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CHAIR'S COLUMN

Divorce in a Declining Economy

by Edward J. O'Donnell

There's a joke that goes something like this: *Divorce lawyers are a lot like bartenders. When times are good, business is good. When times are bad, business is better.*

We have all heard the stories reported in the popular media—married couples are staying together for economic reasons. Apparently they can't afford to be divorced. Are the stories true? Well, to the extent that they are, they are by their nature merely anecdotal. Yet, many counties report at least a temporary drop in the number of filings. Does this mean there will be more people staying together until "death do us part"? I don't think so. Bad marriages generally do not get better. Consider these unhappy couples to be 'inventory'.

Indeed, the studies show that the divorce rate actually increases when there is a recession. Interestingly, the divorce rate also increases in times of economic boom. The conclusion one can draw from these statistics is that it is a *change* in the economic *status quo* that often precedes a divorce. One is reminded of yet another old joke: *When times are good, people can afford to be divorced. When times are bad, they can't afford to stay married.*

But jokes aside, the *immediate* problem is real. Consider the latest economic trends. Unemployment rates have been increasing on a monthly basis. Wall Street jobs have been lost. (Many have been totally eliminated and will not return.) The firms that are not collapsing are laying off employees. The list goes on and on. Indeed, all of our clients have been affected by the declining economy. Many have lost hundreds of thousands of dollars as the value of retirement accounts and residential real estate has plummeted.

The challenge for the lawyers is daunting. Aside from the obvious issue of how a lawyer gets paid (an issue dear to my heart but nevertheless beyond the purview of this column), there are substantive issues and issues of procedure we need to rethink.

The substantive issues jump out at us. How do we deal with the fact that virtually every business today has a *Goldman* issue? How do we dispose of an interest in a marital residence when it can't be sold or refinanced because it is 'upside down'? When does that 'temporary change in circumstance' actually become permanent? The list goes on and on.

[H]ow do we effectively and zealously represent our clients, conduct discovery, get expert appraisals and valuations, and insure an appropriate parenting plan, when the circumstances dictate that we litigate on a shoestring budget?

The substantive issues will, to a large degree, resolve themselves with creative lawyering and innovative thinking. The real problem is: How do we get to the point where we can resolve substantive issues without financially breaking the parties. In other words, how do we effectively and zealously represent our clients, conduct discovery, get expert appraisals and valuations, and insure an appropriate parenting plan, when the circumstances dictate that we litigate on a shoestring budget.

For starters, I would suggest that there be a cooperative effort between the bench and the bar to streamline the costs of litigation. *Lawyers should not have to be cutting their bills or compromising their hourly rates*. Nor should they be required to waste their time and their clients' dollars making court appearances for routine matters such as case management conferences

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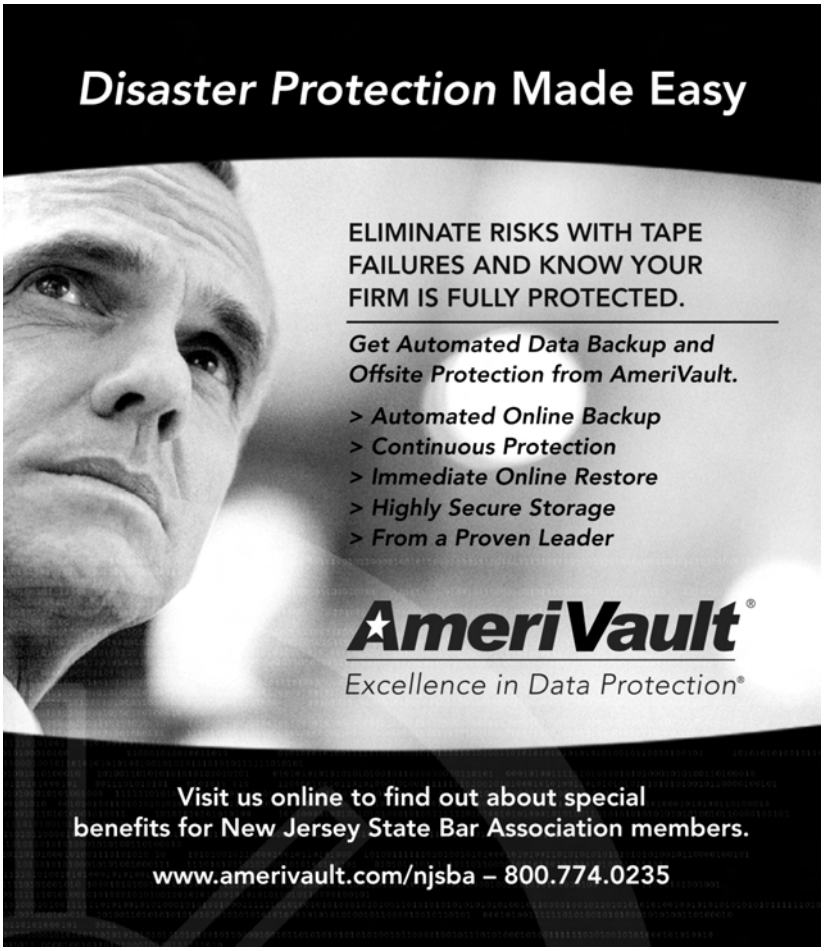
The clients should not be required to incur unnecessary legal costs for those 'ready, set, *don't* go' court appearances. A trial date where counsel must spend time and effort getting ready, drafting trial memoranda, updating case information statements, lining up witnesses, (expert and otherwise) and pre-marking exhibits, only to learn there are three other cases scheduled for trial on the same day, does little to resolve matters and only increases counsel fees. The same is true when counsel and the parties are called to court for an all-day 'blitz' or intensive settlement conference when the court does not have the time to step in and offer meaningful suggestions and settlement initiatives.

There must be cooperation between the members of the bar as well. As much as we need to advocate on behalf of our clients, we must do so with an eye toward the ultimate result. We must assess the cases, as many of our clients do, in terms of what will be the return on investment. We must be cognizant of the law of diminishing returns. All too often, the collective cost of counsel fees just does not justify the result. As much as we must advocate for our clients, we must also guide them to take a long, hard look at the big picture, and what the ultimate result may be. This means we must streamline our discovery requests, and be judicious (pardon the pun) in bringing issues to the court's attention by *pendente lite* applications.

With the change in the economy, it is hard to justify scorched earth litigation and protracted discovery on each and every case. Reasonable expectations need to be set on a case-by-case basis. The landscape has changed and we are going to be required to do business differently. ■



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Recent Developments in Family Law

November 2007–November 2008

by Thomas H. Dilts, E. David Millard, Patricia B. Roe, William R. DeLorenzo, Octavia Melendez, Lawrence R. Jones and David Tang

(Editor's Note: The information reproduced here was provided to members of the judiciary at the judicial college in November of 2008. The analyses and comments are those of the authors, and not that of the judiciary.

CHILDREN IN COURT
STATUTES

Pub. L. No. 110-351
Fostering Connections to Success and Increasing Adoptions Act of 2008
Link: http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR06893:|TOM:/bss/d110query.html|

This law amends, in relevant part, the following statutes: 42 U.S.C. §§ 620-629i, 653, 670, 671, 672, 673, 673b, 674, 675, 676, 677; 26 U.S.C. § 152; 31 U.S.C. § 323. Effective dates vary by subsection.

The amendments represent significant changes to the child welfare laws in five key areas (this list of amendments is not comprehensive, but only provides highlights):

1. Connecting and supporting relative caregivers. This section provides that:
   a. States may opt to establish kinship guardianship programs for grandparents or other relatives
   b. The federal government may make grant funds available for certain organizations
   c. In most cases, after removing a child from his or her home, the state must exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child (including any other adult relatives suggested by the parents)
   d. The state may waive licensing standards on a case-by-case basis for non-safety standards (as determined by the state) in relative foster family homes for specific children in care
2. Improving outcomes for children in foster care. This section provides that:
   a. The state may define child as enumerated in 42 U.S.C.A. §675 (this subsection permits the state to provide services to older youth ages 18-21)
   b. Certain individuals may assist children aging out of the system in the development of a transition plan
   c. Training funds may be available to more child welfare stakeholders
   d. Protocols should be in place to ensure the child's educational stability
   e. The state should develop a plan to coordinate and oversee the healthcare needs of the child
   f. The state should make reasonable efforts to place siblings together unless the placement is contrary to safety and well-being of any of the children
3. Tribal foster care and adoption access. This section provides that:
   a. Indian children in tribal areas should receive equal access to foster care and adoption services
   b. The federal government must provide technical assistance and implementation services that are dedicated to improving services and permanency outcomes for Indian children
4. Improvement of incentives for adoption. This section provides that:
   a. The federal adoption incentives program will be extended for five years and adoption incentives will be increased as enumerated in 42 U.S.C.A. §673b
   b. Special needs children receive more opportunities for adoption
   c. The state must inform an individual who is adopting a foster care child of the potential eligibility of a federal tax credit
5. Clarification of uniform definition of child and other provisions
   a. Amendments to the Internal Revenue Code
   b. Nothing in this act shall be construed to alter prohibitions on federal payments to individuals who are unlawfully present in the United States

P.L. 2007, c. 228 (S-2835)
Authorizes DYFS to review prospective resource family parents' child abuse record

information from other states, and provides these parents with right to be heard at certain hearings
Link: www.njleg.state.nj.us/2006/Bills/PL07/228_.PDF

This law amends the following statutes: N.J.S.A. 9:3-45.2; 30:4C-12.2; 30:4C-27.6; 30:4C-27.7; 30:4C-54; 30:4C-59; 30:4C-61; 30:4C-61.2.

The amendments are enacted to be consistent with federal child welfare laws. First, sections relating to resource families were amended to provide that they have a right to be heard at hearings concerning the child. This language is stronger than the previous language, which stated that resource families would have an opportunity to be heard at these hearings. Second, child welfare agencies are now required to request a child abuse record information check from the applicable authority in each state in which the prospective resource family parent and any other adult residing in the prospective parent's home has resided in the preceding five years.

COURT RULES

None

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CASE LAW

***DYFS v. E.P.*, 196 N.J. 88 (2008) [Justice Albin delivered the opinion of the Court. Chief Justice Rabner and Justices LaVecchia, Wallace, and Hoens join in Justice Albin's opinion. Justice Rivera-Soto filed a separate, dissenting opinion. Justice Long did not participate.]**

Termination of parental rights; continuing parent-child relationship

The Supreme Court reversed the decision to terminate parental rights the of mother to her 13-year-old daughter, despite the mother's continued mental illness and drug abuse, because there was little likelihood of adoption and the troubled child's only significant relationship was with her mother.

The trial judge terminated the parental rights of the mother to her daughter, Andrea, because of her long history of substance abuse and mental illness, finding that all four prongs required to terminate parental rights were established. On the fourth prong, the trial judge held that Andrea was entitled to the opportunity for permanency even if it would take two to three years to find adoptive parents. Further, the trial judge noted that, if Andrea were not adopted and her mother did regain stability, she could move to reopen the guardianship proceeding.

Justice Albin, writing for a divided court, held that the first three prongs were established. The Court found that the fourth prong ("termination of parental rights will not do more harm than good") was not established because the "unlikely possibility" of permanency in the future does not outweigh the strong relationship Andrea had with her mother. The Court noted Andrea's own troubled life with multiple failed placements and her continued strong relationship with her mother who was the only significant person in her life. Justice Albin wrote:

> The sad reality is that Andrea has been hopelessly adrift within the foster care system, and the termination of her mother's parental rights removed her one mooring - the one enduring and sustaining emotional relationship that she has had in this world. *Id.* at 111.

The Court also gave weight to the right of a child, 10 years or older, to be heard by the trial judge before making a decision "that will protect the health, safety and welfare of the children who come before it." *Id*. at 113. Justice Albin wrote:

> We believe that in appropriate cases, the family court would benefit from hearing the wishes of a child over the age of ten, who has reached a level of maturity that allows the child to form and express an intelligent opinion. Moreover, when such a child on his or her own initiative requests the opportunity to express an opinion, the court should allow the child to do so. Because each case will bring to bear particular factors that relate to the psychological well-being of a child, we leave this matter to the sound discretion of the family court. *Id.* at 113-14.

Comment: First, this decision requires family judges to consider interviewing children 10 years of age or older before making decisions affecting their welfare—in all cases, not just termination cases. The child should be interviewed unless the court finds it would be contrary to his or her welfare to do so. The basis for not interviewing should be stated on the record. Second, in termination cases, when there is little prospect of adoption and the child has a relationship with a parent, if the court finds terminating parental rights will not do more harm than good, then specific findings supporting this conclusion must be stated on the order. Third, this decision demonstrates the importance of achieving permanency as early as possible in a child's life. Given her age and history, the Court found that it was unlikely that Andrea would bond with another caregiver even if she were to be adopted.

***DYFS v. M.W., et al., In the Matter of the Guardianship of R.W., et al.*, 398 N.J. Super. 266 (App. Div. 2008) [Judge Collester]**

Parent's whose parental rights were terminated and inheritance from deceased child's estate

Retroactive termination of mother's parental rights to a deceased child and imposition of a constructive trust are appropriate so as to prevent the mother's right to inheritance, according to this appellate court decision.

This case arises out of the "gruesome discoveries in the Newark basement of two starving and abused young boys and the mummified remains of a third" boy, F.W. *Id*. at 275. Judge Grant, the trial

judge, terminated the mother's parental rights to the two surviving boys and to F.W., finding that the mother, M.W., had abused and neglected her children for several years, which included leaving the children in the care of Sherry Murphy in 2001. While in Murphy's custody, the three were abused and F.W. was killed by Murphy's son. DYFS's investigation of the complaints of the abuse in 2001 was so mishandled that the appellate court concluded that the boys were abandoned by the state agency that was supposed to protect them. *Id*. at 282.

As a result of DYFS's negligence, a settlement in a civil action was reached wherein the children received a total of $3.75 million, including $1 million payable to the estate of the deceased child, F.W. His mother, M.W., claimed the $1 million under the law of intestacy. DYFS sought to terminate her parental rights to F.W. retroactively and alternatively to impose a constructive trust on F.W.'s funds in order to disqualify M.W. from receiving them because of her wrongdoing, and so that F.W.'s settlement would pass to his brothers. Judge Grant agreed in an 87-page decision characterized by the appellate panel as "comprehensive and insightful." *Id*. at 285.

Judge Collester, speaking for the appellate court, affirmed the trial judge in all respects saying:

> We agree with Judge Grant that the unique and extraordinary circumstances of this case are such that the Family Court in the exercise of its equitable powers may terminate M.W.'s rights to inherit from F.W. *nunc pro tunc*. The clear public policy of this State is to protect and preserve the welfare of its children, and, to this end, there is reposed in the Family Court inherent equitable authority to fashion appropriate remedies to protect the welfare of children and advance their best interests. *Id*. at 295 (citations omitted).

Further, Judge Collester wrote:

> How cruel, ironic, and inequitable it would be to hold that M.W. retained the right to inherit $1 million from the child she burned, abused, neglected, and abandoned. Equity, morality, and common sense dictate that physically or sexually abusive parents have no right of inheritance by intestacy. The contrary result would bespeak a thoughtless jurisprudence warranting public disrespect. The applicable principle of equity is that "equity will not suffer a wrong without a remedy." *Id*. (citations omitted)

Comment: We repeat for emphasis, "[T]here is reposed in the Family Court inherent equitable authority to fashion appropriate remedies to protect the welfare of children and advance their best interest." *Id*. This holding stands in contrast to the appellate holding in *In Re Rogiers*, 396 N.J. Super. 317 (App. Div. 2007), a probate case, wherein the court declined to impose such drastic remedies, and decided not to bar a non-supporting parent from inheriting from a child who died intestate.

***DYFS v. J.C., In the Matter of the Guardianship of T.J.C. and N.C.*, 399 N.J. Super. 444 (Ch. Div. 2006) [Judge Marinotti]**

Dual representation in parallel criminal and abuse/neglect proceedings

In the interest of preserving a child's right to privacy, one attorney may not represent a defendant in both a protective services action initiated by DYFS and in a criminal action initiated by the state.

DYFS received a referral from the school of a minor child, T.J.C., alleging the child's stepmother, defendant J.C., had punched the child, threw her to the ground, and kicked her, causing a black eye, a bruise on T.J.C.'s lips, and pain in her hips. J.C. was arrested and charged with endangering the welfare of a child and assault. DYFS filed a complaint alleging that T.J.C. and her sibling N.C. were abused or neglected within the meaning of N.J.S.A. 9:6-8.21, *et seq*. J.C. sought dual representation by the same attorney in both matters. DYFS sought to enjoin the attorney retained by J.C. from representing her in both cases.

The court hearing the DYFS application was concerned by "the amount of disclosure and access to DYFS files to which the attorney representing the defendant is entitled." *J.C.*, 399 N.J. Super. at 447. The defense attorney in a DYFS case is entitled to have access to the entire DYFS file. In order to gain access to DYFS's file in the criminal matter, the defense attorney is required to file a motion with the criminal court setting forth what information contained in the DYFS file is "necessary for determination of an issue before the [criminal] Court," *Id*., and that the information cannot be obtained from another source. N.J.S.A. 9:6-8.10a.b.(6). By representing a defendant in both matters, the attorney "would get the benefit of accessing all the information contained in the DYFS reports without having to meet the strict requirements in N.J.S.A. 9:6-8.10a. This would circumvent the procedural and policy safeguards of protecting the victim child and ensuring the best interests of the child." *J.C.,* 399 N.J. Super. at 448. Even where information obtained from the DYFS file is not admissible in the criminal matter, "merely having that information offers criminal counsel an unfair advantage and would provide access to otherwise undiscoverable information." *Id*. at 450. With respect to a defendant's Sixth Amendment right to counsel of her choosing, the court concluded the "defendant is free to choose her own counsel. However, the defendant's choice of counsel must be balanced against the public policies of effective administration of justice and the equitable public interest in protecting the victim child's records from unnecessary disclosure." *Id*. at 451.

Comment: This opinion, out of Bergen County, was written before the publication of *DYFS v. V.J.,* 386 N.J. Super. 71 (Ch. Div. 2006), out of Camden County. The court in *V.J.*

reached the opposite conclusion on the issue of dual representation. Any judge faced with this question must also consider *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (denial of defendant's right to counsel of choice was reversible error).

***DYFS v. J.L. and T.L., In the Matter of the Guardianship of O.L.*, 400 N.J. Super. 454 (App. Div. 2008) [Judge Lisa]**

Burden of proof in a child abuse/neglect case

Once DYFS establishes a *prima facie* case of physical abuse, the burden of going forward shifts to the defendants. The burden of persuasion, however, remains with DYFS, according to this appellate decision.

A three-month-old baby girl suffered leg fractures in her growth plate area and DYFS's experts testified that the injuries were "highly suspicious" of child abuse. *Id*. at 460. DYFS alleged medical neglect and physical abuse by the parents. At the conclusion of DYFS's case, Judge Strelecki held that DYFS had established a *prima facie* case of physical abuse and dismissed the medical neglect. She required that the parents go forward with their proofs, but contrary to the court in *DYFS v. D.T.*, 229 N.J. Super. 509 (App. Div. 1988), she held that DYFS nonetheless retained the burden of persuasion on the issue of physical abuse by the parents. DYFS, relying upon the *D.T.* case, argued that once it established a *prima facie* case, the burden of persuasion shifted to the parents obligating them to prove their non-culpability by a preponderance of the evidence. Judge Strelecki found that DYFS failed to prove physical abuse.

Because other persons had access to the child and could have caused the unexplained, suspicious injuries, the appellate court distinguished *D.T.* and held:

> In a case such as this, where the child is exposed to a number of unidentified individuals over a period of time, and it is unclear as to exactly where and when the child's injuries took place, traditional *res ipsa loquitur* principles apply. This means that once the Division establishes a prima facie case of abuse or neglect under N.J.S.A. 9:6-8.46a(2), the burden will shift to the parents to come forward with evidence to rebut the presumption of abuse or neglect. Unlike the rule set forth in *D.T.,* the burden of proof will not shift to the parents to prove their non-culpability by a preponderance of the evidence. The burden of proof will remain on the Division. *J.L.*, 400 N.J. Super. at 470.

The appellate court affirmed Judge Strelecki's decision that DYFS did not meet its burden of persuasion and that the complaint alleging physical abuse by the parents must be dismissed. The appellate court stated:

> We find no error in the trial judge's finding that the inference of abuse resulting from the Division's establishment of a *prima facie* case under N.J.S.A. 9:6-8.46a(2) was successfully overcome by the evidence presented by defendants. As [the expert] explained, and the judge found credible and persuasive, the extremely fragile growth plates, which are most vulnerable when a baby is two to four months old, can easily sustain mild fractures with minimal force, and such fractures have been known to occur during medical procedures. *Id.* at 473.

***DYFS v. I.Y.A., In the Matter of the Guardianship of T.L. and K.L.*, 400 N.J. Super. 77 (App. Div. 2008) [Judge Graves]**

Sufficient evidence must be presented during a fact-finding hearing

When the basis for transferring custody to the noncustodial parent in a Title 9 matter is the custodial parent's mental health and the children being "parentified," expert testimony or reports must be presented and factual representations of counsel in lieu of sworn testimony is not considered competent evidence.

DYFS first became involved with the family after receiving a referral from hotel staff indicating that the children's mother had left them alone in a room. DYFS substantiated neglect and initiated a case plan. Upon the mother's full cooperation, DYFS closed the case. DYFS became involved again when the children's school principal indicated that the children feared for their safety. When DYFS visited the home to investigate, the mother refused to cooperate, leading to the removal of the children. The mother was involuntarily hospitalized and the court granted DYFS's request for custody, care, and supervision of the children. DYFS placed the children in the custody of their father who had returned from Korea for the proceedings. During the hearing, the law guardian expressed the children's desire to remain in the U.S. with their mother; the trial judge, however, awarded legal and physical custody to the father. During the next hearing, the father's counsel asked the court to dismiss the litigation and for permission to remove the children to Korea. This application was opposed by both counsel for the mother and the law guardian, who reiterated the children's desire to remain with their mother. Though the court specifically instructed the father not to remove the children to Korea, he subsequently did so. The father was held in contempt of court and ordered to return the children to New Jersey. When he failed to do so by the next hearing, he was found in contempt. Without speaking to his clients, the law guardian made a recommendation that the children remain in Korea with their father until the mother could care for them, at which point they would return to the U.S. The trial judge entered an order allowing the father to remain in Korea with the children temporarily, thus terminating litigation. The court also determined that the mother abused or neglected her children despite no presentation of psychological records or sworn witness testimony. The mother appealed the decision of the court.

Pursuant to N.J.S.A. 9:6-8.46b., "[i]n a fact-finding hearing (1) any determination that the child is an abused or neglected child must be based on a preponderance of the evidence and (2) only competent, material and relevant evidence may be admitted." In this case, there was no expert testimony with respect to the mother's mental health status or how her mental health problems impacted her ability to care for the children. "Hospitalization alone is not sufficient to sustain a finding of abuse or neglect." *I.Y.A.*, 400 N.J. Super. at 93. Likewise, there was no expert testimony to confirm that the children were "parentified" nor that the forceful removal of the mother from the motel room posed a substantial risk of harm to the children. Therefore, the case was remanded for "a new fact-finding hearing to determine whether the children were abused or neglected, and an evidentiary hearing must be held prior to transfer of custody to the children's father." *Id.* at 96.

Comment: This panel in *I.Y.A.* noted:

> [W]hile we acknowledge our colleagues held in [*R.G.],* "that a permanency hearing is not required prior to placing a child in the physical custody of the non-abusive parent and dismissing the litigation," we are persuaded the reasoning in the more recent decision of *G.M.* is better suited to the present matter. In *G.M.* we held "notions of fundamental fairness and the best interests of the child require[d]" that:
>
> [B]efore termination [of Title 9 litigation] was permitted by the court, the judge needed to decide whether 1) the children's best interests were served by their continued residence with the original custodial parent, albeit with D.Y.F.S.'s continued obligation to provide services and to monitor the home life; or 2) whether their best interests were served by ordering a change in residential custody. In this case, no hearing was held to consider that difficult issue and, in light of conflicting informal accounts of the children's own preferences and D.Y.F.S.'s own recommendations, it was a mistaken exercise of discretion for the judge to grant D.Y.F.S.'s request and terminate the proceedings without a full custody hearing. *I.Y.A.* at 95 (citations omitted).

***DYFS v. D.H. and J.V., In the Matter of the Guardianship of A.H.*, 398 N.J. Super. 333 (App. Div. 2008) [Judge Rodríguez]**

Kinship legal guardianship as a permanent placement option

When adoption is rejected by a caretaker who has adequately cared for a child and is willing to continue providing care for the long term, kinship legal guardianship (KLG) is a permanent placement option.

DYFS became involved in this matter when a mother, D.H., placed a call claiming her child had been sexually abused by the child's uncle. DYFS investigated the matter and the claim was unfounded. D.H. was admitted to the psychiatric unit at the hospital a short period after DYFS became involved. The father, J.V., was subsequently granted sole legal custody of A.H., allowing A.H. to remain with K.P., the maternal grandmother, while he arranged for child care. D.H. was granted supervised parenting time but it was suspended due to her failure to take her prescribed medication. Thereafter, DYFS temporarily placed A.H. with K.P. after finding that J.V. tested positive for cocaine and opiates. More than a year later, the judge held a permanency hearing. DYFS's permanency plan was to terminate the birth parents' rights followed by select-home adoption (*i.e.*, moving the child to another home where she would be adopted). "The law guardian agreed that both parents were either 'unable or unwilling to care for [A.H.],' but urged that the court accept KLG with the maternal grandmother as the permanency plan." *Id.* at 337. K.P. wanted long-term custody of A.H. but did not want to adopt because she did not want to terminate her daughter's parental rights. The lower court granted DYFS's permanency plan because "A.H. was entitled to 'a permanently defined parent/child relationship without this intrusion... that [KLG] offers....'" *Id.* On appeal, the law guardian and mother argued that the judge erred in accepting DYFS's permanency plan because KLG was the appropriate permanent placement alternative. Moreover, DYFS must prove by clear and convincing evidence that termination of parental rights is warranted based on the four factors set forth in N.J.S.A. 30:4C-15.1a. *Id.* at 339.

KLG is appropriate when the requirements set out by N.J.S.A. 3B:12A-6d are satisfied by clear and convincing evidence. "If adoption is readily available, however, KLG cannot be used to defend against termination of parental rights." *Id.* at 341. Accordingly, "the plain language of the KLG Act indicates that the Legislature intended KLG to be an alternative permanency plan to severing parental rights. N.J.S.A. 3B:12A-1c." *Id.* at 342. The court determined in this case that K.P. had done an excellent job in caring for A.H. and reversed the permanency order. The matter was remanded for a new permanency hearing.

***DYFS v. G.M. and M.M., In the Matter of the Guardianship of K.M. and C.M.*, 398 N.J. Super. 21, *certif. granted* on May 16, 2008 (App. Div. 2008) [Judge Messano] (Supreme Ct. Dkt. No. A-6-08)**

When transferring custody, termination of Title 9 litigation requires a full custody hearing

While modification of residential custody between parents is not considered a placement under N.J.S.A. 9:6-8.54, fundamental fairness and the best interests of the child require a full custody hearing prior to terminating the abuse and neglect litigation to determine whether custody should be modified.

DYFS's involvement with the family commenced when it received a referral from the State Police. G.M., the custodial parent, was intoxicated and had an altercation with K.M. where G.M. had pulled K.M.'s shirt

causing her to choke and vomit, and had scratched her arm. The children, K.M. and C.M., told the DYFS worker that G.M. consumed alcohol on a daily basis. K.M. and C.M. were removed and a verified complaint was filed on March 31, 2006. At the order to show cause hearing, the court granted temporary physical custody to M.M., who resided in Florida, with the condition that the children were not to be removed from New Jersey. On April 6, 2006, the court allowed the children to go to Florida with M.M. A fact finding was held on May 23, 2006, where the court found the children to be abused and neglected. At a hearing on Oct. 26, 2006, without testimony or documents introduced as evidence and without a separate custody action, the trial court granted custody of the children to M.M. and terminated the FN litigation.

The appellate court acknowledged the trial court's authority to award M.M. custody while the order of protection was in effect (*citing DYFS v. R.G.*, 397 N.J. Super. 439 (App. Div. 2008)), and concluded that "such a change in custody is not a 'placement' pursuant to N.J.S.A. 9:6-8.54." *G.M.*, 398 N.J. Super. at 36.

> [O]nce the judge was convinced that K.M. and C.M. no longer needed D.Y.F.S. to exercise its extraordinary statutory powers to insure their safety, the statute did not permit the entry of a dispositional order that terminated the litigation while at the same time significantly altering the custodial arrangements previously agreed to by the parties. Such a result can only be supported by the exercise of the court's inherent *parens patriae* authority, and that, in turn, can only be justified based upon a complete adjudicative hearing on the issues surrounding residential custody of the children. *Id.* at 44.

The court, careful to indicate the limits of its holding, stated:

> We do not agree with G.M.'s implicit suggestion that D.Y.F.S. cannot decide to terminate Title Nine proceedings because it would permit "an end run" around the usual way in which custody disputes are resolved. We can find no statutory bar that prohibits the agency's decision to terminate the abuse and neglect proceedings, nor is there a statutory obligation placed upon D.Y.F.S. to continue supervision of the family and provide services for an indefinite period of time. *Id.* at 39 (*citing DYFS v. R.G., infra*, 397 N.J. Super. 439, 447-48 (App. Div. 2008)).

The matter was reversed and remanded for the trial court to address the custody factors under N.J.S.A. 9:2-4 and "the effect removing these children from New Jersey to Florida will have upon this family." *Id*. at 50.

Comment: The Supreme Court granted certification on May 16, 2008.

***DYFS v. R.G., In the Matter of the Guardianship of R.X.*, 397 N.J. Super. 439 (App. Div. 2008) [Judge Simonelli, t/a]**

Custody with other parent and what constitutes placement

Although a transfer of custody to a non-abusive parent is not a "placement" pursuant to N.J.S.A. 9:6-8.54a., and therefore no permanency hearing is required, an indigent party has a constitutional right to be represented by counsel in a Title 9 matter.

The parents of R.X. were separated and a New York court granted legal and physical custody of R.X. to her father R.G., while S.G., her mother, was given liberal parenting time. DYFS received an anonymous referral that R.X. was not being adequately cared for by R.G. Although R.G. did test positive for cocaine during a urine screen, he was found not to be abusing drugs. DYFS subsequently closed its case. Less than a year later, another referral was made to DYFS. At this time, R.X. was being cared for by R.G.'s mother. R.G. again tested positive for cocaine. An order to show cause was filed. The trial judge and an attorney from the public defender's office advised the defendant that an attorney would be appointed for him.

At the fact-finding hearing, R.G. appeared without the benefit of counsel. The trial judge asked if he had completed an application for the services of a public defender. R.G. responded, "No one told me to." The trial judge again advised R.G. to complete the application for public defender representation. On that date, Mr. P, a public defender, was present in the courtroom. He briefly discussed the matter and a possible stipulation with R.G. Both Mr. P and R.G., however, were uncomfortable proceeding without Mr. P being assigned to the matter. DYFS then moved for summary judgment against R.G. Despite acknowledging the fact that R.G. was entitled to an attorney, the court proceeded with the hearing and concluded that R.G. abused and neglected R.X. At the final hearing, Mr. P was assigned to represent R.G. DYFS recommended that legal and physical custody be transferred to S.G., the mother. Although R.G. objected, the court granted an order transferring custody of R.X. to S.G., granting R.G. liberal supervised visitation and dismissing the matter.

> N.J.S.A. 9:6-8.54(b)(2) requires DYFS to make "reasonable efforts" to preserve and reunify the family. However, DYFS is under no statutory obligation to continue supervision and services indefinitely after determining that the risk to the child's safety has been eliminated and the conditions leading to the child's removal from the physical custody of the abusive parent have been remediated. There also is no statutory bar to dismissing Title 9 litigation after placing physical custody of the child with the non-abusive parent following a period of DYFS supervision aimed at rehabilitating the abusive parent. Once the court has determined that the best interests of the child are served by physical custody with one parent and liberal and unsupervised visitation with the other, nothing in Title 9 prevents termination of protective services litigation, or warrants continued DYFS intrusion in the familial relationship.

> The court is required to hold a permanency hearing when a child is placed with a "relative or other suitable person." N.J.S.A. 9:6-8.54(a). However, we do not view the transfer of custody to a non-abusive parent a "placement" under the statute. Accordingly, there is no need for a permanency hearing prior to placing a child in the physical custody of the non-abusive parent and dismissing the litigation.
>
> Here, defendant did not have the right under N.J.S.A. 9:6-8.54 to a permanency hearing because a "placement" never occurred. Physical custody of R.X. was placed with S.G., the non-abusive parent.
>
> Furthermore, the judge was not required to hold a permanency hearing because R.X. was returned to S.G. in less than twelve months after the child's placement in DYFS's custody and care. N.J.S.A. 9:6-8.54b(2). Accordingly, the judge did not err in failing to hold a permanency hearing. *R.G.*, 397 N.J. Super. at 447-48.

R.G. contended that his constitutional right to due process was violated when the fact-finding hearing and motion for summary judgment occurred without his being afforded the assistance of counsel. "Our Supreme Court has held that 'parents charged with abuse or neglect of their children have a constitutional right to counsel.'" *Id*. at 449 (*citing DYFS v. E.B*., 137 N.J. 180, 186 (1994)). The court stated:

> Here, no one disputes that defendant is indigent. He was accused of abusing and neglecting R.X., and faced the temporary or permanent loss of custody of the child. Thus, defendant had a constitutional right to the appointment of counsel to represent him during all of the proceedings held in this case, the most critical of which was the fact-finding hearing and summary judgment motion on July 24, 2006. Defendant had no such representation, and merely having Mr. Preziosi present on July 24, 2006, "is not enough to satisfy the constitutional command." *Id.* at 450 (citations omitted).
>
> The matter was remanded for "a plenary hearing to determine the issue of abuse and neglect and, as necessary, re-visit the custody issue because the change of custody was based upon the finding of abuse and neglect," which was reversed. *Id.*

***DYFS and Lawnside Borough Bd. of Ed. v. S.S., In the Matter of the Guardianship of K.S.H.*, ___ N.J. Super. ___, (App. Div. 2008) [Judge Gilroy] (App. Div. Dkt. No. A-5209-07T4 and A-5210-07T4)**

Change of custody of child back to natural parent, without first conducting a plenary hearing and no exigent circumstances exist

The trial court may not return custody of a child to his mother over objection of DYFS or the law guardian without first holding a full plenary hearing according to this appellate decision.

In June 2007, the court ordered that the child, K.S.H., be removed from the custody of his mother and that DYFS be granted physical custody.The case was thereafter assigned to another trial judge. On May 29, 2008, the second trial judge rejected DYFS's permanency plan to terminate parental rights and ordered that the custody of K.S.H. be returned to his mother.There was no hearing, no testimony and no notice to the parties that return of custody would be considered on May 29, 2008.

The appellate court, recognizing the duty to base the decision to remove children from the custody of their parents upon "competent reliable evidence," held, "The same principle is equally applicable when the court orders a change of custody from DYFS back to the parent." *Id.,* slip op. at 8.

The appellate court was critical of the May 29, 2008 proceeding, saying:

> [N]o witnesses testified and no documents were admitted into evidence. The proceeding involved only a colloquy between the court; counsel for DYFS; the law guardian; S.S., who represented herself; and an unidentified DYFS caseworker.... *Id.*

The appellate court reversed the decision to return custody and remanded the matter to the trial court to: "Conduct an evidentiary hearing, allowing the parties an opportunity to call witnesses, introduce documentary evidence, and otherwise establish a proper record." *Id.* at 10.

***DYFS v. T.M., In the Matter of the Guardianship of C.S. and A.C.,* 399 N.J. Super. 453 (App. Div. 2008) [Judge Sapp-Peterson]**

Awarding kinship legal guardianship to out-of-state relative and parental visitation

When a kinship legal guardian seeks removal of a child to another state, the court must address the factors under *Baures v. Lewis*, 167 N.J. 91 (2001).

After it was determined that his mother could not care for him, DYFS placed A.C. in the temporary custody of his maternal aunt, L.C. While A.C. was in L.C.'s custody, the family relocated to North Carolina without DYFS conducting an interstate investigation, and over the objection of T.M., A.C.'s natural father. A.C. remained in L.C.'s custody for 17 months before the court approved DYFS' permanent plan to place A.C. in the kinship legal guardianship (KLG) of L.C. T.M. subsequently consented to the award of KLG to L.C. T.M., however, sought an order directing DYFS to facilitate and pay for his visitation with A.C. in North Carolina. The trial court responded that "it was unaware of any legislative authority that would provide the court with the ability to continue to direct facilitated visitation" and dismissed T.M.'s counterclaim. *T.M.,* 399 N.J. Super. at 461.

On appeal, T.M. argued that "the court should not have awarded KLG to L.C. without first exercising its equitable power to fashion an accompanying visitation component that would have facilitated the exer-

cise of his visitation rights." *Id.* at 456. The appellate court held that "the kinship legal guardian may not take action that effectively terminates a parent's visitation rights without first demonstrating to the court that the action, irrespective of its impact, is in the best interest of the child." *Id.* at 465. In its analysis, the court stated that the "removal of a child from the state without the consent of the noncustodial parent implicates additional considerations. *See Baures v. Lewis*, 167 N.J. 91 (2001)." *Id.* at 466. In *Baures*, the court held that the custodial parent must prove a good faith motive for the relocation, and that the move will not be inimical to the best interest of the child. The appellate court likened a kinship legal guardian to a custodial parent by virtue of N.J.S.A. 3B:12A-4a.(1). In determining the best interest of the child, the court must consider twelve factors before allowing a kinship legal guardian to remove a child from New Jersey over the objection of the noncustodial parent(s).

The appellate court rejected DYFS's contention that New Jersey's removal statute does not apply to parents who were never married and reinforced that the parent-child relationship extends "equally to every child and to every parent regardless of the marital status of the parents." *T.M.*, 399 N.J. Super. at 466 (emphasis added). It also rejected DYFS's position that it does not have funds allotted to pay for T.M.'s visits to North Carolina. KLG was affirmed and the matter was remanded for further proceedings to address issues of removal, parenting time and costs of transportation.

JUVENILE

STATUTES

P.L. 2007, c. 219 (S-1917)

Restricts certain sex offenders' access to the Internet

Link: www.njleg.state.nj.us/2006/Bills/PL07/219_.PDF

This law enacts the following new statutes: N.J.S.A. 2C:43-6.6, which states that if one has been adjudicated delinquent of a sex offense and where the trier of fact makes a finding that a computer or any other device with Internet capability was used to facilitate the commission of the crime, the court shall order additional enumerated Internet access conditions.

This law amends N.J.S.A. 2C:7-2, the sex offense registration provisions. The amendment requires a sex offender to report whether he or she has routine access to or use of a computer or any other device with Internet capability.

This law amends N.J.S.A. 2C:43-6.4, a special sentencing provision regarding parole supervision for life. The amendments include conditions regarding Internet access (not applicable to juveniles).

This law amends N.J.S.A. 2C:45-1, conditions of suspension or probation provisions. This amendment includes additional conditions regarding Internet access for a juvenile adjudicated delinquent of a sex offense.

P.L. 2007, c. 234 (A-2667)

Upgrades penalties for recruiting minors and confined persons to be in criminal street gang

Link: www.njleg.state.nj.us/2006/Bills/PL07/234_.PDF

The law amends N.J.S.A. 2C:33-28, which now states that a person who solicits or recruits another to join or actively participate in a criminal street gang while under official detention commits a crime of the second degree.

P.L. 2007, c. 341 (A-4582)

Creates crimes of gang criminality and promoting organized street crime

Link: www.njleg.state.nj.us/2006/Bills/PL07/341_.PDF

This law enacts the following new statutes: N.J.S.A. 2C:33-29, which provides for "gang criminality," defines a criminal street gang; and N.J.S.A. 2C:33-30, which provides for the crime of promoting a street gang.

The law amends:

- N.J.S.A. 2A:4A-26, the waiver statute, to include involuntary waiver of a juvenile to the criminal part for the charges involving gang criminality or promotion of organized street crime.
- N.J.S.A. 2C:41-1, the racketeering statute, to include simple assault requiring purposeful or knowing conduct, and terroristic threats.
- N.J.S.A. 2C:43-6, sentencing provisions (not applicable to juveniles).
- N.J.S.A. 2C:43-7.2, sentencing provisions (not applicable to juveniles).
- N.J.S.A. 2C:44-1, aggravating or mitigating factors (not applicable to juveniles).
- N.J.S.A. 2C:44-3, extended term provisions (not applicable to juveniles).

P.L. 2007, c. 284 (S-2431)

Establishes unlawful possession of certain handguns as a crime of the second degree

Link: www.njleg.state.nj.us/2006/Bills/PL07/284_.PDF

The law amends N.J.S.A. 2C:39-5, which defines the offenses for possession of various types of weapons.

P.L. 2007, c. 298 (S-2932)

Establishes the transport of firearms into state for purposes of an unlawful sale or transfer as a crime of the second degree

Link: www.njleg.state.nj.us/2006/Bills/PL07/298_.PDF

The law amends N.J.S.A. 2C:39-9, which defines the offenses for illegally manufacturing or transporting weapons in New Jersey.

P.L. 2007, c. 297 (S-2930)

Grants the court discretion regarding imposition of DEDR penalties; allows "reformative service" to satisfy a portion of DEDR penalties under certain conditions

Link: www.njleg.state.nj.us/2006/Bills/PL07/297_.PDF

The law amends N.J.S.A. 2C:35-15, which permits the court to impose one drug enforcement and demand reduction (DEDR) penalty for multi-

ple drug offenses, and to waive the remaining DEDR penalties. Also, a person required to pay a penalty under this statute may propose to the court and the prosecutor a plan to perform reformative service in lieu of payment of up to one-half of the DEDR penalty amount imposed.

P.L. 2007, c. 303 (S-2975)
Revises laws concerning hate crimes and bullying; establishes Commission on Bullying in Schools
Link: www.njleg.state.nj.us/2006/Bills/PL07/303_.PDF

The law amends:

- N.J.S.A. 2C:16-1, the bias intimidation law, to clarify the victims. The provision also provides for additional penalties.
- N.J.S.A. 2A:53A-21, to clarify plaintiffs of bias intimidation civil actions.
- N.J.S.A. 52:4B-11, the crime victim compensation law, to include payments for bias intimidation.
- N.J.S.A. 52:17B-5.3, the law requiring local police to report statistics to the attorney general on a quarterly basis, such report to include victim information relating to race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.
- N.J.S.A. 18A:37-15, the law requiring each school district to adopt a policy prohibiting harassment, intimidation or bullying on school property. The amendment requires posting of the policy on the school's website and annual distribution of the policy to parents.

This law enacts the following new statutes:

- N.J.S.A. 52:17B-5.4a, which requires the attorney general to maintain a central repository of information collected pursuant to N.J.S.A. 52:17B-5.3. Such information shall be available to the public.
- N.J.S.A. 52:17B-77.12, which requires police training concerning bias intimidation crimes.

P.L. 2007, c. 315 (A-2281)
Requires suicide and mental health screening of juveniles in county detention centers
Link: www.njleg.state.nj.us/2006/Bills/PL07/315_.PDF

This law enacts the following new statutes:

- N.J.S.A. 52:17B-171.1, which requires the Juvenile Justice Commission to establish standards for suicide and mental health screening in county juvenile detention facilities.
- N.J.S.A. 52:17B-171.2, which requires suicide risk screening for juveniles admitted to county juvenile detention facilities.
- N.J.S.A. 52:17B-171.3, which requires mental health screening for juveniles admitted to county juvenile detention facilities.
- N.J.S.A. 2A:4A-60.2, which provides that any statement made by a juvenile in the course of a suicide or mental health screening shall not be: a. disclosed, except by an attorney representing the juvenile and with the juvenile's consent, to the court, prosecutor, or any law enforcement officer; or b. used in any investigation or delinquency or criminal proceeding involving the juvenile that is currently pending or subsequently initiated.
- N.J.S.A. 52:17B-171.4, which provides that no juvenile shall be placed in isolation before undergoing suicide risk screening and mental health screening.
- N.J.S.A. 52:17B-171.5, which requires the screener to be certified by the Juvenile Justice Commission as qualified to perform such screening.
- N.J.S.A. 52:17B-171.6, which requires the Juvenile Justice Commission, in conjunction with the Department of Children and Families, to establish and maintain a confidential statewide database of the suicide risk screenings and the mental health screenings, to be used exclusively by persons performing suicide risk and mental health screenings.
- N.J.S.A. 52:17B-171.7, which requires the Juvenile Justice Commission to monitor the number of suicides that occur at each county juvenile detention facility. This provision also sets forth procedures for investigating and addressing suicides in juvenile detention facilities.
- N.J.S.A. 52:17B-171.8, which requires the Juvenile Justice Commission to include the certain information on its website regarding juvenile detention centers.
- N.J.S.A. 52:17B-171.9, which requires the Juvenile Justice Commission to develop a training curriculum for juvenile detention officers and youth workers focusing on the mental health needs of the juvenile detention population.
- N.J.S.A. 52:17B-171.10, which requires the Juvenile Justice Commission to submit an annual report to the governor and the Legislature (over the next seven years), detailing: a. the number of suicides and suicide attempts at each county juvenile detention facility; b. the number of suicide and mental health screenings that have been conducted at each facility and the number of juveniles whose screenings have indicated a warning or caution; c. the number of juveniles who have been referred for additional screening or evaluation; and d. a summary of the diagnoses for juveniles who have received treatment.
- N.J.S.A. 52:17B-171.11, which requires the Juvenile Justice Commission to adopt rules and regulations necessary to implement the provisions of this act.
- N.J.S.A. 2A:4A-60.3, which provides that reports or records relating to mental health services provided to a juvenile prior to an adjudication of delinquency or a

finding of guilt, regardless of whether such mental health services were provided with or without the consent of the juvenile, may be disclosed to the court only after an adjudication of delinquency or a finding of guilt has been entered; provided however, an attorney representing a juvenile, with the juvenile's consent, may disclose such reports or records prior to the adjudication of delinquency or finding of guilt. The provisions of this section shall not be construed to limit in any manner the applicability of any privilege or law that otherwise prohibits disclosure of a juvenile's mental health records.

P.L. 2007, c. 321 (A-2976)
Provides mandatory fines and community service for theft of headstones, headstone markers, flags or flag holders from grave sites
Link: www.njleg.state.nj.us/2006/Bills/PL07/321_.PDF

This law enacts the following new statute: N.J.S.A. 2C:20-2.3, which criminalizes the taking of headstones or flags from grave sites.

P.L. 2008, c. 15 (A-1770)
Amends special probation statute to increase participation in the drug court program; authorizes the court to reduce DEDR fees in certain circumstances
Link: www.njleg.state.nj.us/2008/Bills/PL08/15_.PDF

The law amends:

- N.J.S.A. 2C:35-14, regarding the rehabilitation program for drug- and alcohol-dependent persons subject to a presumption of incarceration or a mandatory minimum period of parole ineligibility (not applicable to juveniles).
- N.J.S.A. 2C:35-15, regarding the mandatory DEDR penalties. The amendment provides that an application to participate in a court-administered alcohol and drug rehabilitation program shall have the same effect as the submission of a reformative service plan to the court. The amendment also provides that the court may, in the case of an extreme financial hardship, waive additional amounts of the penalty owed by a person who has completed a court-administered alcohol and drug rehabilitation program if necessary to aid the person's rehabilitation and reintegration into society.

COURT RULES

None

DIRECTIVES AND MEMORANDA

None

CASE LAW

***State in the Interest of D.Y.*, 398 N.J. Super. 128 (App. Div. 2008) [Judge Coburn, P.J.A.D.]**
Timeliness of waiver motion pursuant to N.J.S.A. 2A:4A-26 and R. 5:22-2

The 30-day time frame within which the state may file a petition to waive a juvenile prosecution to adult court runs from the date the complaint in question was filed.

The appellate court reversed and remanded a trial court determination that the 30-day time frame ran from the date earlier charges were filed against the juvenile.

In the course of an ongoing homicide investigation, police initially charged D.Y. with aggravated assault, and as additional evidence unfolded, subsequently charged him with murder. More than 30 days after the filing of the assault charge, but within 20 days of the murder complaint, the prosecutor's office filed an application to waive the murder complaint to the adult criminal court under Rule 5:22-2(a) and N.J.S.A. 2A:4A-26.d.

The 30-day time frame in the waiver statute is complaint specific and does not run from the filing of the "first" charge. The court did, however, agree that the filing of the earlier charges could be relevant to a claim of prejudice affecting the juvenile, although no such prejudice was shown under the facts.

Finally, the court determined that due to the continuing investigation present here with additional facts establishing the culpability of the juvenile unfolding over time that there was also good cause shown for an extension of the 30-day time frame.

Comment: The 30-day time frame applicable to filing a waiver to adult court under the juvenile waiver statute is complaint specific, running from the date the complaint in question is filed, not the date earlier related charges may have been filed.

***State in the Interest of X.B.*, 402 N.J. Super. 23 (App. Div. 2008) [Judge Lyons]**
Constitutionality of the defiant trespassing statute; sufficiency of evidence

A public housing authority may appropriately maintain and enforce a list of individuals excluded from access to the authority's property. In upholding the juvenile's adjudication of delinquency for criminal trespass, the appellate court upheld the constitutionality of the criminal trespass statute and the practice of maintaining such an exclusionary list as specifically applied to this juvenile.

As a result of an earlier weapons adjudication, the authority added X.B.'s name to a list of individuals specifically barred from entering onto housing authority property. X.B. was subsequently charged with a later criminal trespass at the authority property, and challenged the constitutionality of the exclusion list, his inclusion on the list, and the manner of application of the statutes to him.

The appellate court determined that maintenance of the list was a reasonable exercise of the police powers in protecting the public and that there was no suspect classification implicated in X.B.'s inclusion on the list.

> Our State Supreme Court has amplified the federal rule that "discriminatory enforcement of an otherwise impartial law by state and local officials is unconstitutional." *Twp. of Pennsauken v. Schad*, 160 N.J. 156, 183 (1999) (*citing Cox v. Louisiana*, 379 U.S. 536, 538-541; *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)). However, to be unconstitutional, the enforcement of that standard must be based upon an "unjustifiable standard such as race, religion or other arbitrary classification." *Ibid. X.B.,* 402 N.J. Super. at 28.

In *dicta*, the court noted the housing authority should provide procedures for individuals to challenge their inclusion on the list or to seek their subsequent removal.

Comment: A public housing authority may maintain and enforce through criminal prosecution a list of individuals excluded from one of its facilities, so long as there is a non-discriminating and justifiable basis for the initial determination to be included on the list.

State v. Read, 397 N.J. Super. 598 (App. Div. 2008) [Judge Skillman]

Application of juvenile's psychological impairment not a factor in the attorney general guidelines to determine waiver to criminal part

Allegations of a juvenile's psychological impairments are not generally to be considered by the family part in determining whether to waive charges of a chart 1 offense against a juvenile over age 16 to the adult court. The appellate court affirmed the trial court decision declining to include an analysis of the alleged psychological impairments of the juvenile as a relevant factor in the attorney general's waiver guidelines, and finding the prosecutor's decision to waive the charges to the adult court did not constitute a patent and gross abuse of discretion.

The defendant, 17, was charged with acts of delinquency, which if committed by an adult would constitute armed robbery. The family part granted the prosecutor's waiver motion for chart 1 offenses under N.J.S.A. 2A:4A-26, where a juvenile's potential rehabilitation is not a factor. On the defendant's reconsideration motion, he submitted a psychiatric report asserting he had psychological impairments caused by a prior traumatic brain injury. In denying the request, the family part concluded that the defendant's alleged psychological impairments are not encompassed by the attorney general's guidelines governing such waiver applications. This appeal followed a conditional plea of guilty in the Law Division.

A prosecutor's decision to waive a chart 1 offense against a juvenile is only subject to the submission of a written statement of reasons showing compliance with the attorney general's guidelines, and judicial review under a "patent and gross abuse of discretion" standard. A juvenile's psychological impairments are not included in the attorney general's waiver guidelines. The legislative objective in requiring guidelines was to assure uniform application of the waiver statute statewide. Inclusion of other factors would vitiate such a policy. Also, were the juvenile court to consider psychological issues routinely, an evidentiary hearing would be required resulting in the same kind of prosecutorial and judicial resources and delay as occurred prior to the 2000 amendments to N.J.S.A. 2A:4A-26. The court also determined that the failure of the attorney general to include a juvenile's psychological impairments as a factor in the guidelines was not arbitrary and capricious.

Comment: While a juvenile's psychological impairments are generally not relevant in a chart 1 waiver analysis, the court did not foreclose the possibility that such circumstances could be admissible in exceptional circumstances.

DOMESTIC VIOLENCE

STATUTES

None

COURT RULES

None

DIRECTIVES AND MEMORANDA

Assignment Judge Memorandum

Domestic violence—Revised confidential victim information sheet (CVIS); recording complete incident description in FACTS (temporary procedures)—June 11, 2008

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebabfc091ed0b7a/aj080616c.pdf

This memorandum promulgates revised procedures for handling initial complaints in domestic violence matters. The revisions include a new confidential victim information sheet (CVIS), and new procedures for electronically capturing complete incident descriptions in the complaint. The revised CVIS now contains only identification or demographic information. The CVIS does not include incident-related information. Such information should be in the domestic violence complaint. The CVIS remains confidential in its revised form.

CASE LAW

None

DISSOLUTION/NON-DISSOLUTION

STATUTES

None

COURT RULES

Amendments to Appendices IX-A, IX-B and IX-H

Child support guidelines—March 11, 2008

Link: www.judiciary.state.nj.us/notices/2008/n080318c.pdf

Effective March 11, 2008, the Supreme Court adopted revisions to Appendix IX-A (Considerations in the Use of Child Support Guidelines), Appendix IX-B (Use of the Child Support Guidelines) and Appendix IX-H (Combined Tax Withholding Tables for Use with the [Child] Support Guidelines). Specifically, the following items were updated:

- Self-support reserve ($210)

- Shared parenting primary household income thresholds table
- Social Security tax withholding (on first $102,000 of gross earnings and maximum withholding of $6,324)
- Withholding tax exemptions
- Combined tax withholding table

Amendment to R. 4:72-1
Actions for name change—complaint—September 1, 2008
Link: www.judiciary.state.nj.us/notices/2008/n080715a.pdf

This amendment sets forth the protocol for transferring a minor's name change complaint from the Law Division to the family part when the complaint (attached certification) states that a family action is pending or has concluded within the past three years. Name changes are not addressed in the domestic violence docket.

DIRECTIVES AND MEMORANDA
Directive # 12-08
Probation Child Support Enforcement - Diligent Efforts Protocol - July 9, 2008
Link: www.judiciary.state.nj.us/directive/2008/dir_12_08.pdf

This directive details, in child support enforcement proceedings, how Probation Child Support Enforcement (PCSE) staff exercised "diligent efforts" to verify a child support obligor's address when serving notices by ordinary mail. This protocol documents permissible service of process consistent with N.J.S.A. 2A:17-56.54.

Assignment Judge Memorandum
Certification of Non-Military Service (Family) Form and Updates for Non-Dissolution and Dissolution Operations Manuals—April 1, 2008
Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb2e7f0103a9bb9/aj080402a.pdf

This memorandum distributes (1) a new certification of non-military service (family) form for use in family default actions; and (2) related updates to the Non-Dissolution Operations Manual and Dissolution Operations Manual. This certification indicates that the defendant is not on active duty in the armed forces, and is required if the court is to enter a default judgment against the defendant in a family action.

Assignment Judge Memorandum
Family Non-Dissolution Operations Manual—revisions—December 12, 2007
Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebd2ef4d007fda1/ajmemo071212a.pdf

This memorandum distributes new and revised sections of the Family Division's Non-Dissolution Operations Manual. Revisions include:

- Case processing protocols when there are concurrent FD and FV actions
- Procedures to reopen a probation child support enforcement matter and related model forms
- Clearer procedures for processing out-of-state orders for genetic testing of New Jersey residents and related model letters
- Updates consistent with the New Jersey Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA, N.J.S.A. 2A:34-53, *et seq.*) and Directive # 9-07
- A model certification in support of establishing paternity consistent with the New Jersey Parentage Act (N.J.S.A. 9:17-38, *et seq*.)
- A revised uniform summary support order

CASE LAW
Dissolution
***Greely v. Greely,* 194 N.J. 168 (2008) [*Per Curiam*]**
Procedures for voluntary dismissal

A plaintiff may not unilaterally dismiss a complaint after the defendant has filed an answer.

The plaintiff filed a complaint for a divorce in New Jersey. The defendant, a resident of California, filed an answer. Meanwhile, the plaintiff moved to Nebraska and filed a unilateral stipulation of dismissal of the complaint.

The trial court rejected the plaintiff's application, applying Rule 4:37-1(a), which provides that after a responsive pleading is filed, the plaintiff may voluntarily dismiss the action only with a stipulation signed by the defendant. In the event the defendant opposes the dismissal, then the plaintiff must seek leave of the court pursuant to Rule 4:37-1(b).

The trial court also rejected the plaintiff's application to dismiss the action because neither party was a resident of New Jersey. The trial court reasoned that, once the plaintiff chose to commence her divorce action in New Jersey, she was estopped from raising a forum *non conveniens* argument.

The appellate court summarily reversed the trial court finding that, since both parties were not residents of New Jersey at the time of the plaintiff's filing the voluntary dismissal, New Jersey had no further interest in the litigation.

The Supreme Court found that the trial court properly rejected the plaintiff's application to dismiss the action pursuant to Rule 4:37-1. The Supreme Court also reversed the appellate court finding that the trial court did not abuse its discretion in rejecting the plaintiff's forum *non conveniens* claim since the plaintiff elected to commence her action in New Jersey, stating that:

> We cannot accept the notion that the doctrine of forum *non conveniens* can be triggered solely by a plaintiff's after-the-fact choices. As a practical matter, acceptance of plaintiff's assertions that her original forum choice is now inconvenient simply because she has elected to relocate elsewhere could open the door to crass forum shopping. *Greely,* 194 N.J. at 177.

Without deciding the issue of jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) because the plaintiff did not raise it, the

Supreme Court noted that the trial court could decline jurisdiction, at any time, if it found New Jersey was an inconvenient forum. This issue could be raised by the court *sua sponte* or by a party.

Comment: Once an answer is filed, Rule 4:37-1 applies and it limits the plaintiff's ability to dismiss an action without the consent of the other party or a court order.

***Welch v. Welch,* 401 N.J. Super. 438 (Ch. Div. 2008) [Judge Guadagno]**

Post-judgment discovery

Post judgment discovery is not permitted in the absence of a pending plenary hearing order.

The parties, granted a judgment of divorce (JOD) in 1994, have one child, M.W. The plaintiff is the parent of primary residence (PPR). The defendant, challenging the plaintiff's ability to care for M.W. appropriately, filed a notice of motion. Two days prior to the filing, the defendant issued a subpoena to the Marlboro Township Police Department for "reports and/or summonses and/or other records pertaining [to the plaintiff]." *Id*. at 442. The summons required the "supervisor" to provide testimony. The letter accompanying the subpoena encouraged the department to forward the documents in advance of the return date so that testimony by the supervisor might be eliminated.

Pursuant to Rule 5:5-1 and Rule 5:5-4, the court found that no post judgment discovery is permitted except after the court has found that a plenary hearing is required because the matter cannot be resolved in a summary fashion.

In the event discovery is permitted, the issuance of a subpoena to third parties is governed by Rule 4:14-7, which requires that a request for documents from a third party may be made only in connection with a scheduled deposition of the subpoenaed person upon notice to the adversary. The court pointed out that Rule 4:14-7 was designed "to prohibit the apparently proliferating practice of some attorneys, wholly unauthorized, to obtain documentary discovery from non-parties, unilaterally, without notice to other parties by…issuing a subpoena." *Welch*, 401 N.J. Super. at 445. Rule 4:14-7 requires that the moving party serve the subpoena on the witness and all parties not later than 10 days prior to the date fixed for the hearing in order to afford the adversary with the opportunity to move to quash.

The moving party may not request or mislead a third party to produce the subpoenaed documents prior to the 10-day notice period. Not only would such action violate Rule 4:14-7, but it also could lead to the attorney's disqualification from representation. *See* Sylvia B. Pressler, *Rules Governing the Courts of the State of New Jersey*, R. 4:14-7, cmt. 3.2 (Gann Law Books 2009). Cf. Fed. R. Civ. P. 45.

Comment: Post-judgment discovery is not permitted except when authorized by the court pursuant to a plenary hearing order.

***Clark v. Pomponio*, 397 N.J. Super. 630 (App. Div. 2008) [Judge Chambers]**

Impact of a bankruptcy filing on discovery

A bankruptcy stay suspends all discovery.

The plaintiff filed for a divorce. The defendant failed to provide any court ordered discovery. While the divorce proceeding was pending, the defendant filed for bankruptcy, which triggered the automatic stay pursuant to 11 U.S.C.A. §362(a).

The plaintiff moved for sanctions, pursuant to Rule 4:23-5(a)(1), due to the defendant's complete failure to provide discovery. The trial court suppressed the defendant's answer.

The appellate court held that the trial court could not sanction the defendant pursuant to Rule 4:23-5(a)(1) since the bankruptcy stay is designed to: (1) provide a debtor with "breathing space from the demands of creditors so that the debtor can put together a repayment or reorganization plan" and (2) promote equality amongst creditors. *Clark*, 397 N.J. Super. at 637. As a result, once the stay is in effect, the debtor has no obligation to answer interrogatories in a pending state action. As a result, no motion for sanctions may be imposed during the stay period, unless the bankruptcy court grants relief from the stay pursuant to 11 U.S.C.A. §362(d).

Pursuant to 11 U.S.C.A. §362(b)(2), alimony, permanent and *pendente lite*, were exempt from the automatic stay. Enforcement of an alimony award is permitted as against property "that is not property of the [bankruptcy] estate." *Id*. The 2005 amendments to the federal bankruptcy law make it clear that equitable distribution issues are stayed although dissolution of the marriage and custody issues are not.

The appellate court found, however, that because of New Jersey law, which recognizes the interplay of equitable distribution and alimony awards, a final decision as to alimony could not be made independently of the equitable distribution award. The court may, however, provide for *pendente lite* alimony during the stay period. *Clark*, 397 N.J. Super. at 642-43.

As a result, once a bankruptcy stay is in effect the trial court cannot make a final decision as to alimony or equitable distribution. In addition, Rule 5:7-8 provides that: "Bifurcation of trial of the marital dissolution or custody dispute from trial of disputes over support and equitable distribution shall be permitted only with the approval of the family presiding judge, which approval shall be granted only in extraordinary circumstances and for good cause shown." The appellate court stated that "New Jersey's policy against bifurcation of issues in divorce cases is a further impediment to final resolution of support issues when a bankruptcy stay is in place." *Clark,* 397 N.J. Super. at 642.

Comment: Unless the bankruptcy stay is lifted, the court is limited

to providing for *pendente lite* alimony once a party has filed a bankruptcy petition; only limited discovery is permitted while the stay is in place.

***Calbi v. Calbi*, 396 N.J. Super. 532 (App. Div. 2007) [Judge Collester]**

Changed circumstances and alimony

When a spouse receiving alimony committed aggravated assault against the parties' child, which act led to the child's death, such occurrence did not automatically constitute an "egregious circumstance" under *Mani v. Mani*, 183 N.J. 70 (2005), requiring a termination of alimony. In remanding the trial court's order for further fact finding proceedings, the appellate court ruled that if the recipient's wrongful actions caused economic damage to the supporting spouse, then the court could consider modifying alimony.

The parties were divorced following a 15-year marriage, with the defendant-wife having residential custody of the parties' two children. The plaintiff-husband was obligated to pay the defendant permanent alimony. While grossly intoxicated, the defendant assaulted the parties' older child, resulting in his death from medical complications two days later. The defendant pled guilty to an amended charge of aggravated assault, and received a three-year state prison term. The plaintiff filed an application to modify or terminate his alimony obligation. The trial court denied the application to terminate alimony and vacate arrearages, ordering the plaintiff to continue paying down his arrearages but suspending the plaintiff's ongoing alimony obligation while the defendant was in jail.

The appellate court determined that though egregious, the defendant's conduct did not meet the *Mani* standard for "egregious circumstances" warranting modification of alimony based on non-economic fault. The appellate court, however, reversed and remanded for a plenary hearing on the issue of whether the defendant's conduct caused economic harm to the plaintiff. On remand, the trial court must consider whether the impact of the child's death on the plaintiff "resulted in an economic change of circumstances such that his ability to pay alimony was prevented or hindered." *Calbi*, 396 N.J. Super. at 544.

Comment: While non-economic fault may impact the alimony obligation only in "egregious circumstances," fault that results in financial damage to the supporting spouse may appropriately result in a modification of alimony. Issues of (a) whether conduct is "egregious" and (b) whether misconduct has caused financial damage to the obligor are both fact-sensitive issues, which may require a plenary hearing in certain instances.

***Naik v. Naik*, 399 N.J. Super. 390 (App. Div. 2008) [Judge Rodríguez]**

Enforceability and amount of support pursuant to immigration affidavit of support

An agreement to provide support pursuant to an affidavit of support (Form I-864EZ) sponsoring the spouse under applicable immigration proceedings, is a binding support contract, enforceable by a New Jersey family court, independent of any alimony analysis. The appellate court remanded the trial court decision for an evidentiary hearing, to determine whether the sponsored spouse was entitled to assistance pursuant to the affidavit of support.

The plaintiff-husband and defendant-wife were married in India. The plaintiff returned to the United States while the defendant remained in India pending immigration proceedings. As part of the immigration proceedings, the plaintiff sponsored the defendant's entry into the United States by signing an affidavit of support (Form I-864EZ) promising to support the defendant at an annual rate of not less than 125 percent of the federal poverty line. The parties had no children and resided together for only three months before separating. The defendant sought alimony and the case proceeded to trial.

The court denied the defendant's alimony claim. However, the defendant's counsel did not directly raise at trial the issue of whether Form I-864EZ was an enforceable contract independent of any statutory alimony analysis. Nonetheless, the appellate court considered the issue on appeal. The appellate court ruled that Form I-864EZ creates a binding obligation on a sponsor to support a foreign spouse independent of any alimony analysis. The appellate court further set forth the specific order/protocol for calculating a sponsor's support obligation under Form I-864EZ:

> When the sponsor and sponsored immigrant are married, alimony, child support (if any) and equitable distribution of income-producing assets must be included in the sponsored immigrant's available support. Therefore, although Form I-864EZ support is an independent obligation, it is impacted by other monetary obligations set by the court in a matrimonial action.
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> [A]fter setting spousal and child support and equitable distribution, the court should only consider Form I-864EZ support if the sponsored immigrant's sources of support fall below 125 percent of the Federal Poverty Guidelines for the family unit size. In that case the sponsor is required to pay the deficiency only. *Naik,* 399 N.J. Super. at 398-99.

Comment: Form I-864EZ support must be considered in divorce proceedings involving a sponsored immigrant; even in short-term marriages where alimony might not otherwise be awarded, as the sponsored spouse may still be entitled to a level of support under applicable immigration law.

PALIMONY

***Devaney v. L'Esperance,* 195 N.J. 247 (2008) [Justice Wallace]**

Palimony and cohabitation

Cohabitation is an important, but not indispensable element of a palimony claim, which is predicated on the promise to support, coupled with a marital-type relationship.

The Supreme Court unanimously reversed the appellate court's decision that cohabitation was required for an award of palimony, but affirmed the determination rejecting an award of palimony as no marital-type relationship had been proven.

The plaintiff and defendant were engaged in a romantic relationship for approximately 20 years. The defendant provided the plaintiff with a residence, a car, money for various expenses and financed her education. The defendant promised to divorce his wife and have a child with the plaintiff, events that never materialized. The parties did not cohabit nor spend significant time together. The plaintiff filed a palimony claim rejected by the trial judge based on a finding that the parties did not share a "marital type relationship" and that it was more akin to a "dating relationship." On appeal, the appellate panel affirmed the trial court's determination, based upon cohabitation being an essential element of a palimony claim. The Supreme Court granted certification.

Relying on *In re Estate of Roccamonte*, 174 N.J. 381 (2002), the Court determined that a marital-type relationship can exist regardless of cohabitation, and defined the elements of palimony as "the promise to support, expressed or implied, coupled with a marital-type relationship." *Devaney*, 195 N.J. at 258. The Court noted that cohabitation remains a relevant factor and will typically be present in successful palimony cases.

> The trier of fact must consider the realities of the relationship in the quest to achieve substantial justice. Therefore, in addressing a cause of action for palimony, the trial judge should consider the entirety of the relationship and, if a marital-type relationship is otherwise proven, it should not be rejected solely because cohabitation is not present. *Id.* at 259.

The Court refused to apply a bright-line rule requiring cohabitation, but determined the plaintiff's claim was correctly rejected for failure to demonstrate a marital-type relationship. The Court relied on the trial judge's findings the parties had not lived together, had not commingled funds and did not hold themselves out publicly as husband and wife. The Court held "[i]t is the promise to support, express or implied, coupled with a marital-type relationship, that are the indispensable elements to support a valid claim for palimony." *Id.* at 258.

Comment: Cohabitation remains an important, but not essential, element of a successful palimony claim. A palimony claim should not be rejected merely for lack of cohabitation where sufficient evidence is presented of a marital-type relationship.

Connell v. Diehl, 397 N.J. Super. 477 (App. Div. 2008) [Judge Miniman]

Palimony

In determining the quantum of support in a palimony award, the court's goal is not maintenance of the lifestyle as in an alimony award, but rather "adequate support" to meet minimal needs and prevent the necessity of the beneficiary seeking public welfare. A palimony award must be reduced to a lump sum, and is calculated by multiplying the support figure by the life expectancy of the recipient.

The appellate panel upheld the trial court's award of palimony but remanded for recalculation of the amount and a determination of whether the parties had entered into a joint venture regarding the purchase of their principal residence.

The parties lived together for over 30 years and held themselves out as husband and wife. The parties resided in a home, which was solely titled in the defendant's name, but maintained and improved over the years with the assistance of the plaintiff's inheritance. The plaintiff is legally blind and received social security disability (SSD), and while not employed during the course of the relationship, she assisted the defendant with running his various businesses. When the relationship ended, the plaintiff sought an award of palimony. The trial court awarded the plaintiff $107,494.40, determining the plaintiff would have been entitled to $170 per week in alimony had the parties been married. This amount was multiplied by the obligor's life expectancy of 17.88 years, which was less than the plaintiff's. The defendant appealed the award of palimony. The plaintiff cross appealed the amount awarded.

The appellate panel rejected the defendant's contention that the plaintiff failed to prove a *prima facie* case for palimony, finding the parties' conduct clearly indicated intent to form a family unit and marital-type relationship. While determination of the appropriate amount of reasonable support is within the broad discretion of the court, the trial court did not adequately explain how the support level was arrived at, and did not address tax consequences of the award. Unlike an award of alimony, the quantum of support is not aimed at preservation of the former lifestyle.

> The case law does not require that Connell be able to live just as before. Rather, the award need only provide reasonable support sufficient to meet "her minimal needs and prevent the necessity of her seeking public welfare." *Crowe v. DeGoia* 90 N.J. 126, 135 (1982). It is not clear that $170 per week accomplishes that goal. *Connell*, 397 N.J. Super. at 499.

Further, in remanding the obligee's claim to a distribution from the parties' residence, the court should address whether there had been a joint venture, or in lieu thereof, the

return to the plaintiff of the inheritance she had invested in the property. Determination of a lump sum palimony award continues to require the calculations set forth in *Kozlowski v. Kozlowski*, 80 N.J. 378, 388 (1979): A determination of reasonable future support, a determination of the duration of the support, based not on the obligor's life expectancy, but the obligee's, and a reduction of the award to a present value lump sum. *Connell*, 397 N.J. Super. at 497.

Comment: While great deference is given a court's determination of the appropriate amount of a palimony award, the court's decision must be based on specific findings of fact, explaining the rationale of the court's decision.

***Brundage v. Estate of Carambio*, 195 N.J. 575 (2008) [Justice Hoens]**

Attorney's duty to inform tribunal in palimony appeal

An attorney had no ethical obligation to inform the appellate panel that relevant issues before the panel (in this instance, the necessity of "cohabitation" in a palimony action) were the subject of a significant unreported opinion before another panel. While critical of the attorney for playing "fast and loose" with the rules, the court did not find that an actual violation of the Rules of Professional Conduct had occurred. Withholding this information was not reasonably certain to mislead that tribunal in its consideration of the defendant's motion for leave to appeal.

The Supreme Court unanimously reversed the appellate court's holding vacating a settlement agreement as a result of the plaintiff's counsel failing to disclose the existence of a pending appeal regarding the same subject matter.

The plaintiff sought an award of palimony based on the defendant's oral promise for lifetime support and his instructions to his attorney to draft changes to his estate plan. His wishes were thwarted by his family. The parties never cohabited. The plaintiff's counsel represented Jeanette Levine in another case where the critical issue was whether cohabitation was an essential element of a palimony claim. The plaintiff in *Levine v. Konvitz*, 186 N.J. 607 (2006), was denied palimony in an unpublished opinion because there was no cohabitation. The plaintiff filed an appeal. While that appeal was pending, the defendant here sought summary judgment because the parties had not cohabited. Summary judgment was denied and the defendant moved for leave to file an interlocutory appeal. Counsel for the plaintiff failed to disclose either the pending appeal or the contrary trial decision in his opposition to the defendant's motion for leave to appeal. The defendant's motion for leave to appeal was denied. The parties in this case reached a settlement agreement requiring the defendant to pay the plaintiff a lump sum of $175,000. Five days after the monies were due, the *Levine* decision was issued affirming the trial court.

The defendant moved before the family part to set aside the agreement. The trial court denied the defendant's motion and the defendant appealed. The appellate court reversed and set aside the settlement. The Supreme Court resolved the underlying issue of cohabitation in *Devaney v. L'Esperence, supra,* subsequent to argument in this case, but before a decision was issued.

The Supreme Court noted the conduct of counsel was something neither to "applaud nor encourage," *Brundage*, 195 N.J. at 582. In analyzing the history and intent of RPC 3.3(a)(5), the Court held counsel's conduct did not amount to an ethical violation. This rule requires counsel to disclose material facts, the omission of which is reasonably certain to mislead the tribunal. The Court found no indication the trial judge was misled by counsel's conduct. After analyzing the high threshold required for a motion for leave to file an interlocutory appeal, the Court further found no indication the appellate panel would have granted the defendant's motion for leave to appeal had the *Levine* matter been disclosed.

By setting aside the settlement agreement, the appellate panel unjustly penalized the client rather than the attorney. Only in extraordinary cases can an attorney's conduct result in sanctions being placed against the client. Punishment for an attorney's violations of the RPCs should result in appropriate contempt proceedings against counsel, not the imposition of sanctions against the client.

Comment: While not worthy of praise, an attorney's failure to disclose the existence of a pending appeal regarding the same subject matter is not an ethical violation and does not provide grounds to vacate a settlement. The Court referred the issue to the presiding judge for administration of the Appellate Division to assess whether a rule modification requiring such disclosure should be considered.

***Bayne v. Johnson*, ___ N.J. Super. ___, 2008 N.J. Super. LEXIS 218 (App. Div. 2008) [Judge Collester] (App. Div. Dkt. No. A-0974-06T1)**

Palimony; marital-type relationship without promise of lifetime support

The plaintiff is not entitled to palimony where the defendant made no promise, express or implied, to support the plaintiff for life while they were in a marital-type relationship according to this appellate decision.

In 1981, defendant Earl Johnson and plaintiff Fiona Bayne met and began a romantic relationship. At the time Earl was married to defendant Carolyn Johnson, who was the beneficiary of a substantial trust fund. Earl represented to Fiona that Carolyn was his sick elderly aunt. Fiona and Earl managed a long distance relationship for two years, but Fiona quit her job as a flight attendant and moved to the Bahamas to be with Earl. They lived in separate resi-

dences. The three then moved to Florida and it was during this period that Fiona learned that Earl and Carolyn were married. In the mid-1980s, the trio moved to Las Vegas where Fiona eventually moved in with Earl and Carolyn. At one point, Carolyn filed for divorce, but she and Earl reconciled, and the trio again resided together. Earl and Fiona shared a room and Carolyn slept in her own room. They then moved to Illinois, and in 1992, moved to New Jersey where they lived for eight years until Fiona finally moved out in 2000. The entire time Earl and Fiona were involved, they lived extravagantly off of Carolyn's trust. In 2004, Fiona filed her complaint for palimony. After an eight-day trial, the trial court found there to be an enforceable agreement that Earl support Fiona for life. The appellate court reversed.

The appellate court found that there was an almost 20-year marital-type relationship between Earl and Fiona. The appellate court next looked at whether "during their marital-type relationship Earl promised Fiona that he would support her for life and that his promise was made in exchange for valid consideration." *Id.* at 24 (*citing Levine v. Kovitz*, 383 N.J. Super. 1, 3 (App. Div.), *certif. denied*, 186 N.J. 607 (2006)). The court noted that "a promise to support in a palimony action may be expressed or implied." *Id*. at 25 (*citing Kozlowski v. Kozlowski*, 80 N.J. 378, 384-86 (1979)). The court found, however, that:

> [Fiona remained with Earl], not based on a promise of support but on the condition that they live together under the same roof. While there was at least an implied or perhaps an express promise of marriage, a palimony claim may not be based on such a promise under the Heartbalm Act, N.J.S.A. 2A:23-1.
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> Bayne, 2008 N.J. Super. LEXIS 218 at 26 (*citing Kozlowski*, 80 N.J. at 387).

"[T]here was never an express promise of lifetime support, and the record does not substantiate the finding of an implied promise." *Id.* at 27. "Moreover, there was no detrimental reliance by Fiona upon any alleged promise of support." *Id.*

CHILD SUPPORT

Gotlib v. Gotlib, 399 N.J. Super. 295 (App. Div. 2008) [Judge Fuentes]

Children's unreimbursed medical expenses and college expenses

A parent's right to seek reimbursement for medical expenses, as with child support, is not subject to waiver for non-compliance with procedural requirements in an agreement or order. The appellate court affirmed the trial court's order compelling the noncustodial parent to contribute to the child's unreimbursed medical expenses even though the custodial parent did not first consult with him before incurring the expenses as required by the final JOD.

The plaintiff filed a post-judgment application seeking an order for the defendant to contribute to the children's past medical expenses. The defendant argued that the plaintiff waived her right to seek reimbursement because she did not first consult with him on the necessity of the medical expenses. The appellate court held that medical bills were part of support and as such, were not subject to waiver. The appellate court found that the plaintiff had attempted on numerous occasions to collect unreimbursed medical expenses, without cooperation from the defendant. Thus, the plaintiff's "inaction" in continuing to send medical bills to the defendant was "the result of frustration as much as anything else." *Id.* at 306.

> [E]ven in the face of Plaintiff's failure to abide strictly to the provisions of the JOD requiring her to discuss the children's doctor visits with the defendant prior to incurring expenses for services rendered, or her failure bill the defendant on a monthly basis, a court reviewing a motion to enforce litigant's rights may not "impute to a child the custodial parent's negligence, purposeful delay or obstinacy so as to vitiate the child's independent right of support from a natural parent." *L.V. v. R.S.*, 347 N.J. Super. 33, 41 (App. Div. 2002). *Gotlib,* 399 N.J. Super. at 306.

The court did determine that the parent from whom contribution is sought does retain the right to challenge the reasonableness of the medical expenses.

On the issue of college expenses, the court reversed and remanded the trial court's order directing the defendant to pay one half of the child's college expenses, based on the trial court's failure to address the plaintiff's delay in seeking contribution until long after the expenses had been incurred. Citing *Gac v. Gac*, 186 N.J. 535, 546-47 (2006), the court held that, at a minimum, a parent seeking college contribution should initiate an application before the expenses are incurred and that failure to do so will weigh heavily against the grant of a future application. *Gotlib*, 399 N.J. Super. at 309-10.

Comment: The case alters what has often been prevailing practice where courts would deny claims for medical reimbursement submitted years after the fact. In allowing the obligor to contest reasonableness, the decision would not appear to relieve the moving party from producing copies of the medical bills as well as applicable insurance company explanation of benefit statements in support of the application. On the issue of college costs, the case reiterates the principles previously set forth in *Gac*.

U.S. v. Kukafka, 478 F.3d 531 (3d Cir. 2007) [Circuit Judge Fuentes]

Constitutionality of the Deadbeat Parents Punishment Act of 1998

The federal Child Support Recovery Act (CSRA), 18 U.S.C.A. §228 (as amended by the Deadbeat Parents

Punishment Act of 1998) is constitutional and enforceable. The U.S. Court of Appeals affirmed the defendant's criminal conviction under the act and rejected the defendant's contention that the act was unconstitutional.

The defendant-appellant was indicted and convicted for willful failure to pay child support under the CSRA. The defendant appealed, asserting that the act was unconstitutional.

The court of appeals recognized that the act was intended by Congress to strengthen state efforts to enforce child support obligations against parents who flee across state lines. The court rejected the defendant's argument that the act exceeded the scope of Congress' power under the commerce clause.

The court recognized that failure to pay child support gives rise to debts that implicate economic activity. While failure to pay child support might be a local activity, "it is part of a national economic problem that substantially affects interstate commerce." *Kukafka*, 478 F.3d at 535.

Additionally, the defendant challenged his underlying indictment because the divorce decree containing his child support obligation also included a requirement that he obtain an ecclesiastical dissolution of marriage (a 'get'). The court rejected this argument as well.

> We see no merit to this collateral challenge. Regardless of the constitutionality of the Get provision, Kukafka's conviction is based upon his support obligation, which is wholly unrelated to and plainly separate from any obligation that he pay for the Get. Clearly, a federal prosecution under the Deadbeat Parents Act is not the appropriate arena in which to litigate the terms of Kukafka's divorce. To sustain a conviction, the Act does not require a federal court to ensure the validity of each aspect of the underlying court order containing the support obligation. *Id.* at 538.

Comment: The Deadbeat Parents Punishment Act of 1998 is valid and creates an additional tool for custodial parents seeking to enforce child support orders against willfully delinquent obligors residing in other states.

Ibrahim v. Aziz, 402 N.J. Super. 205 (App. Div. 2008) [Judge Chambers]

Imputation of income to defendant who resides and works in a foreign country

In determining support obligations for a foreign national, imputed income must be based on reasonable earning capacity in the home country, not New Jersey. The appellate court reversed and remanded a trial court's order that inappropriately based child support upon the amount of income an Egyptian resident could have earned had he lived in New Jersey rather than Egypt.

The plaintiff-wife and defendant-husband were married in Egypt in 1996. The parties were Egyptian natives and moved to the United States under visas. The parties separated and the defendant moved back to Egypt. The record reflected that the defendant attempted to move back to the United States but was unsuccessful in obtaining another visa.

While the trial court imputed income based upon potential earnings in New Jersey, the appellate court reversed and remanded, relying heavily on the fact that the defendant was only a visitor in the United States on visa status:

> Since the parties were in the United States only on visitor visas, we must presume that had the family remained intact it would have returned to Egypt, as it did after an earlier visit. Hence, only the wages defendant may earn in Egypt are relevant when determining his support obligations. Accordingly, we find no basis to impute to defendant income based on New Jersey wages, since he is not voluntarily underemployed by virtue of leaving this State and returning to Egypt. *Id.* at 212.

Comment: By implication, the outcome of this case may have been radically different had the defendant been: (a) a citizen of the United States who voluntarily moved to Egypt during divorce proceedings or (b) an individual who simply left the U.S. without any documented attempt to return or to obtain a new visa. The court recognized the fact-sensitive nature of this case, where the supporting parent was unable to work in New Jersey "due to no fault on his part." *Id.* at 214.

Strahan v. Strahan, 402 N.J. Super. 298 (App. Div. 2008) [Judge Parker]

Determining child support where one party is a professional athlete earning high income

In determining child support for high-income parents, a court must make detailed findings of fact to support a supplemental award in excess of the basic child support guidelines, distinguishing the child's needs from the custodial parent, as well as the reasonableness of the request. The appellate court reversed and remanded a trial court child support determination ordering annual basic guideline child support of $35,984 plus an annual supplemental award of $200,000.

The plaintiff, a professional football player, and the defendant, employed at the time they met in 1993 as a model and manager for a cosmetics company, married in 1999 and have two twin girls born in 1994. The plaintiff has earnings of approximately $5.8 million per year, while the defendant was essentially a stay at home mother, but with earnings at the time they met of $70,000 per year, as well as holding two college degrees. In assessing the child support obligation, the trial court accepted the mother's proposed lifestyle without determining the reasonableness of the costs or whether the specific items of support were really supporting her, when there was no entitlement to alimony. In addition, the court

neglected to impute any income to the defendant, relying instead on her child support contribution as only unearned interest income from her substantial equitable distribution she received in settlement.

In determining an appropriate amount of child support in the high-income case:

> the court still must "determin[e] needs of a child in a sensible manner consistent with the best interests of the child." *Isaacson, supra*, 348 N.J. Super. at 584, 792 A.2d 525. "[T]he law is not offended if there is some incidental benefit to the custodial parent from increased child support payments." Ibid. While "some incidental benefit" is not offensive, "overreaching in the name of benefiting a child is." *Id.* at 585, 792 A.2d 525. "[A] custodial parent cannot[,] through the guise of the incidental benefits of child support[,] gain a benefit beyond that which is merely incidental to a benefit being conferred on the child." *Loro v. Del Colliano*, 354 N.J. Super. 212, 225-26, 806 A.2d 799 (App. Div.), *certif. denied*, 174 N.J. 544, 810 A.2d 64 (2002). That is especially true where the custodial parent is not entitled to alimony. *Ibid.* "The award of nonessential additions to child support requires a careful weighing and determination as to who is the primary and who is the incidental beneficiary of such support." *Ibid. Strahan*, 402 N.J. Super. at 308.

Specific findings of fact must be made to support supplemental child support awards. The court must also consider the legitimate rights of the high-income obligor to consider the appropriate lifestyle of his or her children. Finally, the court must impute income to the underemployed or unemployed spouse, unless "just cause" for such employment status has been established.

Comment: The case points out the difficulties incumbent in adjudicating the high income child support case where there is no corresponding right to alimony and the need for detailed findings of fact.

CUSTODY/PARENTING TIME

Fawzy v. Fawzy, 400 N.J. Super. 567, certif. granted Oct. 3, 2008 (App. Div. 2008) [Judge Simonelli, t/a] (Supreme Ct. Dkt. No. A-38/39-08)

Arbitration of custody matters

Custody may not be subject to non-appealable binding arbitration.

The parties agreed to submit all of their marital issues to binding, final, non-appealable arbitration. The trial court entered the judgment of divorce after warning that the arbitrator's decision would be final and could not be appealed except for a change in circumstances relating to child support and alimony.

After the arbitration process was commenced, the defendant, apparently sensing that the process could lead to an adverse decision, filed an order to show cause arguing that custody and parenting time issues could not be arbitrated as a matter of law. The trial court denied the defendant's application. At the conclusion of the arbitration process, the trial court confirmed the decision of the arbitrator. The defendant appealed the decision, asserting that the parties "cannot bargain away the court's obligation to review the best interests of the children by agreeing to binding arbitration of custody issues." *Id.* at 570. The defendant did not assert that the award was contrary to the best interest of the children.

The appellate court found that while arbitration is a favored remedy and the Supreme Court has approved arbitration for alimony disputes, it has not extended that approval to child support and custody issues, *citing Faherty v. Faherty*, 97 N.J. 99, 108 (1984) for the proposition that:

> [T]he courts have a nondelegable, special supervisory function in the area of child support that may be exercised upon review of an arbitrator's award. [As a result,] whenever the validity of an arbitration award affecting child support is questioned on the grounds that it does not provide adequate protection for the child, the trial court should conduct a special review of the award. *Fawzy v. Fawzy*, 400 N.J. Super. at 571.

This special review is a two-step process:

1. Review the award pursuant to N.J.S.A. 2A:24-8:
   a. Where the award was procured by corruption, fraud or undue means;
   b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
   c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefore, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
   d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
2. "[C]onduct a *de novo* review unless it is clear on the face of the award that the award could not adversely affect the substantial best interests of the child." *Fawzy v. Fawzy*, 400 N.J. Super. at 571.

Due to the court's *parens patriae* role, which requires the trial court to determine the best interests of children, the court concluded that "custody and parenting time issues cannot be subject to binding arbitration or to any form of arbitration that restricts the court's ability to consider the best interests of the child." *Id.* at 572.

Comment: An agreement to binding arbitration of custody and child support is void. This holding is consistent with *P.T. v. M.S.,* 325 N.J.

Super. 193 (App. Div. 1999).

***Carrascosa v. McGuire*, 520 F.3d 249 (3d Cir. 2008) [Circuit Judge Jordan]**
Removal of child in violation of the Hague Convention

The federal district court's denial of the plaintiff's petition for *habeas corpus*, seeking to end her detention in the Bergen County Jail for violating a civil contempt order of the superior court was affirmed. This federal *habeas corpus* action followed the ruling in *Innes v. Carrascosa*, 391 N.J. Super. 453 (App. Div. 2007), handed down last year. In *Innes,* a complex knot of international procedural maneuverings, the appellate court upheld a trial court decision finding jurisdiction in New Jersey, denying international comity to a decision of the Spanish court, approved the custody determination, and upheld the enforcement orders, which included severe economic sanctions and incarceration of the child's mother. The case was digested in Recent Developments 2006-2007.

NAME CHANGE

***I/M/O Application of E.F.G. to Assume a New Name*, 398 N.J. Super. 539 (App. Div. 2008) [Judge Lyons]**
Domestic violence history and requirement to publish name change

A victim of domestic violence established her right to: (1) change her name without publication of notice in the newspaper and (2) seal all court proceedings, according to this appellate court decision.

The plaintiff filed an action in the Law Division to change her name in order to "start a new life" free from her abuser. She requested that the publication requirements of Rule 4:72 be dispensed with and that the record of the court proceeding be sealed based on her history of "serious life-threatening domestic violence." *Id*. at 543. The Law Division judge denied her request to change her name and refused to waive the publication requirements and denied her request to seal the proceedings. The appellate court reversed the trial judge finding that good cause had been established both to waive the publication requirement of Rule 4:72 and to seal the record pursuant to Rule 1:2-1 and Rule 1:38(e). Noting that the name change statute did not require publication, the appellate court found good cause to relax Rule 4:72 as strict compliance with that Rule would result in an injustice. *See* Rule 1:1-2.

Good cause likewise existed under Rule 1:2-1 and Rule 1:38(e) to seal the record. Relying upon the Supreme Court decision on *Hammock v. Hoffman-LaRoche, Inc*., 142 N.J. 356 (1995), Judge Lyons summarized the process to determine whether the need for secrecy substantially outweighed the presumption of public access to court proceedings. Judge Lyons concluded that because of the "tragic and upsetting history [of] documented domestic violence," that the proceedings should be sealed. *E.F.G*., 398 N.J. Super. at 549. Judge Lyons wrote that to do otherwise would be to deny plaintiff:

> one avenue to obtain peace in her life, and an opportunity to live without fear and constant anxiety. We recognize the foreclosure of that opportunity to result in clear injustice. *Id.* at 547.

Comment: The safety of victims of domestic violence is sufficient good cause to waive strict adherence to the Court Rules and to seal court proceedings under Rule 1:2-1 and Rule 1:38(e).

GENERAL APPLICATION

STATUTES

None

COURT RULES

Amendment to R. 4:4-4
Summons; personal service; in personam jurisdiction—September 1, 2008
Link: www.judiciary.state.nj.us/notices/2008/n080715c.pdf

This amendment provides that *in personam* jurisdiction also may be obtained by mail under the circumstances and in the manner provided by Rule 4:4-3.

Amendment to R. 4:4-5
Summons; service on absent defendants; in rem or quasi in rem jurisdiction—September 1, 2008
Link: www.judiciary.state.nj.us/notices/2008/n080715a.pdf

This amendment sets forth required formatting of the newspaper notice when serving an absent defendant by publication in a newspaper.

DIRECTIVE AND MEMORANDA

Assignment Judge Memorandum
Digital audio recording equipment-backup system—July 8, 2008
Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebb11402c1aac8e/aj080716a.pdf

This memorandum confirms that the new digital audio recording system being rolled out in courtrooms statewide includes a backup system that is always on. The backup is recording even when the primary digital audio recording component is not running and even when there is no court event taking place.

CASE LAW

Update on Confrontation Clause Litigation: *Giles v. California*, 128 S. Ct. 2678 (2008) [Justice Scalia]; *State in the Interest of J.A.,* 195 N.J. 324 (2008) [Justice Albin] (*See also State v. Buda*, 195 N.J. 248 (2008) [Justice Rivera-Soto]; *State v. Sweet and State v. Dorman*, 195 N.J. 357 (2008) [Justice Rivera-Soto])
Confrontation clause

In *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court dramatically altered the admissibility of hearsay evidence under the confrontation clause, bar-

ring out-of-court "testimonial" statements unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. Three decisions this past year by the New Jersey Supreme Court and one by the U.S. Supreme Court have helped both to define the parameters of this rapidly changing jurisprudence, and to create continued uncertainty in application by trial courts.

A threshold issue involving any confrontation clause analysis involves determining whether the hearsay statement in question is "testimonial" or "non-testimonial," as only "testimonial" out-of-court statements implicate the confrontation clause.

In a case consolidating *State v. Sweet* and *State v. Dorman* (*cited as State v. Sweet*, 195 N.J. 357 (2008)), a unanimous Court clarified that breath testing instrument inspection certificates and ampoule certifications are "non-testimonial" hearsay, do not implicate the confrontation clause, and may be admitted into evidence under the business records exception to the hearsay rule. N.J. R. Evid. 803(c)(6). However, the term's remaining decisions made evident that there remains much disagreement in the upper courts over determinations of what constitutes "testimonial" evidence.

In *State in the Interest of JA*, the New Jersey Supreme Court ruled that a witness' statement relating the details of a robbery occurring minutes before, constituted "testimonial" evidence, and was thus subject to the confrontation clause. The Court noted that the decision in *Davis v. Washington*, 547 U.S. 813 (2006), articulated a standard to distinguish between "testimonial" out-of-court statements and those deemed "non-testimonial." Non-testimonial statements include those made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Stated another way, a witness' statement to a law enforcement officer, once the offense is completed, and absent any imminent danger to the witness or victim, is "testimonial." In *Davis*, a 911 call during the course of an ongoing domestic assault was held non-testimonial, under the on-going emergency analysis.

In *State in the Interest of JA*, the opinion by Justice Albin adopted a narrow interpretation of what constituted an on-going emergency. The witness' statement to police some 10 minutes after the robbery, where he had actually followed the suspect fleeing the scene, was determined to be "testimonial," as the crime had been completed and neither the witness, nor victim were then in imminent danger. The Court concluded that the primary purpose of the officer's interrogation of the witness was to obtain evidence relevant to a subsequent prosecution. Such statements implicate the confrontation clause regardless of whether a state hearsay exception is applicable.

In *State v. Buda*, a divided Court reached a contrary conclusion, determining that statements of a child victim of abuse to a DYFS worker at the hospital, constituted "non-testimonial" statements exempt from the confrontation clause. After discovering red marks and bruises on her child, which followed earlier incidents raising the specter of child abuse by her boyfriend, the child's mother took him to a hospital, where the DYFS special response unit was immediately contacted by hospital staff. In response to questioning by the DYFS worker regarding whether anyone had beat him, the child stated, "Dad says nobody beat me. I fell when I was sleeping." In determining that the statement was "non-testimonial" due to an on-going emergency, the majority concluded that the DYFS worker was not primarily operating as a representative of law enforcement, but rather was responding to a life threatening situation, no different than the victim's 911 call in *Davis*.

Justice Albin, the author of *State in the Interest of JA*, wrote a critical dissent, that the majority had improperly deviated from the strictures of *Crawford* and *Davis* because the victim was a four-year-old child. However, the justices were unanimous that an earlier spontaneous admission the child made to his mother was "non-testimonial," and not subject to the confrontation clause, though there continued to be disagreement over the applicability of the particular state hearsay exception.

The controversy generated by *Crawford* reached a crescendo in *Giles v. California*, where the U.S. Supreme Court held that statements arising from an earlier 911 call from the murder victim were inadmissible as the defendant did not have the opportunity to cross examine the deceased at trial. The defendant was accused of murdering his girlfriend by shooting her multiple times. At trial, the prosecution introduced statements from the victim made to a police officer responding to a domestic violence call several weeks earlier, where the victim related that the defendant had choked and beaten her, and threatened her with a knife after he had accused her of having an affair.

The California courts had ruled the defendant forfeited his Sixth Amendment right to confront the statement by virtue of the fact that he had caused her non-appearance in court, that is he had murdered her. In reversing the decision, a divided U.S. Supreme Court ruled that the forfeiture exception is only applicable where it was the specific intent or design of the defendant to keep the witness from testifying, not an ancillary result. The California courts had allowed the testimony without discussion of the defendant's intent or motive, based on the trial judge's preliminary determination that a *prima facie* case had been made that the defendant had in fact killed the victim.

In reversing the California Supreme Court, the opinion authored by Justice Scalia focused on an analysis of English decisional law at the time of the adoption of the Constitution, finding no authority for forfeiture without establishing the defendant's specific intent. The Court was similarly critical that the evidence was being admitted on the finding of a judge before all evidence had been heard, or the jury determining guilt or innocence. The Court did, however, rule that on remand the state court was free to consider evidence of intent, and discussed at length the high relevance of a prior history of domestic violence, abuse and threats, as intending to dissuade victims of domestic violence from resorting to outside help.

To further complicate the analysis, two members of the 6–3 majority, wrote concurring opinions that they believed the statements in question were "non-testimonial" in nature and did not implicate the confrontation clause at all. (The state had not raised the issue that the statements were "non-testimonial" below, and as such the analysis was outside the scope of the Court's inquiry.)

The conclusion to be drawn from the collective cases is that great division remains within the upper courts with conflicting signals emerging over scope and application of the confrontation clause. The *Crawford* metamorphosis is far from complete.

***Daoud v. Mohammad*, 402 N.J. Super. 57 (App. Div. 2008) [Judge Koblitz, P.J.F.P., t/a]**

Need for an interpreter and due process requirements

The need for an interpreter must be evaluated from the perspective of a party's ability to understand the proceedings as well as his or her ability to communicate. In the event the court determines that an interpreter is required, an interpreter must be provided consistent with AOC Directive # 3-04 (3/22/04).

The defendant appealed from a judgment for possession entered in a tenancy dispossess action. The defendant could have raised the lack of habitability in the context of a "Marini" hearing by depositing the rent due with the clerk of the court. *See Marini v. Ireland,* 56 N.J. 130 (1970). The defendant did not deposit the rent and the trial court entered a judgment of possession.

At the hearing, the trial court determined that the defendant required an interpreter. The defendant's brother was permitted to serve as interpreter. The defendant's brother was not put under oath as an interpreter or a witness. No inquiry was made as to the brother's ability to interpret for the defendant.

The appellate court found that the defendant's due process rights were violated since he was deprived of a "full and fair opportunity to be heard as a result of not having had a court-approved interpreter." *Daoud*, 402 N.J. Super. at 60.

The appellate court found that AOC Directive # 3-04 required that, once the trial court found that the defendant had limited proficiency in English, an AOC approved interpreter should have been provided. Pursuant to both N.J. R. Evid. 604 and AOC Directive # 3-04, the use of family members and friends "should be avoided."

The interpreter's role is to act as a conduit from the primary witness to the trier of fact. Therefore, to the extent possible, a word-for-word translation of the testimony provided by the witness is required. *State in the Interest of R.R.,* 79 N.J. 97 (1979). Cf. Fed. R. Evid. 604.

Comment: The trial court must make a diligent inquiry to determine if a party understands the nature of the proceeding and has the ability to communicate. In the event that an interpreter is required, AOC Directive # 3-04 must be followed.

***State v. V.D.,* 401 N.J. Super. 527 (App. Div. 2008) [Judge Wefing]**

Reporting the immigration status of litigants

When the family court becomes aware of illegal activity, it has an obligation to report the activity to the appropriate authorities consistent with AOC Directive # 11-07.

The defendant was arrested during a routine motor vehicle check because she did not have a driver's license. As a result of the arrest, the police determined that the defendant had possession of a fraudulent Social Security and resident alien card.

The defendant legally entered the United States in 2001 but had overstayed her permissible time limit. The defendant entered a plea to the traffic offense. The court imposed upon the defendant the obligation to notify the Bureau of Immigration and Customs Enforcement (ICE) of her conviction.

The appellate court noted, pursuant to *Sheridan v. Sheridan*, 247 N.J. Super. 552 (Ch. Div. 1990), that a court has the obligation to report illegal activity to the appropriate authorities consistent with AOC Directive # 11-07, which provides that such notice is required in driving while intoxicated and indictable matters. The court expressed a concern that in matters involving domestic violence, paternity and child support, reporting a party's immigration status could have a chilling impact on a victim's willingness to report domestic violence or to secure child support.

The appellate court stated, "A determination that the court has an independent authority to compel a litigant to report directly to ICE could have significant ramifications upon the judiciary's ability to protect those who turn to it seeking justice." *V.D.*, 401 N.J. Super. at 538.

Comment: The court has a duty to report illegal activity that rises to the level of an indictable offense; the court should not otherwise report immigration offenses to the prosecutor. The court may not order a party to report their immigration status to ICE.

***DeNike v. Cupo*, ___ N.J. ___, 2008 N.J. LEXIS 1329 (2008) [Chief Justice Rabner]**

The appropriateness of a sitting judge's exploration of future employment opportunities with an attorney appearing before the judge

A judge may not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the judge is participating personally and substantially according to this Supreme Court decision. The appearance of impropriety exists in this case because the judge was negotiating an of counsel position with a firm while handling the case involving that firm.

Judges nearing retirement are given the following guidance by the Supreme Court: Wait until after retirement to seek employment if that is possible so as to avoid overstepping any boundaries or raising an appearance of impropriety. If that is not possible, as the rules do not presently require waiting, then judges should:

1. Refrain from discussions and negotiations with any parties or attorneys involved in a matter in which the judge is participating personally and substantially; and
2. If the subject is raised in any fashion, judges should immediately halt the conversation, rebuff any offer, and disclose what occurred on the record; and
3. Judges should delay starting any discussions until shortly before their planned retirement, and should discuss post-retirement employment opportunities with the fewest possible number of prospective employers; and
4. Judges must disqualify themselves from matters involving parties or attorneys with whom they have discussed future employment, whether or not those discussions lead to a relationship; and
5. Judges should wait a reasonable period of time before discussing employment with an attorney or law firm that has appeared before the judge. ■

***Thomas H. Dilts** is a family part judge in Somerset County. **E. David Millard** is the family part presiding judge for Ocean County. **Patricia B. Roe** is a family part judge in Ocean County. **William R. DeLorenzo** is a family part judge in Bergen County. **Octavia Melendez** is a family part judge in Camden County. **Lawrence R. Jones** is an attorney in Toms River. **David Tang** is an attorney with the Administrative Office of the Courts, Family Practice Division.*

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