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CHAIR'S COLUMN

Forever Vigilant

by Thomas Snyder

The death of Judith Novellino, a matrimonial litigant, is a grim reminder to judges and lawyers alike that we, as professionals and colleagues, must be vigilant in reporting circumstances that would lead us to believe the conduct of a litigant may pose a danger to others.

On June 19, 2010, Morris County resident Judith Novellino was brutally murdered; she was stabbed 84 times. Accused of the crime is her former husband. Ms. Novellino had been married almost 37 years prior to her June 8, 2010, divorce. As reported by the *Morris County Daily Record*, one theory regarding the motive for the murder is Ms. Novellino's former husband's "visceral" response to the divorce and frustration at having to split retirement accounts and other assets.[1]

In addition to being charged with Ms. Novellino's murder, her former husband was also charged with threatening to harm her divorce attorney.

The threats allegedly made against Ms. Novellino's attorney bear witness to the fact that lawyers and judges are not immune from being the target of the violent conduct of litigants embroiled in stressful, expensive, and often acrimonious litigation.

As family law attorneys and judges, we function in a system that, although driven by human behavior, is sometimes inhuman. The Novellino case is just one chilling example of this reality.

There is a dearth of published statistical data reporting incidents of violence directed at judges and lawyers in connection with representing clients or judges presiding over family law matters. New Jersey's Administrative Office of the Courts does not maintain statistical data reflecting reported acts of violence committed against lawyers or judges.

One's status as attorney or judge has little or no impact upon the nature of a crime charged relative to an alleged act of violence. Consequently, most law enforcement agencies do not maintain crime statistics based on a victim's status as judge or attorney. The fact that a crime may have been committed against a member of the judiciary, under certain circumstances, may be considered as an aggravating factor relative to sentencing.[2] However, the sentence imposed upon someone who senselessly kills or harms another does little to rectify the consequences and loss to the victims of the crime.

Despite the absence of quantifiable statistical data on this issue, a review of news headlines readily serves as a reminder that our involvement in the legal system can have horrific life-altering consequences for ourselves and our families.

In February 2010, 61-year-old South Carolina attorney Redmond Coyle was shot and killed outside his office by his client's former husband. The alleged shooter was upset over the divorce settlement.[3] In the not too distant past, in June of 2002, a Red Bank matrimonial attorney suffered a broken back, a broken pelvis and several broken ribs as a result of an attack allegedly emanating out of his representation of a client in a matrimonial matter.[4]

In 2006, Nevada Family Court Judge Chuck Weller was shot while in his office by a man who had appeared before him in a divorce case. The case caught national attention when the suspect, a multimillionaire father of three whose relatives say he was deeply upset over the court's ruling, allegedly used a sniper's rifle to fire through the window of the judge's third-floor office building. Judge Weller was shot in the chest, hospitalized and survived the attack.[5]

The tragedy that befell U.S. District Judge Joan H. Lefkow of Chicago in 2005 is perhaps one of the most horrific examples of the consequences of violence directed toward members of the judiciary. Judge Lefkow found her husband and mother shot dead in

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the basement of her home. The suspected murderer was a litigant whom she had previously held in contempt of court.[6]

While the details of these tragedies are nothing short of grizzly, grim and disturbing, to omit the occurrence of these tragedies from this article would be to overlook the very stark realities of our profession.

As part of the family law community, and the legal community as a whole, we as lawyers and judges have an ethical and moral obligation to be vigilant in our assessment of the prospect that a litigant or a client may intend to harm colleagues, judges or any person.

While this duty and obligation need not be codified in any moral code, it is clearly delineated pursuant to New Jersey Rule of Professional Conduct 1.6, which provides in part that:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).
>
> (b) A lawyer shall reveal such information to the property authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
>
> (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another…
>
> (c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss….
>
> (e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundations in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

Hypothetical and rhetorical debate regarding the definition of "reasonable belief" and what is "a reasonable lawyer" may make for interesting colloquy, but the real life consequences of false sophistry can be devastating. I truly hope none of us are ever in the position of having to face the ethical reality of whether or not we are obligated to comply with the provision of RPC 1.6(b). However, should that day occur for you, do not lose sight of the fact that we, as members of the legal community, have a duty and responsibility to be diligent in not dismissing warning signs that would lead us to conclude that colleagues, adversaries, judges, adverse clients or members of the public at large may be in harm's way as a result of human emotion gone awry. ■

ENDNOTES

1. Dailyrecord.com, July 1, 2010. Peggy Wright.
2. N.J.S.A. 2C:11-3(h); 2C:44-1a(8).
3. ABA Journal – Law News Now, Feb. 5, 2010. Martha Neil.
4. NJ.com, Nov. 20, 2009. Mary Ann Spoto/*Star Ledger*.
5. ABCNews.com, June 16, 2006. Nancy Weiner.
6. *Chicago Tribune*, March 1, 2010. Tom Rabarczyk, Carlos Sadovia, Oscar Avila, Matt O'Connor, Ana Beatriz Cholo, and Todd Lightly.

EDITOR-IN-CHIEF'S COLUMN

Equal Protection for Arbitration

by Charles F. Vuotto Jr.

As recently emphasized by our Supreme Court in the case of *Fawzy v. Fawzy*,[1] "our courts have long noted our public policy that encourages the use of arbitration proceedings as an alternative forum."[2] Our Supreme Court went on to state that the objective of arbitration is,

> [t]he final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between parties. Arbitration can attain its goal of providing final, speedy and inexpensive settlement of disputes only if judicial interference with the process is minimized; it is, after all, meant to be a substitute for and not a springboard for litigation.[3]

Over 25 years ago, the New Jersey Supreme Court, in *Faherty v. Faherty,*[4] approved the arbitration of some family law issues, alimony and child support in particular.[5] The Supreme Court reserved on arbitrating custody and time sharing. The reservation left open in *Faherty* was resolved by the *Fawzy* Supreme Court, which now permits the arbitration of custody and time sharing issues. The Court conditioned these arbitrations upon compliance with certain prerequisites and the application of a modified standard of review. Notwithstanding these pronouncements and the actual provisions of the two relevant arbitration statutes permitting a stay of a case, the response by the trial courts to a case actually going to arbitration seems to be at odds with these laudable goals.

This inconsistency is reflected in the lack of uniformity in how judges in the state address the procedural status of a case where the parties have agreed to arbitrate some or all of the issues. In some counties, the case is maintained on the active docket and the parties are required to continue to make appearances for status or case management conferences. In other counties, the court requires the parties to dismiss their divorce action without prejudice, with the right to reinstate it by formal or informal application within a specified period of time. Courts have also been known to divorce the parties based on their agreement to arbitrate all issues and leave it to them to resolve all substantive issues by making a subsequent application to confirm the arbitration award by way of a summary proceeding in accordance with the applicable arbitration statute.[6]

Although purely anecdotal, it appears that the most prevalent practice is to require the parties to dismiss their divorce action without prejudice. The problem with this approach is multifaceted: First, the parties are left without an avenue for immediate relief or enforcement mechanisms (without first moving to reinstate the case) in the event that a party fails to comply with the arbitration process or abide by an arbitrator's interim award(s). Second, one cannot assume administrative ease in reactivating a case on an informal basis. Third, any orders protecting the rights of the parties entered prior to the arbitration will have no force and effect.

These approaches are at odds with the pronouncements from our Supreme Court and the arbitration statutes themselves, as detailed below. However, there is no question that a counter-consideration exists; namely, the duty of the courts to assure the speedy resolution of disputes. We cannot forget one of the most troubling conclusions emanating from the Michaels commission:[7] "cases take too long and cost too much."

Best practices arose to combat this conclusion. Although many may argue with the conclusions of the Michaels commission and the wisdom of how best practices was implemented, no one can argue with the goal of assuring speedy and economical litigation for those who are unfortunately required to resolve their disputes through the judicial system.

We must first review the two relevant arbitration statutes, which provide that a case may be stayed in the event of arbitration. The Uniform Arbitration Act (UAA) provides that "if the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration."[8] The New Jersey Alternative Procedure for Dispute Resolution Act (APDRA)[9] provides that:

> [i]n an action brought in any court upon an issue arising out of an agreement providing for alternative resolution under this act, the court, when satisfied that the issue involved is referable to alternative resolution, shall stay the action until the alternative resolution proceeding has been conducted in accordance with the terms of the agreement, unless the party seeking the stay is already in default.[10]

The concept of placing a case on the inactive list due to certain events or alternate proceedings is not without precedent in our judicial system or the rules and regulations promulgated by the Administrative Office of the Courts (AOC). The obligations of the Judiciary, as carried out by the AOC, is to assure the proper oversight of cases, as highlighted in a memorandum dated April 27, 2004, from then-acting AOC Administrative Director Hon. Richard J. Williams. This memorandum provides for a uniform statewide policy on inactivating cases. The memorandum was addressed to assignment judges, civil presiding judges, criminal presiding judges, family presiding judges, general equity presiding judges and presiding judges in the municipal courts. The policy became effective on July 1, 2004, and applied to all cases in the Civil, Criminal and Municipal divisions and in both the family and general equity parts of the Chancery Division.

The memorandum reflects the basic principle of the court system, which is that cases should be moved as expeditiously as is possible and appropriate. The memorandum goes on to state, however, that it must also be recognized that in some narrow circumstances, the court is precluded from moving a case. The memorandum further recognizes that statistics measuring the health of our system must balance these factors to provide a realistic picture of the age and nature of the pending caseload. Identifying backlogged cases permits the court system to focus its attention on disposition, but in turn by including cases that are beyond the system's ability to move, distorts performance statistics and undermines credibility.[11]

The memorandum defines inactivation as suspending action on a case and placing it temporarily in a status in which it is not counted in backlog and does not age. The memorandum emphasizes that it is an administrative tool sparingly applied in a few, circumscribed case categories in which the court cannot move the case forward. The preliminary statement of the memorandum concludes by stating that those categories of cases that may and may not be inactivated likely affect all vicinages more or less equally.

There are six limited circumstances, which may appropriately lead to a case inactivation, according to this AOC memorandum.[12] Interestingly, the memorandum notes that a "stayed" case is not "inactivated," and continues to age statistically. The memorandum notes that although the number of inactivated cases will be far fewer under the statewide policy delineated therein, it is nonetheless important that these be closely monitored by the presiding judge and the division manager. The memorandum further states that many, if not all, of the divisional automated systems are programmed to provide regular reports of inactivated cases. Therefore, it appears that the system is already set up to monitor inactivated cases.

Therefore, it would seem preferable for the parties, counsel, and the courts if there was a uniform approach, which addressed everyone's concerns. Specifically, this author proposes that the aforementioned AOC policy be amended to allow for a method by which a family part judge can place a matter on an inactive list when all (and perhaps even some) of the issues have been submitted to arbitration by the parties. This should be tempered with the implementation of a time limit to conclude arbitration and a reasonable date to report back to the court. Placing the case on the inactive list due to arbitration should effectuate a stay of all judicially initiated action, including resolution of the issues being arbitrated, until the arbitration proceedings has been conducted in accordance with the terms of the parties' agreement to arbitrate. No further court proceeding should be initiated by the court, including but not limited to appearances at case management or status conferences, early settlement panel, or trial.

The parties should not be required to report back to the court until the agreed upon arbitration process has run its course, or at least until a reasonable period of time has expired. Generally, that means that there should be no further action by the court until an arbitration award has been rendered and the parties have sought confirmation of that award under the terms of the UAA[13] or the APDRA.[14] Such a process would follow the intent of the statutory scheme, facilitate the fulfillment of the public policy enunciated by our Supreme Court and achieve the goals of arbitration, namely the final, speedy and inexpensive resolution of disputes with minimal judicial interference. ■

ENDNOTES

1. 199 N.J. 456 (2009).
2. *Id.* at 468 (*citing Wein v. Morris*, 194 N.J. 364, 375-76, 944 A.2d 642 (2008) (*quoting Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 489, 610 A.2d 364 (1992)).
3. *Id. See also Barcon Assocs. Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 187, 430 A.2d 214 (1981).
4. 97 N.J. 99 (1984).
5. *Id.* at 108-109.
6. The potential loss of health insurance is one of a number of serious problems with this approach.
7. Supreme Court Committee on Matrimonial Litigation, Final Report issued Feb. 4, 1998, and published in the *New Jersey Law Journal* (issued as a supplement) on Feb. 23, 1998.
8. N.J.S.A. 2A:23B-7(g).
9. N.J.S.A. 2A:23A-1 *et seq.*
10. N.J.S.A 2A:23A-8.
11. *See* memorandum dated April 27, 2004, re: Uniform Statewide Policy on Inactivation of Cases/ Excludable Time, from then acting AOC Administrative Director, Hon. Richard J. Williams.
12. 1. A necessary party is in the military (R. 1:13-6).
    2. A civil or special civil part forfeiture matter may be inactivated if the underly-

ing criminal case is inactivated, e.g., because the defendant is a fugitive (see item 3, below); otherwise the civil or special civil part forfeiture matter may be stayed but not inactivated. The rationale for the latter provision is that, if the underlying criminal case is not inactivated, the court system has the ability to effect the forward movement of the case indirectly by working with the prosecutor to move the case.

3. The defendant is a criminal or juvenile fugitive for more than 30 days or, in a municipal court matter, a warrant has been issued for failure to appear and the defendant remains a fugitive, or the Division of Motor Vehicles has suspended the license of an individual who does not respond to a traffic summons. Such defendants are beyond the reach of the court and so the court can no longer effect the forward movement of the case.
4. The court finds that a criminal or juvenile defendant lacks the fitness to be prosecuted. N.J.S.A. 2C:4-6b requires the proceedings in such circumstances to be "suspended." (In general, however, illness or hospitalization or a party or witness should not result in the case being inactivated. See below).
5. The carrier providing insurance to a party in the litigation is in rehabilitation or liquidation. The appellate opinion in *Aly v. E.S. Sutton Realty,* 360 N.J. Super. 214 (App. Div. 2003) requires that New Jersey judges give comity to out-of-state orders staying all cases in which the carrier in rehabilitation is involved. Such orders may be extended indefinitely. As to carriers in liquidation, N.J.S.A. 17:30A-18 provides that the carrier is entitled to a 120-day stay (which may be extended) so that the guaranty fund can assess the situation, assemble the files and be prepared to defend.
6. A party in a Family Division dissolution case is in bankruptcy. This situation may result in the case being held in abeyance until the bankruptcy stay is lifted. Inactivation may not always be necessary in such instances, but may sometimes be appropriate. Note: With respect to civil and general equity matters, the party in bankruptcy may be dismissed and the case proceed with the remaining parties. If this is not feasible, *e.g.*, if the bankrupt party is the sole or pivotal defendant, the entire case may be dismissed without prejudice, to be restored when the federal bankruptcy stay is lifted. However, such an approach may not be feasible in a dissolution matter. Thus, inactivation is permissible, within the discretion of the judge, only in family dissolution cases.

13. N.J.S.A. 2A:23B-1 *et seq*.
14. N.J.S.A. 2A:23A-1 *et seq*.

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Here, Say Hearsay!

A Critique of Evidence Issues in Title 9 DYFS Cases

by Allison C. Williams

Trial lawyers have been known to say, "Once you know how to try a case, you can try any case." While this saying may be accurate in most instances, it unfortunately does not hold true for cases initiated by the Division of Youth and Family Services (DYFS). DYFS cases are unique in that they are circumscribed by their own set of procedural requirements and evidence rules, many of which are antithetical to the very training lawyers undertake. Lawyers are taught that valid judgments must be based upon competent evidence that hearsay—except in a limited number of circumstances—is unreliable, and that only evidence (both testimonial and documentary) that is reliable and trustworthy should be considered in a court of law.

Trying a DYFS case can make the most skilled lawyer feel as if he or she is operating in a parallel universe. Reliability, trustworthiness and competency give way to reticence, truncation and convenience, almost all of which inures to the benefit of DYFS. However, this need not be the case. The effective advocate must not only be knowledgeable and adept at navigating the New Jersey Rules of Evidence, but also must be able to differentiate those rules from the DYFS evidence rules codified by statute. This article is designed to further that knowledge and assist with that navigation.

An understanding of the applicability of the evidence rules to DYFS proceedings starts with a thorough understanding of the rules of evidence. Specifically, one must become intimately familiar with the evidence rule that is included in Title 9, which can be found at N.J.S.A. 9:6-8.46.

There are three key components of this statute. Part one contains what this author refers to as the nuts and bolts—the who, what, when, where and how of the evidence rule.[1] Part two contains what this author refers to the essentials (*i.e.*, the state's burden of proof and the quality of evidence required).[2] Part three contains what this author refers to as the gotcha provision—the overarching premise in DYFS matters, which confuses even the most skilled lawyers.[3] This article begins the discussion here, as understanding this provision of the Title 9 statute will assist counsel in analyzing evidence issues throughout all phases of a DYFS case.

THE GOTCHA

The New Jersey Rules of Evidence were enacted to ensure the trustworthiness and reliability of evidence before the court. In general, the rules of evidence apply to all court proceedings or proceedings conducted under the supervision of the court.[4] If the rules are applicable to a proceeding, they are not ordinarily relaxed in the absence of specific authority, either within the rules themselves or in statutes.[5]

In child abuse and neglect cases, the rules of evidence are *supplemented*—not supplanted—by statute and by court rule.[6] While some limited hearsay is permissible in DYFS matters, the threshold requirement of reliability remains:

> Judicial findings based on unspecified allegations, hearsay statements, unidentified documents and unsworn colloquy from attorneys and other participants erodes the foundation of the twin pillars upon which the statute rests: (1) that no child should be exposed to the dangers of abuse or neglect at the hands of their parent or guardian; and, commensurately, (2) that no parent should lose custody of his/her child without just cause.[7]

It is the job of defense counsel to ensure that these principles guide the court's analysis when ruling on evidentiary issues in DYFS matters and what the rule says and what it means. Specifically:

> In a dispositional hearing and during all other stages of a proceeding under this act, only material and relevant evidence may be admitted.[8]

Only material and relevant evidence may be admitted. Makes sense, correct? After all, what judge would even want to consider irrelevant evidence? And if not material, the evidence, by definition, would not impact the outcome of the issue under consideration one way or another.

This statutory provision cannot be read in a vacuum. One must consider the preceding provision:

> Evidence offered at fact-finding hearings must be material, relevant *and* competent.[9]

Consider this provision when

read with the proviso that "during all other stages of a [Title 9] proceeding," only material and relevant evidence may be admitted, and you have your gotcha!

Competency, the cornerstone of our judicial system and the core of the New Jersey Rules of Evidence, is only required to determine whether the abuse or neglect alleged actually occurred. Practically speaking, this means that when DYFS files its order to show cause to remove a child, incompetent evidence is allowed at the initial hearing. For example, a caseworker's discussion with the police officer who recounted discussions with a teacher who read from a child's notebook entry that "Daddy burned me" clearly contains multiple layers of hearsay, which would be inadmissible under N.J.R.E. 805 unless a specific exception to each layer of hearsay exists. Notwithstanding all those layers of hearsay, if a judge finds the notebook entry to be *material* and *relevant* to the standard at removal hearings (*i.e.*, imminent danger to a child's life, safety or health[10]) then all of that testimony comes in.

Shocking? To any self-respecting trial lawyer, absolutely. Hence, DYFS can scream "Gotcha" when defense counsel objects, and without defense counsel having a true understanding of how the pieces fit together, DYFS would be correct to do so.

THE ESSENTIALS

As noted above, the DYFS evidence rule delineates the burden of proof in fact-finding hearings. Any determination that the child is an abused or neglected child must be based on a preponderance of the evidence.[11] Is it more likely than not that the child fits any or all of the criteria established by statute to declare a child an abused or neglected child?

While it certainly may be disheartening that the lowest quantum of proof is required for the state to prove a child is "abused or neglected" and then continue its intrusion into the lives of a family, the reality is that tackling this low burden of proof is not an insurmountable obstacle. It means that when the proofs are in equipoise, the defense wins. Thus, every argument made, every objection advanced, every question asked should be designed to attack the division's proofs.

THE NUTS AND BOLTS

The various rules in statutory provision N.J.S.A. 9:6-8.46 (the DYFS evidence rule) that apply to all Title 9 hearings are discussed in summary fashion below.

1. Proof of the abuse or neglect of one child shall be admissible evidence on the issue of abuse or neglect of any other child of the parent.

This rule appears to be an end-run around the general bar to "prior bad act" testimony codified in N.J.R.E. 405(a), which provides: "Specific instances of conduct not the subject of a conviction of crime shall be inadmissible." However, this rule is really nothing more than an explication of the principles of N.J.R.E. 405(b).[12] Also, commentary 1 to N.J.R.E. 405 holds: "The Rule makes it clear that specific instances of conduct not the subject of a criminal conviction are not admissible for proving character except when character is actually in issue."[13] "When a person's character is at issue substantively, evidence of specific acts of the person's character may be used to prove that person's character trait.…[The rule] should not be read as intending to limit the introduction of evidence when character is actually at issue [.]"[14]

Thus, by virtue of offering evidence of a parent's prior act of child abuse or neglect, the division is essentially offering "specific instances of conduct" in accordance with N.J.R.E. 405. While it may seem that this rule can only benefit the division, defense counsel may make use of it as well. Defense counsel should posit that the defense to the division's allegation of child abuse/neglect in this instance is, in part, that the parent does not have the character of a perpetrator of abuse/neglect. By framing the defense's position as one of character, counsel opens the door to introduce evidence of specific instances of conduct, which are inconsistent with the division's theory of the case.

It is important that defense counsel carefully deconstruct this rule. Proof of abuse of one child is admissible on the issue of abuse of another child. It is not sufficient for the division to offer allegations of abuse of one child to prove abuse of another child—the statute requires proof. Before the fact-finding hearing commences, defense counsel should file an *in limine* motion to limit the division's case to omit reference to previous allegations of abuse. It is not uncommon for the division's complaint to plead numerous referrals, which were unsubstantiated or unfounded, or if administratively substantiated, were never the subject of a hearing on the issue. An administrative finding by DYFS is not proof of abuse. After all, if the parent is currently being subjected to a fact-finding hearing at present, obviously DYFS has already made an administrative finding of abuse. Administrative findings in previous matters should be treated as are the current administrative findings (*i.e.,* as allegations by the division, which should be subjected to a hearing on the merits). The fact that the parent did not pursue an administrative appeal of the previous substantiated claims, for whatever reason, should not authorize the division to assert that its previous allegation has been 'proven' any more than has the current allegation.

In cases where the division is making allegations of abuse/neglect regarding more than one child (*e.g.,* mom used excessive corporal punishment on one child on March 1 and on a second child on May 1)

defense counsel should oppose the introduction of the March 1 claim as 'proof' of the May 1 claim. Each allegation may be the subject of the current fact-finding hearing; however, each must be proven independently. The division's efforts to argue "proof by assertion" (*i.e.,* if the division makes multiple allegations against a parent, that must mean that at least one of them happens to be true) often arise in the context of this rule.

If the court does allow a previous superior court finding or stipulation of abuse/neglect to be admitted against a parent, defense counsel must still argue the probative value (or lack thereof) of the previous finding. Any evidence, even that which is admissible pursuant to this statute, remains subject to objections based upon N.J.R.E. 401 (relevancy); N.J.R.E. 403 (probative value) is outweighed by prejudicial effect, and any other appropriate basis under the rules of evidence. Though 403 objections are much less likely to prevail in bench trials verses jury trials, defense counsel should still preserve the record by making the objection. For instance, if an incident occurred in 1993, which resulted in a stipulation of neglect, the division's abuse allegations in 2010 are arguably: a) too remote to be of probative value, and/or b) so unrelated to the current allegation as to render them irrelevant. Thus, while it may come into evidence, it adds little to the discussion.

***2. Proof of a child's injuries or of a child's condition that would ordinarily not exist except by the acts of omissions of a parent shall be* prima facie *evidence that a child is abused and/or neglected child.*[15]**

This rule is often referred to as the burden-shifting provision of the Title 9 evidence statute. If the division can prove that a child's condition would not be present but for the acts/omissions of the parent, the burden of coming forward with an explanation shifts to the parent to prove his or her non-culpability.[16] The *D.T.* court held that "[Where] a *limited number* of persons, each having access or custody of a baby during the time frame when a sexual abuse *concededly occurred, (no one else having such contact)* and the baby being then and now helpless to identify her abuser, ... [t]he burden would then be shifted, and such defendants would be required to come forward and give their evidence to establish non-culpability."[17]

However, *D.T.* should not be read to foist a universal burden-shifting requirement upon parents to prove themselves innocent every time DYFS makes a *prima facie* case of abuse. "[T]he burden-shifting rule prescribed in *D.T.* is not universally applicable in child abuse and neglect cases."[18] In cases where abuse is confirmed and the question before the court, *solely*, is who committed the admitted abuse, the *D.T.* burden-shifting analysis applies, and the parents must come forward to rebut the division's case and the burden of persuasion shifts to the parents.

Conversely, where a number of persons, including the parents, had access to a child who *could have been* abused, once the division makes a *prime facie* case of abuse, "the burden of going forward shifts to respondents to rebut the evidence of parental culpability. But … the burden of proving child abuse always rests with [DYFS]; [s]hifting the burden of explanation or going forward with the case does not shift the burden of proof."[19]

Following are a few practice tips on burden-shifting cases. First, defense counsel should ask the court for a conference to address the applicable burden-shifting analysis to be applied in the case. If the child is *not concededly abused*, as in *D.T.,* and the question to be answered is whether or not abuse occurred, traditional *res ipsa loquitor* principles apply, and the burden of persuasion remains with the division. No matter which burden-shifting paradigm is applied, defense counsel should use every opportunity to remind the court that the burden of proof *always* remains on DYFS.

Second, defense counsel should consider whether to file a motion to have the court determine if this statutory provision is applicable in the present case. Keep in mind that the child's condition must be one that would not ordinarily exist *but for the acts or omissions of a parent*. It is conceivable to have a case in which the child's condition is such that *would* ordinarily exist, exclusive of the parents' acts or omissions. For instance, if a child accidentally ingested a foreign agent, left on the floor in the home, the division's position that the child was inadequately supervised, and therefore neglected, should not shift the burden of coming forward to the parent. Arguable statistics can demonstrate that children's accidental ingestion of foreign agents is not uncommon and does not require parental 'omission' to occur.

3. The business record exception to the hearsay rule (i.e., N.J.R.E. 803(c)(6)) applies and statements contained in DYFS records serve as proof of the child's condition presented herein. However, documents submitted must:

a. Be made in the regular course of the business;
b. Be from a business in which it is the pattern or practice of the business to make such documents; and
c. Be prepared reasonably contemporaneously with the events set forth therein.
d. Be accompanied by a certification from the head of the agency, or if not by the head of the agency, it must be filed with a copy of a delegation. All other circumstances of the making of the record, including lack of personal knowledge of its contents, go to weight, not admissibility.

Because it is standard practice for the division to offer its contact

sheets as proof of abuse or neglect allegations in the fact-finding hearing, it is important that defense counsel be intimately familiar with this provision of the statute, as well as with N.J.R.E. 803(c)(6), as both will be implicated in every fact-finding hearing.

Detailed inquiry should be made in every case as to the requirements of N.J.R.E. 803(c)(6). Defense counsel should never simply accept a caseworker's testimony that the DYFS records being offered are kept in the ordinary course of business of the division. Far too often, this is the colloquy at the beginning of a fact-finding hearing:

DAG: Caseworker, you are employed by the Division of Youth and Family Services?
CW: Yes.
DAG: In what capacity?
CW: As a Child Protective Services case worker. I investigate child abuse and neglect.
DAG: And while working in that capacity, did you investigate Mr. and Mrs. Doe for alleged acts of child abuse that are reflected in the complaint filed on March 1, 2010?
CW: Yes.
DAG: In conducting your investigation, did you document your actions?
CW: Yes.
DAG: Those actions are contained within the division contact sheets you have there in front of you?
CW: Yes.
DAG: Were those records kept in the ordinary course of business of the Division of Youth and Family Services?
CW: Yes.
DAG: Thank you. Judge, I'd like to offer P-1 through P-257 into evidence.
JUDGE: Defense, any objection?
DEFENSE: No objection.

Defense counsel must preserve the record by questioning the division's witnesses prior to the documents being admitted into evidence. A few areas to probe include the following:

a. Ask the caseworker about the functions of DYFS. What is done in the 'ordinary course of business' of DYFS? Extract the details of a Child Protective Services investigations, the process of note-taking and entry of those notes into the computer system. Not every caseworker will know these steps; thus, not every caseworker can lay a foundation for what is done in the ordinary course of business of the division.
b. Turn to the division field operations manual.[20] Cross examine the caseworker on the steps outlined in the manual for documenting an investigation. Often, the caseworker did not comply with the manual. Lock the caseworker in to confirming that the manual represents the steps taken in the ordinary course of business of DYFS. Then get the caseworker to acknowledge his or her non-compliance with the division's requirements.
c. Go through each contact sheet, investigation summary, report, etc. being offered by DYFS. The testimony must show that it is the "pattern or practice" of DYFS to make "such documents." The fact that the caseworker testifies that DYFS is in the habit of making certain contact sheets does not mean that it is in the habit of including certain extraneous information. When there is a pending criminal matter, there are often times when the police document information in lieu of DYFS. Upon cross-examining DYFS employees regarding the division's pattern or practice of documenting information, one quickly discovers that no such pattern exists with any uniformity.

The statute further requires that the document being offered was made "reasonably contemporaneous" with the events documented. It is not uncommon that contact sheets be prepared several days or even weeks after the events described in them. When questioned about the time lag, the caseworker often attempts to minimize the time lag by alleging that handwritten notes were taken simultaneously with the investigation, though not entered into the computer system until days later.

Defense counsel should aggressively pursue this allegation:

a. Ask for a copy of the alleged handwritten notes. If such notes exist, any inconsistency between the short handwritten notes and the thorough typed record undermine the assertion that the typed record truly was made contemporaneously.
b. More likely than not, such notes will not exist; thus, defense counsel can then focus on the time delay between the trial date and the time period when the caseworker made such notes. Obvious attention should be given to memory attrition, which occurs between the investigation (usually months sooner) and the trial, with particular attention being paid to the number of investigations undertaken by the caseworker between the time of the investigation in this case and the time of trial.
c. Turn to the division's field operations manual. Requirements for data entry should be explored with the caseworker in depth. If the delay in typing the handwritten notes is not consistent with DYFS protocol, such inconsistency further erodes the claim that note-taking was 'reasonable' under the circumstances.

This provision requires a certification from the head of the agency or, if by someone other than the head, the certification must be accompanied by a delegation. Do not overlook this requirement. Often, the division will obtain medical records with a certification from the custodian of records of

the hospital. This, alone, is not sufficient. If defense counsel notes such a deficiency when reviewing discovery, a useful strategy may be to ask that evidence issues be handled at the close of the division's case. Once the division closes its case and offers the medical records, defense counsel should object based upon this non-compliance with the statute.

Defense counsel should be mindful that Rule 5:12-4(d) does not 'trump' N.J.R.E. 803(c)(6), but should be read in tandem with it.[21]

Specifically, N.J.R.E. 803(c)(6) lays out the prerequisites to admissibility under the rule, but concludes with the most important *caveat:* "[the documents are admissible]…unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy."

Trustworthiness is required—even with DYFS records. Thus, defense counsel should explore:

a. The source of the information
b. The method of preparing the information
c. The purpose for preparing the information
d. The circumstances of preparing the information

Each area is ripe for productive cross examination. This is where defense counsel should, in essence, put DYFS on trial.

First, consider the source of the information. Information obtained from hostile neighbors, former spouses, disgruntled teachers, overzealous social workers with bias against the economically disadvantaged, appears inherently suspect. Information from doctors appears more trustworthy; however, do not concede this at any stage of litigation. Investigate the referring doctor. Perhaps he or she fears a malpractice claim, and therefore has a vested interest in DYFS or a court finding that the child was abused. Or perhaps the doctor is affiliated with any number of child protection centers throughout New Jersey, and therefore would arguably be more inclined to find child abuse than other medical professionals whose income is not tied to finding child abuse.

And, of course, be critical of information obtained from the caseworker. After all, the division is the plaintiff in this case. As with all parties to litigation, the party has a desire to prove his or her position. Lock the caseworker into a position on the merits—he or she believes this is child abuse/neglect; he or she believed this was child abuse/neglect every time he or she wrote horrible things about the parent; he or she believed this was child abuse/neglect every time he or she spoke to people about the investigation; and most importantly, he or she believed this was child abuse/neglect when preparing to give testimony about what transpired.

Second, explore with the caseworker the method of preparing the information. This really takes place when addressing the business practices of the division, as well as the timing of note-taking in the investigation.

Third, and this cannot be stated emphatically enough, defense counsel must explore the purpose for preparing the information. Documents prepared for litigation purposes are inherently suspect and are treated as such by the rules of evidence. For this reason, before a record is to be admitted in a DYFS proceeding, the trial court must conduct a 104(a) evidentiary hearing to determine whether all criteria for admission, including trustworthiness, are met.[22] Though the caseworker may posit that the division's records were not prepared for the purpose of litigation, but rather to investigate child abuse/neglect, the likelihood is that at least some records were prepared after the division developed its plan to remove the child or to validate a removal that previously occurred.

Finally, defense counsel should explore the circumstances in which the information was prepared. Did the division receive a referral at 2 a.m., necessitating immediate action? If so, notes taken at that hour may be less reliable. Did the investigation involve a parallel criminal investigation? If so, the caseworker may have missed key pieces of information as the matter unfolded, particularly where law enforcement directs the division to discontinue questioning witnesses for fear of tainting its investigation. How many caseworkers, supervisors and investigators were involved in the matter? The more second- and third-hand information received, processed and acted upon, the greater likelihood for errors to have occurred or data to have been lost in translation.

4. Previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, provided uncorroborated statements are insufficient to make a fact finding of abuse or neglect.

This provision of the statute requires corroboration in order for the court to rely upon a child's hearsay statements to make a finding of abuse or neglect. This section does not obligate DYFS to produce every child alleged to be abused or neglected to testify. However, where the division seeks to rely upon the child's statements, corroboration is a condition precedent to a finding of abuse being made.

Defense counsel should be able to tell from the face of the division's complaint whether or not a child's statements may be introduced by the division. If such statements are pled in the complaint, defense counsel should press the division to specify—before the start of trial—whether or not it intends to rely upon the child's statements at trial. If so, demand a proffer regarding the corroboration. Failing a proffer, a motion to dismiss the complaint should be made. Whatever the alleged corroboration, defense counsel should request an

evidentiary hearing at the outset of the case before any such statements are introduced by DYFS. This decreases the impact of such statements, which, if heard by the trial judge before any corroboration is introduced, may lead the less prudent jurist to find corroboration after the fact where none exists.

The division can introduce a broad array of statements, conduct or collateral information to constitute corroboration. Corroborative evidence need not relate directly to the accused.[23] The evidence need only provide support for the out-of-court statements.[24] For instance, in *New Jersey Div. of Youth & Family Servs. v. Z.P.R.,*[25] the trial court admitted evidence of a child's age-inappropriate, sexually precocious knowledge as corroborative of his statements alleging sexual abuse. Though *Z.P.R.* is still good law, defense counsel should question whether sexually precocious knowledge continues to be a viable form of corroboration, as society continues its descent into the realm of 'reality television.' Such sexual knowledge is certainly more rampant for children of all ages now than in past generations.

Whatever the corroboration is alleged by the division, defense counsel must question these proofs and insist that they be proven before the court hears any statements attributed to the child. In the event the court finds the child's statements may be admitted, defense counsel should strongly consider asking the trial judge to conduct an *in camera* interview of the child. If the child is of an age whereby he or she is mature enough to recall his or her alleged abuse or neglect, the trial court may be said to have abused its discretion by refusing to conduct such an interview.[26] This is particularly so where the crux of the division's case is the hearsay account of a child witness who is not produced at trial to testify.[27]

In short, "[a]lthough trial judges have broad discretion in the way they conduct abuse and neglect cases, a judge's factual findings must be based on competent reliable evidence. Thus, when resolution of a material factual dispute depends upon a child witness's testimony, the *in camera* interview affords the trier of fact the opportunity to assess the credibility of the child, his powers of communication and observation, and his demeanor."[28]

A WORD ABOUT POLYGRAPH TESTS

As noted above, competency of evidence is only required at the fact-finding stage of DYFS litigation. Practically speaking, this means that hearsay is generally admissible, except at fact-finding hearings. This rule is not limited to DYFS's presentation of proofs, and the evidence rule does not limit its applicability to the evidence offered by DYFS. Thus, defense counsel may make use of incompetent evidence throughout the case as well.

One device this author has employed with success is the use of polygraph tests in hearings throughout DYFS matters. For many allegations made by the division, the parent will be required to defend multiple claims. The allegation may be a pattern of gross neglect or inadequate supervision. The allegation may be physical abuse in circumstances wherein the parent did have some contact with the child, though not in the manner alleged by DYFS. These cases clearly would not warrant the use of a polygraph test.

However, in cases where the allegation is a single act of abuse and/or neglect, or where the parent clearly could not have committed the act alleged due to timing, location or other circumstances, defense counsel should strongly consider having the parent submit to a polygraph test. For instance, if the allegation is that the parent used physical force on a child, causing a fracture, the parent can be asked whether or not he or she used any force on the child whatsoever. If the allegation is that the parent induced shaken baby syndrome in an infant, the parent can be asked whether he or she ever shook his or her child.

If a parent 'passes' the polygraph test, the evidence should be submitted to the court with an application for return of the child, increased parenting time, unsupervised or less restrictive supervised access to the child, or any number of requests. Unfortunately, polygraph test results are not yet admissible as competent evidence, so they cannot be introduced at the fact-finding hearing.[29] However, a parent's passing a polygraph test certainly is relevant to the issue of whether or not he or she abused his or her child, and few pieces of evidence could arguably be more material. Thus, the test results can be considered for purposes other than fact-finding.

A limited exception to the rule barring introduction of polygraph test results exists where the court conducts an evidentiary hearing pursuant to N.J.R.E. 104(a). In such hearings, the Rules of Evidence do not apply, except for claims of privilege and N.J.R.E. 403 (probative value outweighed by prejudicial effect). Thus, if a 104(a) hearing is conducted in a fact-finding hearing, the test results may be used. For instance, in qualifying an expert to testify, the information upon which he or she relied in making conclusions is relevant to the issue of whether or not the professional has the expertise to be an expert in the case. Many in the mental health community have testified that they rely upon hearsay in making determinations. A polygraph test is no less hearsay than is a statement directly from the parent that he or she did not commit the act alleged. Thus, qualifying an expert may provide an opportunity to introduce polygraph test results.

There are other instances wherein polygraph test results may be admissible pursuant to the rules of evidence. Mental health experts may rely upon such evidence in

evaluating parents, in which case otherwise inadmissible evidence may be admissible.[30] By way of example, if the defense obtained a risk assessment early on in the case in support of the parent's request for a return of the child, the evaluator's report—or some portion of it—may be used at fact-finding on the issue of the parent's mental health. If the evaluator relied upon the polygraph test results in determining that the parent does not pose a risk to the child to warrant further supervision, he or she may testify about the polygraph test results if he or she posits that such test results are of a type "reasonably relied upon by experts."

It is important that defense counsel use every opportunity of persuasion available. The longer the case drags on, the longer the parent will be without his or her child, unless defense counsel is zealous in pursuing the parent's right to parenting time with the child. Every motion should provide a background of the matter, including a background of the removal and its impact on the parent and child. To every application, attach the polygraph test results. Just as DYFS can rely upon incompetent evidence at all stages of the case, except fact-finding, so, too, can and should defense counsel. Polygraph test results offer an ongoing opportunity for the parent to corroborate his or her innocence even before the state's case is presented through testimony, as well as during the case. Defense counsel should be creative in utilizing opportunities to advocate by use of polygraph tests.

CONCLUSION

The rules of evidence are the cornerstone of litigation, but particularly so in DYFS matters. As Judge Geoffrey Gaulkin so eloquently stated some four decades ago, "evidence upon which judgment is based [must] be as reliable as the circumstances permit and the answering parent [must] be given the fullest possible opportunity to test the reliability of the [state's] essential evidence by cross-examination".[31] Just as defense counsel must be adept at challenging the state's evidence through cross examination, so must defense counsel be intimately familiar with the rules of evidence, as well as the Title 9 evidence rules in order to accomplish justice for parents in these most trying matters. ■

ENDNOTES

1. N.J.S.A. 9:6-8.46(a).
2. N.J.S.A. 9:6-8.46(b).
3. N.J.S.A. 9:6-8.46(c).
4. *See,* Biunno Commentary to NJ.R.E. 102(a)(2).
5. *See,* Biunno Comment 1 to NJ.R.E. 102.
6. *See, New Jersey Div. of Youth v. L.A.,* 357 N.J. Super. 155, 166 (App. Div. 2003).
7. *New Jersey Div. of Youth & Fam. Services v. J.Y.*, 352 N.J. Super. 245, 264-265 (App. Div. 2002).
8. N.J.S.A. 9:6-8.46(c).
9. N.J.S.A. 9:6-8.46(b)(2) (In a fact-finding hearing, only competent, material and relevant evidence may be admitted).
10. N.J.S.A. 9:6-8.29.
11. N.J.S.A. 9:6-8.46(b)(1).
12. N.J.R.E. 405(b) provides, "Specific Instances of Conduct. When character or a trait of character of a person is an essential element of a charge, claim, or defense, evidence of specific instances of conduct may also be admitted."
13. Biunno, New Jersey Court Rules, Comment 405[5] (2010 GANN).
14. Id.
15. N.J.S.A. 9:6-8.46(a).
16. *In re D.T.,* 229 N.J. Super. 509 (App. Div. 1988).
17. *Id.* at 517.
18. *Division of Youth and Family Services v. J.L.*, 400 N.J. Super. 454, 457 (App. Div. 2008).
19. *Id.* at 471.
20. A copy can be obtained by subpoenaing the division. This is appropriate in any case in which a DYFS case worker will testify. The manual will provide relevant areas to probe as to policy, which is an appropriate inquiry as a condition precedent to admissible per N.J.R.E. 803(c)(6).
21. *Division of Youth and Family Services v. B.M.,* 413 N.J. Super. 118 (App. Div. 2010)
22. *Division of Youth and Family Services v. E.D.*, 233 N.J. Super. 401, 413 (App. Div. 2008).
23. *New Jersey Div. of Youth & Family Servs. v. Z.P.R.*, 351 N.J. Super. 427, 436 (App. Div. 2002).
24. *Id.*
25. *Id.*
26. *New Jersey Division of Youth and Family Services v. L.A.*, 357 N.J. Super. 155 (App. Div. 2003).
27. *New Jersey Division of Youth and Family Services v. H.B.*, 375 N.J. Super. 148 (App. Div. 2003).
28. Id. at 183-184.
29. *State v. A.O.*, 198 N.J. 69, 83, (2009), citing, *State v. Domicz*, 188 N.J. 285, 312-13 (2006).
30. *See, generally,* N.J.R.E. 703 (Bases of Opinion Testimony by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
31. *In re Guardianship of Cope*, 106 N.J. Super. 336 (App. Div. 1969).

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Effective Technique or Minefield

Calling the Adverse Spouse as Your Witness

by Jamie K. Von Ellen

If you have ever tried a family law case, it is likely that you have had this experience. Your trial is starting in about a month. You are beginning trial preparation. You are starting to get 'trial head'[1] and you are strategizing in your sleep. You are thinking: What is the most effective way to get certain facts in evidence; what facts are provable, what is still murky? A light bulb goes off in your head (figuratively). You think it may be risky, but you begin to consider: Can I call my client's spouse as my witness? Then: Should I call my client's spouse as my witness?

HISTORICAL ANALYSIS

A review of the pertinent statutes, case law and evidence rules in New Jersey shows that historically there was much controversy concerning whether and to what extent a calling party would be allowed to call the adverse party as a witness in a matrimonial case and if so, whether the calling party would be able to 'lead' his or her witness and whether he or she would be 'bound' by the testimony of the adverse party witness.

A leading question is defined as a question that "suggests what the answer should be or contains facts which in the circumstances can and should originate with the witness."[2] "Ordinarily, leading questions should be permitted on cross-examination."[3] Historically, this is because there is generally antagonism between examiner and witness. However, if such antagonism does not exist, the trial court has the discretion to not allow the examiner to lead the witness, even in the cross-examination phase of the testimony. For example, see *State v. Mance,*[4] where the Appellate Division ruled it was not improper for the trial court to refuse to allow leading questions upon cross-examination of a co-defendant who had not given any testimony adverse to the defense. Conversely, see *Greenberg v. Stanley*,[5] where the Supreme Court noted a party called to testify by an adverse party can be cross-examined by his or her own attorney. Ultimately, these cases teach us that the trial court has discretion in controlling the interrogation of witnesses. We cannot assume that leading will always be allowed on cross-examination but 'ordinarily' it should be allowed.

Prior to the enactment of the New Jersey Rules of Evidence, the only pronouncements on the issue of calling the adverse party as a witness were statutory. N.J.S.A. 2A:81-6 allowed for an adverse party to be called as a witness in most situations *except divorce*. It states:

> In all civil actions in any court of record a party shall be sworn and shall give evidence therein when called by the adverse party, but no party thereto shall be compelled to be sworn or give evidence in any action brought to recover a penalty or to enforce a forfeiture. *This section shall not apply to actions for divorce.* (emphasis added).

In addition, N.J.S.A. 2A:81-11 provides:

> Except as otherwise provide by law, when any party is called as a witness by the adverse party he shall be subject to the same rules as to examination and cross-examination as other witnesses.

As a result of these statutes, both of which date back to 1900, and neither of which have been repealed, it seems that calling the adverse party in a divorce action was not allowed. In all other matters, although allowed, since the same rules regarding examination and cross-examination applied whenever a party was called to testify by the

adverse party, there still remained substantial question whether the calling party would be allowed to ask leading questions of the adverse party on direct examination and whether the calling party would be 'bound' by the testimony given. The early answer seemed to be leading questions on direct examination would not be allowed and the calling party was bound by the testimony unless otherwise contradicted.[6]

The law in New Jersey later developed to allow leading questions on direct examination, within the discretion of the trial judge, as necessary to develop the witness's testimony "to avoid confusion, to clarify testimony, or otherwise to bring out the truth in serving the cause of justice."[7] Leading questions and the ability to impeach one's own witness also were allowed if the party calling the witness demonstrated that the witness was "hostile."[8] Once the witness was declared hostile, the attorney calling the witness would be granted "broad latitude" in the manner by which he or she conducted his or her examination.[9] However, the Appellate Division also held that a witness was not *per se* hostile simply because he or she was the adverse party if he or she had not testified in an unexpected manner or had not been uncooperative.[10]

Even after the developments in the case law as specified in the preceding paragraph, New Jersey law remained relatively archaic as compared to the Federal Rules of Evidence relating to this topic. The Federal Rule of Evidence 611(c) provided (and continues to provide):

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. *When a party calls* a hostile witness, *an adverse party*, or a witness identified with an adverse party, *interrogation may be by leading questions* (emphasis added).

In *Lehrman v. Lehrman*, Judge Conrad Krafte…held that an adverse party may be called, and reasoned that in any matrimonial case where the only way of reaching a resolution is a trial, the spouse was no doubt "antagonistic;" therefore, the witness was "hostile *per se*," thereby "triggering all concomitant means of examination permissible under the law."

Prior to the enactment of the current New Jersey Rules of Evidence, there were only two reported decisions in New Jersey on the subject of whether an adverse spouse could be called as a witness despite the apparent prohibition contained in N.J.S.A. 2A:81-6. In *Schaab v. Schaab*,[11] the wife was called to testify by the plaintiff husband's counsel. The court ruled that the wife testified voluntarily, and, therefore, the court did not fully rule on the applicability of N.J.S.A. 2A:81-6. Accordingly, this case did not provide much instruction.

It was not until 1990 that this issue was next raised in a reported case. In *Lehrman v. Lehrman*,[12] Judge Conrad Krafte was called upon to rule on whether a husband in a matrimonial matter could be called as a witness by the wife, and to what extent his testimony would be binding on the wife. Despite N.J.S.A. 2A:81-6, Judge Krafte noted that there was no statute specifically precluding calling an adverse party in a divorce action, and found no reason to disallow it.[13] He held that an adverse party may be called, and reasoned that in any matrimonial case where the only way of reaching a resolution is a trial, the spouse was no doubt "antagonistic;" therefore, the witness was "hostile *per se,*" thereby "triggering all concomitant means of examination permissible under the law."[14]

In *Lehrman*, Judge Krafte recognized the general rule at the time that the calling of an adverse party as a witness binds the calling party regarding the credibility and conclusiveness of the testimony.[15] However, he further recognized the need to modify or abrogate the harsh result that application of the general rule would produce when in the case of a hotly contested matrimonial action the information solicited is known solely by the other spouse. Citing *Becker v. Eisenstodt*,[16] Judge Krafte stated "…while many cases have stood for the proposition that a party is bound by the testimony of the witness called, 'such a rule, so broadly stated, ill serves the cause of justice.'"[17]

Judge Krafte noted Federal Rules of Evidence 611(c), which provided then (as now) that when "a party calls a hostile witness, *an adverse party*, or a witness identified with an adverse party, interrogation may be by leading questions" (emphasis added).[18] Judge Krafte was fully aware that New Jersey had not (at that time) adopted the federal rule. Nevertheless, in an effort "to attain a justifiable end commensurate with the fluid nature of the law, in general, and the growing complexity of divorce law, in particular," and "in order for plaintiff to glean as much factual information regarding defendant's income and marital assets so that an equitable decision can be

reached," the court allowed the wife's counsel to call the defendant to testify, and "the procedures that would restrict the plaintiff to direct examination and bind her by his testimony 'must yield to reason and common sense.' *Becker v. Eisenstodt, supra*, 60 N.J. Super. at 249."[19]

Judge Krafte concluded:

> Thus, it is well within the discretion of this court to permit the procedure where a party to a divorce action may be called by the opposition. Generally, a witness may not ordinarily be labeled as "hostile" merely because he is adverse when he has not been uncooperative nor testified in an unexpected manner. State v. Dwyer, 229 N.J. Super. 531, 552 A.2d 200 (App. Div. 1989). However, *divorce actions do not reach trial unless and, in fact, no agreement can be attained without the intervention of the court. The parties are as "adversarial" and as "hostile" as the non-legal definitions of those terms would import. The litigants clearly would not testify for the other on a purely voluntary basis*. Under such circumstances, in a divorce action a court may declare the adverse party witness "*hostile per se*" and *may grant the other party the "broad latitude" to examine the witness through the use of cross examination, and, as such, will not be bound by such testimony* (emphasis added).[20]

Lehrman is the only reported case in New Jersey to have dealt specifically with this issue. Three years after *Lehrman*, New Jersey enacted the current rules of evidence, which brought the New Jersey rules more in line with the Federal Rules of Evidence, and then left no question regarding whether the adverse spouse could be called, whether leading questions would be allowed, or whether the calling party would be bound by the testimony.

THE PRESENT RULES

On July 1, 1993, the current New Jersey Rules of Evidence became effective. Rule 611 provides as follows:

> **Mode and Order of Interrogation and Presentation**
>
> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) Scope of cross examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
>
> (c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. *When a party calls an adverse party* or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, *interrogation may be by leading questions, subject to the discretion of the court* (emphasis added).

The New Jersey Rule 611(c) follows the federal Rule 611(c) almost verbatim, except it adds "unresponsiveness" as a basis for allowing leading questions and it substitutes "when a witness demonstrates hostility" for the term "hostile witness" as stated in the federal counterpart. Thus, for all intents and purposes, it is now clear that in New Jersey, in matrimonial cases as well as any other litigation, an adverse party can be called as a witness, leading questions are permissible, and the calling party is not bound by the testimony.[21]

Knowing that you *can* call the adverse spouse as your witness should certainly not be the end of your analysis. The next question is:

SHOULD THE ADVERSE PARTY BE CALLED AS A WITNESS

The answer to this question is: Maybe, but only when there is a specific purpose to be served. In general, the type of purpose you may seek to achieve is for example, when the adverse spouse is possessed of information required or useful in your case in chief; when you believe the adverse party can be discredited early on in the case; or, when his or her testimony can help to establish your theory of the case at the outset. Furthermore, once it has been determined that it may be effective or necessary to develop an aspect of your case through the adverse spouse, you must also consider the likelihood of your adversary being allowed to then 'cross-examine' his or her client and develop his or her theory of the case in this manner. In other words, as with all other trial strategy, all angles must be considered before deciding whether the potential advantages outweigh the potential disadvantages.

The question becomes: Under what circumstances is it necessary or advisable to engage in this potentially risky trial practice? Although various articles have been written on this topic in general practice,[22] none have been found that relate to matrimonial or family practice specifically. After speaking with many of the 'icons' of our practice, the consensus is, in general, there seem to be five basic categories of information/purposes an attorney might seek to develop or achieve as a result of calling the adverse spouse. They are:

1. The introduction of financial information in the possession of the adverse spouse, which would not otherwise be known or knowable.
2. To obtain, at the outset, favorable admissions from the adverse spouse (*i.e.*, getting him or her to agree with certain facts support-

ing your theory of the case).
3. To discredit the credibility of the adverse spouse.
4. To show that the adverse spouse did not comply with court orders or discovery.
5. To impeach the adverse spouse with his or her prior inconsistent statements.

When any of these potential goals exist in your case, the real question is when to attempt to develop them by calling the adverse spouse as your witness and when it would be better strategy to do so in the normal course (*i.e*, after his or her direct testimony). Certainly, you almost must call the adverse spouse if he or she is the only person who can testify to certain financial information. If you do not call that party on your case-in-chief, and if the information is necessary as an element of your case, you risk the court granting your opponent's motion for judgment at the close of your case.[23] An example of the type of situation where the adverse spouse's testimony is a necessary element of the plaintiff's case would be a post-divorce support reduction matter where the plaintiff's application is based, in whole or in part, on a substantial increase in the payee spouse's income that occurred subsequent to the time of divorce.

Other possible legitimate purposes to be served by calling the other party as your witness are if you seek to bring out the weaknesses in the adverse party's case in an effort to establish or solidify the court's impressions of the case or possibly to promote the court to initiate or continue settlement discussions. There is also merit to putting the adverse spouse on the stand if you believe your client will not make a good witness and do not want the court's first impressions of the case to be through your client's testimony.

However, regardless of your purpose, before deciding whether to call the adverse spouse, you must keep in mind the limitations on the neutralization of the testimony of one's own witness and the use of prior inconsistent statements of one's own witness as provided in Rules 607 and 803, respectively.

Rule 607 provides:

> **Credibility and Neutralization**
> Except as otherwise provided by Rules 405 and 608, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility, *except that the party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless the statement is in a form admissible under Rule 803(a)(1) or the judge finds that the party calling the witness was surprised.* A prior consistent statement shall not be admitted to support the credibility of a witness except to rebut an express or implied charge against the witness of recent fabrication or of improper influence or motive and except as otherwise provided by the law of evidence (emphasis added).

Rule 803(a)(1) is an exception to the hearsay rule and provides as follows:

> **Prior Statements of Witnesses.**
> A statement previously made by a person who is a witness at a trial or hearing, provided it would have been admissible if made by the declarant while testifying and the statement:
>
> (1) is inconsistent with the witness' testimony at the trial or hearing and is offered in compliance with Rule 613. However, *when the statement is offered by the party calling the witness, it is admissible only if, in addition to the foregoing requirements, it (A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition...* (emphasis added).

The sum and substance of a combined reading of Rules 611(c), 607 and 608(a)(1) is that if you are going to call the adverse party as your witness, and in the event your purpose is to neutralize testimony or impeach by use of a prior contradictory statement, the proffered prior statement must be either in a sound recording, a writing made or signed by the witness in circumstances establishing its reliability or given under oath, or the judge must find that the calling party was surprised.[24] In essence, if the defendant's testimony is anything other than favorable, you must already have a specified form of reliable evidence from which to impeach him or her or this technique will surely backfire.

By way of illustration: The wife's attorney calls the husband as a witness. The attorney strategizes that this is good practice because the husband previously told the wife that he was seeking custody of the children solely as a means to avoid paying child support. The wife's attorney asks the husband: "Is it not true that you are seeking custody solely as a means to avoid paying child support?" The husband answers: "That is absolutely untrue. I would never say such a thing." The wife's attorney could then seek to neutralize with: "Is it not true that on such and such a day, that is precisely what you told your wife?"

Resulting in nothing other than he said, she said, not only is this line of questioning ineffective, but the question "is it not true that is what you told your wife" is objectionable because a party calling a witness cannot neutralize the testimony of a witness by a prior contradictory statement pursuant to Rule 607 "unless the statement is in a form admissible under Rule 803(a)(1) or the judge finds that the party calling the witness was surprised." It is not at all surprising that the husband denied making the alleged statement. Accordingly, without more, the question is impermissible. On the other hand, if the wife

has a tape recording of the husband's statement, it is a whole different ball game. The wife has not only proven that the husband's desire for custody is driven by his pocketbook, but she has also destroyed the husband's credibility. The moral to the story: Without the tape, do not bother; with the tape, it is a home run.

It seems that neutralization by the calling party is permissible only when it would be most effective.[25] As with the prior example, it is impermissible, as well as ineffective, to engage in a line of questioning and then ask questions such as: Did you not understate your income on your tax returns? (Unless you have the second set of books in a writing made by the defendant for follow-up questioning.) Is it not true you lied on your mortgage application? (Unless you have the signed mortgage application.) Did you not previously represent to the court in your prior divorce…? (Unless you have a transcript or certification signed by the witness relating to the issue raised.) Conversely, after the defendant's denial that he pushed the plaintiff and caused her injury, asking the question: Is it not true that plaintiff was bruised as a result of the incident?—even with a photo of the bruise—would be considered improper questioning of a witness you have called, since photographs are not listed in Rule 803(a)(1) as an exception to the hearsay rule.

Of course, and quite important in deciding whether to call the adverse party as your witness, any of these types of questions are permissible on cross-examination. Therefore, if you need to neutralize through the use of prior contradictory statements, and in the event you are not certain that the court will find you were surprised, and in the event you do not have one of the few forms of prior inconsistent statements specified in Rule 803(a)(1)—DO NOT CALL THE ADVERSE PARTY AS YOUR WITNESS! Be patient—you will undoubtedly have the opportunity to raise your issues and attempt to neutralize or impeach when you cross-examine the witness.

Following are some helpful dos and don'ts on this topic:

Do: Decide at the outset if you believe it would be advantageous to be the plaintiff or defendant in the case. If the case looks like one where you would like the option to call the other party as your witness, it is best to be the plaintiff. However, the contrary position is that being the defendant is often advantageous as you then will have the opportunity to adjust your approach after the plaintiff's case has been presented.

Do: Always include "parties to the suit" in your list of potential witnesses when answering interrogatories, to ensure that your right to call the adverse party is preserved.

Do: Serve your adversary with a trial notice in lieu of subpoena, pursuant to N.J. Court Rule 1:9-1, if you have not listed "parties to the suit" in your list of potential witnesses, to ensure that an objection based on lack of notice will not be sustained.

Do: Be prepared to meet any objections. Many opposing counsel will be surprised when they hear their client's name called as your witness. If for no other reason than to allow his or her client an opportunity to recover, opposing counsel will likely object to the client being called on your direct case. Have a copy and be prepared to cite New Jersey Rules of Evidence 611(c), as well as *Lehrman, supra*, for good measure. If you did not list "parties to the suit" as potential witnesses in your answers to interrogatories, and also did not serve a trial notice in lieu of subpoena, your adversary may have a legitimate objection.

Do: Use this technique judiciously and only for specific and good reasons. Have a plan and a purpose. Only inquire into the lines of questioning that you can develop to your client's advantage. You may only have one point you seek to make. If you only have one zinger, use it and then sit down. If you have a point or points that will expose the weakness of the adverse party's case, question him or her on those topics only.

Do: Call the adverse spouse as your witness if his or her testimony on an essential element of your case will increase the likelihood of the court denying your opponent's anticipated motion for judgment after the close of your case (*see* Rule 4:40-1).

Do: Call the adverse spouse as your witness if his or her testimony is likely to prove an element of your case, such as when he or she is possessed of certain facts or information otherwise not known or knowable.

Do: Call the adverse spouse as your witness in an effort to streamline proceedings, such as avoiding having to call third-party witnesses, which may occur when you already have the deposition testimony of the witnesses and you believe the defendant will testify consistent with what the witnesses have already said. If you are correct, and the defendant does testify consistent with what the third parties stated in their depositions, you may be able to dispense with having to call the third parties at the trial.

Do: Use this technique if the defendant has been non-compliant with discovery or court orders. It is effective to get this information in the mind of the court at the outset, because most judges will generally not favor the contumacious spouse and also to establish your client's entitlement to counsel fees, pursuant to Rule 5:3-5(c).

Do: Call the adverse party as your witness when you need him or her to first deny a fact in order for you to be able to introduce an otherwise inadmissible or otherwise ineffective tape, photo or writing into evidence. By way of example: The husband seeks custody and claims the wife is a neglectful parent. The wife has provided you with five years of

Mother's Day and birthday cards from the husband, within which he pronounces her virtues as a mom. Although admissible through your client ("These are the cards he gave me."), it would be far more effective to introduce the cards through the husband with a line of questioning such as: "You seek custody and claim that your wife has been neglectful of the children?" "As a good father, witnessing her neglectfulness over the years, you have done your best to influence her to change her behavior?" "Would you ever encourage her to simply stay the same?" "Would you tell her she was a great mom?" You then show husband the cards he gave her praising her as a mother.

Do: State that you have no other questions for this witness at this time after you have questioned the adverse party on the specific issues you have prepared, but reserve the right to cross-examine if he or she is called on direct.

Do: Be succinct and skillful. Use short questions. (*See* N.J.R.E. 611 comment 1, pg. 562, cautioning against the use of misleading or compound questions).

Do: Prepare your client for the possibility he or she may be called as a witness by the plaintiff's counsel if you represent the defendant.

Do: Prepare your line of questioning for your own client prior to the time of trial if you are representing the defendant. If your adversary calls your client to testify, you may be in a position to cross-examine your client throughthe use of leading questions, and if properly prepared, may be in a position to serve a serious blow to the plaintiff's case.

Do: As plaintiff's counsel, understand the substantial risk involved in giving your opponent the opportunity to cross-examine his or her own client. Ask yourself if calling the adverse spouse on your direct case is worth the risk of your opponent being able to lead his or her client through their theory of the case.

Do: Have copies of and be prepared to cite *Greenberg v. Stanley*,[26] and N.J.S.A. 2A:81-11—if your client was called by plaintiff's counsel and you then want to lead your client through a cross-examination—for the proposition that the same rules of examination and cross-examination apply when a party is called as a witness by the adverse party and that our Supreme Court has recognized that a party called by the adverse party may be cross-examined by his or her own attorney.

Do: Be prepared to object and cite *State v. Mance*,[27]—if you call the adverse spouse, and your adversary then attempts to lead his or her client through cross-examination—for the proposition that since antagonism is not present, leading should not be allowed as Rule 611(c) provides "*ordinarily*, leading questions *should* be permitted on cross examination" (emphasis added) and accordingly, the Court has the discretion to not allow same.

Do: Understand that if you call the adverse spouse as a witness, he or she will have the opportunity to testify twice.

Don't: Give an open-ended forum. Limit the testimony on direct to ensure that the cross-examination by the witness's counsel will be limited to the topics addressed on direct only.

Don't: Believe that your adversary is bound by what his or her client stated on direct. Know that your adversary will have the opportunity to rehabilitate his or her client's testimony.

Don't: Engage in this technique for purposes of impeaching an adverse party with a prior inconsistent statement unless you have the goods (*i.e.*, deposition testimony, written documents or sound recording, as specified in Rule 803(a)(1)).

Don't: Feel compelled to cross-examine your client if representing the defendant who has been called to testify by the plaintiff. If you are not prepared to question your client at the time, or if you believe you will not be able to rehabilitate your client, you can reserve and then question your client on direct.

Don't: Give away the element of surprise. Unless you have to serve a trial notice in lieu of subpoena, do not even tell your client in advance that you intend to call his or her spouse on direct. It may get back to others.

Don't: Be gimmicky. If you are contemplating calling the adverse spouse because you think it is fun or exciting, refrain. Do not do anything without specific purpose.

Don't: Disregard the potential that by calling his or her client on your direct you have opened the door for your adversary to cross-examine his or her client, thereby affording him or her the opportunity to establish his or her theory of the case by leading the client through a carefully prepared cross-examination.

CONCLUSION

It is hoped that this article will be of assistance to those readers who have heretofore been less familiar with the evidence rules relating to calling the adverse spouse as a witness as well as the potential purposes to be served by doing so and the possible risks inherent in the practice. Bottom line: Calling the adverse spouse may be an effective technique depending on the actual facts and circumstances of your case and also depending on the specific purpose intended to be served. But be careful, this is potentially risky trial practice. ■

ENDNOTES

1. The phrase the author uses for when the author cannot think of anything else.
2. *State v. Abbott*, 36 N.J. 63, 79 (1961).
3. N.J.R.E. 611.
4. *State v. Mance*, 300 N.J. Super. 37, 62 (App. Div. 1997).
5. *Greenberg v. Stanley*, 30 N.J. 485 (1959).
6. *Krafte v. Belfus*, 114 N.J. Eq. 207 (1933).

7. *Nobero Co. v. Ferro Trucking, Inc.,* 107 N.J. Super. 394, 404 (App. Div. 1969).
8. *State v. Rajnai*, 132 N.J. Super. 530, 541 (App. Div.1975).
9. *Lyons v. Camden*, 48 N.J. 524 (1967).
10. *State v. Dwyer*, 229 N.J. Super. 531, 537 (App. Div. 1989).
11. *Schaab v. Schaab*, 66 N.J. Eq. 334 (1904).
12. *Lehrman v. Lehrman*, 248 N.J. Super. 312 (Ch. Div. 1990).
13. The author is unable to reconcile N.J.S.A. 2A:81-6 with Judge Krafte's pronouncement that there was no statute specifically precluding calling an adverse party as a witness in a divorce action.
14. *Id.* at 313.
15. N.J.S.A. 2A:81-11.
16. *Becker v. Eisenstodt*, 60 N.J. Super. 240, 248 (App. Div. 1960).
17. *Id*. at 316.
18. *Id.*
19. *Id.* at 317.
20. *Id.* at 318.
21. The rules of evidence have clearly rendered N.J.S.A. 2A:81-6 and 2A:81-11 impotent. Nevertheless, these laws remain on the books.
22. *See*, for example, Stern, "The Adverse Party as Your Witness," *The New Jersey Trial Lawyer* (August 1988) and Lenahan, "Consequences of Calling an Adverse Party as a Witness" *New Jersey Lawyer* (February 1986, Winter Issue).
23. *See* Rule 4:40-1.
24. Notable, although it is said that a picture is worth a thousand words, photographs are not mentioned in Rule 803(a)(1).
25. For the younger or less experienced lawyers, it is important to remember that it is best to put together a line of questions that set the stage and pin down the witness before attempting impeachment or neutralization. This locks the witness into what he or she has previously said or represented. An example of such a line of questioning might be: "Is this your signature on the tax return?" "By signing, you swore to the accuracy of the information to the best of your knowledge and belief; you signed under penalty of perjury; you supplied your accountant with the income figures as stated in this return; you intended the information to be complete and accurate; you intended the return to fully reflect your income as is required by law?" After these questions, you can then get to the crux of the issue (*i.e.*, demonstrate the inconsistency with what has previously been said or represented).
26. *Greenberg v. Stanley*, 30 N.J. 485 (1959) and N.J.S.A. 2A:81-11.
27. *State v. Mance*, 300 N.J. Super. 37 (App. Div. 1997).

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Book Review

NEW JERSEY FAMILY LAW (2ND ED.)
Alan M. Grosman and Cary B. Cheifetz
LexisNexis, 2010

The second edition of *New Jersey Family Law,* by Alan M. Grosman and Cary B. Cheifetz, offers a comprehensive survey of family law litigation in New Jersey. Grosman and Cheifetz provide a reference book that is clear, concise and approachable. Chapters are organized according to general subject, such as "Marriage and Same-Sex Unions" and "Adoption." Within those broad topics, the authors have created subsections, such as "Common Law Marriage." Controlling statutory authority and case law references are provided throughout, greatly simplifying the research process for a particular issue.

The breadth of the coverage in *New Jersey Family Law* is a testament to the substantial experience of the authors as family law practitioners. The target audience is family law professionals, and many practice tips are included. However, because of the intuitive organization of each topic, and the accessible writing style, non-attorneys will also find *New Jersey Family Law* a valuable guide for navigating the many emotionally charged issues that are dealt with in family courts throughout the state.

Another benefit for family law attorneys is the inclusion of a cd-rom containing dozens of sample forms and pleadings. These time-saving documents will be of benefit to attorneys as well as their clients.

Reviewed by
Madeline Marzano-Lesnevich

In Calculating Alimony and Child Support—Don't Forget the 'Perks'

by Israel S. Wahrman

Everyone knows that a party's income is used when calculating alimony and child support, but what is sometimes overlooked when applying a party's income is the 'perks' such as the company car, the employer's contribution to the party's health insurance, cell phone contribution by the company, free meals, gas/tolls/mileage, sports/theater tickets, gym membership, and car service, just to name a few. When determining how much the obligor must pay to the obligee in calculating child support and/or alimony, the definition of "income" must be expanded beyond the party's base salary. New Jersey law requires that income include fringe benefits, or perquisites (perks). In many cases, fringe benefits are overlooked or ignored by attorneys, even though they may represent a substantial percentage of the obligor's or obligee's remuneration. Perquisites, therefore, are important in determining both alimony and child support, and these perks are relevant not just for determining the income of the obligor, but for determining the income of the obligee as well.

In determining the appropriate amount of alimony to be applied, N.J.S.A. 2A:34-23 lists 13 factors to be considered. Among these factors is "the actual need and ability of the parties to pay" (factor 1). In determining the appropriate amount of child support to be applied, the New Jersey Court Rules[1] list many sources of income, including "the value of in-kind benefits." The rule defines "in-kind income" as the "fair market value of goods, services, or benefits received in lieu of wages…if they reduce personal living expenses of the recipient regardless of whether they are derived from an employer, self-employment, or the operation of a business." The rule provides the following examples: "vehicles, automobile insurance, free housing, meals, benefits selected under a cafeteria plan, memberships, or vacations."

Case law in New Jersey, and in other states, has supported the use of fringe benefits in calculating alimony and child support. In fact, the official Child Support Guidelines computer program, used by all law clerks in the family part throughout New Jersey, includes a space to enter the value of in-kind income, a space generally left blank by attorneys.

Case law in New Jersey, and in other states, has supported the use of fringe benefits in calculating alimony and child support. In fact, the official Child Support Guidelines computer program, used by all law clerks in the family part throughout New Jersey, includes a space to enter the value of in-kind income, a space generally left blank by attorneys.

The Appellate Division, in *Monte v. Monte,*[2] has concluded that the "general considerations in determining alimony and support are the dependent spouse's needs, the dependent spouse's ability to contribute fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard."

In *Grayer v. Grayer*,[3] the court considered fringe benefits relevant to both the alimony and child support determination. The trial court in *Grayer*[4] considered the following fringe benefits: "use of an automobile and the total cost of maintaining and operating it, substantial entertainment paid by the corporation, including season tickets for professional football team, and payment by the corporation of all medical expenses and life insurance protection." In addition, the trial court considered expensive vacations paid by the employer, as well as "the availability to the parties during the time they lived together of substantial amounts of additional cash…[beyond which the] income tax figures would suggest." The Appellate Division made no determination regarding whether the fringe benefits reviewed by the trial court, and ultimately added back to that party's "income," were appropriate. Instead, the Appellate Division simply remanded the case back to the trial judge, instructing the judge to "express findings as to the parties' respective needs and reasonable financial expectations."

In determining what fringe benefits should appropriately be considered as an add-back to a party's income, Gary N. Skoloff and Laurence J. Cutler, in *New Jersey Family Law and Practice*, state that fringe benefits "may to some degree be considered as part of the payor's disposable income."[5] They give as examples the use and maintenance of an automobile, travel and entertainment expenses. Nevertheless, Skoloff and Cutler state that "the replacement value of the more usual benefits such as medical or life insurance, are not usually imputed to the payor's income."[6] However, they do not provide case law, statutes or other evidence to support this statement. Some cases have stated that the employer's contribution toward a party's medical and life insurance is a relevant fringe benefit to be added back to one's income when determining support.

Fringe benefits can make a significant difference in determining the marital lifestyle. In *Steneken v. Steneken*,[7] the Appellate Division stated that actual income plus perquisites "funded the upper middle-class lifestyle enjoyed by the parties throughout their marriage." The *Steneken* court cited *Crews v. Crews,*[8] in which the New Jersey Supreme Court stated that "the marital standard of living is the measure for assessing the initial awards of alimony, as well as for reviewing any motion to modify such awards."

In *Kulakowski v. Kulakowski*,[9] the wife sought alimony from her husband. The husband's base income was $49,500 gross when the complaint for divorce was filed, and his annual salary was increased to $52,000 during the litigation. However, after adding back the husband's 'perks' to his income, such as guaranteed minimum annual bonus; his company vehicle, which was maintained by the company; and a monthly expense account, the court concluded the husband's total income exceeded $90,000 for determining alimony and child support.

The Appellate Division court looked at "reported or unreported" additional income earned by a medical doctor for treating certain patients, and "perquisites received from his medical practice" in *Christopher v. Christopher.*[10] In *Valente v. Valente,*[111] business perquisites, including membership in a country club and tennis club, were considered in determining the nature of the "high end and enviable marital lifestyle." In *Casole v. Casole*,[12] the court noted that "if necessary, a hearing should be conducted concerning defendant's actual income [and] the value of perquisites and benefits..." In *Casole*, adding business reimbursements to the party's income had the effect of raising income from $150,000 to $200,000.[13] In *Jones v. Duch*,[14] perquisites added $23,592 back to a party's income.

The Appellate Division included "a Jeep, gasoline expenses for the Jeep and plaintiff's Honda, a clothing allowance, cell phones, and insurance for the Jeep" as business perquisites in *Stille v. Stille*.[15] Interestingly, the court also factored in money provided to the parties by family members. The Appellate Division stated, "given the family's history of providing financial assistance to the parties, the judge could reasonably conclude that the family continued to make additional monies available to defendant to meet the parties' marital expenses."[16]

In *Horowitz v. Horowitz*,[17] the Appellate Division relied upon the view of the lower court that distinguished between that which is deductible for income tax purposes and that which is available for the purpose of calculating alimony obligations. With regard to alimony, the court opined:

> It is a general rule that income and expense from the operation of a business should be carefully reviewed to determine adjusted gross earned income to pay alimony. Specifically excluded from ordinary and necessary expenses for support purposes would be (1) home office; (2) travel; (3) automobile; and (4) any other business expenses the court finds to be inappropriate for determining gross income for support purposes.[18]

In a 2005 case, the Appellate Division also included severance pay in calculating income, and stated that severance pay "may not be distributable, but can be used to measure a parent's ability to pay support..."[19] Case law in other states similarly allow for including fringe benefits in calculating income to determine alimony and child support.[20]

As set forth in *Horowitz*,[21] it is not enough to say that a specific perk must be added back to determine the family's income. Rather, an inquiry is needed to determine whether, in each case, the perquisite contributes to the available income *and* affects the family's lifestyle, as opposed to an alleged perk that is really just a part of the business activity, and therefore should not be included in calculating the family income.

As Skoloff and Cutler[22] noted, automobile travel and entertainment expenses would appear to qualify. It would appear that club memberships, clothing allowances, cell phones, support from one's family, as well as many other perquisites that can contribute to the overall family lifestyle qualify as perks to be added back to one's income for determining support.

In *Re the Marriage of Churchill*,[23] the Iowa appellate court utilized the Black's Law Dictionary definition of fringe benefits, which included insurance. The court therefore reasoned that the employer's contribution to health insurance did constitute a fringe benefit. With regard to the cost of medical insurance and life insurance, and whether they should be considered perks in New Jersey, although the court in *Grayor* considered them perks, the Appellate Division did not make a bright-line determination that they should be considered automatic perks that are added back to

increase one's income.

On the other hand, Appendix IX-B of the New Jersey Court Rules[24] provides that "in-kind income" should be included as gross income. Appendix IX-B does not specifically list the employer's contribution to medical or life insurance. However, one can reasonably argue that this cost should be considered in-kind income, and thus should be added back as a perk. It remains to be seen if New Jersey courts will uphold the employer's payment of health insurance premiums on behalf of an employee as a perk to be added back to income when calculating alimony and child support.

Many attorneys ignore fringe benefits when calculating a party's income for the purpose of determining alimony and/or child support. Whether at attorney represents the party seeking support or the party from whom funds are sought, he or she should not overlook fringe benefits. Statutes, rules and case law are consistent, in New Jersey and around the country, that fringe benefits are fair game when determining a party's income. While in some cases the effect of the fringe benefits may minimally affect that party's income, there is no doubt that in some cases the value of fringe benefits may be quite substantial.

It is possible that, as attorneys pay greater attention to adding fringe benefits to a party's income for support purposes, this may become yet another area of potential contention among the family law attorneys and judges. There may be disputes regarding the value of a particular fringe benefit and whether a particular expense should even be considered a fringe benefit at all. Nevertheless, as advocates for our clients, attorneys must examine and utilize fringe benefits in calculating income for determining support, as their inclusion could make a meaningful and significant difference in the amount of alimony and child support owed. Fringe benefits should, therefore, not be ignored. ■

ENDNOTES

1. Pressler, Current N.J. Court Rules, Appendix IX-B (2010).
2. *Monte v. Monte*, 212 N.J. Super. 557 (App. Div. 1986).
3. *Grayer v. Grayer*, 147 N.J. Super. 513, 517-518 (App. Div. 1977).
4. *Id.*
5. Gary N. Skoloff and Laurence J. Cutler, *New Jersey Family Law and Practice* (13th ed. 2008), 5:103.
6. *Id*.
7. *Steneken v. Steneken*, 367 N.J. Super. 427, 421 (App. Div. 2004).
8. *Crews v. Crews*, 164 N.J. 11 (2000).
9. *Kulakowski v. Kulakowski*, 191 N.J. Super. 609, 612 (Ch. Div. 1982).
10. *Christopher v. Christopher*, 2009 N.J. Super. Unpub. LEXIS 1761 (App. Div. 2009).
11. *Valente v. Valente*, 2009 N.J. Super. Unpub. LEXIS 331 (App. Div. 2009).
12. *Casole v. Casole*, 2008 N.J. Super. Unpub. LEXIS 2585, 1.
13. *See Id*.
14. *Jones v. Duch*, 2007 N.J. Super. Unpub. LEXIS 204 (App. Div. 2007).
15. *Stille v. Stille*, 2007 N.J. Super. Unpub. LEXIS 641, 6-7 (App. Div. 2007).
16. *Id*.
17. *Horowitz v. Horowitz*, 2005 N.J. Super. Unpub. LEXIS 242 (App. Div. 2005).
18. *Id*.
19. *Robertson v. Robertson*, 381 N.J. Super. 199, 209 (App. Div. 2005).
20. *See Curtis v. Curtis*, 1998 Conn. Super. LEXIS 3019, 1-2 (Conn. Super. Ct. 1998) (the court included certain fringe benefits when determining income for the purpose of calculating child support and alimony); *see Bassett v. Bassett*, 459 So.2d 473, 475 (Fla. 2ND ca 1984) (in determining alimony, the court considered the fact that the husband's employer provided him with an automobile, expense account, and other fringe benefits); *see Re Marriage of Patterson*, 2007 Iowa. App. LEXIS 98, 23-24 (Iowa Ct. App. 2007) (the district court's reduction of wife's alimony was upheld, noting that the wife received income plus "substantial fringe benefits").
21. *See Horowitz*, 2005 N.J. Super. Unpub. LEXIS 242.
22. *See* Gary N. Skoloff and Laurence J. Cutler, *New Jersey Family Law and Practice* (13th ed. 2008), 5:103.
23. *Re the Marriage of Churchill*, 2002 Iowa. App. LEXIS 7, 8-9 (Iowa. Ct. App. 2002).
24. Pressler, Current N.J. Court Rules, Appendix IX-B at page 2409 (2010).

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Legal Custody in the 21st Century

Parents' Rights to Make Decisions About Children's Presence and Participation in the Internet

by Amanda S. Trigg

Throughout the state of New Jersey, in families of all sizes and socio-economic status, parents face decisions about their children and the vast web of available technology. Among those difficult decisions is the question of whether children should have access to the Internet, and, if so, how much access and by what means. As always, divorcing parents bring different, and sometimes divergent, perspectives to the process of making such decisions. In the face of all the new technologies that touch children, incorporating these issues into the definition of legal custody provides clarity for the divided family.

N.J.S.A. 9:2-4 requires the entry of a custody order addressing provisions for how the parents will make the "major decisions regarding the child's health, education and general welfare."[1] In contested custody cases parents must file a custody and parenting time/ visitation plan, which must include, among other information and proposals, how each parent proposes to arrange "participation in making decisions regarding the child(ren)."[2] Decisions within the scope of a custody plan include "'major' decisions regarding the child's welfare."[3] Traditionally, these include medical treatment and education,[4] religious upbringing and training,[5] and the child's surname.[6] In practice, parents frequently include child care and sometimes extracurricular activities[7] as major decisions.

The common denominator for all such major decisions is that to foster the best interests of a child one must protect the "safety, happiness, physical, mental and moral welfare of the child."[8] In 2010, children literally walk around with the Internet in their pockets, holding access to seemingly unlimited amounts of information on their iTouch or Nintendo DSi. In turn, strangers have access to children via the Internet.

Twenty-five years ago, in prescient *dicta* of *Wilke v. Culp*, the Appellate Division observed that "People are what they are for good or for bad, but unfortunately may influence others whose lives they touch in subtle ways which are not necessarily in their best interests."[9] In 2010, the same can be said of the influences found on the Internet.

Internet safety constitutes a *bona fide* area of parental concern, as evidenced by the fact that the United States Department of Justice, Federal Bureau of Investigations, publishes "A Parent's Guide to Internet Safety."[10] Furthermore, the United States' Congress has enacted the Children's Online Privacy Protection Act (COPPA)[11] under the umbrella of the Electronic Privacy Information Center.[12]

The intent of COPPA is to protect the privacy of children under the age of 13 by requesting parental consent for the collection or use of any personal information of the users. Any commercial websites or online services targeted toward children must acquire verifiable parental consent prior to collecting any personal information from a child under the age of 13, and must also disclose to parents any information collected from children by the website. Unfortunately, COPPA does not apply to general audience websites, and it draws an arbitrary line between teenagers and younger children by establishing the age of 13 as sufficiently adult to use websites without parental consent. Despite the good intention of increasing parental involvement with children's Internet activities, COPPA simply does not relieve parents of the duty of monitoring and controlling online activity. It does, however, raise the question of

which parent may give consent when requested by a child.

Internet access will be a constant issue at the homes of both parents, and therefore cannot properly be considered a minor or "day-to-day" decision to be determined by the residential parent on any given day. As of yet, however, New Jersey case law has not been expanded to expressly include the issue among "major" decisions. Therefore, unless a custody and parenting time/visitation plan contains provisions that make Internet access a major decision, and expressly defines the process for making such decisions, it is reasonable to anticipate that the parent of primary residence will receive deference because in other areas of decision making, the parent of primary residence tends to be afforded deference to decide issues in the event of disagreement.[13]

This deference even has extended into areas of major decisions. For example, in *Feldman v. Feldman*,[14] the Appellate Division held that, in light of the absence of any agreement on the subject of religious upbringing and education of the children, the primary caretaker had sole authority to decide the religious upbringing of the children and the secondary caretaker was not to enroll the children in different religious training over the primary caretaker's objection. Similarly, when a primary caretaker seeks to name, or change the surname, of a child, there is a rebuttable presumption in favor of the primary caretaker that the name selected is in the best interests of the child.[15]

As parenting responsibilities change, custody agreements and orders must evolve as well. A general designation of joint legal custody likely will not suffice to force the parents to jointly decide how their children will access and utilize the Internet. Rather, silence on these technological issues may afford more authority to the primary residential parent to decide such issues in the event of a disagreement. Accordingly, for parenting in 2010 and beyond, any custody and parenting time/visitation plan should include detailed proposals about how separating or divorcing parents will make decisions for their child, including, as examples, the following:

- What criteria to follow for deciding whether and when a child should have access to the Internet;
- What methods of Internet access the parents will permit;
- What parental controls the parents will impose on any Internet-access device;
- What supervision the parents will provide over the child's access to the Internet;
- Which parent may give consent to a child's use of the Internet and what notice should be given to the other parent;
- If both parents must consent, how that consent will be arranged and documented

As always in family law, new problems require new innovations, and since the Internet is seemingly here to stay, we must innovate and prepare our custody plans to assist our 21st century clientele. ■

ENDNOTES

1. N.J.S.A. 9:2-4(a) (2009).
2. Pressler, Current N.J. Court Rules, (Gann), R. 5:8-5(a)(7).
3. *Beck v. Beck*, 86 N.J. 480, 487 (1981).
4. *Brzozowski v. Brzozowski*, 265 N.J. Super. 141 (Ch. Div. 1993).
5. *Feldman v. Feldman*, 378 N.J. Super. 83 (App. Div. 2005).
6. *Ronan v. Adely*, 182 N.J. 103 (2004).
7. *Beck, supra*, at 497.
8. *Citing Fantony v. Fantony*, 21 N.J. 525, 536 (1956).
9. *Wilke v. Culpe*, 196 N.J. Super. 487, 495-6 (1984).
10. http://www.fbi.gov/publications/pguide/pguidee.htm.
11. 15 U.S.C. § 6501–6506 (1998).
12. http://epic.org/privacy/kids.
13. *Pascale v. Pascale*, 140 N.J. 583, 606 (1995), *citing Brzozoski v. Brzozoski*, 265 N.J. Super. 141, 147 (Ch. Div. 1993).
14. *Feldman v. Feldman,* 378 N.J. Super. 83 (App. Div. 2005).
15. *Ronan v. Adely*, 182 N.J. 103 (2004).

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