New Jersey
Family Lawyer

Vol. 34, No. 6 — August 2014

Outgoing Chair's Column

Of Alimony and Austin

by Brian Schwartz

By the time this column is published, I will be the former chair of this section. As such, some reflection and thank yous are appropriate. To say the least, it has been a busy year for our section. The year started with my appearance before the Supreme Court regarding proposed changes to the Rules of Court. Prior to the appearance, the section—in a joint effort with the New Jersey chapter of the American Academy of Matrimonial Lawyers—prepared a lengthy report and submitted it to Supreme Court for consideration. The two main issues were the revised child support guidelines and matrimonial arbitration. I have previously written about the child support issue, and remain disappointed that the Court did not adopt any of the recommended changes. As for the arbitration rule, the Supreme Court created an *ad hoc* committee to review the issue in more detail, with the goal of creating a uniform arbitration rule for the family part. The state bar association selected Chuck Vuotto to represent the Family Law Section, and I can think of no better person to zealously present our position.

My year ended with another appearance before the Supreme Court; this time to argue our *amicus* position in the *Maeker v. Ross* matter. For this, I have several people to thank. First, I thank Ralph Lamparello, the now-immediate past president of the state bar association, for selecting me to argue the case. I also must thank Brian Paul and Elizabeth Vinhal for helping me prepare the brief. Not surprisingly, the Court was prepared for the argument and was animated in its participation. I am hopeful that our brief, and my argument, will persuade the Court to adopt the position we set forth in our brief.

In between those appearances, the section addressed a number of other issues through our review of proposed legislation, including grandparent visitation, collaborative law, presumptive 50-50 custody, non-dissolution/DCPP matters and marriage equality, to name just a few. In this regard, I must thank our legislative committee—Ron Lieberman, Kimber Gallo and Megan

Murray—who worked tirelessly to prepare comprehensive legislative agendas for each meeting. We also have submitted an *amicus* brief in the *Gnall* matter. Thanks to Derek Freed and Brian Paul for helping me draft that brief.

Yet, despite all of the accomplishments during my year as chair, I anticipate that my year will be described in two words—alimony and Austin. Regarding alimony, since Feb. 2012, the section has been actively involved in the discussion regarding alimony in New Jersey. When our involvement first started, I wasn't quite sure how to even get to Trenton; by now, I can get there in my sleep. The other officers and I have been to towns and counties we did not know existed in New Jersey. But anywhere/anytime someone was willing to meet with us, we went, sometimes on one day's notice. Our effort was extensive and impressive. Rarely did we leave someone's office without emphatically and eloquently making our point—and generally winning that person over.

I had hoped that, by now, I would be able to address a new alimony statute—a statute that is fair to *both* payors and payees, a statute that provides additional guidance to trial courts as to applications based upon changed circumstances, a statute that allows for a reasonable retirement date. Although a compromise bill has passed the Assembly and the Senate, it has still not been signed into law. As such, I will refrain from any extensive comments here.

Instead, I will praise our entire executive committee. At the beginning of my term, I made it known to all of the members that ours would be a "working" committee; that is, I expected everyone to roll up their sleeves and get to work. To their credit, each and every member actively participated in our efforts. Some wrote op-eds; some met with legislators; some used personal relationships to set up meetings for the officers. Our committee debated the issue in a respectful and scholarly manner, often extending our committee meetings well past the two-hour mark, in order to refine our position and our strategy. But, most importantly, on a regular basis, everyone asked "What can I do to help?" and everyone provided encouragement and emotional support for the cause. For that, I thank each and every member of the executive committee, and I know this overwhelming effort will continue for Jeralyn, for Amanda, and for every officer who follows.

I must also thank Angela Scheck, the executive director of our association. Early in the process, I contacted Angela, explaining the importance of the alimony issue and asking for the support and resources of the association. Much to her credit, Angela immediately understood our needs and gave us access to the tremendous resources of the association.

I will never forget the afternoon of Friday, Dec. 13, 2013. On that day, the officers and I were at the Law Center to receive the Distinguished Legislative Service Award when we received word that the Senate was going to post the alimony guidelines bill on the following Monday. Angela immediately organized her staff (Kate, Sharon, Todd and Jena, as well as others) and provided us with a conference room (which we turned into our version of a war room). From there, we all worked the phones and the Internet, contacted sources and collaborators, and, with our lobbyist extraordinaire, Bill Maer, created a strategy to stop what at that time appeared to be a *fait accompli*. Ralph Lamparello, Paris Eliades, Kevin McCann and other prominent members of the association (many of whom were not family lawyers) used their relationships to gather information and to further our already staunch opposition. Due to our overwhelming efforts on that Friday, by Monday the Senate decided not to post the bill.

Our association is very fortunate to be led by Angela, and our section never could have been so successful in our efforts without her overwhelming support.

In addition to hard work, our section also knows how to have some fun. This year was no exception. We had our first annual golf outing at Royce Brook—thank you to Tim McGoughran and Jay McManigal for their efforts in organizing that wonderful day. Our holiday party in December at the Oyster Point was a tremendous success, with well over 200 people in attendance. We raised over $8,000 for Partners for Women and Justice, a great organization. Thanks to Sheryl Seiden and her staff of young lawyers for their spectacular efforts.

But the highlight was our retreat in Austin, Texas. In the mornings, there were very successful lectures. The first presentation was given by Larry Temple, the chair of the LBJ Foundation and former member of President Johnson's staff. He told wonderful behind-the-scenes stories about President Johnson that only an insider could provide. Ask anyone who attended—that may have been the best ICLE program ever. The following morning, we invited two family law attorneys from Texas—Sherri Evans from Houston and Jimmy Vaught from Austin—to discuss alimony issues. If we thought the proposed changes to alimony here in New Jersey were scary, one just has to review the alimony laws in Texas to know just how unfair those laws can be. Sherri and

Jimmy were informative and funny, and were a welcome part of our presentation. The third lecture was presented by the young lawyers and was just overall fun.

And then there were the parties. From the opening reception at Max's Wine Dive to the 'food truck' party on the lawn at the Four Seasons to the barbeque at Kali-Kate Ranch outside of Austin, the great music, fantastic food, camaraderie and frivolity were all in abundance. Since the fun could not be contained to these organized events, there were 'after parties' each night. No one in attendance will soon forget our taking over the piano bar late into the evening on a certain Thursday night.

In sum, the retreat was a great success. Thanks to Denise Gallo and the staff at the state bar for their tremendous contribution, and for believing in my dream of a successful retreat in Austin. Thanks also to Tacy Infante and her great staff at Meritage Events. I cannot overstate how incredible it was to see Tacy's ability to convert my visions into reality. Last, but certainly not least, no retreat can be a success without the many sponsors who continue to support our section.

As I look back, I know that I could never have succeeded this year without the continued support of certain people. First, to Jeralyn and Amanda—you were my sounding board throughout the year. Although we did not always agree, the final decision was always better because of the discussion. I know that you will both be incredible leaders and the section is lucky to have you both. I also must thank Tim and Stephanie for their help during the year. Thanks to my office staff; I was not around as much as I would have liked, but the office still ran smoothly and successfully in my absence, which is a credit to all of you.

Last, I must thank my family. My wife, Michelle, and my kids, Allison and Rachel (and my pups, Oy Faye and Chico) have been quite patient, and have been very forgiving of my late nights and weekends at work. They allowed me to work for all of you, and now I am ready to go back to being a husband and father.

It has been an incredible, active year. I am so proud of all of the work this committee has accomplished. Our section is, and will continue to be, the one other sections want to imitate. Our officers are committed to hard work, and I hope each and every member of the section will continue to ask, "How can I help?." And, now, it is time for me to step aside and allow the next generation of leaders to continue to make this section the best our association has to offer. Thank you, and good night! ■

Inside this issue

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

Editor-in-Chief's Column

Equal Protection vs. Parental Autonomy

by Charles F. Vuotto Jr.

(Caveat: All references below are to discussions occurring on the NJSBA's community message board with permission of each of the referenced authors.)

Many of us have recently seen reports of the Morris County case involving an 18-year-old high school senior who left her parents' home (either voluntarily according to her parents or forced to leave according to her), suing for financial support and to compel her parents to pay for her education. Allegedly, this young lady is a cheerleader and lacrosse player at Morris Catholic High School who wants to be a biochemical engineer. She filed a lawsuit in the family part of the superior court in Morris County seeking the judge's declaration that she is not emancipated and dependent on her parents for support. However, when she initiated suit she was not living in her home and, in fact, was living with the family of a friend who appeared to be funding the litigation. Thankfully, Canning voluntarily decided to dismiss the complaint and it appears that she has moved back in with her parents and family reunification is underway. I am sure that this is due in a small part to the sensitive manner in which the judge handled the initial application. However, putting aside the factual contentions between this young lady and her parents, the case raises interesting issues regarding the apparent conflict between equal protection and parental autonomy. It also impacts issues of jurisdiction and emancipation.

Is there a conflict between New Jersey law that requires divorcing or divorced parents to contribute to their children's post-secondary educational costs while there is no corresponding obligation of parents in an intact family? At first blush, there would appear to be some inconsistencies in law.

Debra Guston, Esq. made an interesting comment that we might have to reconsider the definition of emancipation in light of college being the "new high school" for most young people's career prospects. Guston commented that, "our society has to embrace a commitment to all young people's higher education. Either we have to make meaningful higher education really inexpensive so kids can afford it on their own—or parents have to have some longer-term obligations to assist their children. We can't have another generation of people coming out of college or graduate school hundreds of thousands of dollars in debt and compete with nations that provide free higher education to their young people."

As to the jurisdictional issues raised, Jenny Berse, Esq. referenced Rule 5:6A and Comment 2.2.1, which reads "although an emancipated child has the right to intervene in one parent's action to compel the other parent to contribute to college expenses, an unemancipated child may not, the custodial parent being deemed to be protecting that child's interest."[1] However, those cases relate to divorcing or divorced families and not intact families.

As correctly noted by Curtis Romanowski, Esq., there was an attempt to push through litigation in the early 90s that actually cleared one house of the Legislature by a landslide, doing away with the required contribution to post-secondary education expenses even in the context of divorce. As very aptly explained in the column by John P. Paone Jr. entitled "Bar Opposes Ban On College Education,"[2] the New Jersey State Bar Association strongly opposed the proposed legislation based upon the best interest of New Jersey's children (as noted in more detail below).

Gary Borger, Esq. commented by reference to the unreported case of *Orero v. Orero*,[3] which noted "We find no merit to defendant's argument that compelling a non-custodial parent to contribute to college expenses when such an obligation is not imposed upon a parent in general is a violation of the Federal or State Constitution. The GAC court specifically declined to consider the issue since it had not been raised below."[4]

A number of attorneys commented on equal protection and parental authority issues. Specifically, Richard Diamond, Esq. responded that this was reminiscent of the grandparent seeking visitation against the parents of an intact family where the married couple did not want the grandmother to visit with their child. Diamond cautioned that the concept of the pendulum swinging too far to a side, ruling in the daughter's favor, could very easily be the pendulum swinging wildly and perceived by the public as outrageous and an undue infringement into the intact family structure. Hanan Isaacs, Esq., responded that "children are children, regardless of their parents' marriages—or if their parents ever married." Isaacs also questions if the value of higher education is so elevated, then why restrict its mandate to adult dependent children of divorcing parties? If the value of higher education is not elevated enough to impose on intact households, then why force divorcing parties to fund it? "As Emerson said, 'A foolish consistency is the hobgoblin of little minds.' What do we call a foolish inconsistency? A violation of Equal Protection under the law, perhaps," wrote Isaacs.

Nancy Marchioni, Esq. thought it would be interesting to see whether the court will go so far as to state that *Newburg*[5] and its progeny applies to all parents, regardless of marital status. She commented that, "the one factor in this case that will be critical is whether this young lady is emancipated or not. This is not simply a case where the daughter is saying, "I want to go to college; you have the financial resources to pay for it; your refusal to do so is preventing me from pursuing my education." Rather, the factual "fly in the ointment" in this case is that this young lady is no longer living under her parents' roof but still wants them to foot all of her educational bills—claiming they kicked her out; parents are claiming she left of her own freewill. If the court finds that she left voluntarily, it may not need to make a decision as to whether the obligation to provide for a college education extends to an intact family."

Faith Ullmann, Esq. commented that the court's interim decision did not favor the 18-year-old, but did not deny all relief. A review of the papers by Ullmann concluded that it appeared the primary issue before the court was whether the court has legal authority to make determinations of support for an 18-year-old child of an intact family. The judge denied temporary child support for the child on March 5th and further denied the daughter's request for her parents to pay for her last year of high school at Morris Catholic. The judge set a review hearing for whether the parents should pay for her college expenses, apparently taking into consideration any college funds earmarked for the child's higher education. Ullmann commented that if the court awards such relief, it would seem inconsistent with its preliminary decision denying private school contribution and temporary support. Ullmann further commented that indeed, the court has the jurisdiction to order such relief relative to divorced families—setting up an equal protection argument. If the judge orders the parents to fund the child's college education (right or wrong) Ullmann noted that this would certainly open the door for many "adult" children to sue their parents to fund higher educational costs. She closed her comments by stating, "Sounds like family therapy may be the right way to go!"

Mark Gruber, Esq. commented that the entire case may impact the holding in *Newburg v. Arrigo,* since the equal protection arguments have not been "squarely addressed by the New Jersey Supreme Court." He further questioned, "How do children of separated or divorced parents get more rights than children of intact families? Does estrangement of children and parents give the children more rights than families without estrangement?" Gruber concluded his comments by stating that, "If this case goes up, *Newburg* may go down at some point soon thereafter."

Retired Superior Court Family Part Judge Thomas Dilts, J.S.C. (ret.) made the following astute observation:

"While it is possible a higher court decision could impact *Newburgh*, I think it is unlikely. The *parens patriae* doctrine is the underpinning to the right of the State to intervene into the family affairs of divorcing parents. That is, because the family unit is no longer intact, the child is at risk of being neglected or even abused by divorcing parents and the Legislature and the Court are permitted to intervene to act to protect the child by ensuring that support and education are provided.

Equal protection disparities abound in family law. What about the right of non-custodial parents to relocate out of New Jersey without court approval, whereas the custodial parent must have consent or court approval? This is probably the most obvious example. And yet, the best interests of the child provide a legally sufficient basis for the exercise of its *parens patriae* powers and is legally sufficient to sustain this obviously unequal result.

It is difficult to imagine a scenario where the fundamental (and constitutionally recognized) right of intact parents to raise and control their 18-year-old children as

they see fit and make judgments that parents have been permitted to make would be disturbed. The Supreme Court decision in *Troxel v. Granville*, and its progeny, support the right of non-divorcing parents to make these judgments. "The interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[6] There are limits to the power of the state to intervene—both legal and practical. The current focus certainly gives an opportunity to articulate the limits, rights and responsibilities of parents—and children.

Noting with empathy the plight of the parents involved in the *Canning* matter, Rosalyn Metzger, Esq. suggested that the case should have been handled by alternate dispute resolution with the assistance of counsel and mental health professionals.

The primary reason that the bar opposed the legislative proposal banning family court judges from compelling divorcing parties to pay for their children's college education was based upon the best interest of New Jersey's children. Paone stated that children who have an expectation of college education because their parents have the ability to pay, and because the children are academically worthy, should be provided with a college education. He asserted that New Jersey should be concerned about educating its children, especially in the new world economy where having an educated workforce is imperative. He explained that the state should have a strong interest in seeing that parents properly educate their children. Paone cautioned that if the legislative proposal to ban family court judges from compelling divorcing parties to pay for the college education of their children is passed, then the courts will be inundated with post-judgment applications in cases where parents previously agreed to accept responsibility for the college education of their children.

There also will be lawsuits filed by children under theories of contract and the unemancipated child's right to support.[7] Such a bill would put children directly in the line of litigation against their parents. Finally, the bar opposed the legislation to address other legitimate issues in the college education controversy. Paone explained that the courts must ensure that in cases where children have voluntarily terminated their relationship with a parent, the court should not compel a parent to be nothing but a "blank check" to the child. A child who does not earnestly pursue a college education on a full-time basis upon graduation from high school should be declared emancipated. Children who are not academically able to pursue a *bona fide* college education should not be permitted to take 'basket-weaving' courses for four years. In cases where parties do not have the financial ability to pay for college, children should be required to pursue student loans, grants, scholarships, and other monies, including income earned through part-time employment. The Family Law Section felt that the ban on college education was ill-advised legislation.[8]

I wish to thank the many contributors to this discussion as referenced above and apologize to those that I may not have quoted. Many people commented upon this interesting issue. It is unclear where this case is going to go and what the ramifications may be. I do believe, however, that input is necessary from the bench and bar. For my part, I have trouble with the apparent inconsistency, but could never imagine the law permitting such an invasive intrusion into parental authority in the context of an intact family. It must be presumed, with the exception of providing basic necessities and in the absence of abuse or neglect, that intact families adequately attend to the needs of their children. These families have not put themselves before the court. It is only when that occurs, whether due to separation, divorce, abuse, neglect or other legal construct placing the family before the court system, that the state is then permitted to step in under its *parens patriae* jurisdiction to make sure the needs and rights of children are protected. However, where the family is not thrust before the court, whether voluntarily or involuntarily, the fundamental constitutional rights associated with child rearing must be protected. This is only one person's view, and I certainly welcome others. ■

Endnotes

1. *White v. White*, 313 N.J. Super. 637 (Ch. Div. 1998), *Johnson v. Bradbury*, 233 N.J. Super. 129 (App. Div. 1989), recognizing the right of an adult child to sue either parent for college assistance under either a contract theory or the guidelines of *Newburg v. Arrigo,* 88 N.J. 529 (1982). It should be noted that Ron Lieberman, Esq. commented on the reference to *Johnson v. Bradbury* and pointed out that the current situation regarding *Canning* is much different than the *Johnson* matter where it involved the child of divorced parents suing for payment of college costs. Lieberman commented that divorced parents put themselves before a court for resolution of issues, whereas intact families do not.
2. Volume 15, Issue #4.
3. 210 WL 596980, App. Div. 2010.
4. 186 N.J. at 547, 897 (A.2D 1018) "The defendant provides no support for his argument."
5. *Newburg v. Arrigo*, 88 N.J. 529 (1982).
6. 530 US at 65 (2000).
7. *See Johnson v. Bradbury*, 233 N.J. Super. 129 (App. Div. 1989).
8. The article was published in *New Jersey Family Lawyer*, Volume XV, No. 4, July 1995.

Executive Editor's Column

The Burdens on Family Lawyers Extend to Potential Liability for Not Freezing Already 'Frozen' Assets—Don't 'Let It Go'

by Ronald G. Lieberman

Family lawyers were recently met with the surprising news that a federal judge permitted a former client to sue her matrimonial lawyer for not stopping the other party from violating an amended final judgment of divorce that ordered a freeze on an asset to be divided in equitable distribution. That opinion in *Gallagher v. Makowski*[1] was just the latest in a long line of cases holding a family lawyer liable to his or her client for wrongdoings committed by someone other than the attorney. That case also raises issues of defining and determining liability for matrimonial attorneys.

In *Gallagher*, after a four-day trial, Jennifer Gallagher was divorced from her husband, Gary Brooks, by way of a final divorce judgment that resolved only the dissolution and name change. The other issues were to be determined by the trial judge. Gallagher's attorney prepared that initial divorce judgment. A month later, the trial judge issued an amended final judgment of divorce that addressed the remaining issues, including equitable distribution of Brooks' retirement plan with a plumbers' union located in Philadelphia, Pennsylvania.

Before the divorce trial, the trial judge entered an order prohibiting either party from dissipating any marital assets. But, between the time of the entry of the initial final judgment of divorce and the amended one, Brooks withdrew half of the funds contained in his retirement plan. The remaining funds were eventually paid out to Gallagher. When Brooks sought the withdrawal, he sent the plan administrator the original divorce judgment and falsely certified Gallagher was not entitled to any portion of the plan.

Gallagher sued her divorce attorney and the plan officers in state court; however, because of the federal question involved and diversity jurisdiction, the case was removed to federal court. Her arguments against her divorce attorney were that the attorney was obligated during the divorce to inform the plan administrator that the trial judge issued an order prohibiting either party from dissipating marital assets. She argued that the attorney failed to specify in the initial divorce judgment, which he prepared, that an amended one would be forthcoming from the trial judge. Her claims survived the attorney's summary judgment application and the case is still pending in federal court.

The *Gallagher* case should sound like a siren's call to matrimonial attorneys: If an attorney can be alleged to be liable for the fraudulent actions of the other party, even when the asset was ordered to be frozen during the divorce, where will potential liability stop? Does a family law attorney ever have the ability to 'let it go' when it comes to follow-up with orders, judgments, or events related to a divorce? Or must the attorney assume the worst and perform billable services designed to deal with a worst-case scenario, no matter how speculative a scenario it might be?

Our courts have held since at least 1997 that, practically speaking, when a divorce complaint is filed, the assets of the marital estate are held "*in custodia legis*."[2] Accordingly, it would appear that family law attorneys should be able to rely upon that case as some measure of protection from the other party's wrongful dissipation of assets, putting aside that the attorney is not liable for another party's fraud. But, as one door may close on liability, another seems to open.

In 1997, the New Jersey Supreme Court opened divorce attorneys up to liability on a separate category of issues, that being the existence of proper life insurance to secure payment obligations. Specifically, in *Menichelli v. Massachusetts General Life Insurance Company,*[3] a policyholder's material misrepresentation in a life insur-

ance policy designed to secure his alimony obligation caused the insurance company to rescind the policy. The Supreme Court permitted that rescission and stated *in dicta* that the family law attorney for the obligee should be furnished with the policy and the application in order to detect misrepresentation by the policyholder/obligor. In essence, a family law attorney was being directed to independently verify the representations by the other party contained in that party's life insurance policy, no matter the costs and the attendant burdens of obtaining information, which may be cloaked in privilege or privacy.

Our case law details example after example where family law attorneys have been held liable or were allowed to be sued for instances when someone else besides the attorney did something wrong, an action could not be foreseen by the attorney, or work was demanded by the attorney outside of the scope of handling a divorce matter. A family law attorney can be sued in malpractice for the negligent services of an expert in preparing a qualified domestic relations order, even though most family law attorneys routinely insist on retaining such an expert for that very purpose.[4] A family law attorney has to wonder whether the other party will raise issues years after the divorce, alleging malpractice because a client is not deemed to have constructive knowledge of the existence of a legal malpractice claim at the time of the filing of a divorce settlement agreement. Rather, the time tolls when the client first becomes aware of that claim.[5] An attorney can be liable when his or her client negotiates away his or her ability to buy out the other party's interest in the former marital home, even when that client may not have initially wanted to keep the home.[6] A family law attorney was sued for not recording a divorce judgment in the book of deeds, even though the attorney was not retained for performing the work.[7]

Those examples raise all measures of questions about the outer limits of the duties incumbent upon a family lawyer. The scope of any lawyer's duty has been stated as follows: "Duty is largely grounded in the natural responsibilities of social living and human relations…."[8] So, a family lawyer might have liability as broad as "the natural responsibilities of social living and human relations." How can that scope ever been foreseen by a family lawyer? Does the family law attorney have to independently verify every statement and presentation by the other party, regardless of the fact that remedies exist to the wronged party for fraud and that such presentations by parties are often made under oath under penalty of perjury?

Recognizing the potentially very broad scope of a family attorney's duties to a client raises complex issues about which services a family law attorney must perform for a client. Does that attorney need to ensure that car payments are made or that mortgage payments are current even if such representations of payment are made under oath or made for the purpose of reliance by the other party? Does the attorney have to insist upon the performance of a judgment and lien search on each parcel of real estate subject to equitable distribution even though deeds might be supplied guaranteeing the lack of such judgments or liens or the fact that jointly titled property cannot likely be encumbered without the signatures of both parties? Should that attorney have the parties perform and then exchange credit reports to verify or to question the existence of liabilities, or is the presentation under oath in a case information statement regarding a statement of liabilities sufficient? Must a family law attorney issue subpoenas to each financial and banking institution revealed in a case information statement or during discovery to verify presentations from the other party about withdrawals or transfers? Does that attorney have to verify the representations made by parties on their income tax returns or does the attorney need to review all documents used to prepare them, with the assistance of a separately retained accountant or tax lawyer?

Before family lawyers leave the practice altogether or call their malpractice carriers to increase coverage amounts, they should all take a collective deep breath. Practicing in this area of law is a privilege. Very often, if an attorney does not have a passion for family law, that attorney leaves the practice relatively early on in his or her career. So those of us who do practice regularly or exclusively in this area do so because we are passionate about it. We are involved in helping people get out of bad relationships and move on with their rest of their lives. We are privy to all measures of private information and thoughts. Privilege has its risks and the risks are real. Our clients entrust us with their innermost thoughts, problems, and hopes. Why should the family lawyer not have a frank and open discussion with his or her client about worst-case scenario and strategize on how to plan for them? But, opening the door to malpractice if an attorney does not foresee the other party's wrongful withdrawal of funds from an asset after a court-ordered freeze was imposed on that asset stretches the bounds of reasonableness.

With some forethought and effort, family lawyers can hopefully avoid the numerous pitfalls in our practice area, which have befallen our colleagues over the years. Mistakes happen and, in fact, "[e]xperience is simply the name we give our mistakes."[9] If there is a moral to the story in the *Gallagher* matter, where frozen assets were not actually frozen, it is that family law attorneys should not just let the matter rage on and should not just 'let it go.'[10]

Endnotes

1. 2014 U.S. Dist. LEXIS 41909 (D. N.J. March 28, 2014).
2. *Vander Weert v. Vander Weert*, 304 N.J. Super. 339, 349-350 (App. Div. 1997).
3. 152 N.J. 194 (1997).
4. *Schachter, Trombadore, Offen, Stanton & Pavics, P.A. v. Peters*, 2008 N.J. Super LEXIS 2417 (App. Div. 2008).
5. *Viglione v. Farrington*, 2007 N.J. Super. LEXIS 2724 (App. Div. 2007).
6. *Smith v. Grayson*, 2011 N.J. Super. LEXIS 3056 (App. Div. 2011).
7. *Gibau v. Klein*, 329 N.J. Super. 227 (App. Div. 2000).
8. *Wytupeck v. Camden*, 25 N.J. 450 461-462 (1957).
9. Oscar Wilde.
10. References to 'frozen' and 'let it go' address the Disney movie "Frozen."

Meet the Officers

Jeralyn L. Lawrence (Chair), a partner in the firm of Norris, McLaughlin & Marcus, P.A., devotes her practice to matrimonial and family law, and is a trained collaborative lawyer and divorce mediator. She has received the NJSBA's Young Lawyers Division's Professional Achievement Award and the Annual Legislative Recognition Award, twice. Ms. Lawrence works with the state bar's Military Legal Assistance Program, where she provides *pro bono* legal assistance to New Jersey residents who have served overseas or on active duty in the armed forces after Sept. 11, 2001. She is a senior editor of the *New Jersey Family Lawyer.*

Ms. Lawrence has been certified by the Supreme Court of New Jersey as a matrimonial law attorney and serves on the Matrimonial Certification Committee that oversees the statewide matrimonial attorney certification process. She is a fellow of the American Academy of Matrimonial Lawyers and sits on its board of managers. The American Academy of Matrimonial Lawyers has also certified her as a family law arbitrator.

Ms. Lawrence is the first vice president of the Somerset County Bar Association. She serves on the New Jersey Supreme Court of Attorney Ethics, District XIII Attorney Ethics Committee and is a member of the New Jersey Association of Justice and the New Jersey Women Lawyers Association. She has been selected as a New Jersey Super Lawyer in Family Law for several years and named in the top 100 lawyers and top 50 women categories. She was also recognized by *New Jersey Law Journal* as one of the 40 accomplished and promising attorneys in the state under the age of 40. She has also been selected by her peers as one of New Jersey's Top Ten matrimonial lawyers under the age of 40.

Ms. Lawrence is an attorney volunteer at the Somerset County Resource Center for Women and Their Families, a member of the Association of Family and Conciliation Courts and a member of the American Bar Association. She was honored by NJBiz as one of New Jersey's best 50 Women in Business; received the Kean University Distinguished Alumna Award; and was honored as an outstanding woman by the Somerset County Commission on the Status of Women. Ms. Lawrence is also a member of the New Jersey Collaborative Law Group, the New Jersey Association of Professional Mediators and the International Academy of Collaborative Professionals. She was appointed to the Somerset County Domestic Violence Working Group as a representative of the Somerset County Family Law Section and is a member of the Norris, McLaughlin and Marcus Women's Forum Steering Committee. She is a graduate of the National Institute of Trial Advocacy and a member of the Central New Jersey Inns of Court.

Ms. Lawrence earned her bachelor's degree from Kean College and her law degree from Seton Hall, where she graduated second in her class.

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Mr. McGoughran is a member of the New Jersey State Bar Association's Family Law Section Executive Committee as well as the Family Law Committee of the Monmouth County Bar Association. As a member of the Monmouth Bar Association he has served as co-chair of the Family Law Committee (2009-2011) and president of the Monmouth Bar Association (2007-2008), and still serves as a trustee. In addition to serving on the state bar's Family Law Section Executive Committee he is also a member of the state bar's Military and Veteran's Affairs Section Executive Committee and Legal Education Committee.

He presently serves as the trustee for Monmouth County on the New Jersey State Bar Association's Board of Trustees (2013-2015) and chairs the Meeting Arrangements and Program Committee. He has been honored by the state bar association with the Distinguished Legislative Service Award in 2010 and 2013. He also received the Family Lawyer of the Year Award in 2012 from the Monmouth Bar Association's Family Law Committee.

Mr. McGoughran is a regular speaker and presenter at numerous symposiums regarding various facets of law and ethics. He graduated from the University of Pittsburgh with a B.A. in political science in 1982 and from the Seton Hall School of Law with a *juris doctorate* in 1986.

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Mr. Weinberg received his B.S. from Bentley College and his J.D., *magna cum laude*, from Capital University Law School, where he was published in the *Law Review* and was a selected member of the 1993 National Moot Court Team. He was a law clerk to the Honorable Charles A. Little.

Mr. Weinberg's professional and community involvement includes: former member of the District IV Fee Arbitration Committee and America's Registry of Outstanding Professionals; member of the executive board of the Jewish Community Center; former chair of the Cherry Hill Zoning Board of Adjustment; former member of the Cherry Hill Township Democratic Committee; member of the ATLA Matrimonial Trial Lawyers Section; member of the Committee for the Drive Out Hunger Golf Classic to benefit Philabundance; and member of the Multiple Sclerosis Leadership Class of 2003.

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Each year since 2011, Mr. Schwartz has been named to the Best Lawyers in America, and his firm was named a "Tier One" Best Law Firm in America. Mr. Schwartz has been a Super Lawyer every year since 2007, and was named a "Rising Star" by Super Lawyers in 2006. In 2006, he was also named one of the Top Ten Leaders under 45 in Matrimonial Law in Northern New Jersey, and in 2005, he was named one of the Top Ten Matrimonial Attorneys under 40.

In 2011, Mr. Schwartz was a faculty member in the inaugural American Institute for Certified Public Accountants (AICPA) Expert Witness Skills Workshop in Washington, D.C.; he was again a faculty member in 2012 in Chicago, 2013 in Seattle and 2014 in New Orleans.

Mr. Schwartz received his B.A. from the George Washington University and his J.D. from the University of Pittsburgh School of Law.

The Devil in the Details: Drafting Considerations in Family Law Agreements

by Jennifer Lazor and Tara J. Schellhorn

Sometimes things are better left unsaid in life. At times that adage also applies to agreements in family law. In other words, sometimes economy in drafting gets the job done best. At other times issues need to be addressed in detail—both in terms of choosing the words you need and negotiating those terms with opposing counsel. This article examines some of the thornier issues arising in family law agreements. The subject provisions probably arise most commonly in matrimonial settlement agreements (MSAs) but also may arise in other family law agreements. In addition to identifying the issues, this article proposes some potential methodologies for addressing them in drafting.

The Marital Lifestyle and Income Assumptions

It is a foundational axiom that material, non-temporary changes in circumstances pose a possible basis for modifying the alimony and/or support provisions of a family law agreement or order/judgment.[1] Whether such a change has occurred is generally determined by comparing the 'new' circumstances alleged to those circumstances in place at the time the agreement was made. Since the circumstances at the time of the agreement are such an important benchmark, to what extent should family law attorneys identify those circumstances in the agreement?

In a perfect world, the predicate financial circumstances upon which the alimony and child support provisions of an agreement were based probably should be stated with specificity. However, a 'perfect world' only exists in circumstances where both parties have filed case information statements reflecting similar accounts of the marital lifestyle in Schedules A, B and C, and where both parties have had consistent W-2 earnings in the years proximate to the divorce. In those perfect world scenarios it likely is not controversial to include a paragraph in the agreement identifying the marital lifestyle and incomes used for support. However, what if you are faced with a matter where any of the following issues apply:

- There is a dispute over the marital lifestyle;
- A party is unemployed at the time of the agreement and income needs to be imputed to that party;
- A party's income varied significantly during the marriage;
- A party's income changed from marital norms at the time the agreement is being negotiated;
- A party is compensated with both cash and non-cash compensation;
- A party is a business owner and is in control of the manner in which income is paid, perquisites are given and/or retained earnings are distributed.

It is surprising how often material issues, including those listed above, can be disputed—yet the parties still are able to agree on the amounts of support to be paid. It is akin to situations where the parties contest that the variables are two and two but agree that the answer is four. In such cases, should an agreement be sacrificed because the parties cannot agree on how it was reached? The visceral, yet perhaps uneasy, response to that question by most family law practitioners is: no, one gets the deal done. The unease, however, arises because a degree of drafting in family law matters is done with an eye toward the future: How are these terms going to survive in the event of a post-judgment application? In matters where foundational assumptions of an agreement are left undefined and are then subjected to post-judgment scrutiny years later, there may be complicated post-judgment practice ahead, including a plenary hearing necessitated in part to illustrate to the judge what the financial circumstances were at the time the agreement was reached.

With respect to the bulleted issues above, there are some drafting goals and principles that may help get the deal done even when there are disputes. These methodologies may even leave a few breadcrumbs for post-judgment fact finders to follow if necessary.

The Martial Lifestyle

Without the benefit of formal data, it is likely a safe wager that the marital lifestyle is one of the most disputed issues in family law matters involving alimony, and to an extent child support not encompassed by the child support guidelines.

As the marital lifestyle is a significant factor in determining support obligations,[2] it is important to understand what that lifestyle was as it relates to the support obligations. Rule 5:5-2(e) specifically addresses the issue of marital standard of living declarations in agreements. The rule provides an 'out' for drafting purposes when a controversy over the lifestyle cannot be resolved at the time of the agreement. Essentially, the rule requires that the lifestyle be defined in the agreement,[3] or if an agreement cannot be reached then each party must agree to retain a copy of "their respective filed Case Information Statements until such time as alimony is terminated."[4] The latter aspect at least ensures that at the time of any post-judgment application the parties will be able to produce for the court a statement of what he or she determined was the approximate standard of living at the time of the divorce.[5] Therefore, agreements can cite this rule and specifically memorialize that the parties agree to retain the case information statements—if only to put off the dispute for potentially another day.

The requirement to retain case information statements as least 'freezes' the parties into a range of dispute, thereby, in theory at least, narrowing the controversy accordingly. However, it is important to ensure that a client's case information statement is current at the time of the agreement and accurately reflects the precedents one is trying to preserve. For example, in an initial case information statement, there may have been certain marital lifestyle expenses that were designated as 'unknown' or something similar, pending completion of discovery. Such place-markers should be completed as the agreement is finalized.

Imputed Income

There may be circumstances where an agreement is predicated upon a spouse's income set at a level other than that reflected on income tax returns. In those instances it may be helpful to identify the predicate income in the agreement, whether that predicate income is the result of averaging, imputation or some other methodology. In addition to the income used, it may also be useful to explain why the income was used. For example, in a situation where the payor spouse's income varied year to year during the marriage and the predicate income was calculated by averaging certain years, that calculation can be set forth in the agreement.[6] The same holds true if the imputation is based on a party achieving certain levels of employment.

Cash and Non-Cash Compensation

If a party receives cash and non-cash compensation (*e.g.*, stock awards, restricted stock, stock options) there may be circumstances where that non-cash compensation may be treated as income available for support purposes.[7] In such matters, the agreement may differentiate between support paid on the cash compensation versus support due on the non-cash compensation, or other circumstances where the non-cash compensation would be used toward a support obligation. In such agreements, it becomes necessary to address details such as how the non-cash compensation is to be distributed to the other spouse; methodologies for tax withholdings; timelines for notification of intent to exercise and deadlines for exercises (of stock). Where the non-titled spouse cannot hold the stock or other forms of non-cash compensation directly, these details are often addressed in the context of a *Callahan*[8] trust, which is a constructive trust instrument. The titled spouse retains title of the stock or other subject security/asset and sells, exercises or liquidates it, as the case may be, based on the instructions of the non-titled party.

It can be helpful, in cases such as these, to identify in the agreement what the cash to non-cash compensation ratio is at the time of the agreement. Take an example where a support obligation is a hybrid of both cash and non-cash compensation. Subsequent to the agreement, what if the payor's non-cash compensation increases while the cash component decreases? From a cash flow perspective alone, the payor may seek to modify the support ratio to reflect his or her new circumstances.

A False Sense of Security?

Often, family law agreements characterize certain obligations as 'priority liens.' One example of such a designation occurs in a scenario regarding life insurance. Agreements often provide that if the insurance policy is not maintained in a certain amount, there will be a priority lien against the insured's estate in the amount that the policy was intended to be. Before assessing the adequacy of such language, it is helpful to understand some of the foundational elements of the issue.

The Priority of Liens

A lien is a legal claim against the title of property to secure the payment of a debt or the performance of an obligation. The creation and perfection of liens is governed by state law, typically the applicable version of the Uniform Commercial Code.[10] Perfection is most often accomplished through recordation of the lien in a specific office.[11] Once perfected, a lien will be given 'priority' against any subsequent claims upon the collateral of the lien, and the holder of the lien is considered a 'secured' creditor.[12]

In connection with a divorce decree, the court has the power to create an equitable lien in favor of one of the parties.[13] However, courts in New Jersey have held "all property distribution awards in a divorce judgment are subject to existing liens and no *valid, properly perfected prior lien* may be extinguished or diminished by an award between spouses for equitable distribution."[14] Thus, the standard rule of 'first in time, first in right' regarding priority disputes among creditors applies. In other words, lien priorities are determined by the order in which execution is issued rather than priority of docketing of judgments.[15] As the Appellate Division explained in *Vander Weert v. Vander Weert*:[16]

> If the creditor's lien is not perfected until after the divorce judgment is entered, as by an execution to satisfy a judgment, the equitable distribution scheme is entitled to priority, and the extent of the executing judgment creditor's lien is limited to whatever interest in the property the debtor spouse has been accorded by the divorce judgment.[17]

Priority status is particularly important in the context of a bankruptcy, where a creditor with a perfected security interest in collateral (*i.e.*, a secured creditor) is entitled to payment from the proceeds of the collateral prior to the payment of general unsecured creditors. As explained further below, the Bankruptcy Code conveys certain priority status to particular unsecured claims against a debtor. As a result, these 'priority claims' are entitled to payment prior to the general unsecured creditors, who share any distribution on a *pro rata* basis.

However, Section 507(a) of the Bankruptcy Code sets forth 10 categories of allowed unsecured claims that are entitled to 'priority' in bankruptcy cases.[18] As a result of this provision, certain unsecured creditors are entitled to payment of their claims *prior to* the payment of other general unsecured creditors. The rights of holders of priority claims remain subject to the rights of holders of liens against property. Stated differently, secured creditors are entitled to payment prior to distributions to priority unsecured creditors.

Section 507(a)(1) of the Bankruptcy Code grants first priority status to claims for domestic support obligations owed to or recoverable by the debtor's spouse, former spouse, child(ren) or by certain persons acting on their behalf.[19] The term "domestic support obligation" is defined in Section 101(14A) of the Bankruptcy Code.[20] In order to be considered a domestic support obligation under the Bankruptcy Code, the following elements must be satisfied:

> (i) the payee of the obligation must be either a governmental unit or a person with a particular relationship to the debtor or a child of the debtor; (ii) the nature of the obligation must be support; (iii) the source of the obligation must be an agreement, court order, or other determination; and (iv) the assignment status of the obligation must be consistent with paragraph (D) [of section 101(14A) of the Bankruptcy Code].[21]

Thus, in determining whether payments due in connection with a divorce settlement will receive priority status, one of the key inquiries is whether the obligation is in the nature of support, as opposed to being a property settlement. This is a question of bankruptcy law and not state law.[22] In *Berse v. Langman (In re Langman)*, the Third Circuit Court of Appeals noted that:

> whether an obligation is in the nature of alimony, maintenance or support, as distinguished from a property settlement, depends on a finding as to the intent of the parties at the time of the settlement agreement. That intent can best be found by examining three principal indicators. First, the court must examine the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary. [Second, the court must examine] the parties' financial circumstances at the time of the settlement. Third, the court should examine the function served by the obligation at the time of the

divorce or settlement. An obligation that serves to maintain daily necessities such as food, housing and transportation is indicative of a debt intended to be in the nature of support.[23]

As a result of Section 507(a)(1) of the Bankruptcy Code, as long as there are sufficient assets in a bankruptcy estate to allow a distribution to unsecured creditors, a domestic support creditor will be paid *in full* prior to other unsecured creditors.

Thus, returning to the life insurance hypothetical offered above, assuming that a court characterizes the obligation to carry life insurance as a support obligation, it is likely, at best, a 'priority' only after secured creditors have been paid. The designation in the agreement as a priority lien still falls under the characterization of language better to have than not. However, the reference to a priority lien in the agreement is still better to have than not. Therefore, it is important to make sure that proof of life insurance coverage is provided on an annual basis to ensure a policy is in place.

Security provisions in an agreement are not exclusive to life insurance coverage offered to guarantee support obligations. For example, often when buying a spouse out of a business interest, payments may need to be made to the spouse being bought-out over time, as there are insufficient assets to pay the buy-out in full. In that instance, the following concepts are offered as types of security-related concepts. Mostly they are of a theoretical nature. If there were actual collateral to secure the transaction, it likely would have been used to effectuate the buy-out in full at the time of the divorce. Nonetheless, here are some non-exhaustive suggestions:

- Particularly if there is more than one business owner, the owner subject to the marital agreement can confirm that the buy-out provisions are consistent with internal operating agreements, capitalization requirements and other internal aspects of the business.
- The owner can identify whether there are any creditors (such as secured creditors) with rights superior to the spouse being bought out. This disclosure at least lets the party being bought out understand the full circumstances under which the buy-out occurs.
- Similarly, the owner can identify whether there are any capital calls or any other funding obligations associated with the business that interfere with the owner's ability to meet the terms of the buy-out.
- The buy-out will undoubtedly include a schedule of the cash payments to be made and by what date they will be made. However, the practitioner should consider whether any acceleration events, such as change in control, sale of the business, retirement or death of the owner, need to be addressed in the agreement. Similarly, the schedule of payments may include certain 'good faith' payments along the way that pay down the obligation faster.
- Life insurance can be held on the owner in the amount of the buy-out until the buy-out is paid in full.
- For the term of the buy-out, the owner can be restrained from selling, depleting, dissipating, gifting, bequeathing, devising, converting, hypothecating, encumbering or otherwise reducing his or her share in the business, absent the written consent of the other party. The objective of this provision is to prevent the owner from: 1) relinquishing the control and authority over the business required to meet his or her obligations to the other spouse under the agreement; and 2) dissipating or encumbering the business in a manner that renders impossible his or her ability to make the payments due.
- Remedies and indemnifications can be added in the event of a breach.
- If both spouses own an interest in the business, the one being bought out may not relinquish his or her shares until certain buy-out payments are met. This provision should be contemplated with the assistance of an accounting expert as retention of ownership may create tax consequences, liability for capitalization requirements and other forms of potential liability that might undermine the benefit of the provision.

And Another Thing about Life Insurance…

In many agreements, the life insurance provisions reference the husband and wife acting as "trustee" of one another' respective life insurance policies (held for child support security). While arguments can be made over whether the agreement itself creates a 'trust' with respect to the life insurance, it is probably better practice to actually create a life insurance trust, with the life insurance policy being the asset of the trust. In an ideal world, those trusts would be drafted and executed simultaneously with the execution of the agreement. Otherwise, the agreement can state that trust(s) will be drafted and created consistent with the terms of the agreement; exchanged for

review within a set time period; and finalized shortly thereafter. In that scenario, a post-judgment follow-up item is created—yet another devil in the details.

There is an equipoise between being an overzealous wordsmith and leaving too many stones unturned when drafting agreements. The line of centrality moves with the circumstances of each case. While this article addresses only a few drafting issues, it hopefully acts as a helpful checklist to help keep the devil at bay.

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Endnotes

1. *Lepis v. Lepis*; 83 N.J. 139 (1980).
2. *Id.*; N.J.S.A. 2A:34.23.
3. R. 5:5-2(e)(1-2).
4. R. 5:5-2(e)(3).
5. Note that R. 5:5-4(a) requires productions of underlying case information statements in addition to current case information statements with modification applications.
6. *See Platt v. Platt,* 384 N.J. Super. 418, 426 (App. Div. 2006) and *Lanza v. Lanza*, 268 N.J. Super. 603, 607 (Ch. Div. 1993) as examples of cases where income averaging was used.
7. Cases addressing use of non-cash compensation (specifically stock options) for support purposes include *Heller-Loren v. Apuzzio*, 371 N.J. Super. 518, 522 (App. Div. 20014) and the unreported decision *Milner v. Goldenburg,* 2009 WL3460219 (NJ App. Div. 2009). *See also, Weishaus v. Weishaus,* 360 N.J. Super. 281, 289 (App. Div. 2003) *rev'd in part, aff'd in part as mod.*, 180 N.J. 131 (2004), standing in part for the proposition that reliance on proceeds of liquidated assets during the marriage are a consideration in assessing the martial standard of living. Relatedly, *see also, Miller v. Miller,* 160 N.J. 408 (1999) and *Aronson v. Aronson*, 245 N.J. Super. 354 (App. Div. 1990). both regarding imputing income based on potential to generate unearned income from investments—regardless of whether the underlying source was exempt from equitable distribution.
8. *See Callahan v. Callahan,* 142 N.J. Super. 325 (Ch. Div. 1976).
9. *See* N.J.S.A. § 12A:9-101 *et seq.*
10. *See* N.J.S.A. § 12A:9-3109(a).
11. *See, generally,* N.J.S.A § 12A:9-322.
12. *See Sisco v. NJ Bank, N.A.*, 158 N.J. Super. 111, 117 (App. Div. 1978) ("The power of a court of equity to create liens in a divorce decree in favor of one of the parties to assure the performance of its terms is not to be doubted such form of decree is not novel in this State.").
13. *Interchange State Bank v. Riegel*, 190 N.J. Super. 139, 201 (App. Div. 1983) (emphasis added).
14. *See* N.J.S.A. 2A:17-39; *see also, Massaker v. Petraitis*, 173 N.J. Super. 459, 465 (App. Div. 1980); *Silver v. Williams*, 72 N.J. Super. 564, 567 (App. Div. 1962).
15. *Vander Weert v. Vander Weert*, 304 N.J. Super. 339 (App. Div. 1997).
16. *Id.* at 346-347.
17. *See* 11 U.S.C. § 507(a).
18. *See* 11 U.S.C. § 507(a)(1).
19. *See* 11 U.S.C. § 101(14A).
20. *In re Anthony*, 453 B.R. 782, 786 (Bankr. D.N.J. 2011). Also, Section 101(14A) of the Bankruptcy Code requires that the obligation not be "assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt." 11 U.S.C. § 101(14A)(D).
21. *See Berse v. Langman (In re Langman)*, 465 B.R. 395, 404 (Bankr. D.N.J. 2012).
22. *Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 762-63 (3d Cir. 1990).
23. *Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 762-63 (3d Cir. 1990).

Ten Commandments for Handling Military Retirement Benefits

by Mark E. Sullivan and Amy M. Privette

As family law practitioners, we are all well versed in the means and methods of equitably distributing retirement benefits. It seems as if almost every marital estate we come across is composed of at least one retirement account subject to equitable distribution. Dealing with the division of these assets has become almost second nature. However, not all retirement plans are created equal. This is particularly true in the case of military pension plans. Unlike traditional 401Ks or pension plans, military pension plans are not governed by the Employee Retirement Income Security Act (ERISA).

Allocating and dividing military retirement benefits presents unique pitfalls and challenges, which may not be evident to even the most seasoned matrimonial attorney. This article provides the 10 commandments to be followed by every practitioner unfamiliar with the proper procedure for dividing military pension plans incident to a divorce.

Get the documents: There are numerous documents that must be requested from the servicemember to evaluate what retirement benefits are available. For active-duty members the practitioner must obtain a leave and earnings statement. For Reserve and National Guard members the practitioner must obtain a retirement points statement. Finally, for military retirees the practitioner must obtain a retiree account statement, Survivor Benefit Plan (SBP) election forms, retirement orders and discharge papers, as well as officer or enlisted record briefs.

Know the rules: The division of military retired pay is authorized by the Uniformed Services Former Spouses' Protection Act (USFSPA).[1] It is an enabling act that allows states to divide military retired pay but leaves the specifics of how to effectuate the division to the discretion of each state. The SBP is the survivor annuity program that allows the former spouse to continue receiving a stream of payments after the servicemember/retiree dies. SBP is provided for under 10 U.S.C. § 1447 *et seq.* Volume 7B of the Department of Defense Financial Management Regulation[2] expands upon the federal statutes to provide more detailed guidance regarding the division of military retirement benefits.[3]

Identify the system: Active-duty retirement occurs under one of three systems: 1) final retired pay, 2) High-3, and 3) CSB/Redux.[4] Reserve/National Guard retirements are based on retirement points, not just duration of service. For example, a National Guard/Reserve servicemember must have at least 20 'good years' of service to be retirement-eligible. A good year of service requires earning at least 50 retirement points. Active-duty retirements pay out immediately upon retirement, whereas Reserve or National Guard retirements generally do not pay out until the retiree reaches age 60. The cost of providing SBP coverage to a former spouse can also differ, depending on whether it is an active-duty or National Guard/Reserve retirement.

Use the right lingo: In the event that the pension benefits are to be divided prior to the servicemember's actual retirement, the pension division order must state that the member's rights under the Servicemembers Civil Relief Act[5] (SCRA) have been honored. Defense Finance and Accounting Service (DFAS) is the retired pay center for Army, Navy, Air Force, Marine Corps (as well as Reserve units and Air and Army National Guard). The Coast Guard, as of Jan. 2014, administers retired pay orders for retirees of the Coast Guard, Public Health Service, and National Oceanographic and Atmospheric Administration. Disposable retired pay (DRP) refers to the gross retired pay less any applicable deductions such as Veteran's Administration (VA) disability waiver, the premium for SBP (if coverage is for the former spouse of the divorce), or any other money owed to the federal government. DRP is what the pay center divides, regardless of what the court order says. Cost-of-living adjustments (COLAs) are usually applied to retired pay in January and are automatically included in the share received

by the former spouse unless the court order awards the spouse a fixed dollar amount. Military pensions are not funds. Therefore, the practitioner cannot refer to an account balance or the part of the fund acquired during the marriage or vested at the date of divorce. Military pension plans are statutory retirement plans, not qualified plans. Thus, a military pension plan cannot be divided by a qualified domestic relations order (QDRO). To divide a military pension the practitioner must draft a Military Pension Division order (MPDO).

Choose wisely: When the pension is based on retirement from active duty, there are four acceptable methods for division: 1) fixed dollar amount, 2) percentage, 3) formula clause, and 4) hypothetical award. There are pros and cons for each method. The practioner must evaluate each scenario and decide which method best suits the client's case. A full explanation of the four methods can be found in the *Attorney Instruction Guide* available at the DFAS website.[6]

Don't forget the SBP: SBP is a unitary benefit and cannot be divided between a present and former spouse. Without SBP, the stream of pension payments to the former spouse ceases upon the death of the servicemember/retiree. The benefit paid out is 55 percent of the selected base amount. The maximum base amount is the full retired paycheck. The minimum base amount is $300 per month. The cost for former-spouse coverage is generally 6.5 percent of the selected base amount in active-duty cases (about 10 percent in National Guard/Reserve cases), paid upon retirement by deduction from the pension check. If the former spouse predeceases the retiree, then the spouse's share of the retired pay automatically reverts back to the retiree at no cost. If the former spouse gets remarried before age 55, then his or her coverage under SBP is suspended.

Watch the clock: There must be 10 years of marriage overlapping 10 years of military service for the former spouse to receive pension payments directly from the pay center. If there is an overlap of less than 10 years, the former spouse may still be eligible to claim a share of the retired pay. However, the former spouse's share must be paid directly to the former spouse by the retiree. There are two deadlines for setting up SBP coverage for the former spouse. If the servicemember makes the election, the SBP coverage must be established within one year of the date of divorce. If the member fails or refuses to make the required election, then the former spouse may initiate a 'deemed election.' This must be done within one year of the date of the order requiring the other party to elect SBP coverage.

Beware of disabilities: Certain types of disability compensation can reduce the retired pay that is divisible with a former spouse. The primary types of disability payments are military disability retired pay, VA disability compensation, and combat-related special compensation (CRSC). The court cannot divide VA disability compensation, and only a small part of military disability retired pay is subject to pension division. When the military retiree has a VA disability rating of less than 50 percent, the election of VA payments means a dollar-for-dollar reduction of retired pay. Thus, the retired pay share for the former spouse gets reduced due to the unilateral action of the retiree. Courts and agreements often employ indemnification language to protect the property share awarded to a former spouse.

(Don't) get a life: When representing the former spouse, don't rely on the Servicemembers Group Life Insurance (SGLI) to secure benefits upon the member's death. The 1981 Supreme Court decision of *Ridgway v. Ridgway* held that courts can't enforce orders or agreements that require SGLI.[7]

"Medic!": If there have been 20 years of marriage overlapping 20 years of military service, then an unremarried former spouse may qualify for full medical benefits. For shorter-term marriages, look in to the Continued Health Care Benefit Program (CHCBP) as a means of providing health insurance coverage.

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Endnotes

1. 10 U.S.C. § 1408.
2. DoD 7000.14-R (DoDFMR)
3. *See also* 10 U.S.C. § 1408 (c)(4) for specific rules regarding which courts have jurisdiction to divide military retirements.
4. http://militarypay.defense.gov/retirement/ad/01_whichsystem.html.
5. 50 U.S.C. Appx. 501 *et seq.*
6. http://www.dfas.mil/garnishment/usfspa/attorneyinstructions.html.
7. *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

The Impact of Changes in DCPP Investigatory Findings

by Michael R. Ascher and Dina M. Mikulka

There has been a dramatic change in the investigatory findings of child protection investigations. For the first time since the late 1990s, there are now findings of child abuse/neglect that are not entitled to be challenged by an independent fact-finding procedure. Attorneys who do not routinely practice in the area of child protection litigation should take notice. This new findings scheme can have a significant impact on the average New Jersey family enduring a Division of Child Placement and Permanency (DCPP) (formerly known as DYFS)[1] investigation or on a parent who makes a serious, but one-time, error in judgment and risk being labeled for the rest of his or her life as a child abuser.

The most commonly relied upon definition of an abused child is:

> …[A] child whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian…to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so…or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court.[2]

There have been significant decisions in recent years that may have made it more difficult for the division to establish abuse/neglect under Title 9. A one-time incident where a mother used physical discipline against her autistic daughter resulted in the Appellate Division reversing a final agency decision of abuse.[3]

The mother in *K.A*:

> Out of sheer frustration, or through an ill-advised impulse…struck her child five times. These blows, though undoubtedly painful, did not cause the child any permanent harm, did not require medical intervention of any kind, and were not a part of a pattern of abuse.[4]

The Appellate Division concluded that "[u]nder all of these circumstances, labeling K.A. a child abuser is factually unwarranted and legally unsustainable."[5]

The division created a new category of child abuse with the 'established' finding in an effort to circumvent unfavorable appellate decisions. 'Established' is a less serious investigatory finding than 'substantiated,' but nonetheless may have a highly negative impact on a person, particularly a parent, who may be faced with a child custody dispute. The parent, or other accused, has no right of administrative appeal to challenge any division finding other than 'substantiated.' However, an 'established' and 'not established' finding is maintained in division records in perpetuity and conveys that the perpetrator did something to harm a child. As explained below, the DCPP records are obtainable in future non-DCPP court proceedings.

In New Jersey, the protection of children from acts of abuse and neglect falls within the authority of the division. The division must investigate all abuse, abandonment, cruelty, and neglect cases pursuant to statutes N.J.S.A. 9:6-8.9, N.J.S.A. 9:6-1 and N.J.S.A. 9:6-8.21.

Reports that are made to the division and information obtained during the course of the investigation are entitled to statutory confidentiality.[6] However, as explained below, confidentiality can be pierced under circumstances defined in the statute. Although the courts recognize that many of the division's investigatory findings are not subject to procedural challenges, the trend

has been to expand the disclosure category. In 2006, the division was required to turn over investigation results for a new profession:

> [The Division] shall conduct a check of its child abuse registry for each person seeking registration as a professional guardian…The department shall immediately forward the information obtained as a result of the check to the Office of the Public Guardian for Elderly Adults.[7]

It is important to note that the division is not specifically limited to only disclosing 'substantiated' findings against professional guardians by the above statute. It is foreseeable that at some future point all individuals employed with what might be considered vulnerable populations may be subject to disclosure of any child abuse investigatory findings.

After a referral is received, an investigation must be conducted, generally within 24 hours in most instances, pursuant to the protocol established by the New Jersey Administrative Code, at N.J.A.C. 10:129-1.1. An emergency caseworker is dispatched to conduct an initial investigation if it contains at least one allegation of child abuse or neglect as defined by the statute. An investigator must assess each new and separate report. By way of illustration in the context of a custody dispute: where one parent makes nine referrals of child abuse in nine months, the division will open and initiate nine investigations and issue nine separate findings.

The investigation must be started no later than the end of a workday or within 24 hours after the referral is received. The child protective investigator follows a specific protocol requiring contact with the alleged victim, members of the family, other children in the home, school personnel, medical care providers and other collateral sources.[8]

The investigator is also duty-bound to report suspected cases of abuse or neglect to the appropriate county prosecutor if criminal activity is suspected on the part of the child's parent, caregiver or other person.[9] During the process, the investigator is required to notify each alleged perpetrator of the investigation and the fact that he or she had been named, unless law enforcement officials advise otherwise.

The investigation must be completed and findings made within 60 days of the receipt of the referral. Extensions in increments of 30 days may be sought with authorization by a supervisor. At the end of the investigation, specific findings are made and entered into the DCPP record. Prior to April 1, 2013, findings were limited to two categories: 1) substantiated, or 2) unfounded. Unfounded was defined as meaning there did not exist sufficient evidence to establish a child was abused or neglected, and the child had not been harmed or placed at risk of harm by the caregiver.[10]

Significantly, if an unfounded finding was entered, reports of the investigation would be expunged within three years.[11] However, a substantiated finding remains in the DCPP records and results in inclusion in the central registry.[12]

Originally, neither a substantiated finding nor inclusion in the central registry was entitled to procedural due process and was appealable to the Appellate Division as a final agency decision. However, based upon a due process challenge, an administrative appeal procedure was established.[13]

The *East Park High School* decision recognized that, although the "substantiated" reports are deemed confidential pursuant to N.J.S.A. 9:6-8.10a, they were subject to disclosure to third parties upon written requests for certain statutorily authorized purposes.[14] For example, if necessary to provide evidence in a matrimonial custody dispute, the record could be obtained by a litigant. Based upon the foregoing, the court held that the inclusion in the central registry created a protectable liberty interest under the state constitution warranting due process to protect an individual's reputation.[15] The court ultimately determined that the procedure utilized by the division was constitutionally infirm since the alleged perpetrator was not afforded the right of cross-examination or any opportunity to rebut the referral. As a result, (then) DYFS was required to provide administrative appeals from determinations of substantiation.

As of April 1, 2013, there has been a drastic change to the investigation findings, with DCPP now utilizing four classifications. This change has great significance, since it deprives individuals of the right to challenge three of the four findings, including a finding of child abuse or neglect, by way of administrative appeal.

The newly promulgated provisions of the Administrative Code provide:

(c) For each allegation, the Department representative shall make a finding that an allegation is "substantiated," "established," "not established," or "unfounded."
   1. An allegation shall be "substantiated" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21 and either the investigation indicates the existence of any of the circumstances in N.J.A.C. 10:129-7.4 or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 10:129-7.5.
   2. An allegation shall be "established" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21, but the act or acts committed or omitted do not warrant a finding of "substantiated" as defined in (c)1 above.
   3. An allegation shall be "not established" if there is not a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, but evidence indicates that the child was harmed or was placed at risk of harm.
   4. An allegation shall be "unfounded" if there is not a preponderance of the evidence indicating that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, and the evidence indicates that a child was not harmed or placed at risk of harm.

An Established Finding Doesn't Presently Afford a Right to Administrative Due Process

The 'established' finding is a new investigatory conclusion. It constitutes a finding of child abuse and neglect yet further acknowledges factors mitigating against a more serious finding of substantiated.[16]

The code goes on to clarify that a finding of either established or substantiated results in a determination that the child is abused/neglected pursuant to N.J.S.A. 9:6-8.21.[17] The findings of not established and unfounded constitute a determination that a child is not abused or neglected pursuant to the same statute.[18]

The division representative must look to N.J.A.C. 10:129-7.4 to determine whether child abuse or neglect is substantiated. "The existence of any one or more of the following circumstances *shall* require a finding of substantiated when the investigation indicates:"

1. The death or near death of a child as a result of abuse or neglect;
2. Subjecting a child to sexual activity or exposure to inappropriate sexual activity or materials;
3. The infliction of injury or creation of a condition requiring a child to be hospitalized or to receive significant medical attention;
4. Repeated instances of physical abuse committed by the perpetrator against any child;
5. Failure to take reasonable action to protect a child from sexual abuse or repeated instances of physical abuse under circumstances where the parent or guardian knew or should have known that such abuse was occurring; or
6. Depriving a child of necessary care, which either caused serious harm or created substantial risk of serious harm.[19]

If N.J.A.C. 10:129-7.4 does not apply, DCPP staff must look to N.J.A.C. 10:129-7.5 to determine whether a finding should be substantiated or established.[20]

There are aggravating factors that lean toward substantiation as opposed to established. "The Department representative shall consider the aggravating factors below in determining if abuse or neglect should be substantiated or established:"

1. Institutional abuse or neglect;
2. The perpetrator's failure to comply with court orders or clearly established or agreed-upon considerations designed to ensure the children's safety, such as a child safety plan or case plan;
3. The tender age, delayed developmental status, or other vulnerability of the child;

4. Any significant or lasting physical, psychological, or emotional harm on the child;
5. An attempt to inflict any significant or lasting physical, psychological, or emotional harm on the child;
6. Evidence suggesting a repetition or pattern of abuse or neglect, including multiple instances in which abuse or neglect was substantiated or established; and
7. The child's safety requires separation of the child from the perpetrator.[21]

"The Department representative shall consider the mitigating factors below in determining if abuse or neglect should be substantiated or established:"

1. Remedial actions taken by the alleged perpetrator before the investigation was concluded;
2. Extraordinary, situational, or temporary stressors that caused the parent or guardian to act in an uncharacteristically abusive or neglectful manner;
3. The isolated or aberrational nature of the abuse or neglect; and
4. The limited, minor, or negligible physical, psychological, or emotional abuse or neglect on the child.[22]

N.J.A.C. 10:129-7.5 limits the trial court to a general finding of whether the child was abused or neglected, but not substantiated or established. "The Superior Court, Chancery Division, has jurisdiction to adjudicate determinations that a child is an abused or neglected child."[23]

The Administrative Code prevents the court from rendering a decision regarding a specific finding. The "Department shall retain the administrative authority to:"

1. Determine whether an allegation of conduct determined to be abuse by the Superior Court, Chancery Division, is established or substantiated;
2. Determine whether an allegation of conduct determined to not be abuse or neglect by the Superior Court, Chancery Division is not established or unfounded; and
3. Determine the finding for each allegation of abuse or neglect that is not adjudicated by the Superior Court, Chancery Division.[24]

There is no statutory requirement under Title 9 for a trial court to make specific findings regarding aggravating or mitigating circumstances. The court is only required to conduct a fact-finding hearing that is defined as "a hearing to determine whether the child is an abused or neglected child as defined herein."[25]

Even though a trial court may conduct a fact-finding trial pursuant to Title 9, "[a] determination by the Superior Court that abuse or neglect did occur shall not extinguish a perpetrator's right or eligibility to contest a substantiated finding of the allegation by administrative hearing pursuant to N.J.A.C. 10:120A."[26]

Thus, a substantiated perpetrator will have to defend him or herself not only in the superior court at a fact-finding hearing, but then at an Office of Administrative Law (OAL) appeal.

Significantly, it appears that the only findings that are appealable for the purpose of having a fact-finding or trial-type hearing are 'substantiated' findings. There is no right to an OAL hearing (*i.e.*, administrative due process) for a finding of established. However, the only findings that may be expunged are those categorized as unfounded.

If the trial court concludes there was abuse/neglect, a parent would then have to defend him or herself a second time at an OAL hearing regarding whether the finding of abuse/neglect will be substantiated or not. There is no indication that public defenders would be appointed to represent parents, who are essentially conducting two forms of litigation over the same issue. The judicial time and cost to litigants is exorbitant.

The division (referred to as the department in more recently amended sections of the code), "shall provide notice of a finding of substantiated abuse or neglect to each perpetrator pursuant to N.J.A.C. 10:129-7.6(c)."[27]

According to N.J.A.C. 10:120A-4.3: "The Administrative Hearings Unit (AHU) shall transmit a matter that constitutes a contested case…to the Office of Administrative Law, including…[a] request by a perpetrator of child abuse or neglect to appeal a *substantiated* finding of child abuse or neglect." (Emphasis added.)

The AHU is not to transmit the following to the OAL: "Requests to appeal the terms of a court order which specifically addresses the disputed Division action." Arguably, if the court makes findings consistent with N.J.A.C. 10:129-7.3, 7.4 or 7.5, it seems as though the nature of the finding may be considered resolved, though this seems somewhat inconsistent with N.J.A.C. 10:129-7.3, which specifically reserves the division's right to determine the category of the finding. This inconsistency must be addressed and can leave clients in legal limbo.

One obvious question that needs to be addressed with clients facing DCPP litigation or administrative proceedings is whether there is any real benefit to a litigant of having a finding of established versus substantiated. Although higher courts may eventually weigh in on this issue, it does appear that a substantiated finding may have a more significant negative impact on a litigant's life, including preclusion from working as a childcare provider, being licensed to run a daycare center or preschool and possibly expanding a family by way of adoption. The way the division uses established findings remains to be seen and is likely determined by way of additional litigation that explores what, to many practitioners, is a murky area of the law.

In conclusion, under the present administrative and statutory scheme there is no right for an individual against whom child abuse or neglect has been established to due process in the form of a fact-finding hearing. This leaves such individuals the recourse of appealing the final agency decision to the Appellate Division of the superior court. It appears to the authors that whether the investigatory conclusion is a finding of established or substantiated, the negative implication of a finding of child abuse/neglect warrants some administrative due process in the form of an OAL/fact-finding hearing. Another glaring problem, the authors feel, is the prospect of litigating a substantiated finding twice—once before the superior court and a second time at the OAL. ■

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Endnotes

1. DCPP is interchangeably referred to as division, department and/or DYFS in this article.
2. N.J.S.A. 9:6-8.21 (c)(4)(c). *See* N.J.S.A. 9:6-8.9 for additional definitions.
3. *DYFS v. K.A.*, 413 N.J. Super. 504, 996 A.2d 1040 (App. Div. 2010).
4. *DYFS v. K.A., supra*, 413 N.J. Super. at 512.
5. *DYFS v. K.A., supra*, 413 N.J. Super. at 513.
6. N.J.S.A. 9:6-8.10(a).
7. N.J.S.A. 9:6-8.10e.
8. N.J.A.C. 10:129-3.2.
9. N.J.A.C. 10:129-5.1.
10. *See* N.J.A.C. 10:129-7.3(c)(4).
11. N.J.S.A. 9:6-8.40a.
12. N.J.S.A. 9:6-8.11.
13. *IMO Allegations of Sexual Abuse at East Park High School*, 314 N.J. Super. 149, 714 A.2d 339 (App. Div. 1998).
14. N.J.S.A. 9:6-8.10a(b)(1) to 8.10a(b)(8).
15. *Doe v. Poritz*, 142 N.J. 1, (1995).
16. N.J.A.C. 10:129-7.3.
17. N.J.A.C. 10:129-7.3(d).
18. N.J.A.C. 10:129-7.3(d).
19. N.J.A.C. 10:129-7.4(a)1-6 (emphasis added).
20. N.J.A.C. 10:129-7.5.
21. N.J.A.C. 10:129-7.5(a) 1-7.
22. N.J.A.C. 10:129- 7.5(b) 1-4.
23. N.J.A.C. 10:129-7.5(g).
24. N.J.A.C. 10:129-7.3(h) 1-3.
25. N.J.S.A. 9:6-8.44.
26. N.J.A.C. 10:129-7.3(i).
27. N.J.A.C. 10:120A-2.3.