action, there is no guarantee the request will be granted. The rules of court give courts more discretion to grant or deny oral argument in the family part. Even "substantive and non-routine" motions may be adjudicated on the papers in the family part because of one simple word in the rule: "ordinarily."[2]

"Motions in family actions shall be governed by R. 1:6-2(b) except that, in exercising its discretion as to the mode and scheduling of the disposition of motions, the court shall *ordinarily* grant requests for oral argument on substantive and non-routine discovery motions and ordinarily deny requests for oral argument on calendar and routine discovery motions."[3] The question then is what are "substantive" motions or "non-routine discovery motions," and how does the court go about deciding when to grant oral argument and when to determine a case on the papers?

The distinction between a matter or issue that is substantive and a matter or issue that is procedural has long been established in the New Jersey court system. The Supreme Court of New Jersey identifies the distinction as follows:

> In [*Winberry v. Salisbury*, 5 N.J. 240 (1950)], we distinguished between substantive and procedural laws by their primary effects on the parties. Substantive law defines the parties' rights and duties, whereas procedural law regulates the means through which these rights and duties are enforced. *Winberry*, *supra*, 5 N.J. at 247-48. In other words, "[i]f it is but one step in the ladder to final determination and can effectively aid a court function, it is procedural in nature and within the Supreme Court's power of rule promulgation." *Suchit v. Baxt*, 176 N.J. Super. 407, 427 (Law Div. 1980).[4]

This distinction was again set forth in a 2007 unpublished Appellate Division case seeking to determine whether an arbitrator's failure to explain his basis for a treble damage award in a consumer protection matter was appropriate. There, the Court applied the difference between substantive and procedural law by explaining, "[t]he mandate that an arbitrator explain a treble damage award does not affect the winning party's substantive right to receive the award; it simply describes the procedure by which the award is to be made."[5]

While *Palombi* has been widely utilized by family part judges since the Appellate Division's decision in 2010, it certainly was not the first case allowing a family part judge to deny oral argument in his or her discretion.[6] The rules of court have been continuously amended to address issues that arise within the court system, including the specific desire to expedite matters

within the family court.[7] Specifically, Rule 1:6-2(b) permits a trial court judge to determine the "mode and manner of disposition of motions and whether they will be orally argued or not."[8] This court rule was interpreted to "give the trial judge the option of dispensing with oral argument…when no evidence beyond the motion papers themselves and whatever else is already in the record is necessary to a decision."[9] The purpose of the rule was simply to permit trial court judges to avoid "unnecessary or unproductive advocacy."[10] The court in *Mackowski* interpreted Rule 5:5-4 to mean that oral argument should normally be granted in matters when "significant substantive issues are raised and argument is requested."[11]

The Appellate Division has identified specific family part issues that are presumed to be substantive and would ordinarily require oral argument. A non-exhaustive list of these issues includes child custody,[12] parenting time,[13] alimony,[14] emancipation,[15] and modification of child support.[16] While these issues are ordinarily considered to be substantive, the attorney or *pro se* litigant filing the motion must be clear in his or her arguments and aware that the trial court judge continues to have discretion to deny oral argument, despite the existence of a substantive issue. Further, attorneys or litigants should be aware that the existence of disputed material facts does not alone give rise to a substantive issue.

Beware the Procedural Deficiency Pitfalls

While *Palombi* permits trial court judges to deny oral argument based on the lack of a substantive issue, that is not the only basis for doing so. If a motion is procedurally deficient, the trial court judge may deny oral argument outright, despite the existence of a potential substantive issue or a dispute regarding the facts.[17] There are a number of court rules that require certain procedural steps to be taken within the initial filing of a motion. First, as outlined in Rule 1:6-2(d), a party must request oral argument in his or her moving papers.[18] This request, however, may be conditioned on the requirement that opposition be filed before the moving party's request for oral argument can be triggered.[19] Regardless, as referenced above, if a moving party fails to make this request in his or her moving papers, the court may deem the omission as consent to having the matter heard on the papers.

Certain requests for relief must also be accompanied by particular exhibits, which, if excluded from a submission, may render the entire submission procedurally deficient, and a basis to deny oral argument.

Rule 5:5-4(a) provides:

> When a motion is brought for enforcement or modification of a prior order or judgment, a copy of the order or judgment sought to be enforced or modified shall be appended to the pleading filed in support of the motion. When a motion or cross-motion is brought for the entry or modification of an order or judgment for alimony or child support based on changed circumstances, the pleading filed in support of the motion shall have appended to it a copy of the prior case information statement or statements filed before entry of the order or judgment sought to be modified and a copy of a current case information statement.[20]

In the *Palombi* matter, the parties' mutual failure to adhere to the rules of court was ultimately fatal to their respective positions, despite the fact that substantive issues regarding child support and alimony were raised by the parties.[21] While the court ordinarily hears oral argument on issues in which substantive issues are raised, the party's failure to append the appropriate proofs to their moving papers was fatal. Oral argument would have been insufficient to cure these defects. Oral argument is intended to be a forum in which the parties further argue their respective positions and perhaps answer any questions that linger in the judge's mind after reviewing the parties' papers. Oral argument is not intended to be an opportunity for parties to cure the deficiencies in their motions or present facts not of record, judicially noticeable or stipulated.[22]

Another procedural deficiency that may lead to the denial of oral argument is a party's failure to adequately support his or her request for reconsideration of a prior order. When filing a motion for reconsideration, the court rules require the party abide by Rule 5:5-4(a) in providing the prior order, but also that the party plead with specificity the aspects of the order the party believes the court has overlooked or erred in making its prior decision.[23] If either of these prongs is not adequately met, the trial court may procedurally deny the motion, despite the fact that substantive issues might exist.

Palombi specifically addressed the issue of reconsideration motions by stating:

> …Michael's failure to satisfy the threshold requirement of demonstrating that the court acted in an arbitrary, capricious, or unreasonable manner in his motion papers was not a defect that could be cured at oral argument. Accordingly, the court was not required to engage in the reconsideration process and oral argument would amount to no more than unnecessary and unproductive advocacy.[24]

While the *Palombi* matter is instructive regarding the Judiciary's discretion to dispense with oral argument, it is perhaps more helpful to family law attorneys to ensure they do not fall victim to the procedural pitfalls that will result in the denial of their oral argument requests.

Practice Points Following *Palombi*

While the *Palombi* matter may often be regarded by attorneys as a tool by which the Judiciary arbitrarily denies oral argument, the legislative intent of the rules behind the case law is judicial economy and efficiency. Attorneys who raise a substantive issue in motion practice must present their matter in a manner that will provide the court with no option but to hear the matter outright. In order to do so, remember the following practice points:

1. Always request oral argument in the moving papers or opposing papers, pursuant to Rule 1:6-2(c) and (d).
2. Oral argument is ordinarily only granted for substantive and non-routine motions, pursuant to Rule 5:5-4(a).
3. A motion that presents a substantive issue but is procedurally deficient may be denied oral argument.
4. Be aware of the rules of court as they apply to procedural issues. Specifically, always attach the prior order(s) you seek to modify, as well as the prior and current case information statement for those motions seeking a modification of a support obligation, pursuant to Rule 5:5-4(a).
5. Plead motions for reconsideration with specificity and be sure to attach all necessary prior orders, pursuant to Rule 4:49-2 and Rule 5:5-4(a).
6. Remember that factual disputes do not necessarily give rise to a substantive issue, and include all appropriate proofs to adequately present your matter to the judge.
7. Submit all necessary proofs to the judge with the initial motion, and do not rely upon your appearance at oral argument to furnish additional documents or facts to the judge. ■

Rosanne S. DeTorres is a founding member of the law firm of DeTorres & DeGeorge, LLC. Caitlin DeGuilo Toker is an associate at the firm.

Endnotes

1. N.J. Court Rules, R. 1:6-2(d) (2015).
2. N.J. Court Rules, R. 5:5-4(a) (2015).
3. *Id.* (emphasis added).
4. *Ferreira v. Rancocas Orthopedic Assocs.*, 178 N.J. 144, 162 (2003) (Zazzali, J., concurring in part and dissenting in part).
5. *Preferred Warranties, Inc. v. Fialkowski*, 2007 WL 4270361 (N.J. Super. Ct. App. Div. Dec. 7, 2007).
6. *Palombi v. Palombi*, 414 N.J. Super. 274 (App. Div. 2010).
7. *Fusco v. Fusco*, 186 N.J. Super. 321, 328 (App. Div. 1982).
8. N.J. Court Rules, R. 1:6-2(b) (2015).
9. *Fusco*, *supra*, at 328.
10. *Id.*
11. *Mackowski v. Mackowski*, 414 N.J. Super. 274, 285 (App. Div. 1998).
12. *Fusco*, *supra*, 186 N.J. Super. at 684-85; *see also Brower v. Brower*, 2013 WL 656315 (N.J. Super. Ct. App. Div. Feb. 25, 2013).

21st Century Parentage Law: Why Marriage Equality Has Not Solved Parentage Dilemmas for LGBT Parents

by Debra E. Guston

Post-*Obergefell*[1] there exists a false notion in New Jersey that the parentage rights of lesbian, gay and transgender parents have all been resolved. For example, many married lesbian couples in New Jersey believe that marital presumptions[2] are automatically being read in a gender-neutral manner, and that a name on a birth certificate guarantees parentage recognition. Likewise, many gay men in New Jersey are under the false impression that gender-neutral marital presumptions have come to pass with, and that genetic children of their husbands delivered by gestational carriers are recognized as being born of, their marriages. Transgender people storing their gametes before undergoing surgery that will eliminate their future ability to procreate in a traditional manner often believe their genetic relationship to a child conceived using assisted reproductive technology will be sufficient to establish legal ties to that child when, in fact, under the present state of the law the very opposite may be true.

These binary parental structures seem easy to discuss when faced with multiple-parent families, configured with various combinations of bio-parents; psychological or *de facto* parents; grandparents and other extended family members; polyamorous adults; non-romantic partners; and friends and neighbors who have come together in the 'it takes a village' spirit to raise, support and protect children. But the post-*Obergefell* parentage dilemma is not confined to LGBT couples. Unmarried, straight men rely on a woman's reporting of their parentage on birth certificates as absolute proof of parentage, and women believe that if they name a man on the birth certificate he is held to parentage status, regardless of a biological tie.

How, then, does New Jersey law catch up with the ever-evolving nature of the American family structure? This article will contrast New Jersey's antiquated parentage laws with the new Parentage Act recently passed in the state of Maine, which recognizes family structure evolution and provides routes to parental recognition and enforcement not available elsewhere. The review of New Jersey's current law should give every lawyer pause when consulted about parentage issues; who is and who is not a legal parent may not be as obvious as it may seem.

New Jersey's Uniform Parentage Act

The New Jersey Uniform Parentage Act was originally enacted in 1983 and, while amended periodically since, remains in a 1980s construct. The New Jersey act's primary goal, as expressed in its first section,[3] is to extend equally to every child the right to a parent-child relationship, regardless of the marital status of his or her parents. The enactment of this section was intended to do away with the differential treatment previously given to 'illegitimate' children, and to allow unmarried fathers similar stature as the mothers of children.[4] But this statute, now over 30 years old, has yet to examine the preferential treatment given to different-sex genetic parents of children and those parents who are either same-sex parents, transgender parents, or others conceiving with the use of surrogates or other assisted-reproductive technologies and practices. As such, a close examination of the New Jersey act will show it to be antiquated regarding children of 'modern' families.

Assisted-Reproduction Issues in the New Jersey Act

Artificial Insemination

N.J.S.A. 9:17-44, when enacted in 1983, was in keeping with medical technology and social practice of the time. It provides that when a married woman, under the "supervision" of a doctor and with the consent of her husband, is inseminated with sperm from a man other than her husband, the husband will be treated by law as if he was the "natural" father.[5] The statute requires that the wife and husband provide consent in writing and, in the

absence of such consent, the mother of a child conceived in such a manner may contest the paternal status of her husband. Most medical practices deal with this issue by requiring the husband to provide written consent before treatment can commence, but the potential for dispute in this regard clearly exists. Another portion of this section of the statute provides that unless the donor of the semen and the married woman have a written agreement to the contrary, the donor is absolved of all parental obligations, and is not to be treated as a parent so long as he has delivered the semen to a licensed physician.[6]

Since at least 2007, when the Civil Union Act[7] was enacted, New Jersey birth certificates have been issued to lesbian couples who are in civil unions or married at the time of birth of a child conceived by donor sperm. The legal theory behind this general practice has been a gender-neutral application of the principles set forth in N.J.S.A. 9:17-44. This practice is now clearly mandated by *Obergefell,*[8] inasmuch as it held that all marital rights and privileges must be extended to same-sex couples. However, on a practical level relying on a birth certificate for proof of parentage remains problematic for two reasons.

First, on a factual level there are many lesbian couples who do not follow the statutory procedures to be able to take advantage of the 'marital presumption' in this section of the New Jersey act because they have not used donor sperm delivered to a doctor or provided written consent to the insemination. 'Do-it-yourself' home inseminations and sexual intercourse often provide the means to a pregnancy. The 'donor' in these scenarios may be considered by the parties to be a donor, but from a legal perspective he is the legal father as defined by New Jersey law. Disputes may later arise when this father seeks parenting time, or when a gestational mother who is now separated from her former partner or spouse seeks child support. These types of disputes can lead to psychological parent litigation; parenting time and custody litigation; child support claims; and sometimes even litigation to establish that a child has more than two legal parents. Additionally, on a factual level, a woman who gives birth to a child in New Jersey is the only legal mother. This issue will be discussed in further detail below, with respect to surrogacy.

Second, the gender-neutral reading of the New Jersey act is a creation of New Jersey public policy. As the Appellate Division said in *In the Matter of the Parentage of a Child by T.J.S. and A.L.S., h/w:*[9]

> A birth certificate simply records the fact of parentage as reported by others; it neither constitutes a legal finding of parentage nor independently creates or terminates parental rights.[10]

Therefore, while New Jersey will honor the direction of the birth mother in placing her civil union partner or wife on the birth certificate, doing so does not establish legal proof of parentage, and is, therefore, subject to challenge. Further, a birth certificate is not a document entitled to full faith and credit recognition under the United States Constitution.

In light of the foregoing, the only remedy for known donor cases and for certain recognition of the status of a wife or civil union partner of a child born in New Jersey using medical or more 'traditional' assisted-reproduction is a second- or step-parent adoption (for donor situations where the genetic father is known and where the insemination was not physician assisted), or what is coming to be known as a 'confirmatory' adoption (where the gestational mother is married or in a civil union, the insemination was physician assisted using sperm from an anonymous donor, and the parties wish to confirm the legal standing of the wife or partner as a parent to a child).

Surrogacy in New Jersey

The New Jersey act makes no reference to establishment of parentage for children born through surrogacy arrangements. The New Jersey Legislature has twice passed a comprehensive gestational carrier bill,[11] only to fall to two gubernatorial vetoes. Surrogacy exists in New Jersey. It is a practice that exists unregulated until a child is born and the parties agree to fulfill the intentions of their agreement to establish parentage in the 'intended parents' and to end any and all rights the carrier and her spouse or legal partner might have under the New Jersey act. New court rules[12] taking effect Sept. 2015, codify the procedure for many of the parentage actions necessary to conclude the process. But without the addition of new law, these arrangements are unenforceable,[13] leaving carriers the legal parents of children they never intended to parent, requiring genetic parents of children to co-parent if the carrier wishes to back away from the original agreement and, one could envision, potentially leaving a child abandoned by both carrier and intended parents if unwanted due to disability or illness.

Gender Roles Under New Jersey Law

The New Jersey act is a law clearly based on what is known about biology and child bearing, not what is known about parents. Assigning the legal status of 'mother' to a woman who gives birth,[14] and calling her the 'natural' mother is based solely on who bore a child, and is not even related to who may have supplied the gametes. A genetic mother may exist who has no legal status under the New Jersey act until a court restores her legal relationship to the child relinquished when her ovum are extracted. A 'natural' father has means of establishing his status through blood or genetic testing or, without establishing genetic ties, by acknowledgment.[15] So a man not related to a child, with the consent of the 'natural' mother, may acknowledge paternity and become a legal father to a child, but a woman does not have the same rights.

Further, the presumptions set forth in N.J.S.A. 9:17-43 are entirely focused on how a man establishes fatherhood. Therefore, the wife of a natural mother remains statutorily unable to rely on the marital presumption under the artificial insemination statute, even if there is consent and physician assistance. Likewise, the wife of a natural mother is unable to take advantage of acknowledging her intention and desire to parent as would any man, genetically related to the child or not, and is unable to rely on the other presumptions that were tailored to establishing fatherhood.

From that vantage point, the New Jersey Uniform Parentage Act is antiquated, relying heavily on biology as a means of establishing parentage, rather than who wishes to be a parent to a child and who is actually parenting. This leaves non-biological parents, whether LGBT or not, to rely on the concept of psychological parentage, thereby giving them custodial or parenting time rights but depriving the child of a legal relationship from which permanency and economic benefits flow.

How, then, does the state move into the future of parentage laws? The state of Maine recently convened a commission to review its parentage laws, and this year passed a new law that provides a comprehensive view of where parentage laws are moving, acknowledging families are not always formed through sexual intercourse between a husband and wife.

MAINE LD 1017/SP 358, the 'Maine Parentage Act,', Effective July 1, 2016

Assisted Reproduction

As the first law addressing assisted reproduction in the state of Maine, the Maine Parentage Act jumps fully into the 21st century by including the following provisions:

1. It allows persons who in the past would have been treated as 'donors' by medical practices and law to be both the contributor of gametes *and* a legal parent to a child born of the contribution when they enter into a written agreement to be treated as such.[16] Thus, through this provision a lesbian couple in the state of Maine desiring to enter into a co-maternity agreement (where one's ovum will be used and one will gestate the child) can, by written agreement, both be recognized as parents of the child without the need of a second parent adoption. Questions remain regarding whether a second parent or 'confirmatory' adoption should be done to extend the reach of Maine's law and public policy to recognition under full faith and credit principles in all states. This portion of the Maine act also assists transgender people when they seek to store their gametes for use in assisted reproduction in the future. They will no longer be looked at as donors whose parentage rights terminate with the extraction or provision of gametes to a medical storage facility.
2. It defines terms commonly used in all forms of modern assisted reproduction. For example, a donor is defined as a contributor of genetic material, whether for or without compensation, and assisted reproduction is defined as an umbrella term to cover all forms of medical procedures used to accomplish retrieval of genetic material, creation of embryos and transfer of semen or embryos.[17]
3. It seeks to avoid so-called 'personhood' debates by defining an embryo as a "cell or group of cells containing a diploid complement of chromosomes or a group of such cells, not including a gamete, that has the potential to develop into a live born human being."[18]
4. It addresses gestational surrogacy rather than traditional surrogacy by defining a gestational carrier as a woman carrying a child who is neither the intended parent nor the genetic mother of the child.[19]
5. It defines intended parents as persons who manifest the intent to be legally bound as a parent without regard to sexual orientation or marital status.[20]

Broad Reach and Procedure

The Maine act is intended to determine parentage for an adult within the state of Maine regardless of the child's state of birth or the past or present residence of the child.[21] The Maine act specifically does not create, enlarge or diminish the reach of parentage laws or the equity

powers of the courts, except as may be specifically stated in the act.[22] The Maine act does state that, unless certain conditions exist as set forth in Maine's long-arm jurisdiction statute concerning parentage actions previously in effect, no one can be adjudged a parent without the court having personal jurisdiction over them.[23] There is no right to trial by jury,[24] and general rules of Maine's civil procedure apply to venue.[25] The Maine act also rids Maine law of any negative inferences of illegitimacy by directing that "every child has the same rights under law as any other child without regard to the marital status or gender of the parents or the circumstances of the child's birth."[26]

***Standing*[27]**

Standing is broadly defined within the Maine act as being available to:

1. The child;
2. A woman giving birth;
3. A person whose parentage is to be adjudicated;
4. The state's department of health and human services; or
5. A representative of an individual (guardian, executor, etc.).

***Interim Child Support*[28]**

Pursuant to the Maine act, the court may order interim child support while the parentage proceedings are pending. The Maine act defines persons who may be subject to such *pendente lite* orders as:

1. A presumed, acknowledged or adjudicated parent;
2. A person petitioning to have his or her parentage adjudicated;
3. A person identified as a genetic parent through testing;
4. An alleged parent who has declined to submit to testing; or
5. The woman who has given birth to the child.

The court may also issue parentage rights on a *pendente lite* basis, including parenting time.

***Orders Adjudicating Parentage*[29]**

Orders adjudicating parentage may also change a child's name or amend the birth registration, and they are required to identify the child by name and birth date within the order.

***In Divorce Proceedings*[30]**

An order adjudicating parentage in a divorce proceeding must comply with the Maine act and expressly identify the child as a child of the marriage or issue of the marriage. The Maine act also mandates provisions for the support of the child by the parent or parents.

***Full Faith and Credit*[31]**

The Maine act provides for full faith and credit recognition of parentage judgments of other jurisdictions, including declarations of paternity, if the determinations are valid and effective under the law of the other states. This would tend to create a race to the finish when jurisdiction might be acquired in more than one state.

Establishment of Parentage

The establishment of parentage is where the Maine act becomes progressive and anticipates the variety of ways in which people can and do become parents. More specifically, the Maine act lists the following methods by which parentage can be established:

1. **A woman gives birth** (unless she is a gestational carrier under the act);[32]
2. **A person adopts the child**;[33]
3. **A man, not married to the woman giving birth, acknowledges paternity with intent to establish paternity, or the birth mother acknowledges his status.** (This acknowledgment may be voidable under certain circumstances and the Maine act provides great detail on filing denials of parentage, challenges and requests for rescission);[34] or
4. **There exists an unrebutted presumption as follows:**

   A. *Marital presumption:*[35]

      1. The person and the woman giving birth are married—a gender-neutral marital presumption;
      2. The person and the woman giving birth were married to each other and the child was born within 300 days after the marriage was terminated by death, annulment, divorce or declaration of invalidity or after decree of separation—again gender neutral, even though based on the presumed human gestational period;
      3. The person and the woman giving birth were married before the birth of the child in apparent compliance with law (but that marriage might be void).

   Note: The marital presumption applies to legal relationships in other jurisdictions that have equivalent status to marriage. Hence, civil union partners or registered domestic partners should be able to use the marital presumption.[36]

B. *Non-marital presumption:*[37]

1. A person who has resided in the same household with the child and held that child out as his or her own from the time the child was born or adopted, and for a period of at least two years after that, and assumed financial or custodial responsibilities. The concern here is that this applies only to a child born into the household of unmarried parents. A person entering the child's life later on will be subject to the *de facto* parent evaluation.

C. *Rebuttal of presumption: This is only by adjudication.*[38]

D. *Statutes of limitation:* A challenge to parentage where parentage is presumed must be commenced no later than two years after the birth of the child, unless certain 'discovery' theories apply, such as where the presumed parent may have had no reasonable prospect of knowledge of the child's birth. This short statute of limitations provides certainty for the child.[39]

E. *Multiple presumptions:* If the court finds more than one presumption applies, it is directed to enter an order adjudicating parentage.[40]

5. ***De facto* parentage**;[41]

A. *Standing:* The person has resided with the child for a significant period of time and engaged in consistent caretaking. With these facts established by affidavit, the court shall either proceed to a hearing on the additional factors or, if disputed by opposing affidavit, schedule a hearing on these two initial factors.

B. *Adjudication:* The court must further find a bonded and dependent relationship has been established and was fostered and supported by another parent (not necessarily both legal parents); the person and the other parent understood the person to be a parent, accepting full and permanent responsibility; and that the continuation of relationship is in child's best interests. If the court finds these facts exist, then an appropriate order must be entered establishing parentage, not just *de facto* parentage. But this does not disestablish the parentage of others. In other words, a child may have *multiple* legal parents. The court is required to make appropriate support and parenting time and responsibility orders.

6. **Genetic parentage**:[42] The Maine act defines modern genetic testing procedures, results requirements and rebuttal standards. It also provides grounds for denial of genetic testing based on equitable estoppel where the testing and possible result would not be in the child's best interest. A guardian *ad litem* may be appointed for the child if best interest is in dispute.

7. **Assisted reproduction**: The Maine act creates a fully articulated assisted-reproduction parentage process[43] allowing for written contracts for donors to be donors with or without parentage, and for gestational surrogacy. It also provides for spousal challenge to marital presumptions under certain conditions,[44] the effect of divorce on assisted-reproductive contracts,[45] and for the pre-birth order process to confirm parentage.[46] Finally, the Maine act requires that the intended parents are the legal parents, even in the event of laboratory error.[4]

Conclusions

While there are some open questions resulting from Maine's new act, including its influence on other states in full faith and credit disputes, this new law creates gender-neutral marital and equivalent relationship presumptions; codifies *de facto* parent analysis and recognizes that some children may indeed have more than two legal parents; brings best practices to codifying assisted reproductive law; recognizes that parentage determinations should not be based on the marital status or sexual orientation of a putative parent; and requires that all children be treated equally, regardless of the circumstances of their births, all of which bring parentage laws into the 21st century.

Debra E. Guston is partner in the Bergen County firm Guston & Guston, L.L.P.

Endnotes

1. *Obergefell v. Hodges*, 576 U.S. ____ (2015).
2. Marital presumptions presume that a child born to a married woman is the child of her husband.
3. N.J.S.A. 9:17-40.
4. *See, e.g., E. v. T.*, 124 N.J. Super. 535 (Ch. Div. 1973).
5. N.J.S.A. 9:17-44(a).
6. N.J.S.A. 9:17-44(b).
7. N.J.S.A. 37:1-28, *et. seq.*
8. *Obergefell v. Hodges, supra.*
9. 419 N.J. Super. 46 (App. Div. 2011).
10. *Id.* at 53.
11. *See* Senate Bill S-866 (2105).
12. R. 5:14-4.
13. *See In Re: Baby M*, 109 N.J. 396 (N.J. 1988).
14. N.J.S.A. 9:17-41(a).
15. N.J.S.A. 9:17-41(b).
16. §1922(2) & (3).
17. §§1832 (5) & 1832 (2).
18. §1832 (6).
19. §§1931-1938.
20. §1931 (2).
21. §1833 (1) & (2).
22. §1833 (3).
23. 2005 Maine Code §2961.
24. §1834 (4).
25. §§1834 & 1838.
26. §1852.
27. §1835.
28. §1840.
29. §1842.
30. §1844 (2).
31. §1845.
32. §1851 (1).
33. §1851 (2).
34. §§ 1861-1873.
35. § 1881 (1).
36. §1881 (2).
37. §1881 (3).
38. §1881 (4).
39. §1882.
40. §1883.
41. §1891.
42. §§1901-1915.
43. §§1921-1929.
44. §1925.
45. §1926.
46. §1928.
47. §1929.

What Constitutes Corroboration in Child Sexual Abuse Cases?

by Victoria D. Miranda

Corroboration, or evidence that supports a statement, is utilized in a variety of legal settings. This article focuses on the use of corroboration with children's out-of-court statements in sexual abuse cases. The purpose of using corroboration in these cases is to provide additional support for a child's out-of-court statements, whether it is by physical, emotional or scientific evidence. Corroboration is required when the court relies upon an out-of-court statement made by the child, and the child is unavailable to testify as a witness.[1] It plays a key role in child sexual abuse cases because children are often too traumatized to repeat the alleged events, or are too embarrassed to discuss the events with any degree of consistency. The use of corroboration in these cases is needed to demonstrate whether an alleged event actually occurred, or whether outside influences have prompted allegations of sexual abuse. This article will define corroboration, discuss its application in civil cases and provide insight into how child sexual abuse cases can be made or defended successfully by understanding its role in the process. This article will also explore the types of corroboration used, the issues associated with those types of corroboration and the variations in the use of corroboration between civil cases and Division of Child Protection & Permanency cases.

Over the past decade, issues regarding corroboration in child sexual abuse cases have become more prominent. It began with an influx of cases during the 1980s and 1990s. Significant research and psychological analysis has been performed on the impact of investigations on young children and their vulnerability to suggestibility. During this time, case law has expanded to define the criteria that must be met for a child's allegation of sexual abuse to be deemed corroborated and, therefore, admissible at trial without direct testimony of the child. The corroboration bar is not set unattainably high, and children's statements are easily admissible with evidence of emotional or psychological turmoil.

Two evidence rules primarily apply to child sexual abuse cases: N.J.R.E. 803(c)(27) and N.J.S.A. 9:6-8.46(a) and (b). These rules have been expanded and clarified through case law, which will be discussed throughout the article.

N.J.R.E. 803(c)(27) provides:

> A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile or civil proceeding if (a) the proponent of the statement makes known to the adverse party intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to meet it; (b) the court finds, in a hearing conducted pursuant to *Rule* 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of *Rule* 601.

This rule applies in any criminal, juvenile or civil case. Therefore, it may be used in a matrimonial proceeding or a Division of Child Protection & Permanency case. Whether you are defending allegations of sexual abuse, or attempting to use allegations as an affirmative defense in a matrimonial proceeding, you have to begin with N.J.R.E. 803(c)(27).

Alternatively, in a case involving the Division of Child Protection & Permanency, Title 9 of the New Jersey statutes will apply to all proceedings. This statute will not, however, apply in a matrimonial proceeding in

which the division is not involved. Title 9 will only apply in a case where abuse and neglect actions are initiated.

N.J.S.A. 9:6-8.46(a)(4) provides, in pertinent part:

> In any hearing under this act, including an administrative hearing held in accordance with the "Administrative Procedure Act,".... (4) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect.

Any finding of sexual abuse by the court must be based on competent, reliable evidence.[2] For evidence to be corroborative, it "need only provide support for the out-of-court statements."[3] "A child's hearsay statement may be admitted into evidence, but may not be the sole basis for a finding of abuse or neglect."[4] Under this standard, a party need only show that a child's statements can be corroborated through the use of other evidence.

Physical and Psychological Corroboration

A review of case law concerning child sexual abuse allegations in New Jersey evidences three types of corroboration that meet the requirement under N.J.S.A. 9:6-8.46(a)(4). These are: eyewitness testimony, which is rare; a confession or admission by the accused; and medical or scientific testimony. The most common type of corroboration used in these cases is medical or scientific testimony, which can be presented either by physical corroboration of the abuse or by psychological corroboration of the abuse. The published cases demonstrate that the cases involving psychological corroboration must be skillfully navigated.

New Jersey courts have repeatedly noted that physical or testimonial evidence is typically unavailable with young children in sexual abuse cases. In *Division of Youth & Family Servs. v. Z.P.R.*, the Appellate Division indicated "[i]t would be a rare case where evidence could be produced that would directly corroborate the specific allegation of abuse between the child and the perpetrator."[5] In fact, "[i]n most cases of child sexual abuse there is no direct or physical evidence."[6] Further, when addressing the sexual abuse of particularly young children, "direct evidence, physical or testimonial, is usually unavailable."[7] The corroboration requirement allows for indirect evidence of abuse to be utilized by the state, which usually includes a child's psychological symptoms.[8] Examples of psychological symptoms used by the court to find corroboration are: night terrors, precocious sexual knowledge, extreme behaviors, severe emotional disturbance and suicidal ideations.[9] Physical corroboration is also used in cases to prove sexual abuse actually occurred, but those cases are much more straightforward. Physical corroboration can include injuries to the anal or vaginal area, a broken hymen, semen, bruises and lacerations, or sexually transmitted diseases.[10]

Psychological corroboration is much more complex, and requires a deeper understanding of the child and the underlying facts. Psychological corroboration can include suicidal ideations, mental health decline and night terrors. The mere presence of a suicidal ideation is not, however, evidence of corroboration *per se*. In *Division of Youth & Family Servs. v. A.H.*, the court found that psychological corroboration was not proper and could not be used as evidence.[11] The out-of-court statements made by the child in *A.H.* showed she had anxiety, but the court determined the anxiety was a result of having to testify in front of her mother, and not due to sexual abuse.[12] The child's statements were consistently inconsistent, and she later recanted the abuse allegations.[13] Notably, a child can evidence psychological symptoms that do not result in a finding of corroboration.

For the corroboration requirement to be satisfied, the corroborative statement must be truthful. For example, if a child makes an allegation to a parent, and then recants that allegation, the parent cannot repeat the allegation to the court because it will be considered hearsay.[14] In *A.H.*, the child's statements were inconsistent, and on their own did not serve as corroboration. The court held the mother's statement about the child's allegation was "inadmissible hearsay and would not constitute corroboration as it was not independently corroborative, but instead constituted nothing more than a restatement of the original accusation."[15]

While *A.H.* is an unpublished decision, it details many common bases for child welfare agencies, and even third parties involved in child sexual abuse cases, to argue corroboration, which the Appellate Division found unpersuasive. In *A.H.*, the child recanted her allegation against her father and the division relied upon the prior statements made by the child and the various aspects of "psychological corroboration" it felt corroborated the abuse allegations. The various professionals from Audrey Hepburn Children's Home noted the child was exhibit-

ing signs of anxiety, namely stomachaches and vomiting, which the child associated with seeing her mother in court.[16] The primary psychologist for the child determined the child had psychological symptoms of abuse "based solely upon [the child's] original accusations."[17] The Appellate Division held that the fact that the child had anxiety and made previous statements to law enforcement was not indicative of corroboration of sexual abuse.

In many cases, parents may attempt to step in and testify about a child's out-of-court statement, but this is not a proper form of corroboration. For example, one court found a doctor could not attempt to testify about sexual abuse, when during her examination she found no physical findings other than the fact the child had been cutting himself. The doctor conceded during cross-examination that cutting could have various causes other than sexual abuse.[18]

Precocious Sexual Knowledge

The court in *Division of Youth & Family Services v. Z.P.R.,* noted that "[o]ne of the facts militating in favor of the reliability of out-of-court statements of child sex abuse victims was the child's exhibiting knowledge of sexual practices beyond her reasonably anticipated imagination[.]"[19] A child's precocious sexual knowledge, combined with incessant sexual actions, has been deemed sexualized behavior not consistent with the child's age.[20] Moreover, a child's demonstration of knowledge of sexual practices, reasonably expected to be foreign to a child of his or her years, accompanied by expert interpretation of a psychologist, could be considered sufficient basis for corroboration.[21] Precocious knowledge is one of the most common types of corroboration used by medical providers to prove abuse. Even though psychologists rely heavily upon a child's sexual knowledge to corroborate alleged sexual abuse, there is often an explanation for the child's knowledge other than that the child has been abused. The presence of precocious knowledge by children can be explained by various other factors, whether it was something a child witnessed on television, through stories by other children or through deceptive interview techniques.

The majority of case law will endorse a therapist's opinion that a child has precocious sexual knowledge. For example, in *Division of Youth & Family Services v. J.M.*, the court found the child's sexual knowledge when speaking with her therapist provided the necessary corroboration to meet the standard of N.J.S.A. 9:6-8.46(a)(4).[22] The court noted that "[t]he Court has recognized the need to use inappropriate sexual awareness as indirect corroboration in *Z.P.R.* 'It would be a rare case where evidence could be produced that would directly corroborate the specific allegation of abuse between the child and the perpetrator....The case law does not require that the evidence be that specific before it can be deemed corroborative of the child's out of court statements.'"[23] It is not uncommon that a therapist will believe a child has been sexually abused if they exhibit any abnormal behaviors.

Susceptibility of Children to Suggestibility in Interviewing Techniques

Several studies have found that young children are highly susceptible to suggestibility in abuse cases. Whether it is through interviews with professionals or conversations with the non-accused parent, there are various ways in which a child can come to believe he or she has been sexually abused, even if no abuse has occurred. A study conducted by psychologists Maggie Bruck and Stephen J. Ceci outlined the ways in which suggestibility in interviewing techniques can lead a child to believe he or she has been sexually abused and to form false memories of that abuse. The authors noted "the largest suggestibility effects are produced when young children are confronted with a combination of implicit and explicit suggestive techniques that are woven into the fabric of the interview through the use of such techniques as bribes, threats, and repetitions of questions."[24]

In many child abuse cases, interviewers will begin a discussion with the child, already anticipating that a child has been abused. Because of this preconceived notion of sexual abuse, an interviewer may attempt to only gather confirmatory evidence, and avoid any discussion that will disconfirm a child's allegations.[25] Young children are susceptible to the interviewers' techniques, and will most often accommodate themselves to agree with the statements the interviewer is eliciting. This is often done with the use of "selective encouragement for statements that are consistent with the interviewer's beliefs."[26] Children will also tend to agree with an interviewer through the use of 'guided imagery,' where they are asked by the interviewer to try and remember or imagine a certain event occurred. According to the study, under these circumstances children will later believe those events actually occurred, and will not be able to distinguish actual memories from imagined memories.[27]

Interviewers may attempt to defend their techniques

by testifying that children are often ashamed or afraid to admit they have been abused. Skillful use of cross-examination, however, may unearth these beliefs. By finding alternative explanations for a child's sexual knowledge, or emotional disturbances, one can dispel the notion that a child has been sexually abused. Physical evidence is not usually present in these cases. As noted by one New Jersey court, "physical evidence of assault is certainly corroborative, but is rare because the sex offenses committed against children tend to be nonviolent offenses such as petting, exhibitionism, fondling and oral copulation."[28]

State v. Michaels

One of the pivotal cases concerning interviewing techniques and the possibility for suggestibility is the New Jersey Supreme Court's decision in *State v. Michaels*.[29] Michaels, a preschool teacher, was accused of sexually abusing the children in her class. The majority of the state's evidence against her was the children's out-of-court statements, which referred extensively to pretrial statements made during the state's investigatory interviews.[30] The Court in *Michaels* found "that an investigatory interview of a young child can be coercive or suggestive, and thus shape the child's responses, is generally accepted. If a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events."[31] In these cases, certain techniques used by investigators, whether police officers or therapists, can shape the way a child relays an event. The Court noted that "a fairly wide consensus exists among experts, scholars, and practitioners concerning improper interrogation techniques."[32] Throughout the decision, the Court cites to various psychologists and case law to bolster its holding and reasoning.

The Supreme Court further explored the numerous ways interview techniques can sway a child's testimony, based upon the consensus of experts, scholars and practitioners:

> [T]he factors that can undermine the neutrality of an interview and create undue suggestiveness are a lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers.[33]

Further examples of interview techniques that have a manipulative effect on children are the use of incessantly repeated questions, the explicit vilification or criticism of the person charged with the wrongdoing, and the interviewer's tone of voice, praise, use of bribes and rewards, and finally, peer pressure.[34]

In *Michaels*, the interviewers utilized most of the suggestible interrogation techniques. The interviewers often lacked impartiality and focused on the goal of eliciting statements from the children that they had been sexually abused by their teacher. A majority of the questions posed to the children were leading. In fact, "[o]ne investigator, who conducted the majority of interviews with the children, stated that his interview techniques had been based on the premise that 'the interview process is in essence the beginning of the healing process.'"[35] This mindset can be common among professionals who interview children who have allegedly been sexually abused. Because these professionals are beginning the interviews already believing the children have been sexually abused, they often do not accept any statements other than confirmatory statements by the children regarding the alleged abuse. A critical issue in these interviews is the use of negative reinforcement when children deny abuse allegations or make statements that suggest the original allegation was false.[36]

Factors Relied Upon by the Court to Determine Reliability of Statements

In determining whether a statement made by a child is admissible in evidence, the reliability of the child's statement is paramount. Several principles typically implicated in criminal cases are equally applicable to civil cases when the issue of reliability is present. This is due, in part, to N.J.R.E. 803(c)(27), which states that a statement made by a child relating to sexual abuse is admissible in a "criminal, juvenile or civil proceeding[.]" Therefore, the evidence rules permit statements made by children to be admissible in a civil proceeding to determine whether there was, in fact, sexual abuse.

In an attempt to assess the trustworthiness of a child's statement and allow it to be admissible in court, the court in *State v. D.R.*, required a hearing to determine whether a child's statement possesses a sufficient *indicia* of reliability.[37] The court also presented a series of factors

to consider when determining reliability:

> Among the factors that bear on that determination are: (1) the person to whom the child made the statement; (2) whether the statement was made under conditions likely to elicit truthfulness; (3) whether the child's recitation exhibits unusual or above-age-level familiarity with sex or sexual functions; (4) post-event and post-recitation distress; (5) any physical evidence of abuse; and (6) any congruity between a defendant's confession or statement.[38]

These factors were expanded in *State v. Hill*.[39] The court noted several factors that should be considered in assessing the reliability of a complaint regarding sexual offenses: "(1) the age of the victim; (2) circumstances of the questioning; (3) the victim's relationship with the interrogator; and (4) the type of questions asked."[40] These factors are pertinent in assessing whether a child has been coached or, through various suggestible interview techniques, has made an allegation that does not bear truth on what actually occurred.

A major thrust of these cases is that the initial burden to trigger a pretrial hearing regarding the unreliability of a child's out-of-court statements is on the defendant. Notably, "[o]nce the defendant establishes that sufficient evidence of unreliability exists, the burden shall shift to the State to prove the reliability of the proffered statements and testimony by clear and convincing evidence."[41] The initial burden is on the defendant because of the premise that child victims are to be presumed no more or less reliable than any other class of witness.[42] A defendant must show suggestive or coercive interview techniques were present, which produced the child's unreliable statements. Another factor is the number of interviews to which a child was subjected. This, in and of itself, can lead a child to change his or her story. Because the same incident is revisited, in his or her mind the child's denial of abuse was not believed the first time, and he or she may change the story and make a 'disclosure' during the next interview.

Sexual Abuse Allegations in the Context of Matrimonial Cases

Issues regarding sexual abuse allegations do not arise solely in cases involving the Division of Child Protection & Permanency. These allegations also arise in the context of matrimonial cases. They may be brought in the context of a custody case or as an allegation in a divorce complaint. These cases pose an array of difficulties, complicated by the age of the children involved, the motivations of the parties and the need to protect the rights, interests and welfare of the children.[43]

In a study conducted by Hollida Wakefield, M.A. and Ralph Underwager, Ph.D., the major changes in attitudes and laws concerning divorce over the past several years has "created an environment that makes sexual abuse allegations more likely."[44] This is more often the case due to 'no fault' divorces, when one spouse feels betrayed by the other and has no recourse since they are not filing for divorce based on the actions of the other spouse. Instead, they use allegations of abuse as retaliation for the actions that lead to the breakdown of the marriage. According to the study, another reason for the prevalence of sexual abuse allegations is changes in custody.[45] Moreover, "[o]ne of the few clear and immediate reasons for changing a custody order is an accusation of sexual abuse by one parent."[46]

A further complication in divorce proceedings is that children's behavioral symptoms, which are a result of the impact of the divorce, are extremely similar to those of an abused child.[47] Children are often distressed due to the turmoil they are experiencing at home because of the friction between the parents. Distress in a child can be exhibited in various ways, depending on the "predispositions and learning environment of that child."[48] According to Wakefield and Underwager, "[t]here is no behavior or set of behaviors that occurs *only* in victims of child sexual abuse."[49] As previously discussed, courts consider age-inappropriate sexual knowledge to be more reliable *indicia* that a child has actually been abused. This, however, must be navigated carefully, as not all precocious knowledge is a result of child sexual abuse. In *A.H.*, *supra*, the court found that the child's precocious sexual knowledge was not indicative of sexual abuse, as the child obtained that knowledge from viewing the movie "Towelhead."[50] Because of the source of this knowledge, the court found that the sexual knowledge was not sufficient corroboration of sexual abuse.[51]

Critically, while there may be a high percentage of false allegations, a study by Kathleen Coulborn Faller, Ph.D., propounded three reasons why truthful allegations would initially surface in a divorce: "(1) the non-offending parent finds out about the sexual abuse and decides to divorce the offending parent; (2) there is long-standing sexual abuse that is revealed only in the context of

divorce; or (3) sexual abuse is precipitated by the marital dissolution."[52] As a result of the extreme stress and anxiety generated by the divorce proceeding, however, the likelihood for false accusations rises significantly. Further, if a parent has a vendetta against the other party because of certain behaviors during the marriage, or the reason for the divorce, he or she may use a sexual abuse allegation as a way to obtain custody of the children.

In *K.M. v. S.M.M.*, the mother alleged her husband sexually abused their daughter during the course of their divorce proceedings and raised the issue in her counterclaim for divorce.[53] The court in *K.M.* held that under a matrimonial proceeding, the party alleging the sexual abuse has the burden of proving the allegations.[54] In *K.M.*, there was no physical corroboration of sexual abuse and, therefore, the court had to rely on the child's out-of-court statements. The court conducted a N.J.R.E. 104 evidentiary hearing that spanned 21 days to determine whether there was sufficient corroboration to admit the child's out-of-court statements. The court found the underlying evidence of the child's disclosures and expert testimony on the child's specific disclosures had no *indicia* of reliability and excluded the statements.[55]

During the interviews that had been conducted with therapists and the police department, the child in *K.M.* had given various statements, none of which were found to be reliable.[56] The child constantly changed her story regarding the abuse and was usually prompted by her mother. It was the mother who was adamant the child had been sexually abused. During the course of the matrimonial proceedings, the mother repeatedly claimed the child required therapy to focus on sexual abuse treatment in an attempt to prompt the child to disclose abuse by the father.[57] The psychologist interviewing the child had doubts about how "spontaneous and real [the child's] disclosure [of abuse] was because of her lack of sadness or anxiety when reporting the incidents."[58] Various professionals felt the child had been "prepped," and noted the child immediately started volunteering information about the abuse at the outset of the meetings.[59] Further, the mother repeatedly asked leading questions of the child in the presence of the professionals to prompt the child to speak of the abuse allegations.[60]

The court held the child's emotional health and safety had been jeopardized by the mother's behaviors, which were orchestrated to gain sole custody of the child and to prohibit the father from exercising his constitutional right to raise his child.[61] The court further found the child's memory had been tainted by the suggestible techniques used by the mother, and that any out-of-court statements regarding the alleged abuse were untrustworthy and inadmissible.[62] The mother chose to seek sole custody of the child by alleging the father had sexually abused her, which the court found was "the most heinous allegation that can be hurled against an innocent parent."[63]

Sexual Allegations in Divorce Syndrome

A 1990 study conducted by Gordon J. Blush, Ed.D and Karol L. Ross, M.A. suggested there are patterns that characterize false allegations. This has been termed the physical pattern of false accusations: SAID (sexual allegations in divorce) syndrome.[64] This syndrome bears the following characteristics: 1) the accusations surface after separation and legal action begins; 2) there is a history of family dysfunction with unresolved divorce conflict and hidden underlying issues; 3) the female (accusing) parent often is a hysterical or borderline personality or is angry, defensive and justifying; 4) the male (the accused) parent is generally passive, nurturing, and lacks 'macho' characteristics; 5) the child is typically a female under age eight; 6) the allegations surfaces via the custodial parent; 7) the mother takes the child to an 'expert' who confirms the abuse and identifies the father as the perpetrator; and 8) the court reacts to the expert's information by terminating or limiting visitation.[65]

Through the use of case studies of contested divorces, the mental status of the parent who brings false accusations in a divorce proceeding has been outlined. According to Wakefield and Underwager, parents who have falsely accused the other of sexual abuse have a higher percentage of a diagnosis of personality disorder, such as histrionic, borderline, passive-aggressive or paranoid (74 percent).[66] Unfortunately, because of these personality disorders, these parents are more likely to allege sexual abuse has occurred to obtain the desired outcome in the divorce proceedings.

Conclusion

Child sexual abuse allegations present critical litigation issues and can have significant, enduring effects on the individuals involved, regardless of whether the abuse actually occurred. If an allegation is false, or a child has been coached or manipulated into believing he or she has been abused, an intensive review of all interviews must be conducted to establish that the out-of-court statements made by the child are unreliable because of the suggest-

ibility by the interviewer. It is incumbent upon the defendant to present to the court the possibility that the child's out-of-court statements are unreliable.

The defendant's strongest defense is to demonstrate the interview process was tainted, and that there is a high probability the child's statements have been manipulated, whether intentionally or not, by the various professionals who elicited those statements. In a divorce proceeding, parties should give careful thought before raising sexual abuse allegations in a complaint for divorce. If the allegations are brought as a ploy to obtain custody of a child, it will likely result in disastrous effects on the children as well as the parents. Unfortunately, there is no exact science to determine whether a child truly has been a victim of sexual abuse or, instead, has been the victim of manipulative interview techniques. The magnitude of the task often rests on defense counsel ascertaining whether and which improper techniques were used to prompt a child into a false allegation.

Victoria D. Miranda is with the Williams Law Group, LLC, in Union.

Endnotes

1. *See N.J.S.A.* 9:6-8.46(a)(4); N.J.R.E. 803(c)(27).
2. *Division of Youth & Family Services v. L.A.*, 357 N.J. Super. 155 (App. Div. 2003).
3. *Id.*
4. *Division of Youth & Family Services v. R.D.*, 2012 WL 762142, (App. Div. 2012).
5. *See Division of Youth & Family Servs. v. Z.P.R.*, 351 N.J. Super. 427 (App. Div. 2002).
6. *Division of Youth & Family Servs. v. A.H.*, 2012 WL 1858995 (App. Div. 2012).
7. *Division of Youth & Family Servs. v. P.H.*, 2013 WL 1350893 (App. Div. 2013).
8. *See P.H.*, *supra*.
9. *P.H.*, *supra*.
10. *Id.*
11. *A.H.*, *supra*.
12. *Id.*
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. *Division of Youth & Family Services v. S.G.*, 2014 WL 3819014 (App. Div. 2014).
19. *Z.P.R.*, *supra*, 351 N.J. Super. 427.
20. *Division of Youth & Family Services v. D.T.*, 2013 WL 4436478 (App. Div. 2013).
21. *State v. D.R.*, 109 N.J. 348 (1988).
22. *Division of Youth & Family Services v. J.M.*, 2010 WL 4483413 (App. Div. 2010).
23. *Id.* (*quoting Z.P.R.*, *supra*, 351 N.J. Super. at 435).
24. Maggie Bruck, Stephen J. Ceci and Helene Hembrooke, The Nature of Children's True and False Narratives, *Developmental Review* 22 (2002).
25. *Id.* at 522.
26. *Id.* at 523.
27. *Id.* at 524.
28. *Division of Youth & Family Services v. A.R.*, 2007 WL 3051420 (App. Div. 2007).
29. *State v. Michaels*, 136 *N.J.* 299 (1994).
30. *Id.* at 305.
31. *Id.* at 309.

32. *Ibid.*
33. *Ibid.*
34. *Id.* at 310.
35. *Id.* at 314.
36. *See*, Maggie Bruck, Stephen J. Ceci and Helene Hembrooke, The Nature of Children's True and False Narratives, *Developmental Review* 22 (2002).
37. *D.R., supra*, 109 N.J. at 360.
38. *Michaels*, *supra,* 136 N.J. at 317-318 (*quoting D.R., supra,* 109 N.J. at 348 (1988)).
39. *State v. Hill*, 121 N.J. 150 (1990).
40. *Id.* at 168.
41. *Ibid.*
42. *Ibid.*
43. *Michaels*, *supra*, 136 N.J. at 321.
44. Hollida Wakefield, M.A. & Ralph Underwager, Ph.D., *Sexual Abuse Allegations in Divorce and Custody Disputes*,
45. *Id.* at 2.
46. *Ibid.*
47. *Ibid.*
48. *Id.* at 10.
49. *Ibid.*
50. *A.H., supra.*
51. *Id.* at 3.
52. *Ibid.*
53. *K.M. v. S.M.M.,* 2011 WL 3176534 (App. Div. 2011).
54. *Id.*
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*
58. *Id.* at 20.
59. *Id.* at 8.
60. *Ibid.*
61. *Id.* at 12.
62. *Id.* at 18.
63. *Id.* at 38.
64. *Wakefield*, *supra*, at 7.
65. *Id.*
66. *Ibid.*

What is Included in Child Support under the Child Support Guidelines?

by William J. Rudnik

Clients often ask, "What is included in the child support guidelines?" While some expenses are clearly included under a child support guidelines calculation, such as housing and clothing, other less-obvious expenses, such as certain activity expenses, summer camp and car insurance, are also included. A review of the New Jersey Court Rules and appendix to the rules, together with the case law, provides some clarification. The best way, however, to address expenses for which there is a question regarding inclusion in the guidelines calculation is to specify in a marital settlement agreement or consent order whether the expenses are to be paid separately from child support.

New Jersey Court Rules and Appendix

Initially, New Jersey Court Rule 5:6A, entitled "Child Support Guidelines," provides:

> [t]he guidelines set forth in Appendix IX of these Rules shall be applied when an application to establish or modify child support is considered by the court. The guidelines may be modified or disregarded by the court only where good cause is shown. Good cause shall consist of a) the consideration set forth in Appendix IX-A, or the presence of other relevant factors which may make the guidelines inapplicable or subject to modification, and b) injustice would result from the application of the guidelines. In all cases, the determination of good cause shall be within the sound discretion of the court.

Appendix IX to the court rules provides some additional clarification regarding the expenses included in the child support guidelines. Specifically, Appendix IX-A, paragraph 8, "Expenses Included in the Child Support Schedules," provides the child support will "include the child's share of expenses for housing, food, clothing, transportation, entertainment, unreimbursed health care up to and including $250 per child, per year, and miscellaneous items." The appendix also delineates additional details for each of these categories. While certain expected items are listed under the housing costs, including mortgage principal and interest payments, home equity loans and property taxes, this category also includes "miscellaneous household equipment (*e.g.*, clocks, luggage, light fixtures, computers and software, decorating items, etc.)." As noted below, the court has interpreted this language to include expenses to set up a child's college dormitory room and a laptop computer for a child.

Under transportation, the definition in paragraph 8 includes:

> all costs involved with owning or leasing an automobile including monthly installments toward principal cost, finance charges (interest), lease payments, gas and motor oil, insurance, maintenance and repairs. Also included are other costs related to transportation such as public transit, parking fees, license and registration fees, towing, tolls and automobile service clubs. The net outlay (purchase price minus the trade-in value) for a vehicle purchase is not included.

Transportation, likewise, does not include "expenses associated with a motor vehicle purchase or lease for the intended primary use of a child subject to the support order." The language seems to indicate, without specifically addressing the issue, that a parent's increased cost for his or her own car insurance, as a result of having a child who is a licensed driver living with him or her, is included in the child support calculation.

Paragraph 8 of Appendix IX-A defines 'entertainment' as "[f]ees, memberships and admissions to sports, recreation, or social events, lessons or instructions, movie rentals, televisions, mobile devices, sound equipment, pets, hobbies, toys, playground equipment, photographic equipment, file processing, video games and recreational, exercise or sports equipment." Since fees, member-

ships, lessons and instructions are included in the child support calculation, are there certain sports or activities that are not included? Under the case law, the answer seems to depend on the cost of the activity and whether the parties' collective incomes exceed the child support guidelines limit.

This provision of Appendix IX-A also includes the following note: "The fact that a family does not incur a specific expense in a consumption category is not a basis for a deviation from the child support guidelines." To deviate based upon a claim that a family's costs differ from the average cost used in formulating the guidelines, "a parent must show that the family's marginal spending on children for all items related to a consumption category differs from the average family (e.g., there are no housing costs)." Considering this language, it appears deviation from the guidelines based on 'average costs' is rarely appropriate.

Paragraph 9 of Appendix IX-A, entitled "Expenses That May Be Added to the Basic Child Support Obligation," addresses certain expenses that are not included in basic child support awards. These expenses include childcare; health insurance for the child; predictable and recurring unreimbursed healthcare expenses in excess of $250 per child, per year; and other expenses approved by the court. The average cost of childcare expenses including "day camp, in lieu of child care is not factored into the schedules." These expenses should be added separately. Under the definition of other expenses approved by the court, which would also be added to the basic child support amount, paragraph 9(d) states:

> These are predictable and recurring expenses for children that may not be incurred by average or intact families such as private, elementary, or secondary education, special needs of gifted or disabled children and NCP/PAR time transportation expenses. The addition of these expenses to the basic obligation must be approved by the court. If incurred, special expenses that are not predictable and recurring should be shared by the parents in proportion to their relative incomes (i.e. the sharing of these expenses should be addressed in the general language of the order or judgment). Special expenses not included in the award should be paid directly to the parent who made or will make the expenditure or to the provider of the goods or services.

The question then becomes which expenses are considered 'special' or 'extraordinary,' and when is a child considered 'gifted' for purposes of an educational expense, a sport or an activity?

In evaluating any expense, the first step is to determine whether it is included in the basic child support amount. If it is not included in the child support amount, the next step in the analysis is to determine if it is a predictable and recurring expense, such as private elementary education. Or, is it a 'special' expense that is not predictable and recurring? If an expense is not included in the child support guidelines, the underlying premise for the analysis is whether an expense is 'necessary' for a child. The case law provides additional assistance regarding this analysis.

Analysis of Case Law

The Appellate Division's decision in *Accardi v. Accardi*[1] analyzes how the court views the issue of activity expenses and whether these expenses are considered 'extraordinary.' In *Accardi*, the plaintiff appealed the trial judge's decision deeming certain activities extraordinary and requiring the plaintiff to contribute to these expenses separately from child support. The court found the former wife's listing of claimed extraordinary expenses was insufficient to support an award of such expenses; however, a remand was required to permit resolution of numerous issues regarding these claimed extraordinary expenses. The court noted the wife had the burden of proof to demonstrate the expenses she claimed were both legitimate and reasonable. The former husband argued the motion judge should not have characterized certain expenses as extraordinary because they were for ordinary extracurricular activities, which should be paid from basic child support, including gymnastics, tennis lessons, horseback riding lessons, drum lessons and cheerleading. The wife countered that these expenses were not only extraordinary but that the children of parents with higher incomes were entitled to the benefits of these advantages.

Although the motion judge determined gymnastics, art lessons and horseback riding lessons were extraordinary expenses, the Appellate Division determined this characterization is not consistent with the child support guidelines. Although the appellate court determined most of the expenses appeared to fall within the description of entertainment expenses as set forth in paragraph 8 of Appendix IX-A to the Rules of Court, the court also considered paragraph 9 of Appendix IX-A. Although

these were not extraordinary expenses, the appellate court noted the expenses "may, in the discretion of the trial court with proper consideration of the statutory factors in N.J.S.A. 2A:34-23, be added to the support obligation of a high income earner."

The Appellate Division, in concluding the expenses were not extraordinary, could not determine from the record whether they fell within the category of extraordinary expenses, which are "not predictable and recurring" and should be shared between the parents in proportion to their relative incomes. The court remanded the matter for a plenary hearing to determine: 1) the items categorized as extraordinary expenses; 2) the items categorized as ordinary extracurricular expenses; 3) whether the extracurricular expenses should be added to or included in the defendant's support obligation under the statutory factors; 4) the allocation of extraordinary and extracurricular expenses between the parties; and 5) calculation of the extraordinary expenses consistent with these directives for 2000, 2001 and 2002.[2]

While *Accardi* provides some direction regarding the analysis to be undertaken by the court, in most cases the cost of the plenary hearing will exceed the actual activity expenses. As a result, parties should endeavor to determine which activities, if any, will be added to the basic child support amount.

In addition, courts have typically considered camp expenses, class trips and driver education classes to be included in the basic child support award under the guidelines.[3] In cases where the parties reach an agreement that provides for a specific division of the children's extracurricular activities, the Appellate Division has determined the trial court does not have a basis to deviate from the parties' agreement without a change in circumstances.[4]

One trial court utilized a formula with a cost threshold for activities that would be reimbursed outside of child support. This is an approach attorneys have also used in drafting property settlement agreements. In *Werosta v. Werosta,*[5] the parties agreed in the property settlement agreement to deviate from the child support guidelines. Subsequent to the divorce, by way of motion, the court ordered the defendant to pay 60 percent of the children's extracurricular expenses, after the plaintiff paid the first $250 per year for each child.

The order specifically referenced the oldest son's hockey league expenses and provided the cost of extracurricular activities beyond $250 per year were "extraordinary expenses that should be shared." The plaintiff appealed, claiming she could not afford the son's travel team hockey expenses based on her limited income. The appellate court noted the trial court's order requiring the parties to share in those expenses when they exceed $250 per child, per year, did not include findings or other provisions determining whether particular extracurricular activities are appropriate for the children or how potential disputes about the costs might be resolved. The court further noted "[a] divorce parent is not bound indefinitely to pay the costs of all extracurricular activities that the other parent chooses for the children. Neither parent may unreasonably withhold agreement, but where an activity is unusually costly or inappropriate for other reasons, it is not unreasonable for a parent to disapprove the expenses or activity. The parent who nevertheless insists on that activity should bear the cost."

The Appellate Division remanded the matter, directing that the trial court should consider and resolve "the parties' dispute regarding each parent's obligation to pay for extraordinary expenses of the children's activities such as for travel hockey team." While the appellate court did not specifically disagree with the trial court's approach that any activity over $250 per child, per year, would be considered extraordinary, the court did address whether both parents should contribute to an expense that is considered extraordinary based upon their respective incomes.

In *Devine v. Devine,*[6] the parties specifically provided for an allocation of certain extracurricular activities in their matrimonial settlement agreement, and also included language that further limited reimbursement to "other activities undertaken after a decision jointly made by the parties, noting neither party's consent [shall] be unreasonably withheld." The appellate court noted the moving party bore the burden of proof regarding whether there was an agreement to pay other expenses, such as school trip expenses. The court determined that because there were no findings the plaintiff agreed to pay a portion of a school trip, for which $491 in contribution was sought, the activity was deemed to fall outside of the parties' agreement. Accordingly, the Appellate Division vacated the order requiring reimbursement of this expense.

Additionally, in *Perry v. Jones,*[7] the trial court awarded the plaintiff a lump sum of $50,000 as additional child support. The Appellate Division noted that unless there is a deviation based upon good cause, a judge is required to apply the child support guidelines.[8] The court further found the trial judge failed to include findings that the plaintiff showed a deviation from the guidelines in the

form of a lump-sum payment was appropriate based upon the factors set forth in the appendix, or because an injustice would result in applying the guidelines. The court reversed the $50,000 lump sum amount and stated if the trial court disregards the child support guidelines, the court must make findings regarding the needs of the children and the standard of living of the parties.

The Appellate Division, in *Elrom v. Elrom,*[9] reviewed a trial judge's decision requiring the defendant to contribute to childcare expenses and to pay half of the children's extracurricular activities as additional support at a time when the plaintiff was unemployed. The court found the trial court failed to explain the deviation from the guidelines by adding childcare and extracurricular activity costs as supplemental support. The plaintiff's assertions were not supported by evidence, as they merely reflected her opinion, and the testimony failed to establish the 'good cause' necessary for disregarding the child support guidelines.

The Appellate Division remanded the matter and requested the trial judge consider whether good cause for a separate allocation of specific extracurricular activities was warranted. The court did note there was no basis for the defendant to contribute to childcare costs because the plaintiff was unemployed at that time.

In *Sherry v. Zebe,*[10] the Appellate Division addressed three separate appeals filed by the parties over time. One of the issues involved the defendant's responsibility to contribute to the cost of repairing the car used by one of the parties' daughters. The Appellate Division noted because the eldest daughter was in college, her use of the vehicle had to be evaluated in accordance with the law governing a parent's duty to support his or her children. Without a duty, the liability for the repairs could not be imposed. In addition, the repair bill must be analyzed because only reasonable repairs can be reimbursed. Although the trial judge acknowledged the child support guidelines covered transportation, the judge determined because the defendant's income was so high, it was appropriate for him to pay a portion of the cost to repair the vehicle so his daughter could use the vehicle to safely transport herself to and from college. The trial judge also found the purchase of software, including Microsoft Home Office, and sorority dues were related to college expenses and should be separately reimbursed. In addition, the court found dormitory furnishings were college expenses, as was the cost of a nurse's uniform for the nursing program. Notably, the language in the parties' settlement agreement that defined college-related expenses did not include expenses such as dormitory furnishings.

The Appellate Division noted that although it was not a child support guidelines case, when parties provide for child support in their settlement agreement, it should be construed in accordance with the applicable law. The parties determined repairing a car was included in basic child support and should not have been awarded separately. If the amount of child support was insufficient as a result of a change in circumstances, then child support should have been recalculated to include nonessential items, rather than entering an *ad hoc* award of child support add-ons. The appellate court reached the same conclusion regarding housing-related expenses, and reversed the award of expenses for software and household items for the younger daughter's dormitory room. The Appellate Division also noted that laptop computers are included in child support and should not be separately reimbursed.[11] The sorority dues and nursing uniform were, likewise, not college expenses as defined by the settlement agreement, and the defendant, therefore, would not be required to contribute separately to those expenses.

In *Tuman v. Tuman*,[12] the trial court required a contribution of one-third of previous and future laptops for the children, one-third of the cost of summer camp, as well as other costs separate from child support. The trial judge's decision was affirmed by the Appellate Division. It is unclear from the decision why the computer cost was awarded. Regarding summer camp, the children had attended camp during the marriage, and the court found continued attendance after the divorce was also reasonable. In analyzing the extraordinary expenses based upon the principles in *Accardi v. Accardi*, the court focused on expenses that were, or should have been, contemplated by the parties during their marriage.

In the case of *Levine v. Levine,*[13] the appellate court addressed commuting expenses for the child to travel from Jersey City to New York City for high school, as well as the cost of uniforms and a class trip to England. The definition of 'transportation' in Appendix IX-A included "other costs related to transportation such as public transit." The remaining expenses for school uniforms and a mandatory trip to England were not extraordinary expenses and should be treated as predictable and recurring expenses, which must be approved by the court to be added to any child support obligation. The trial court viewed the ancillary expenses as falling under existing support payments, and the Appellate Division affirmed.

Commentary

The appendix to the child support guidelines makes it clear car and related expenses for a child who is included under a support order are not included in the child support guidelines calculation. In determining whether the cost for a vehicle for a child should be shared between the parties, the question is whether the vehicle is a necessity for a child. Arguably, if a child is commuting to college and living at home with one of the parents in a rural area (where public transportation is limited), a vehicle is likely necessary, and is an expense that should be shared between the parties in some manner. In high-income families, it can be considered an extraordinary expense that may be added to basic child support. Because it is not separately addressed in the appendix, it appears expenses for the parent's car, including the increase in car insurance once a child is a licensed driver living in his or her home, would already be included in the basic child support calculation. The reality is, however, this becomes a significant expense because the parent's car insurance premiums may increase by more than $1,000 per year simply because a child is now a licensed driver residing in their home. The attorney can argue this constitutes a change in circumstances warranting a recalculation of child support to factor in the additional costs for the car insurance.

Regarding summer camp, if it is in lieu of daycare (*i.e.*, standard recreational or day camp expense), then it is a separate expense that would be added to the basic child support guidelines calculation. Day camp expenses, which are not in lieu of work-related daycare, would not automatically be added as a separate expense to the basic child support guidelines calculation. Day camp or sleep-away camp would be addressed based upon numerous factors under the case law. Do the parties' incomes exceed the basic child support guidelines limit? Were these expenses anticipated prior to the divorce? By way of example, did the children attend similar camps prior to the divorce? If the camp is a specific type of camp (either sports or educational), a party may also argue it falls within the category of special or extraordinary expenses. The courts seem to analyze these expenses based upon whether the child previously attended or participated in them, whether there is a need for the child to attend or participate, and whether the parents can afford to pay for these expenses. While these types of expenses appear to be fact sensitive, it is clear they are not included in the basic child support calculation. This does not, however, automatically mean a parent must contribute to those expenses.

In addition, it remains unclear when a sports, music, educational activity or lesson is or is not included in the child support calculation. It appears from the case law that most of these expenses would be included in the child support guidelines calculation. At least one court, however, believed a threshold amount of $250 per child, per year, would be appropriate for determining whether an expense would be considered 'extraordinary.'

A question also remains regarding expenses for a child who is involved in an activity such as horseback riding or gymnastics (which can cost in the range of $100 to $500 per month depending on the frequency of the activity) and participates on a continuous basis. Could this be considered a predictable and recurring expense that would be added to the basic child support amount? If not, is this automatically considered a 'special' or 'extraordinary' expense based on the cost? Moreover, travel sports can cost several thousand dollars per year, separate and apart from the actual cost of traveling and staying in hotels for away games/meets and tournaments. Based upon the typical child support guidelines calculation, these types of expenses would appear to exceed the amount used to determine the basic child support guidelines.

The most effective way to handle these types of expenses is to specify, in a marital settlement agreement, which expenses are and are not included in the child support guidelines calculation. While some of this language will depend on whether the children are already involved in certain activities and are anticipated to continue, the parties can also agree on a threshold dollar amount where an activity costing more than a certain amount per year would be shared by the parties. Because of the costs involved in litigating these issues, it is certainly beneficial to try to address them in as much detail as possible in a settlement agreement. Of course, if there are changes in circumstances from the time the parties are divorced, similar to basic child support, the payment for the children's activities is always subject to change. ■

William J. Rudnik is a partner at the law firm of Gebhardt & Kiefer, P.C. in Clinton.

Endnotes

1. *Accardi v. Accardi*, 369 N.J. Super. 75 (App. Div. 2004).
2. *Ibid.* (The initial child support award was $6,000 per month, which was above the child support guidelines based on income. Child support was subsequently reduced, although the amount of child support remained above the guidelines).
3. *Spiegler v. Spiegler*, 2009 WL 1257680 (App. Div. 2009)(The trial court noted, and the Appellate Division affirmed, that expenses such as camp expenses, class trips and driver education classes were not "extraordinary expenses" and are included in the child support schedules).
4. *Elgart v. Elgart*, 2015 WL 5446484 (App. Div. 2015).
5. *Werosta v. Werosta*, 2011 WL 3611335 (App. Div. 2011).
6. *Devine v. Devine*, 2015 WL 2211980 (App. Div. 2015) at *7.
7. *Perry v. Jones*, 2014 WL 10190767 (App. Div. 2015).
8. *Perry, supra, citing Diehl v. Diehl*, 389 N.J. Super. 443, 452 (App. Div. 2006).
9. *Elrom v. Elrom*, 439 N.J. Super. 424 (App. Div. 2015).
10. *Sherry v. Zebe*, 2011 WL 4483170 (App. Div. 2011).
11. *Compare with Tuman v. Tuman*, 2011 WL 181303 (App. Div. 2011) where the court awarded, and the Appellate Division, affirmed a required contribution of one-third of the previous and future laptop computers for the children.
12. *Tuman, supra*.
13. *Levine v. Levine*, 2009 WL 153516 (App. Div. 2009).