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Chair's Column

Who are the New Jersey Family Lawyers?

by Amanda S. Trigg

How many times has another lawyer, other professional, friend or family member said to you, "I could never do family law" or "I don't know how you do that"? I usually interpret it as an invitation to redirect the entire conversation to something much more neutral than why I choose to dedicate my career to family law and to spend much of my time surrounded by other attorneys who do the same. Nonetheless, I often wonder what the speaker really means.

Sometimes that comment feels like an attack, as if the work that we do is inherently offensive. I know how to gloss over the unintended insult and to sustain a healthy sense of self-respect.

Other times, it feels like a dangerous opening to someone's personal horror story. Although I will listen in silence if someone simply must regale me with a tale of woe, I do my best to refrain from agreeing that it is extraordinary. I will disappoint anyone who thinks I am going to validate his or her impression that his or her own situation compares to the latest celebrity gossip or the plot twist in a popular movie. Usually, by the time the story is over, I have figured out how to change the subject or extricate myself. As much as I enjoy commiserating with my colleagues about challenging cases, I do not believe my professional duties extend to letting just anyone burden me with another story about another sad family.

Every divorce lawyer has his or her own way of deflecting the thinly veiled attempt to get some quick and free legal advice. We know better than to offer even the simplest comment or to run the risk of giving legal advice on the fly. No matter how desperate the presentation, there are two sides to every story, and people often omit the most important facts accidentally or purposefully. I will unapologetically run the risk of offending someone who fails to appreciate that competent, effective legal advice requires attention to detail and analysis of the totality of circumstances by refusing to offer even simple answers about a specific situation. If "I don't know how you do it" morphs into "I want to know what to do," then I quickly end the conversation.

Some speakers consciously or unconsciously want insight into whether we have information that would be useful in assessing their marriage or other relationship, or reassurance that

a divorce lawyer is not needed or going to be needed. Conversely, perhaps the comment is really an honest aversion, conveying "I don't want to do what you do" or "I don't want to know what you do." As a group, divorce lawyers engender some fear because no one wants to ever need our services, and yet few married people have the confidence to believe that they never will.

Mostly, though, I believe that it means "I don't know what you do," which is honest and understandable. It is truly difficult to explain to any outsider what we do. Few really want to know the excruciating details. At its core, our job requires us to solve complicated problems for people who trust us with their lives. We shoulder heavy intellectual and emotional burdens. Our profession requires mental dexterity, and tolerance for uncontrollable changes in our physical and mental schedules. We lose sleep and sacrifice personal time when our clients need us. We do this job, rather than any other, by choice. If "I don't know what you do" means "I don't know why you do what you do" then the answer is easy. We are New Jersey family lawyers because our work matters. We know what we do and, I hope, we are all proud to share the same job description. ■

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
Gnall Decided

by Charles F. Vuotto Jr.

In a prior column penned by this author, the following quote from the appellate court's decision in *Gnall* was highlighted as giving rise to concern:

> We do not intend to draw specific lines delineating "short-term" and "long-term" marriages in an effort to define those cases warranting only limited duration rather than permanent alimony. We also underscore it is not merely the years from the wedding to the parties' separation or commencement of divorce that dictates the applicability or inapplicability of permanent alimony. *Nevertheless, we do not hesitate to declare a fifteen-year marriage is not short-term, a conclusion which precludes consideration of an award of limited duration alimony.*[1] (Emphasis added)

This author previously stated that, "There is no question that this paragraph stands for the proposition that LDA cannot be awarded in a marriage of 15 years or more."[2] Whether this proposition was intended or unintended is left to conjecture.

In the Supreme Court's decision in *Gnall v. Gnall*, the Court held that "the Appellate Division inadvertently created a bright-line rule for distinguishing between a short-term and long-term marriage as it pertains to an award of permanent alimony."[3] The Supreme Court reasoned that although the bright-line rule may not have been intended by the Appellate Division, "a fair reading of the opinion may lead to such a conclusion" because the Appellate Division did not clarify that the statement applied only to the 15-year marriage in the particular case.[4] Further, the Appellate Division's statement that a 15-year marriage was "not short-term" resulted in a mandate that it cannot be considered for limited duration alimony.[5] The Court found this holding erroneously removed consideration of the other statutory factors for alimony where a marriage reaches the 15-year mark.[6]

The Supreme Court also found, however, the trial court improperly relied upon the duration of the marriage over the other statutory factors in determining that, since the marriage was not one of 25 to 30 years, permanent alimony was not warranted. The Supreme Court concluded the trial court erred by improperly weighing the duration of the marriage over the other statutory factors and effectively determining that permanent alimony awards are reserved for long-term marriages of 25 years or more.

While *Gnall* reaffirms the principles that all statutory factors must be weighed and considered by the court in awarding alimony, its holding has limited applicability because it analyzes the issue under rubric of the former alimony statute. In a footnote, the Court acknowledges the passage of the new alimony statute on Sept. 10, 2014, and notes that the amendment is not applicable to the case.[7]

Endnotes

1. *Gnall v. Gnall*, 432 N.J. Super. 129, 153 (App. Div. 2013) (emphasis added), reversed 2015 N.J. LEXIS 812 (July 29, 2015).
2. 34 *NJFL* 3 (2013).
3. *Gnall v. Gnall*, 2015 N.J. LEXIS 812 (July 29, 2015).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at n.1.

Executive Editor's Column

Equity: Bounded By Principle or Boundless Wonder?

by Ronald G. Lieberman

Recently, in Oakland County, Michigan, a family court judge ordered three minor children, ages nine to 14, to spend the summer in the county's juvenile detention center.[1] The judge had previously ordered the children to attend lunch with their father and to "have a healthy relationship with [their] father." When they refused to do so, the children were deemed in contempt of court.[2] Each of the three children had their own court-appointed lawyer, who stated that the children refused to cooperate or even talk to them, so not one of the attorneys objected to the trial judge's order for detention.[3] The basis for the judge's decision was the prior order compelling the children to spend time their father.[4] Placement of the three minor children in juvenile detention for the summer for defying the order was based on that judge's equity powers.[5]

The action by the judge in Michigan caused this author to wonder if the decision was a proper exercise of equity. The question posed a potentially more serious question: Does equitable relief have any boundaries, or is it dependent upon the individual temperament of an individual judge? As a family law practitioner, this author would prefer to believe that family law decisions stem from case law and statutes that family law judges carry out with some predictability, as opposed to individual judicial whim.

In order to answer the question of whether equity has any boundaries, it is important to look both at whether family law has a common definition and the history of equitable relief.

Can We Arrive at a Unified Theory of Family Law?

Can a judge arrive at a theory of what defines family law from a mere reading of statutes and decisional law? A practitioner should rightfully assume a connection between statutory and decisional authority and an ability to predict how a judge may rule, so that each case will be decided "in the shadow of the law."[6] Does equity, however, lend itself to predictability?

As all family law practitioners know, when issues involving a child or children are discussed the standard to be applied by judges is the best interest of the child. Can that well-known and universally accepted legal standard be defined? The best interests of the child standard had been described as "more a vague platitude than a legal or scientific standard."[7] So, if the most common legal standard in family law—best interests of the child—is "vague," is it too much to ask for there to be a defined theory of what family law is in order to ensure that decisions are grounded in commonality among judges? Is family law dependent on the local character of the individual judges sitting in the state's 15 vicinages? Can family law judges all share an overarching theory of family law incorporating their range of attitudes, approaches and dispositions, which permeate legal decision-making? Perhaps the answers to these questions lie within a reading of the history of equity.

The History of Equity

Family law statutes impart judges with broad discretion because they contain a catch-all factor of, generally speaking, any other relevant facts judges may wish to consider in rendering a decision.[8] So, given the statutes provide broad discretion to judges, it should not come as a surprise that there will always be a gap between the law on the books and the law in action.

Here is a common definition of equity: "[i]n the broad jurisprudential sense, equity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules."[9] But where did the concept of equitable relief come from?

The American colonies generally distinguished between law and equity.[10] Years later, under Article III of the Constitution, there was a reflection of the separation of law and equity, stating in part, "The Judicial Power shall extend to all Cases in Law and Equity rising under this Constitution....[11] The Judiciary Act of 1789 granted the federal circuit court's jurisdiction over "Suits of a civil

nature, act, law, or equity" between citizens of different states.[12] It was not until 1938 that law and equity were merged in the federal courts through the adoption of the Federal Rules of Civil Procedure.[13]

Knowing that equity is as old as the nation, however, does not answer whether equitable relief is guided by precedence or by subjective notions of fairness. Perhaps a review of how New Jersey courts view equity would provide an answer to that question.

Interpretation of Equity by New Jersey Courts

New Jersey courts addressing the application of equity to legal matters have held that the use of equity involves "an appreciation of the need for a genuine weighing of the genuine interests."[14] That definition does not provide meaningful guidance regarding whether equity has a foundation in law.

When equity is applied to cases, interpretations of written statutes, rules, and laws that promote reason and fairness are encouraged, and may prevail over hypertechnical and overly strict interpretations and readings, which may lead to illogical and unreasonable results.[15] Reading that definition does not inform practitioners if equity is guided by any bedrock legal principles. The next definition of equity moves further away from any foundation, too.

The New Jersey Supreme Court has held that, "[e]quity preserves that flexibility to devise new remedies to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed."[16] A reading of that definition of equity could lead to a belief that equity is incapable of being grounded in any theory of the law.

Almost 60 years ago, the courts provided some guidance on how a judge sitting in equity should apply equity, holding in a broad fashion that a "court of equity has the power of devising the remedy in shaping it so as to fit the changing circumstances of every case and the complex relationship of all of the parties."[17] Even the lack of precedence will not be an obstacle to the invocation of equitable relief.[18] In point of fact, equitable remedies need to fit the particular circumstances of any case.[19]

Those pronouncements do little, if anything, to provide guidance on when a judge should invoke equity or the boundaries a judge has when deciding cases based on equity. It appears that equity is incapable of being defined or fixed to a concrete principle, other than it is "constantly committed" to "changing circumstances."

Conclusion

Bringing this discussion full circle, could a family law judge in New Jersey have ordered minor children to spend time in a juvenile detention center for violating a court order regarding their parents based upon an exercise of a court's equity power? From the lack of a concrete definition of family law or equity, each judge in the state could rule differently, and each judge would, therefore, be exercising equity as he or she sees fit.

When a family law judge is faced with a decision about whether to enter relief based on equity, it is this author's opinion that the judge should do so if there is a foundation or precedence, or at the very least a clear goal of what is to be accomplished. This author's experience leads him to believe that clients expect their attorneys to be able to predict the results of hearings within a range of outcomes. So, it would be unfair to the litigants and the justice system for a judge to enter relief based on equity without knowing how to predict the application of equity to a set of facts or a defined theory of law.

It is known to this author that a client's experience of his or her case is as likely to be formed by the procedure of the case as by the substantive outcome. Without a pre-existing justification for the entry of equitable relief by a judge, a client may not see family law as anything other than amorphous or incoherent. Without grounded decision-making relating to a common theory of family law or equity, invocations of equity by judges can easily become mistaken for rulings lying solely with the whims of each family law judge, so much so that equity depends on the courtroom and not the facts or a theory of family law. Litigants deserve far more than unbridled, boundless 'equity' in the family courts. ■

Endnotes

1. Judge Jails Kids for Refusing Lunch with Dad, www.freep.com/story/news/local/Michigan/Oakland/2015/07/09/divorce-custody-refuse-parenting-time-juvenile-home-charles-manson/29905867/

2. *Ibid*.
3. *Id*.
4. *Detroit Free Press*, freep.com/story/news/local/2015/07/09/jailed-kids/29944037/
5. *Ibid*.
6. R. Mnookin and L. Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce (1979), 88 *Yale L.J.* 950 and R. Mnookin "Divorce Bargaining: The Limits of Private Ordering, The Resolution of Family Conflict, Butterworths, 1984.
7. A. Charlow, Awarding Custody: The Best Interests of the Child and Other Fictions, (1987), *Yale Law and Policy Rev.* 267.
8. N.J.S.A. 2A:34-23; N.J.S.A. 2A:34-23.1.
9. Kevin C. Kennedy, Equitable Remedies and Principle Discretion: The Michigan Experience, 74 *U. Det. Mercy L. Rev.* 609, 610, (1997).
10. John R. Kroger, Supreme Court Equity, 1789-1853, and the History of American Judging, 34 *Hous. L. RV.* 1425, 1438 (1998).
11. U.S. Const. Art. III. Section 2, Cl. 1.
12. 1 Stat. 78 (1789) *quoted* in Naomi R. Kahn, Family Law, Federalism and the Federal Courts, 79 *Iowa L. Rev.* 1073, 1087-88 (1994).
13. *Ross v. Bernhard*, 396 U.S. 531, 539 (1970); F.R.C.P. 2.
14. *Kazen v. Kazen*, 81 N.J. 85, 91-92 (1979).
15. *Club 35 v. Borough of Sayreville*, 420 N.J. Super. 231, 240 (App. Div. 2011).
16. *Crowe v. DeGioia*, 90 N.J. 126, 137 (1982), *citing* 1 Pomeroy, Equity Jurisprudence, Section 111 at 144.
17. *Am. Assn. of Univ. Professors v. Bloomfield College*, 129 N.J. Super. 249, 274 (Ch. Div. 1974) (*citing Grieco v. Grieco*, 38 N.J. Super. 593, 598 (App. Div. 1956).
18. *Am. Assn. of Univ. Professors v. Bloomfield College*, 136 N.J. Super. 442, 448 (App. Div. 1975) (*citing Cooper v. Nutley Son Printing Co., Inc.*, 36 N.J. 189, 198 (1961)).
19. *Arabia v. Zisman*, 143, N.J. Super. 168, 176, (Ch. Div. 1976) (*citing Sears Roebuck & Co. v. Camp*, 124 N.J. Eq. 403 (E. & A. 1938)).

The Right to Parent Versus the Right to Privacy

by Christine C. Fitzgerald

The right to parent and the right to privacy are often competing rights. In the family law world, these rights most frequently collide when parents of a child separate prior to the birth of their child. In some instances, the parent who is not carrying the child often wants to assert his or her parental rights before the child is born. This leads to many questions that have unclear answers. Does a parent have parental rights prior to the birth of the child? If the parental rights of one parent conflicts with the other parent's right to privacy, which right takes precedence?

Right to Privacy

The due process clause of the 14th Amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law." Over the years, the Supreme Court has understood this clause to bar "certain government actions regardless of the fairness of the procedures used to implement them."[1] Although the Constitution does not explicitly contain a right to privacy, the Supreme Court analyzed cases as far back as 1891 where the right to privacy was recognized. In *Palko v. Connecticut*, the Court determine that only personal rights that are "implicit in the concept of ordered liberty" are included in the right to personal privacy.[2] The right of personal privacy was then extended to marriage,[3] procreation[4] and contraception.[5]

In the case *Roe v. Wade*, decided in 1973, the United States Supreme Court extended the due process clause to include a fundamental right to privacy.[6] In *Roe*, a woman challenged the constitutionality of a Texas law that made abortion in the absence of medical necessity to save the mother's life, a crime. In opining that a woman's fundamental right to privacy includes control over her own pregnancy in the context of abortion, the Supreme Court used a multi-tier test to hold that the Texas statute infringed on the woman's right to privacy and that the state failed to demonstrate the infringement was "necessary to support a compelling state interest."[7]

Almost 20 years later, the Supreme Court expanded this right to privacy in *Planned Parenthood v. Casey*.[8] In this case, the Supreme Court overturned a provision in a statute that would require a woman to notify her spouse prior to obtaining an abortion. In doing so, the Court recognized the spouse's interest in the wife's pregnancy and the unborn child who she is carrying but found that mother/wife's right to privacy prevails. Specifically, the Court stated, "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[9]

In New Jersey, the state constitution provides even broader protection over fundamental rights, including the right to privacy. Article I, paragraph 1 of the New Jersey Constitution states "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty…and of pursuing and obtaining safety and happiness."[10] To determine whether a law violates due process, the New Jersey courts use a balancing test, which "weighs the governmental interest in the statutory classification against the interests of the affected class. Using this balancing test, the court considers the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction."[11]

Under the New Jersey balancing test, a right to privacy extends to sexual conduct,[12] the right to sterilization,[13] and the right to terminate life itself.[14] *In re Grady*, the Supreme Court stated "under some circumstances, an individual's personal right to control her own body and life overrides the State's general interest in preserving life."[15]

More recently, in *Planned Parenthood of Central New Jersey v. Farmer*, the Supreme Court struck down a statute that requires a minor to obtain parental notification prior to obtaining an abortion.[16] In making this determination, the Supreme Court found that although the state has a substantial interest in preserving families and protecting parental rights, that interest does not outweigh the "right of a young woman to make the most personal and intimate decision whether to carry a child to term."[17]

What is clear from case law in New Jersey is that the New Jersey Constitution provides for a more expansive right to privacy, as well as a greater protection of that right, than the United States Constitution does.

Right to Parent

The United State Supreme Court has held that a legal parent has the right to the custody, care and companionship of his or her child. The rights to have a child and to raise your child have been deemed "essential,"[18] "basic civil rights of man,"[19] and "rights far more precious…than property rights."[20] In 1944, the Supreme Court stated "[i]t is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[21] In *Stanley v Illinois*, the Supreme Court notes that the "integrity of the family unit has found protection in the due process clause of the Fourteenth Amendment,[22] the Equal Protection Clause of the Fourteenth Amendment,[23] and the Ninth Amendment."[24]

In New Jersey, the Legislature has recognized "the fundamental nature of parental rights and the importance of family integrity" by declaring that "the preservation and strengthening of family life is a matter of public concern as being in the interest of the general welfare."[25]

Similarly, New Jersey case law also stands for the premise that a legal parent has the fundament right to the care, custody and nurturance of his or her child.[26] However, this right is not absolute. For example, "a legal parent's fundamental right to custody and control of a child may be infringed upon by the state if the parent endangered the health or safety of the child."[27]

Similarly, pursuant to N.J.S.A. 9:2-4, children have the right to "frequent and continuing contact with both parents." New Jersey case law reaffirms this premise. The Appellate Division stated "[i]n promoting the child's welfare, the Court should [make] every effort to attain for the child the affection of both parents."[28] Further, in *Daly v. Daly*, the court found that a child has a right to know, love and respect both parents.[29]

Recently, in an unpublished decision, *R.R. v. L.A.C.*, the trial court used its *parens patriae* power to take this premise a step further. In that case, the father was scheduled for a default hearing. The mother appeared and asked to be heard by the court. The court obliged, and the mother asked for assurances that the father would assist her with raising their child. During the hearing, the court noticed that the parties' daughter was in the court, and the mother explained that the daughter wanted to ask the judge some questions. The child asked to see her father once a week and for a hug. While the child was in the court's chamber, the father expressed his hesitation, for reasons that the opinion did not fully address. However, when the child returned to the courtroom, the father walked toward his daughter and gave her a hug. Relying on *In re Jackson,*[30] the trial court determined it had the authority to grant the child's request to see her father.[31] While the trial court could not compel the child's request for a hug from her father, the court used its powers of persuasion and understanding to begin the healing process for this family.

Similar to the right to privacy, New Jersey has clearly defined parental rights, which include the right to the care, custody, and companionship of one's child. Just as parents have parental rights, New Jersey has found that children have the right to affection from their parents.

Right to Privacy v. Right to Parent

Since the right to privacy and the right to parent are both clearly defined in New Jersey and constitutionally protected by the United States Supreme Court, what happens when these two compelling rights compete?

The New Jersey case *Plotnick v. DeLuccia* dealt with these competing rights, when a putative father filed an order to show cause seeking to be notified when the mother went into labor and to be present during the delivery of his child, among other requested relief,[32] over the mother's objection.[33] According to the trial court, this is a case of first impression in New Jersey and in the United States.[34]

Since this matter contemplated the parental rights of an unborn child, the trial court first had to analyze the ripeness of the case. The trial court determined the case was ripe as "federal and state courts allow litigation to commence before the potential birth of a fetus."[35] Moreover, citing *In the Matter of T.J.S.*, the trial court stated that "New Jersey courts have permitted cases concerning parentage rights to commence before the birth of a fetus."[36] The court then found that the case is ripe because the issues are "purely legal" and "appropriate for judicial resolution."[37]

After the court determined that the matter was ripe, the trial court analyzed the emergent nature of the case. Under *Crowe v. De Gioia*, emergent relief is granted upon a showing that: "1) such relief is necessary to prevent irreparable harm; 2) the applicant presents a settled

underlying claim and makes a showing of reasonable probability of success on the merits; and 3) balancing of the relative hardships of the parties favors granting relief."[38] In *Plotnick*, the father was seeking a mandatory injunction, in part, to be notified that the mother was in labor and to be present during the child's birth.[39] The mother opposed the father's request to be notified that she was in labor and to be present during her delivery for privacy reasons.[40] The court thoroughly analyzed each parties' protected rights—the mother's right to privacy and the father's right to parent.

Although the trial court found the matter was emergent because "the father would suffer irreparable harm if the court were to find in his favor at a later time," the court was not persuaded that the father would prevail on the merits of the case.[41] The trial court found that "both notification and forced entry into the delivery room would in fact be inconsistent with existing jurisprudence on the interest of women," and that it "would also lead to a slippery slope where the mother's interest could be subjugated to that of the father's as the *Casey* court warned."[42] Thus, the father was not likely to succeed on the merits.

Similarly, the court had to balance the mother's relative hardship of having her privacy invaded by the father's presence and the undue burden on her for having to notify him during the "immense physical and psychological pain during labor" with the father's "interest in the child's well-being and birth."[43] However, the court determined the "mother's constitutionally protected interest before the child is born far outweigh the State's and father's interest during the delivery period," stating that "for the State to interfere with [the mother's] interest in privacy during this critical time [of labor] would contradict the State's own interest in protecting the potentiality of human life."[44]

Thus, the trial court denied the father's requests to be notified and to be present during the delivery of the child because the "father's interest in [sic] the child pre-birth is not equal to the mother's interest" in privacy.[45] The court further held that "the State's interest in protecting the potentiality of life requires it not to issue a mandatory injunction for notice or the father's appearance at the fetus's birth."[46]

Despite the fact that the trial court protected the mother's privacy rights, the court made note that the "father's desire to be involved in the child's life from inception is laudable and consistent with New Jersey's long standing general public policy to provide access to both parents."[47]

Although the trial court found that the mother's pre-birth privacy rights triumph the father's pre-birth parental rights, this decision should not be taken as an assault on fathers' rights to the custody, care and affection of their children. Instead, this case can be understood to demonstrate New Jersey's longstanding public policy that individual privacy rights are of the upmost importance.

This case should not be deemed as a bar in all cases for a punitive father to be present during the delivery of his child. For example, in the context of a child being born with a condition that makes it unlikely that the child would survive long after birth, would the outcome be different? In that specific situation, under the analysis of *Plotnick*, a putative father would be able to show irreparable harm and, certainly, the hardship to the father could outweigh mother's privacy right. The outcome would lie in whether a court would find the father would succeed on the merits. In order for the father to succeed on the merits, he would have to show that the governmental interest in his right to meet his child that may not survive long past birth outweighs the mother's right to privacy.

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Endnotes

1. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) *citing Daniels v. Williams*, 474 U.S. 327, 331 (1986).
2. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).
3. *Loving v. Virginia*, 388 U.S. 1 (1967).
4. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

5. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
6. *Roe v. Wade*, 410 U.S. 113 (1973).
7. *Id*. at 154.
8. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
9. *Id*. at 896.
10. N.J. Const. art. I, §1.
11. *Plotnick v. DeLuccia*, 85 A.3d 1039, 1050 (Ch. Div. 2013) *citing Planned Parenthood of Central New Jersey v. Farmer*, 165 N.J. 609, 631 (2000).
12. *State v. Saunders*, 75 N.J. 200 (1977).
13. *In the Matter of Lee Ann Grady*, 85 N.J. 235 (1981).
14. *In the Matter of Karen Quinlan*, 70 N.J. 10 (1976).
15. *In re Grady* at 249.
16. *Planned Parenthood of Central New Jersey v. Farmer*, 165 N.J. 609 (2000).
17. *Id*. at 622.
18. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
19. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
20. *May v. Anderson*, 345 U.S. 528, 540 (1953); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).
21. *Id*. at 651, *citing Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).
22. *Meyer v. Nebraska*, *supra*, at 399.
23. *Skinner v. Oklahoma*, *supra*, at 541.
24. *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring); *Stanley* at 651.
25. *In the matter of the Guardianship of K.H.O.*, 736 A.2d 1246, 1251 (1999) *citing N.J.S.A.* 30:4C-1(a).
26. *Watkins v. Nelson*, 163 N.J. 235, 245 (2000); *In the Matter of D.T.*, 200 N.J. Super. 171, 176 (App. Div. 1985).
27. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).
28. *In the Matter of the Application of Jackson for Custody of Laurie Elizabeth Jackson*, 12 N.J. Super. 144, 147-48 (App. Div. 1958).
29. *Daly v. Daly*, 39 N.J. Super. 117, 123 (Cty. Ct. 1956).
30. *In re Jackson*, *supra*.
31. *R.R. v. L.A.C.*, FM-09-934-15, (April 15, 2015).
32. The father was also requesting to sign the birth certificate when the child is born, for the child to have his surname, and parenting time with the child. *Plotnick*, *supra*, a 1041.
33. *Plotnick*, *supra*, at 1041.
34. *Id*.
35. *Id*. at 1042.
36. *In the Matter of T.J.S.*, 212 N.J. 334 (2012).
37. *Id*. at 1042, *citing Abbotts Labs v. Gardner*, 387 U.S. 136, 149 (1967); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001).
38. *Crowe v. De Gioia*, 90 N.J. 126, 139 (1982).
39. *Plotnick*, *supra*, at 1047.
40. *Id*.
41. *Id*. at 1051-1054.
42. *Id*. at 1054.
43. *Id*. at 1055.
44. *Id*.
45. *Id*. at 1057.
46. *Id*.
47. *Id*. at 1055.

Avoiding Client Dissatisfaction Related to the Qualified Domestic Relations Order Process

by Matthew L. Lundy

When it comes to client satisfaction, an attorney cannot control the outcome of a case, but has control over the expectations they set for their clients. Family law attorneys can apply these principles to managing their client's expectations when dealing with the retirement account division process, otherwise known as the qualified domestic relations order or QDRO (*i.e.*, the QDRO process). When not managed correctly, unrealistic client expectations often lead otherwise satisfied clients to being dissatisfied—sometimes long after the case is thought to be over. With a proper explanation to a client, combined with the effective execution and completion of the QDRO process, client dissatisfaction rarely occurs. This article addresses some of the common mistakes made by family law attorneys when setting client expectations related to the QDRO process, and offers recommendations on how to avoid those mistakes.

Timing of Completing a QDRO or Similar Order

By far the most common mistake family lawyers make when it comes to setting client expectations related to the QDRO process is assuming that the QDRO process comes with some kind of guarantee regarding timing. This is to say, when a client asks how long it will take to get their share of retirement from the other party's account, a lawyer must be mindful of 29 U.S.C. § 1056(d)(3)(G)(i)(II), which provides, in pertinent part:

> within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

As a practical matter, this means that the plan administrator has no precise time limit as to how long they can take to review and administer an order. While certain timetables may be safely assumed, generally, promising a client that the QDRO process will be quick can lead to unrealistic expectations and dissatisfaction. If an attorney is not familiar with a particular plan (keep in mind there are over 100,000 plans nationwide, and the number is growing) and its qualification process, it is best to avoid estimating anything shorter than several months from the time the QDRO is prepared.

Timing of Entry of a QDRO or Similar Order

The appropriate time in a case to have a QDRO entered is simultaneously with a final divorce decree, if not earlier. In the event a final decree is entered and a QDRO has not yet been completed, a participant could die, retire, and/or engage in wrongdoing that may cause irreparable harm to the payee spouse (who may be the practitioner's client).

For example, imagine that an alternate payee has been granted 50 percent of a participant's Bank of America defined benefit pension plan, plus survivor benefits. A final decree is entered, but no QDRO has been entered. The participant spouse leaves the courthouse, and makes an irrevocable election to receive his or her benefits immediately as a single life annuity, thereby foreclosing the possibility of the alternate payee spouse ever getting his or her survivor benefits. Now imagine that instead of retiring, the participant spouse dies while walking out of the courthouse. Their retirement plan then goes to their estate, to which the payee spouse no longer has an entitlement. Whose fault is this? Who will the alternate payee blame?

Which Plans Require QDROs?

Not all retirement plans require QDROs. For example, individual retirement accounts (IRAs) do not necessitate the use of a QDRO to effectuate division of the accounts, since they are established by an individual and not an employer. I.R.C. § 414(p)(1)(B) (along with ERISA 29 U.S.C. § 1056 (d)(3)) defines what a QDRO is, and what plans QDROs apply to).

It is important to note that there are not any laws that prevent IRAs from requiring that a QDRO or QDRO-like order be prepared so the IRA custodian is directed to effectuate a transfer. In fact, many IRA and annuity custodians demand that they be directed by QDRO to effectuate any transfers to a former spouse as a part of a domestic relations case. Thus, unless a lawyer is absolutely certain that a particular IRA does not require a QDRO, he or she should reserve their right to obtain one in the future.

Note that government retirement plans are exempt from the Employee Retirement Income Security Act (ERISA), but many around the country have QDRO-like orders that go by different names, including but not limited to, COAP (court order acceptance for processing) or DRO (domestic relations order) or PADRO (plan-approved domestic relations order). Each of these plans, like IRAs and most ERISA-based accounts, have unique rules that one must be acquainted with to properly divide them. Thus, if an attorney is not acquainted with the processes established by a particular plan, it is best to avoid making assumptions that one plan is similar to another.

Tax Consequences

Generally, the distributee of a payment from a retirement plan is going to be taxed on the distribution.[1] Thus, when a QDRO or similar order is administered, and direct payment is made from a retirement plan to an alternate payee, the participant will not experience any tax consequences but an alternate payee will.

When dealing with a defined contribution plan, there are generally two tax consequences and one exception to each of those consequences that a family lawyer needs to know about. First, any distribution made to a party from a defined contribution will be subject to regular income tax, unless the payment is made from a Roth IRA or 401(k).[2] Second, any distribution made from a defined contribution plan prior to age 59 ½ will be subject to a 10 percent penalty. A limited exception to the 10 percent penalty exists when a distribution is made pursuant to a QDRO. To be clear, when an ERISA-based qualified defined contribution plan is divided pursuant to a QDRO, the payee spouse has the option of taking a distribution rather than a rollover that will be subject to regular income tax, but not subject to the 10 percent penalty, even if the payee is younger than 59 ½.[3] This does not include government plans.

This becomes a useful rule if a client has consented to a QDRO during a case to pay fees or temporary support, since both parties can potentially benefit from this 10 percent penalty exemption.

Valuation Dates and Passive Gains and Losses

When parties execute a settlement agreement, they often fail to specify a valuation date. Under New Jersey law, the cut-off date for marital assets is the date of marriage. However, parties may agree to use virtually any date of their choosing, as long as it is allowable under a particular retirement plan. When parties' use ambiguous settlement agreement language, such as stating a dollar amount or percentage without specifying a valuation date, the potential for unnecessary litigation is created. This is particularly true when the market is volatile, or there has been a long divorce case and a pension has changed in value throughout the case.

The same issue arises when parties and their attorneys fail to specify whether or not passive gains/losses apply to an award from a defined contribution plan. Parties often wait months or years to have their QDROs or similar orders drafted and administered, and accounts will likely wildly fluctuate in value during that time. Therefore, if a dollar amount is specified in a settlement agreement, and that dollar amount represents a certain percentage of an account as of an intended date, that amount when actually distributed may represent significantly more or less of the account, which may, in turn, lead to a dissatisfied client and/or litigation.

Survivor Benefits

There is no more important, nor more misunderstood ancillary economic benefit related to retirement accounts than survivor benefits. Again, it is critical that the family law practitioner *specify* whether or not the payee spouse will receive all or a portion of any pre- or post-retirement survivor benefits, or they may be lost completely. Otherwise, there may be grounds for litigation or, worse yet, a payee spouse may completely lose the benefit of being awarded a portion of the pension. Note that most survivor benefits come at a cost, in the form of a reduction to the monthly pension annuity, and that although they are generally only associated with defined benefit plans, they can also come into play with annuitized defined contribution plans.

Federal and Military Age 55 Rule

In representing the payee spouse of a member of the military or a federal civilian employee who is entitled to a pension, it is critical to advise the client that if he or she remarries prior to age 55, he or she is not entitled to survivor benefits.[4] Advising a client of this is not only important for the purpose of setting client expectations, but also in order to give the client the opportunity to make informed decisions about which assets they actually want as part of their divorce, and to properly plan for their future.

Conclusion

When encountering retirement plans in family law cases, special attention is *always* required. No two plans are the same, and many of the most common plans are governed by totally different sets of laws. However, with proper discovery, and close attention to detail, the proper division of a retirement plan can be relatively simple. ■

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Endnotes

1. *See* I.R.C. § 72(a)(1).
2. *See* I.R.C. § 408A(d).
3. *See* I.R.C. § 72(t).
4. *See* 10. U.S.C. § 1450(b); 5 C.F.R. § 831.644(b).

The Passage of the New Jersey Family Collaborative Law Act and the Impact on Collaborative Practice

by Amy Zylman Shimalla

On Sept. 10, 2014, the New Jersey Family Collaborative Law Act was passed. It became effective Dec. 11, 2014.[1]

In the preamble to N.J.S.A. 2A:23D, the New Jersey Family Collaborative Law Act, the Legislature set forth the following findings and declarations:[2]

> Since at least 2005, attorneys in New Jersey have participated in the dispute resolution method known as family collaborative law, in which any attorney is retained for the limited purpose of assisting his client in resolving family disputes in a voluntary, non-adversarial manner, without court intervention. The family collaborative law process is distinct from other dispute resolution mechanisms because the parties intend to resolve their dispute without litigation. Instead, each party, represented by his attorney, meets together with the other party to the dispute, that party's attorney, and, as needed, one or more nonparty participants who are not attorneys but are professionals in their fields, such as certified financial planners, certified public accountants, licensed clinical social workers, psychologists, licensed professional counselors, licensed marriage and family therapists, and psychiatrists. All participants in the family collaborative law process understand and agree that the process is intended to replace litigation and that the process will terminate if either party or either attorney commences a proceeding related to the subject matter to be addressed through the family collaborative process before a court or other tribunal other than to seek incorporation of a settlement agreement into a final judgment.

New Jersey is now one of the only 10 states with a family collaborative law act on its books. Texas, Florida, and Massachusetts have had similar laws introduced this year. This is despite the fact that collaborative law is practiced in 43 states at this juncture.[3] Thus, once again, New Jersey is on the forefront in family law.

As a result of the expansion of collaborative law and the enactment of the act, the public is becoming increasingly aware of this alternate to a traditional litigated divorce. More lawyers are being trained in collaborative law. Solos, as well as boutique matrimonial firms and matrimonial departments in larger firms, are adding the collaborative process as an option to their divorcing clients. Mental health practitioners and financial professionals, such as certified divorce financial planners and accountants, are becoming more aware and have been trained in collaborative law themselves. These mental health and financial professionals are often on the front lines, giving direction to their clients who are contemplating divorce. They frequently suggest participation in a collaborative divorce process, which is often a better option for couples.

The Paradigm Shift

The term "paradigm shift" is a term-of-art referencing the change in thought process that must take place for a lawyer to make the transition from litigation to the collaborative divorce process. More lawyers are making this transition, which is a departure from the traditional adversarial mindset of a litigator to a more resolution-oriented thought process.

In Feb. 2015, the former chair of the New Jersey State Bar Association's Family Law Section, Jeralyn Lawrence, wrote about collaborative divorce in her column for the *New Jersey Family Lawyer.* She noted that the most critical aspect of the collaborative divorce process is the paradigm shift lawyers participating in the process must make to help ensure a successful collaborative divorce.[4]

Pauline H. Tesler, author of the book *Collaborative Law*, described this paradigm shift and outlined the four stages lawyers must complete during the collaborative process:

- **Stage 1:** Shifting the lawyer's thinking from gladiator to peacemaker and learning to apply perspectives from other professions.
- **Stage 2:** Shifting the lawyer-client relationship to include helping the client improve his or her behavior toward the other party, and to take responsibility for achieving a better divorce.
- **Stage 3:** Shifting the way the practitioner thinks about and communicate with the other party and team members, and using good faith, interest-based negotiation.
- **Stage 4:** Shifting negotiations to learn how to manage the process by following a clear structure (pre-meetings, agendas, minute-taking, etc.) and how to implement conflict resolution strategies.[5]

Confidentiality and Privilege

The act defines the participants in the collaborative process as the parties, their lawyers and other agreed-upon team members. It defines the dispute as any family law matter. Arguably, the most important aspects of the act are the portions addressing privilege and confidentiality, which are critical elements of the collaborative process.

The act creates a privilege between parties and non-attorney collaborative professionals during the negotiation process. Section 2A:23D-12 of the act provides that "a family collaborative law communication is confidential to the extent agreed to by the parties in a signed record or as provided by law." A "collaborative law communication" is defined under the act as "a statement made in the course of a collaborative law process after the parties sign a collaborative agreement but before the collaborative law process is concluded."[6]

Thus, in order to fall within the definition of 'confidential' under the act, the communication must take place after the participation agreement is signed and before the collaborative process is terminated.

Section 2A:23D-13 addresses privileges under the act as follows:

> 13a. [Provides that] a family collaborative law communication made by a party or any nonparty participant is privileged...and is not subject to discovery, and is not admissible in evidence.
>
> 13b. In a proceeding, and in addition to application of the lawyer-client privilege provided under the laws of this State, the following privileges apply:
>
> (1) A party may refuse to disclose, and may prevent the party's lawyer, or a non-party participant, or any other person from disclosing, a family collaborative law communication.
>
> (2) A nonparty participant may refuse to disclose, and may prevent a party, a party's lawyer or any other person from disclosing, a family collaborative law communication of the non-party participant.
>
> 13c. The privilege created by this section may be claimed by the party or nonparty participant...
>
> 13d. Evidence or information that is otherwise admissible, readily available from other sources, or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a family collaborative law process.

By extending the privilege to nonparties for their own communications, the act seeks to facilitate the candid participation of experts and others who may have information and perspective beneficial to the process. This, in turn, fosters an expedient resolution of the dispute. For example, a forensic accountant's work product resulting from his or her evaluation of a business during a collaborative process would be considered privileged. That work product would continue to be protected from disclosure if the collaborative process terminated and the matter proceeded in litigation.

Collaborative lawyers are *not* considered non-party participants under the act. Similar to the attorney-client privilege, the client holds the privilege under the collaborative law act. Thus, the client has the authority to waive the privilege over the lawyer's objection. The lawyer's allegiance and responsibility is to the client pursuant to the Rules of Professional Responsibility. As a result, a lawyer has no additional right to independently assert privilege as a participant in the collaborative process.

The Participation Agreement

The participation agreement is the cornerstone of the collaborative process. It is a contract signed by both parties and their attorneys in which they commit to reaching a settlement outside of court.

Section 4.2 of the act defines the essential elements of the participation agreement as follows:

> (a) A family collaborative law participation agreement shall:
>
> (1) be in a record; (2) be signed by the parties; (3) state the parties' intention to resolve a family law dispute through a family collaborative law process pursuant to the Act; (4) describe the nature and scope of the family law dispute; (5) identify the family collaborative lawyer who represents each party in the process; (6) contain a statement that a family collaborative lawyer's role is limited as defined in the Act and consistent with the Rules of Professional Conduct; (7) set forth the manner by which a family collaborative law process begins and the manner by which it terminates or concludes in accordance with the provisions of the Act; (8) state that any family collaborative law communication of a party or a nonparty participant is confidential and subject to an evidentiary privilege under the Act, and that the privilege may be waived only expressly and by both parties or in the case of a nonparty participant, by the nonparty participant having the right to exercise the privilege; and (9) state that the conduct of the family collaborative lawyer is governed by, the New Jersey Rules of Court, and the Rules of Professional Conduct and the Act does not alter the family collaborative lawyer's responsibilities to the client under the Rules of Professional Conduct and any other applicable Rules of Court.
>
> (b) Parties may agree to include in a family collaborative law participation agreement additional provisions not inconsistent with the Act or other applicable law.

Thus, the privileges and other key elements of the act, and the responsibilities of the collaborative attorneys, are reiterated in the required terms of the participation agreement. This assures that the parties enter into the process with full knowledge of the related constraints.

Rule Changes

As a result of the enactment of the act, Rule 5:4-2(h) has been modified as of Sept. 1, 2015.[7] Thus, reference to collaborative divorce has been added to the list of alternate dispute resolution options of which all lawyers are mandated to advise their clients at the beginning of the divorce process.

New Jersey Practice Groups

Collaborative practice groups exist throughout New Jersey. They consist of collaboratively trained lawyers, mental health professionals, and financial professionals, including certified financial planners and forensic accountants. These groups have a dual purpose of educating their members and educating the public about the collaborative process. As more professionals are trained, the number of practice groups and membership within the practice groups continues to grow.

The first practice group in New Jersey was the Jersey Shore Collaborative Law Group. Over the last several years the following groups have formed:[8]

- Association for the Advancement of Collaborative Practice
- Collaborative Divorce Association of North Jersey
- Collaborative Divorce Professionals
- Jersey Shore Collaborative Law Group
- Mid-Jersey Collaborative Law Alliance
- New Jersey Center for Collaborative Divorce and Mediation
- New Jersey Collaborative Law Group
- South Jersey Collaborative Divorce Professionals

New Jersey Council of Collaborative Practice Groups

The New Jersey Council of Collaborative Practice Groups is a statewide council made up of leaders of the aforementioned practice groups. Each of the practice groups has one or more representatives on the council. The number of representatives is determined by the number of members in each group. There are also founding members of the council, who have open terms. The council is the body that spearheaded the formation and passage of the act.

The mission statement of the council is as follows:

> The New Jersey Council of Collaborative Practice Groups supports excellence among the community of collaborative divorce professionals, and promotes and expands the use of quality collaborative practice throughout New Jersey. The Council serves as a unified voice and central resource for education, training, networking and development of standards of practice as well as expanding public and professional awareness.[9]

Conclusion

With the passage of the act, collaborative divorce is expanding throughout New Jersey. It is now offered as another option for couples going through divorce. Much as mediation and arbitration are good options for some families, so too is the collaborative process. It is not a shortcut. It is not exclusively effective in cases where the parties get along. The process can benefit those with diametrically opposed points of view by offering an array of insight and perspective. With the help of other team members, as necessary, the parties and their lawyers are able to tackle difficult issues in an efficient, private, and effective manner. It is a method that allows families to survive the process with as little collateral damage as possible, both emotionally and financially. ■

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Endnotes

1. N.J.S.A. 2A:23D.
2. N.J.S.A. 2A:23D pmbl.
3. International Academy of Collaborative Professionals, Section on Collaborative Practice in the USA, https://www.collaborative practice.com/.
4. Chair's Column, Collaborative Divorce: A Paradigm Shift, *New Jersey Family Lawyer*, Vol. 35, No. 3 – Feb. 2015.
5. Pauline H. Tesler, *Collaborative Law*, American Bar Association, 2003. Print.
6. N.J.S.A. 2A:23D-3.
7. Rule 5:4-2(h).
8. New Jersey Council of Collaborative Practice Groups, Home Page, http://www.collaboratenj.org/.
9. *Ibid.*

Arbitration Under the New Rules of Court: A New Era Has Begun

by Charles F. Vuotto Jr.

By order entered July 27, 2015, the chief justice of the New Jersey Supreme Court, Stuart Rabner, effectuated substantial amendments to the rules governing the courts of the state of New Jersey effective Sept. 1, 2015. Part and parcel of those revisions to the Rules of Court included a sea change in the arbitration of family law matters. The new and amended rules, as well as related forms that are now part of the appendix to the Rules of Court, found their origin in the pronouncements of Justice Virginia Long about six years ago, in *Fawzy v. Fawzy*, at 199 N.J. 456, 482 (2009). As a result of Justice Long's direction, the Supreme Court created the *Ad Hoc* Committee on the Arbitration of Family Matters. The *ad hoc* committee was established to formulate rules, forms and procedures to address arbitration in family law matters. It worked diligently to carry out its task from the time it was created in or about Dec. 2013 to when the *ad hoc* committee issued its report, on Feb. 9, 2015.[1]

As indicated in the *ad hoc* committee's report, *Fawzy* charged the Supreme Court Family Practice Committee with developing forms and procedures for the arbitration of family law matters pursuant to the Uniform Arbitration Act (UAA) (to wit, N.J.S.A. 2A:23B-1 to 32). The report goes on to explain that *Johnson v. Johnson*[2] extended the charge to include the Alternative Procedure for Dispute Resolution Act (APDRA) (to wit, N.J.S.A. 2A:23A-1 to 9).

The *ad hoc* committee's report goes on to note that, in furtherance of the Court's charge in *Fawzy,* with additional considerations under *Johnson*, that the Family Part Practice Committee developed forms and a script in its 2009–2011 cycle, and again in the 2011–2013 cycle. The proposed rules, forms and procedures were developed by the committee and presented to the Court. Each attempt, however, resulted in a submission that was rejected by the Court due to differences in opinion from the public on the intent of the applicable case law and statutes. As explained in the *ad hoc* committee's report, "members of the public argued that the proposed forms were confusing, complicated and lengthy, made the arbitration process too similar to litigation, did not provide procedures for the review and enforcement of awards and were inconsistent and unclear." Therefore, the *ad hoc* committee "was selected to address the concerns of the public and develop a procedure that was acceptable to all parties." As such, "the Ad Hoc Committee was comprised of representatives from the judiciary, the family bar and the civil bar including experts on arbitration."

In the course of complying with their charge, the *ad hoc* committee drafted amendments to existing rules, new rules, a questionnaire for litigants to answer and sign, a disclosure form for the arbitrator/umpire to sign and two form agreements (one under the UAA and one under the APDRA) to "formalize the procedures and to address the concerns that were previously raised through the public comments."

This article will first address the changes to the Rules of Court and then the significant forms that are now part of the appendices to the Rules of Court.

Revisions and Additions to the Rules of Court

First, Rule 4:21A-1 was amended to add subparagraph (f), which provides that "arbitration in Family Part Matters shall be governed by R. 5:1-5." Rule 5:1-4 (providing for differentiated case management in civil family actions) was amended to add an "arbitration track." A new rule was created; to wit, Rule 5:1-5 is simply entitled "Arbitration" and provides the bulk of the new provisions. Lastly, the second new rule is Rule 5:3-8, which addresses the review and enforcement of arbitration awards. These amended and new rules are discussed in greater detail below.

Rule 5:1-4. Differentiated Case Management and Civil Family Actions

In addition to the "priority," "complex," "expedited" and "standard" tracks, the Supreme Court has now added the "arbitration track." The rule provides that at any point in a proceeding, the parties may agree to

execute a consent order or agreement to arbitrate or resolve the issues pending before the court pursuant to the UAA, APDRA or any other agreed-upon framework for arbitration of disputes between and among parties to any proceeding arising from a family or family-type relationship, except as provided by Rule 5:1-5(a)(1).[3] Rule 5:1-4(a)(5) further provides that if the parties elect to arbitrate, the litigation shall be assigned to the arbitration track, and the arbitration shall proceed pursuant to Rule 5:1-5. Further, issues not resolved in arbitration shall be addressed in a separate mediation process or by the court after the disposition of the arbitration.

Whereas the court should generally honor the preference of counsel who agree on the track assignment, Rule 5:1-4(b) permits the court discretion to assign a case to a different track for good cause. Importantly, the good cause exception does *not* apply to a case assigned to the arbitration track. Further, if it is not clear from an examination of the information provided by the parties which track assignment is most appropriate, the court is presently empowered to assign the case to the track that "affords the greatest degree of management." However, the court may *not* assign a case to the arbitration track under those circumstances. Similarly, the authority granted by Rule 5:1-4(c) to reassign a case to a track other than that specified in the original notice on the court's motion or on an application by a party does not apply to assignments to the arbitration track. Lastly, Rule 5:1-4(c) provides that an action assigned to the arbitration track may be reassigned to the track assignment most appropriate if the parties mutually elect to opt out of the arbitration track by consent order or agreement.

Rule 5:1-5. Arbitration

The first new rule is Rule 5:1-5, which applies to all agreements to arbitrate and all consent orders to arbitrate, including but not limited to those entered into pursuant to the UAA, APDRA or any other agreed-upon framework for arbitration or resolution of disputes between and among parties to any proceeding heard in the family part with the exception of certain issues, which cannot be arbitrated. Those issues are: 1) the entry of the final judgment of annulment or dissolution of relationship; 2) action involving the Division of Child Protection and Permanency; 3) domestic violence actions; 4) juvenile delinquency actions; 5) family crisis actions; and 6) adoption actions.

Rule 5:1-5(b) lists specific prerequisites to arbitrating a family law dispute. The first of these require that the parties, prior to the execution of any agreement or entry of a consent order, each review and execute the arbitration questionnaire, which is now set forth in Appendix XXIX-A. Each party's questionnaire shall be attached to the agreement or consent order. This form will be more fully discussed below.

Although there are significant clauses in the form agreements to arbitrate that are now contained within the appendix to the rules (Appendix XXIX-B and Appendix XXIX-C) that are advisable, although discretionary, the Court has set forth in the body of the Rules of Court various substantive provisions that are mandatory. (*Caveat:* Additional mandatory provisions are referenced in the introductory notes preceding each of the form agreements, as detailed below.)

Specifically, Rule 5:1-5(b)(2)(A) provides that any agreement or consent order to arbitrate in a pending family law matter shall state that:

i. The parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive the right;
ii. The parties are aware of the limited circumstances under which a challenge to the award may be advanced and agree to those limitations;
iii. The parties have had sufficient time to consider the implications of their decision to arbitrate; and
iv. The parties have entered into the agreement or consent order freely and voluntarily, after due consideration of the consequences of doing so.

In addition to the foregoing, Rule 5:1-5(b)(2)(B) provides that in all family proceedings involving child custody and parenting time issues, the agreement or consent order shall provide that:

i. A record of all documentary evidence shall be kept;
ii. All testimony shall be recorded verbatim; and
iii. The award shall state, in writing, findings of fact and conclusions of law with a focus on the best interest of the child standard.

Further, Rule 5:1-5(b)(2)(c) provides that in all family proceedings involving child *support* issues, the agreement or consent order shall provide that the award shall state, in writing, findings of fact and conclusions of law with a focus on the best interests standard, and consistent with Rule 5:6A and Rules Appendix IX.

Rule 5:1-5(b) (2)(D),(E) and (F) refer to the templates for the form agreements (*i.e.*, the form under the UAA found in Appendix XXIX-B; the form agreement to

resolve disputes pursuant to the APDRA found in Appendix XXIX-C; and the arbitrator/umpire disclosure form found in Appendix XXIX-D). Further still, Rule 5:1-5(b)(3) provides that if parties have entered into an agreement or consent order to arbitrate or an arbitration award has issued, the certification filed pursuant to Rule 4:5-1(b)(2)[4] shall so state.

Lastly, Rule 5:1-5(c) provides that any action pending at the time that an agreement or consent order to arbitrate is reached shall be placed on the arbitration track referenced in Rule 5:1-4 for no more than one year following arbitration track assignment, which term may be extended by the court for good cause. This paragraph further provides that cases assigned to the arbitration track shall be given scheduling consideration when fixing court appearances in other matters. This provision was intended to help avoid situations where some judges gave little or no deference to scheduled arbitration dates in other matters being arbitrated by counsel before the court.

Rule 5:3-8. Review and Enforcement of Arbitration Awards

The second new rule is Rule 5:3-8, and provides for procedures to review and enforce arbitration awards consistent with the UAA and APDRA. The *ad hoc* committee addressed the procedures to enforce final and interim awards by an arbitrator or umpire. Essentially, this rule relates back to the statutory framework, with some tweaking regarding interim awards.

It is common for family law litigants to seek interim relief from the court by way of *pendente lite* orders for alimony, child support, restraints against the dissipation of assets and various other forms of relief. Depending on the issues to be arbitrated, an arbitrator or umpire may be faced with the same issues. Any award issued would have little impact if it could not be enforced in a timely manner, not only upon the conclusion of the matter, but also during its pendency.

Rule 5:3-8(a) addresses the procedure for the confirmation of final or interim economic awards (except for child support awards that are governed by subparagraph(c)).

Rule 5:3-8(a) provides that regarding such economic awards (other than child support), either party may apply to the court by motion, *the return date for which may be shortened by the court pursuant to Rule 1:6-3 (a),* or summarily pursuant to Rule 5:4-1 if no other family action is pending, to confirm a final or interim arbitration award. This rule requires the court to confirm and enter a judgment in conformity with the final award of the arbitrator, *or confirm or enter a pendente lite order in conformity with an interim award of the arbitrator,* unless the court determines to correct, modify or vacate the final or interim arbitration award pursuant to the procedures and standards set forth in the UAA (paragraphs 23 or 24) (unless the parties have expanded the scope of review in accordance with paragraph 4(c)); the APDRA (paragraphs 13 or 14); or any other applicable statute or agreed-upon framework under which the parties have agreed to arbitrate their dispute.

Rule 5:3-8(b) addresses the procedures for the confirmation of final or interim custody and parenting time awards. The same procedures as detailed under Rule 5:3-8(a) are applicable, with the added direction that the award should not be entered if the court finds that:

i. A record of all documentary evidence has not been kept; or
ii. The award does not contain detailed written findings of fact and conclusions of law; or
iii. The verbatim record of the proceeding was not made, in which case any interim or final award shall be subject to vacation and reviewed *de novo* by the court; or
iv. There is evidential support establishing a *prima facie* case of harm to a child, in which event the court shall conduct a hearing and if, after that hearing, there is a finding of harm to a child, the parties' choice of arbitration shall be invalidated, the court shall vacate the interim or final award and determine *de novo* the child's best interest. If there is no finding of harm to a child, the court shall confirm and enter a judgment in conformity with the final award of the arbitrator or confirm and enter a *pendente lite* order in conformity with an interim award of the arbitrator, unless the court determines to correct, modify or vacate the final interim arbitration award pursuant to the procedures set forth under the UAA (unless the parties have expanded them); APDRA; any other applicable statute or any other agreed upon framework.

Under Rule 5:3-8(c) the court is given direction regarding the procedures for confirmation of a final or interim *child support* award. Again, the same procedures are detailed as referenced above pursuant to Rule 5:3-8(a), with direction to confirm the award unless the court finds that there is evidential support establishing a

prima facie case of harm to a child with provisions similar to those detailed above with regard to Rule 5:3-8(b) (*i.e.*, confirmation of final or interim custody and parenting time awards).

New Forms

As previously stated, the *ad hoc* committee has created various forms to assist litigants and attorneys in resolving family law matters through arbitration or alternative dispute resolution. Included are forms for arbitrating under the UAA and APDRA. These forms are now part of the appendices to the Rules of Court. As stated within the *ad hoc* committee's report, these form agreements contain explanatory notes as guides for attorneys and parties who are less familiar with the arbitration/alternative dispute resolution process. The form agreements contain mandatory and optional sections that incorporate important language from the UAA and the APDRA. Importantly, the *ad hoc* committee's report notes that the form agreements allow the parties to agree on standards of review, except those that cannot be waived by statute, and offer options for parties to consider, including: reconsideration, expansion of the scope of judicial review under the UAA and an appeal to an appellate arbitrator/umpire. The form agreements also contain provisions about enforcing *pendente lite* awards of the arbitrator/umpire. These option provisions dovetail with the new Rule 5:3-8 about enforcing awards.

Questionnaire Form (Appendix XXIX-A)

The first form is a questionnaire that is to be reviewed and executed by each party prior to execution of an agreement or consent order submitting a family law matter to arbitration/alternate dispute resolution. The questionnaire contains 10 specific questions (with an additional four questions if child support, custody and/or parenting time is an issue), regarding which each party must either check "yes" or "no." Each party must certify by signing the questionnaire that he or she has read each and every question, and that the responses are truthful. The purpose of the questionnaire is to verify to the court (in any subsequent proceeding) that the party has read the agreement or consent order; understands its terms; understands that he or she has the right to a trial to resolve whatever issues are being submitted to arbitration/alternate dispute resolution; is waiving his or her rights to appeal and has limited ability to challenge the awards of an arbitrator/umpire; has had time to consider the implications of his or her decision to arbitrate; is doing so freely and voluntarily; is not under the influence of any substance; had all of his or her questions answered; and agrees to be bound by the arbitration/alternate dispute resolution agreement or consent order.

If child support, custody or parenting time are an issue, each party must also reflect their understanding that an award pertaining to the issues can be vacated if either party can establish that it threatens or poses a risk of harm to the child or children; that a party will not be able to challenge, vacate, modify or amend the award solely because he or she thinks the best interest of the child is better served by a different decision; and that the requirements regarding maintaining documentary evidence and creating a record are understood.

Agreement to Arbitrate Pursuant to the Uniform Arbitration Act (UAA), N.J.S.A. 2A:23B-1 et. seq. (Appendix XXIX-B)

The introductory note to the form agreement under the UAA is important to review. First and foremost, the note states that, "the Supreme Court of New Jersey endorses the use of Arbitration and other Alternative Dispute Resolution processes for the resolution of disputes." The introductory note further states that the parties and their counsel may use the form included within the appendix to develop an arbitration agreement or consent order for the arbitration of certain family law disputes under the UAA and Rule 5:1-5(a) of the Rules of Court. It is important to note that the parties may agree to arbitrate certain family law disputes if there is no pending proceeding in the New Jersey Superior Court, Family Part. Further, the introductory note makes it clear that the provisions of the form included within the appendix are acceptable to establish an enforceable arbitration agreement under the UAA. However, the introductory note also cautions that the form attached under Appendix XXIX-B should not be used for proceedings under the APDRA. Rather, the form attached under Appendix XXIX-C should be used for proceedings under the APDRA.

The introductory note also cautions that the parties should understand that adding certain clauses may increase the time and cost of arbitration. For example, electing to strictly apply the Rules of Evidence, permitting full discovery under the Rules of Court, requiring a full verbatim transcript of the proceeding where not required by case law or requiring full findings of fact and

conclusions of law where not required by case law, can, and likely will, significantly increase the duration and cost of the arbitration process.

The explanatory note also advises litigants and their counsel that certain provisions of the annexed form are required to assure the enforceability of the arbitration agreement. Specifically, these paragraphs are paragraph 1 (relating to a knowing waiver of rights, consent to arbitration, scope of arbitration and entry of a judgment on arbitration award); paragraph 2 (delineating the issues to be arbitrated); and paragraph 4 (stating that the judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof). The explanatory note also advises litigants and their attorneys of provisions that are required in any arbitration involving children, including custody, parenting time or child support issues. These include paragraph 1 (as stated above); paragraph 14 (required record keeping); paragraph 16 (relating to documentary evidence to be held by the arbitrator until the issuance of the award); and paragraph 17 (regarding the required findings and form of the award).

Lastly, the introductory note advises litigants and counsel of certain paragraphs that should be agreed upon to avoid later disputes (*i.e.*, paragraphs 6, 7, 9, 11, 15, 18, 19, 20, 22 and 29), and refers to the remaining provisions of the form agreement as offered for consideration by the parties and their counsel in planning the arbitration proceeding.

Agreement to Resolve Disputes Pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1, et seq. (Appendix XXIX-C)

The introductory note relative to the form agreement under the APDRA is almost identical to that related to the form agreement for the UAA. However, it bears review as certain paragraph references are different since it refers to a different form.

Arbitrator/Umpire Disclosure Form (Appendix XXIX-D)

In order to verify the independence of the arbitrator or umpire, the Rules of Court require that a disclosure form be reviewed and executed by the arbitrator/umpire prior to execution of an agreement or consent order submitting a family law matter dispute to arbitration or ADR process. The preamble to the form states that, "it is important that the parties have complete confidence in the arbitrator/umpire's impartiality. Therefore, any past or present relationship with the parties, their counsel, or potential witnesses, direct or indirect, whether financial, professional or social, or of any other kind must be disclosed. Any doubt should be resolved in favor of disclosure." The form contains 13 separate questions, which must be answered either "yes" or "no" by the arbitrator/umpire. Should the answer to any question be "yes," or if the arbitrator/umpire is aware of any other information that may lead to a justifiable doubt as to his or her impartiality or independence or create an appearance of partiality, the arbitrator/umpire is required to describe the nature of a potential conflict(s) on an attached page. The arbitrator/umpire must then sign the disclosure form indicating that he or she understands the duty to disclose is a continuing duty, which requires him or her to disclose at any stage of the arbitration, any such interests, or relationship that may arise, which are recalled or discovered. The form further states that his or her failure to do so may be grounds to vacate the award.

Conclusion

It is critical for any attorney representing a litigant contemplating entering into an agreement or consent order to arbitrate under the UAA, APDRA or any other agreed-upon framework for arbitration or ADR to review the amendments to Rule 5:1-4 and the new Rules of Court (to wit, Rule 5:1-5 and Rule 5:3-8).

Further, it is important to recognize that the form agreements attached as Appendix XXIX-B and XXIX-C are provided to help develop an arbitration agreement or consent order. These forms, other than mandatory provisions as stated in the introductory note to each form, must be tailored to the particular facts and circumstances of each case. ■

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Endnotes

1. Its report can be found on the New Jersey Judiciary website at judiciary.state.nj.us/reports2015/adhoc_family.pdf. The report was then released for public comment. It was supported by the New Jersey State Bar Association. Ultimately, it was adopted in its entirety in the new rules effective Sept. 1, 2015.
2. 204 N.J. 529 (2010).
3. Rule 5:1-5(a) prohibits resolution of the following issues by way of arbitration or alternate dispute resolution: 1) the entry of the final judgment of annulment or dissolution of relationship; 2) action involving the Division of Child Protection and Permanency; 3) domestic violence actions; 4) juvenile delinquency actions; 5) family crisis actions; and 6) adoption actions.
4. Said rule states, "Notice of Other Actions and Potentially Liable Persons. Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. The court may require notice of the action to be given to any non-party whose name is disclosed in accordance with this rule or may compel joinder pursuant to R. 4:29-1(b). If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action against a party whose existence was not disclosed or the imposition on the noncomplying party of litigation expenses that could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action."