New Jersey Family Lawyer

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CHAIR'S COLUMN

Freddy Meets Jason at the Courthouse

by Lizanne Ceconi

I tend not to be an alarmist. Yet, after reading the Report of the Supreme Court Special Committee on Public Access to Court Records, I am beginning to believe that the practice of family law as we now know it is about to change forever—for the worse. The report was submitted to Chief Justice Stuart Rabner on Nov. 29, 2007, by Justice Barry Albin, chair of the special committee. The committee was charged with reviewing the judiciary's policy regarding the public's right to inspect and copy court records. The balancing test, according to the report was between "the public's general right to know and the individual's limited right to privacy within our court system and how placing court records on the Internet will alter exponentially the calculus between those competing rights."[1]

To start, I am at a loss in understanding why the public has a superior right to know about a person's litigation than an individual's right to privacy. What constitutionally protected right exists that allows your neighbors, business colleagues, teachers, children's friends and others to know all about your divorce case? The report focused on providing transparency in the court system. Courtrooms are generally open to the public, and should be. Public access to the courts, however, is far different from *publishing* the vast majority of court records over the Internet. I am told that family matters will not be posted to the Internet, although the report is silent on that issue. I am also told that electronic filing of matrimonial pleadings is in our future in the next 10 years. Do we really believe these records will not be accessible over the Internet once they are filed through the Internet?

The Internet is cause for more protection to family law litigants. Even if the system requires a visit to the courthouse to request documents, the person requesting the information should be identified, and have a basis for the information sought. Today, it is just too easy to spread information to literally thousands of people anonymously with the push of a button. Simply

scan a document, use an obscure email address and start a chain email. Before you know it, your life's story is being smeared worldwide, and you have no means to prevent it. Is this right to know really superior to your privacy?

The report contained 35 specific recommendations. The first is that certain confidential personal identifiers (CPIs) be treated as confidential. The identifiers include Social Security, driver's license, vehicle plate, insurance policy, financial account and credit card numbers.[2]

In recommendation 5, the report places the burden on the attorneys and litigants to ensure that these CPIs are redacted from all court documents. Attorneys and litigants will now have to certify at the commencement of every case that CPIs will not be included in any document filed with the court. The report specifically exempts court staff from any responsibility in the redaction of court records. The report, however, does not address the consequences that befall the attorney and/or client who fails to redact. This leaves open the possibility of liability for damages, ethics breaches, malpractice actions and sanctions.

Practically speaking, there is very little in matrimonial pleadings that does not or should not contain CPIs. The initial pleadings require a confidential litigant information statement and a certification of insurance coverage. Both documents request the most personal of information, such as Social Security numbers, mother's maiden name, and all insurance information, including coverage and policy numbers. Tax returns, bank account records, credit card statements and Social Security earnings history statements are just some of the documents routinely provided in matrimonial pleadings in order for the court to fairly and adequately address the issues to be decided.

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The report fails to address the cost factor involved in redacting all of the CPIs that appear on these documents. Certainly, this is not work that can be delegated to staff, in light of the potential liability caused by the attorney certification. The time and cost involved in the exercise of redaction may very well cause litigants to either pay far more in legal fees or present a less-than-comprehensive position in order to avoid submission of these documents.

The redaction of this information does not necessarily protect individuals from identity theft. For example, the last four digits of a credit card or Social Security number provide sufficient information to many telephone inquiries by financial institutions.

Recommendation 9 of the report recognizes that family part matters should be viewed differently, and therefore recommends that certain documents involving children should be protected. The recommendation does not go far enough, and fails to appreciate how family part matters are decided.

Issues of custody and parenting time are so interwoven with equitable distribution and support that it would be impossible to redact the information only as it relates to children. Matrimonial pleadings often recite allegations regarding a child's mental and physical health, special needs and personal preferences. These issues are relevant regarding a parent's earnings capacity and/or financial contributions during the marriage. The harm to children when this information is disseminated and accessible to the public is immeasurable. In a similar vein, a blanket rule that prohibits access to family part matters involving children would create an unfair discrimination against parties without children.

The report also fails to address the privacy rights of third parties to a family part action. Employers, business associates, family members, childcare providers, neighbors, new spouses, girlfriends/boyfriends and teachers can all be relevant to a family part action. They, however, have no control over the information being filed with the courts. Employers and business associates have a strong interest in making sure offers of employment, benefits and the like are not publicly distributed, yet there is no protection for them. What court does not want to see the offer of employment to determine compensation? Do we compromise our client's arguments when we become reluctant providing the court with the full financial picture, or are judges expected to make rulings without all the relevant data?

Recommendation 10 exempts the family part case information statement from access. This recommendation makes great sense; however, in family part actions the case information statement and other sensitive documents are regularly attached to motions. The definition of "court record"[3] makes it clear that motion papers and attachments are publicly accessible. Are we required to change our practices and hope that the judges reviewing the matter have all documents necessary to make a fair ruling? What control do we have over the opposing party in preventing certain documents from being attached to motion papers? Are we on the advent of a cottage industry of applications for protective orders and sealing of records? Should the courts be burdened with the additional caseload in addressing these issues?

The report proposed a new Rule 1:38-2, Court Records Excluded from Public Access. The purpose is to compile in one place a comprehensive listing of exempted records from public inspection. The glaring omissions from the proposed court rule are domestic relations orders, guardianship actions and notices of equitable distribution. In these instances, disclosure of CPIs, mental and physical health records and statements regarding lists of assets and liabilities are required to be included in the documents.

The report specifically provides: "[t]he Committee undertook this task with the understanding that the Judiciary serves the people and that court records, like our courtrooms, are presumptively open to the public."[4] The proposed recommendations seem to encourage matrimonial litigants to avoid the system. In essence, the report supports a two-tiered system of justice. Where is the public's right to access to the courts for a fair adjudication of issues?

Wealthier litigants will opt for private adjudication, while those without the funds will not be able to protect their privacy. Will litigants compromise their legal positions for fear that information required to be viewed by the court is far too sensitive to be made available? Does the vindictive litigant gain an upper hand in the litigation by forcing the other party to acquiesce simply to bring the matter to conclusion or by refusing to submit to alternate dispute resolution? Are litigants being punished for failing to avail themselves of mediation or arbitration?

The Family Law Executive Committee (FLEC) was asked to weigh in on the report. An overwhelming majority of its members opposed the report for the reasons set forth above. A motion was passed, stating the following:

> All Family Part matter records shall be considered "exempt" (as defined in the Report) except the Judgment of Divorce (without the Property/Matrimonial Settlement Agreement of the parties annexed thereto) and any post-judgment orders[5] (except Domestic Relations Orders, which shall also be exempt), unless upon a motion by an interested party, for which good cause is shown for the release of said records to the interested party upon clear and convincing evidence.

The motion passed does not pro-

hibit interested parties from obtaining family part documents. Rather, it shifts the burden to the interested party to show by clear and convincing evidence the need for release of the documents. More importantly, it notices the litigant that someone is seeking access to these records.

Since voting on the motion, many members of FLEC have contacted me with voter's remorse. The sentiment is that the motion may not have gone far enough to protect our clients. Pull out any file and determine whether you would have handled it differently knowing that anonymous public Internet access is available. What is the obligation to the client to address this issue?

Recommendation 34 suggests that the judiciary educate the public and the bar about the presumptively open nature of court records. This reminds me of a backpacking trip I was on in southern Spain many years ago. I walked into a bar and saw a half dozen sailors high on valium and quaaludes. When I asked what was going on, it was explained to me that just before docking a notice was distributed to all ship personnel that they would be approached on shore to buy these drugs because they are readily available without prescription at any local pharmacy! Are we encouraging people to seek out this information by educating them on its availability?

The state of New York has a model that seals essentially all family part records except the names of the parties and the nature of the action. When I attempt to balance the advantages of an open public access system against the rights of individuals to privacy and protection from harm in using the system, individual rights prevail. No right-minded parent wants his or her child to have access to matrimonial proceedings. Neighbors, classmates and school personnel should not be able to read about the most personal aspects of someone's life for purely prurient reasons. Should prospective employers be able to access past earnings, marital history and medical history? Can this potentially trigger a claim by the employer for fraud or misrepresentation? What is the impact of allegations for spousal abuse on a person's prospective employer? Can mere allegations published on the Internet create negative financial consequences for a family? The list is endless regarding the potential harm caused by the publication of family part court records.

I think this is all really scary. Call me an alarmist, but this feels like a movie: Freddy Meets Jason at the Courthouse. Hopefully, if enough of us share our concerns with the judiciary, we'll be able to avoid this horror flick. ■

ENDNOTES

1. Report of the Supreme Court Special Committee on Public Access to Court Reports, Nov. 29, 2007, page i.
2. *Id*. at 11.
3. *Id*. at 17.
4. *Id*. at i.
5. The statement of reasons sometimes attached to post-judgment orders should also be exempt from public access given the often-detailed financial and personal information contained therein.

EDITOR'S COLUMN

Family Part Judges: An Endangered Species

by John P. Paone

The Honorable Fred Kieser Jr. served in the Middlesex County Superior Court from 2001–2008. He had volunteered to remain in the family part long past the period when he could have elected to be transferred to another division. Recently, through the political cowardice of the New Jersey Senate Judiciary Committee and Governor Jon Corzine, Judge Kieser was denied tenure and is now off the bench. The circumstances surrounding the judge's failure to obtain tenure are disturbing.

During his reappointment hearing, the committee was troubled by a litigant's complaint that during her case the judge had used the phrase "no tiki no laundry," which is widely considered a racial slur against Chinese-Americans. It was reported that the litigant, who turned out to be non-Asian, had been unsuccessful on the merits of her case before Judge Kieser. The committee refused to take an up or down vote on the judge's reappointment. When the story hit the press, the governor (hardly a profile in courage) withdrew the appointment and ended the judge's career.

The committee identified no other conduct by Judge Kieser, from his record of handling thousands of cases during seven years of service, demonstrating racial basis of any kind. The Middlesex County Bar Association and the many attorneys who had appeared before him supported his tenure. Those who have called for and applauded Judge Kieser's removal indicate that a zero-tolerance policy toward racism in the judiciary is appropriate. However, this position operates on the faulty premise that one who utters a racially insensitive remark is a racist. When Hillary Clinton referred to a St. Louis gas station attendant as "Ghandi," did she expose herself as a closet racist? Did John McCain expose himself as a closet racist by referring to his North Vietnamese captors as "gooks"? When Governor Corzine, then a candidate for the U.S. Senate, made a remark about Italian contractors making "cement shoes" and their "Jewish lawyers getting them out of jail," did he expose himself as a closet racist? I think not.

As human beings, we are imperfect, and if given sufficient opportunity to speak in public, we will inevitably say something that proves offensive simply because we have attempted to be humorous, irreverent, down to earth, or witty, and failed. However, one slip of the tongue does not prove malice or hatred on behalf of the speaker. One improper statement should not defeat a history of good words.

As family law attorneys, we need to be concerned as to how this episode regarding Judge Kieser affects the family part and the judges sitting in that division. Clearly, it does not bode well for a court that is already beleaguered by constant defections. Indeed, it has a chilling effect on those who would consider dedicating their judicial career to the family division.

As family lawyers already know, it is difficult (if not at times impossible) to attract jurists to sit and ultimately remain in the family division. First, there are few judges who were family law practitioners before coming onto the bench. This is a by-product of the fact that family law attorneys are not generally involved in state politics. This is unfortunate, as judges who handled family law matters in their private practice might be more inclined to pursue a career in the family division.

Some may blame the Administrative Office of the Courts' (AOC) policy of rotation for moving good judges out of the family part. I no longer believe that rotation is the real culprit. Indeed, without rotation I believe that we would never get judges to test the waters in the family division in the first place. Can anyone blame judges who were successful civil or criminal attorneys from shying away from the family part when they can serve in a division where they are comfortable and knowledgeable? Fortunately, even jurists who never handled a family law case in their private practice sometimes get the feel for this work and learn to like it. Those that do, report to me that they are doing important work by helping families and children in crisis.

However, no matter how much judges enjoy or are rewarded by their work, the work in the family part is more stressful and demanding than in any other division in the courthouse. In the family division, the judges (not jurors) make the difficult decisions. In most cases, the judge can make neither side happy, and often draws the ire of both parties. Family part judges spend many hours each day on the bench with their every word being recorded, and in

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Recent Developments in Family Law

November 2006–November 2007

by Thomas H. Dilts, William R. DeLorenzo, Octavia Melendez, E. David Millard, Patricia B. Roe, Amy Z. Shimalla, and David Tang

(Editor's Note: The information reproduced here was provided to members of the judiciary at the judicial college in November of 2007. The analyses and comments are those of the authors, and not that of the judiciary.)

CHILDREN IN COURT

STATUTES

P.L. 2007, c. 130 (S-1217)

Expands Responsibilities of New Jersey Task Force on Child Abuse and Neglect

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebd068465b83758/2007c130_Law.pdf

This law amends N.J.S.A. 9:6-8.75 and expands the purview of the New Jersey Task Force on Child Abuse and Neglect to include addressing child abuse prevention services and educating the public on child abuse.

COURT RULES

Amendment to R. 5:2-1

Venue, Where Laid—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-02-01.pdf

This amendment provides that, for kinship legal guardianship actions, venue is laid pursuant to R. 5:9A-3.

Amendment to R. 5:4-4

Service of Process in Paternity and Support Proceedings; Kinship Legal Guardianship—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-04-04.pdf

This amendment requires an affidavit or certification of non-military service must be provided to the court before entering a default against a defendant.

Amendment to R. 5:9A-1

Title of Action—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-09A-01.pdf

This amendment provides that all kinship legal guardianship papers shall be titled Kinship Matter of _____.

Amendment to R. 5:9A-2

Filing and Service—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-09A-02.pdf

This amendment renumbers R. 5:9A to R. 5:9A-2 and titles the new rule Filing and Service.

Adoption of R. 5:9A-3

Venue in Actions Concerning Kinship Legal Guardianship—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-09A-03.pdf

This new rule provides for the protocol to establish venue for kinship legal guardianship matters.

Amendment to R. 5:12-4

Case Management conference, Hearings, or Trial—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-12-04.pdf

This rule amendment updates citations to the New Jersey Rules of Evidence.

Adoption of R. 5:12-6

Matters Involving Law Enforcement—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-12-06.pdf

This new rule sets forth procedures to address matters where a single incident may give rise to a child abuse/neglect complaint and a criminal complaint against a parent or guardian. The rule provides that, in these situations, the family part determines parental visitation. It further provides that the Division of Youth and Family Services (DYFS or the division) may request information from the prosecutor relating to the incident. If the prosecutor and DYFS cannot agree on what information is to be provided, then either agency may request the assignment judge to assign a judge to assist in the resolution of the matter.

DIRECTIVES AND MEMORANDA

Revised Children in Court (CIC) Model Orders and Forms—August 24, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/reso

urces/file/eb187e4acdd2a54/ajmemo070824a.pdf

This memorandum distributes seven revised children in court (CIC) model orders and forms:

- Order to show cause and to appoint a law guardian with temporary custody
- Post-termination summary hearing order
- Judgment of guardianship
- Advisory notice for parents and counsel when parental rights are terminated
- Three permanency orders (FN, FG and FC dockets)

CASE LAW

DYFS v. M.M., 189 N.J. 261 (2007) [Chief Justice Zazzali]

Termination of Parental Rights as to One Parent Refusing to Protect the Child from the Other Parent

In an opinion written by Chief Justice Zazzali, with Justices Wallace and Rivera-Soto dissenting, the Court determined that notwithstanding a parent's ability to adequately care for one child, termination of parental rights is warranted when the second child has special needs, is bonded in the home where he has resided from birth, and where the parent is unable to provide a safe and stable home due to the other parent's alcohol abuse, mental retardation, false allegations of domestic violence, and frequent episodes of "running away" from the family home.

This family had been known to the division since 1993, prior to the birth of the oldest daughter, as a result of substance abuse and domestic violence issues. At one point a superior court order was entered prohibiting the child to be left alone in the mother's care. The immediate matter began shortly after the birth of M.A.M. Mom was overwhelmed with his care and unable to follow the nurse's feeding instructions. The father was unable to formulate an acceptable plan that would not leave M.A.M., an infant born with various developmental disabilities as a result of overexposure to alcohol in utero, in the care of his mentally retarded, alcohol addicted mother, who often "ran away" from home to binge drink. In January 2003, DYFS filed for custody and M.A.M. was placed in his current home. He has lived with them since he was 16 days old and receives speech therapy and physical therapy for muscular disorders on a daily basis.

In 2004 DYFS filed a petition for guardianship with adoption as the permanency goal. At trial DYFS, the mother and the father all presented psychological experts to testify. All three experts opined that the mother posed a risk of harm to the son; Dr. Dyers, DYFS' expert, concluded that she was too cognitively limited and emotionally immature to care for the son. Her own expert, Dr. Silikovitz, corroborated Dr. Dyers' findings and added that it would not be in the son's best interest to be placed in the mother's care. Dr. Fulford, the father's expert, testified that although he did not personally evaluate the mother, he believed that she would present a potential threat of harm to the child.

With respect to the father, Dr. Fulford opined that he was stable, capable and responsible, and would be an able custodial parent to the son. While Dr. Dyer agreed with Dr. Fulford regarding the father's ability, he concluded that the son's attachment to his foster parents and the father's inability to protect the child from the mother's destabilizing influence both "militate[d] against" placement with him. The Court noted that Dr. Dyer was the only expert that evaluated all family members and foster parents. The evidence also indicated that the father was compliant with all DYFS requirements for reunification, but he was devoted to the mother despite the risk she posed to the son.

In May 2005, the trial court granted the termination of parental rights as to both parents, finding it was in the son's best interest to remain with the foster parents based on the bonding evaluations and due to the "repeated destabilizing elements created by the mother." Both parents appealed. The Appellate Division upheld the termination of the mother's rights but reversed the father's, reasoning that "one parent cannot be held responsible for the shortcomings of the other." *DYFS v. M.M.,* 382 N.J. Super. 264, 282-84 (App. Div. 2006).

In reviewing the first prong test under N.J.S.A. 30:4c-15.1(a) with respect to the father, the Supreme Court noted, "Although we are mindful of the mother's limitations, it is the father who established the dangerous situation at home, who maintains those conditions, and who is unable or unwilling to substantially alter those conditions." 382 N.J. Super. at 282. In analyzing the second prong the Court concluded that the father was "unable to protect his son"; that he did "not fully appreciate the needs of his infant son and the risks created by the mother's presence in the home"; that "the daughter's development…[was] not an accurate barometer of the potential harm to the son" and considered the strong bonds that M.A.M. had developed with his foster parents. *Id.* at 285. With respect to the fourth prong, the Court noted that "Integral to our analysis…is the foster parents' willingness to permit continued visitation by the father and the daughter." *Id.* at 288.

Comment: This opinion refocuses our attention to the harm to the child by reminding us that "the harms need not be inflicted by the parent personally…the relevant inquiry focuses on the cumulative effect, over time, of harms arising from the home life provided by the parent." *Id.* at 289.

DYFS v. G.L., 191 N.J. 596 (2007) [_Per Curiam_]

Termination of Parental Rights—One Parent Maintaining Relationship With Offending Parent

Parental rights may not be termi-

nated for a parent who has complied with all of DYFS' requirements, including separating from a husband who was responsible for the death of a prior child, not allowing any unsupervised contact with him, and where psychologists have repeatedly recommended the return of the child, concludes the Supreme Court in this *per curiam* decision.

In March 2002, I.C. died as a result of shaken baby syndrome. T.C., his father, was indicted for second degree manslaughter and third-degree endangering the welfare of a child. He was subsequently convicted of the endangerment charges, as a result of shaking I.C. While the criminal matter was pending, G.L. became pregnant with M.J. At the time of M.J.'s birth, the parents had been separated for several months. G.L. had agreed to no unsupervised contact with T.C. and to psychological evaluations, parenting classes and counseling. The psychologist concluded that G.L. showed no risk of harming M.J. and recommended a psychiatric evaluation and continued therapy, and G.L. complied. Although G.L. separated from T.C. and never allowed unsupervised contact, she did not believe that T.C. had shaken I.C. and only that he had failed to call 911, notwithstanding T.C.'s conviction. (On appeal from the criminal matter, the Appellate Division was clear that the conviction was a result of shaking the child and not because of his failure to call 911.)

In July 2003, DYFS requested and was granted custody of M.J. In the summer of 2004, DYFS sought to reunify M.J. and G.L. and arranged for another psychological evaluation, which also recommended the return of the child. The trial judge rejected the plans for reunification out of concern that G.L. refused to acknowledge that T.C. shook their son to death. The goal was changed to adoption. Parental rights were terminated in September of 2005. The Appellate Division affirmed.

In analyzing the first prong under N.J.S.A. 30:4c-15.1a the Court concluded that G.L. had "complied with every requirement imposed on her by DYFS and satisfied both DYFS and the experts as to her ability to function as M.J.'s mother." *Id.* at 607. Furthermore, she "never allowed T.C. to see his daughter without supervision and covenanted to maintain that stance. She also underwent numerous psychological and psychiatric evaluations and participated in whatever counseling DYFS requested with the result that reunification was DYFS' goal." *Id.* The Court noted that: "The heart of the issue here is that G.L. refused to condemn T.C. for the death of I.C. Instead, and despite the autopsy report and the jury verdict, she insisted that his crime was in failing to call for help. Although that stance was unrealistic and a tactical error, it did not justify the loss of her parental rights." *Id.* at 608.

Comment: The Court makes a clear distinction between parents maintaining a relationship with each other and the ability of the non-abusive parent to protect the child from the other parent. "[T]here is no reason why G.L. cannot maintain her belief in and relationship with T.C.—the father of her children—so long as she does not live with him, allow him unsupervised visits with M.J., or otherwise place M.J. at risk." *Id.*

***DYFS v. B.R., In the Matter of the Guardianship of A.W. and A.R.,* 192 N.J. 301 (2007) [Justice Long]**

Effective Assistance of Counsel—Application of Strickland Test on Direct Appeal

Where a defendant claims ineffective assistance of counsel in a termination case, the issue should be raised on direct appeal and the court deciding the case should apply the two-prong analysis set forth in *Strickland v. Washington,* 466 U.S. 668 (1984), according to this unanimous decision by the Supreme Court.

B.R.'s parental rights to A.W. and A.R. were terminated after a lengthy trial, which B.R. appealed. The appellate court rejected B.R.'s claim of ineffective assistance of counsel as "legally inapplicable to this civil proceeding"; noting, however, that on the merits B.R.'s representation was in fact ineffective. The Supreme Court granted her petition for certification and accorded *amicus curiae* status to Legal Services of New Jersey.

The first issue addressed was whether B.R. was entitled to the assistance of counsel at her trial for termination of parental rights. The Court found "the right to counsel in a termination case has constitutional as well as statutory bases. Either way, the performance of that counsel must be effective." 192 N.J. at 306. Turning to remedy, the Court adopts *Strickland* as the standard for assessing ineffective assistance claims in parental termination cases because it "is clear, familiar to lawyers and judges, and carries with it a developed body of case law." 192 N.J. at 308-09. The Court found no grounds for reversal on the claim of ineffective assistance of counsel.

The Court's greatest concern is "the practical application of a post-trial remedy, given the time constraints that apply in a parental termination case because of a child's need for permanency." *Id.* at 309. After reviewing the option of post-judgment motion in the trial court against a direct appeal, the Court "direct[s] that claims of ineffective assistance of counsel in termination cases be raised on direct appeal." *Id.* at 311. The Court established a plan for handling such cases, which was referred to the Committee on Family Practice for recommendations on codification. The plan requires:

1. An attorney other than trial counsel to file the appeal. *Id.*
2. A detailed exposition of how the trial lawyer fell short. *Id.*
3. A statement regarding why the result would have been different had the lawyer's performance not been deficient. *Id.*
4. An evidentiary proffer in appropriate cases. *Id.*

The Court believes that many cases will be resolved based on the appeal record, with some requiring a remand to the trial judge to resolve a genuine issue of fact. In such cases, the trial judge should grant "an accelerated hearing (to be heard in no more than fourteen days)...the parties should then be permitted simultaneously to exchange supplemental appellate briefs within seven days." *Id.*

Comment: This opinion was consistent with and amplified Judge Lyons' decision in *DYFS v. B.H.*, 391 N.J. Super. 322 (App. Div. 2007).

***DYFS v. B.H., In the Matter of Guardianship of O.F., A.F. and E.F.,* 391 N.J. Super. 322 (App. Div. 2007) [Judge Lyons, t/a]**

Effective Assistance of Counsel in Children in Court Matters

The right to counsel in proceedings that may affect parental rights embodies an inherent right to effective assistance of counsel, which should be tested by the standard set out in *Strickland v. Washington,* 466 U.S. 668 (1984).

The DYFS first became involved with the mother, B.H., in November 2002, due to allegations of physical abuse. While abuse was not substantiated until May 2005, DYFS continued to have involvement with the family as reports of increasing violence were received. On Aug. 10, 2005, B.H. testified at a fact-finding hearing that she did in fact strike E.F. on the buttocks and leg with his belt, but that the belt buckle accidentally hit him in the eye as he was running away from her. The trial court judge found B.H.'s testimony incredible and inconsistent. Finding DYFS' evidence more persuasive, the court placed the children with their father, O.H. Sr. At a compliance review hearing on Jan. 11, 2006, counsel for O.H. Sr. sought to have the litigation terminated, allowing the children to remain in the custody of their father. The trial court judge concluded termination was premature, allowing B.H. more time to comply with the Division's requirements. On May 3, 2006, DYFS moved for termination of the litigation, which was granted, allowing both B.H. and O.H. Sr. to retain legal custody, but placing the children in the physical custody of O.H. Sr. B.H. appealed the decision, based on ineffective assistance of counsel.

While ineffective assistance of counsel was not raised below, the appellate court agreed to consider the case because it "concern[ed] matters of great public interest." *Reynolds Offset Co. v. Summer*, 58 N.J. Super. 542, 548 (App. Div. 1959). First the court considered whether B.H. had a right to counsel, finding "[b]oth the statutory law and case law of this State suggest that a defendant has a right to counsel when a complaint is filed against him or her charging abuse and neglect and threatening the individual's parental rights." *Id.* at 345. Judge Lyons then proceeded to evaluate the available methods of determining the effectiveness of counsel, deciding to follow the two-prong analysis set forth in *Strickland v. Washington*. In analyzing the performance prong of *Strickland*, the appellate panel found B.H.'s counsel "did not err in relying predominately upon the DYFS reports and not calling workers or agents to testify; this trial strategy was permitted." *B.H., supra,* 391 N.J. Super. at 350. With respect to the second prong, the court determined "it was B.H.'s own testimony that prejudiced her cause, not the action or inaction of her counsel." *Id.* at 351.

***DYFS v. K.S., J.S., R.S. and T.S., In the Matter of the Guardianship of A.S.,* 388 N.J. Super. 521 (App. Div. 2006) [Judge Lihotz]**

Parent's Authority to Transfer Legal Custody of Child After DYFS has Already Obtained Legal Custody

The appellate court affirmed the trial court's decision to deny a motion to intervene by the appellant, A Loving Choice Adoption Associates (ALCAA). On appeal, the court ruled that allowing ALCAA to intervene in the proceedings would interfere with the trial court's role as overseer over DYFS' responsibility to care for the child, and would have undermined the state's *parens patriae* authority to protect children. The issue in this case was whether a natural parent may sign a "surrender" of his or her child to a private adoption agency after having given custody to a third party and the division removing that child from the custodian's care and taking legal custody.

On June 17, 2003, A.S. was born to a substance-abusing mother, K.S. At that time, the father's whereabouts were unknown. On Jan. 21, 2005, K.S. gave custody of A.S. to her brother and his wife, R.S. and T.S. On Aug. 31, 2005, an anonymous referral reported concerns about A.S.'s safety to DYFS. DYFS investigated and confirmed the allegations, and conducted an emergency removal after T.S. and R.S. told them that they no longer wanted custody of the child. They also informed DYFS that K.S. wanted to place A.S. with ALCAA.

On Aug. 2, 2005, K.S. signed the birth parents statement of intent, expressing her intent to give custody of A.S. to ALCAA for adoption purposes. This document was faxed to DYFS on Sept. 6, 2005. On the same day, DYFS filed an emergent motion for care, custody and supervision of A.S., and the court granted the request. Both T.S. and R.S. were present at that hearing, but the whereabouts of K.S. and the child's father were unknown. While K.S. failed to appear in court, she signed a surrender of custody of A.S. and consent for adoption to ALCAA on Sept. 6, 2005.

On Sept. 16, 2005, ALCAA filed a motion to intervene and for custody of A.S. The court denied the motion, ruling that the agency did not have standing because K.S.' surrender had no legal effect given that she did not have custody. On appeal, ALCAA argued that the trial court erred since the statute did not mandate that the natural parent have custody of the child at the time of surrender; thus, her signed surrender superseded

DYFS' emergent motion. The appellate court ruled to the contrary, stating:

> [N.J.S.A. 9:3-41] contemplates both the surrender of parental rights and the relinquishment of guardianship and custody. In this matter, K.S. had already transferred legal and physical custody of her daughter to T.S. and R.S., by order dated January 21, 2005. Thereafter, pursuant to its statutory authority, DYFS took emergency legal and physical custody of A.S., N.J.S.A. 9:6-8.29, and the Division's role as custodian of the child was reaffirmed by order of the court. N.J.S.A. *9:6-8.31*. K.S. executed the "surrender" to ALCAA for the purpose of defeating the Division's authority. This is impermissible. K.S.'s execution of the surrender was without legal effect. At the time of her actions, she lacked custody of the child and, thus, lacked the capacity to surrender the child in derogation of DYFS's role. 388 N.J. Super. at 525.

***DYFS v. F.H. and A.H.,* 389 N.J. Super. 576 (App. Div. 2007) [Judge Fuentes]**

Termination of Parental Rights—Requirement to Prove by Clear and Convincing Evidence that Each Child Was Abused or Neglected

Where the child to whom the termination of parental rights (TPR) applies is not the victim of abuse or neglect, the trial court must find by clear and convincing evidence that "failure to adequately respond to and/or prevent the abuse endured by one child, exposes any similarly situated sibling to a high probability of being abused or neglected." 389 N.J. Super. at 625.

Harry (The appellate panel assigned the fictitious names of "Kathy," "Harry," and "James" to protect the identity of the children involved) suffered nine bone fractures in his first 18 months of life. Over the course of DYFS' involvement, tests were performed ruling out Poland sequence, osteogenesis imperfecta, rickets and other conditions that might help explain Harry's injuries. When initially placed, Harry was classified as "medically fragile," but that was scaled down as he remained injury-free in placement. The panel took particular interest in the fact that Harry sustained no further injuries once removed from the care of A.H. and F.H. The panel found the record insufficient as to substantiate any abuse of Kathy and James.

Both parents appealed, alleging that DYFS did not prove each element of N.J.S.A. 30:4C-15.1a by clear and convincing evidence. In analyzing the first prong of N.J.S.A. 30:4C-15.1a, the court concluded that "the record supports the trial court's ultimate conclusion that both parents were unable to eliminate the harm endured by Harry, and did not provide a safe and stable home for him." 389 N.J. Super. at 612. With respect to the second prong, the panel agreed that the parents refused to take responsibility for Harry's injuries, insisting that he was the victim of a medical condition making him prone to injury, despite all medical evidence to the contrary. The court finds no deficiency in services DYFS provided under the third prong. As to the fourth prong, the court again differentiates between the siblings, finding that no more harm than good would come from TPR as to Harry, but finding Kathy and James had not sufficiently bonded with their foster parents. The case was affirmed with respect to Harry, but reversed and remanded with respect to Kathy and James.

***DYFS v. S.F.,* 392 N.J. Super. 201 (App. Div. 2007) [Judge Baxter, t/a]**

Granting Kinship Legal Guardianship When Parent Has Ongoing Substance Abuse Issues

Where a parent has had a protracted and intractable drug addiction, has had sporadic contact with her children, and refuses to recognize their special needs, granting kinship legal guardianship (KLG) to devoted grandparents was properly awarded.

The family was involved with the division for more than a decade prior to the commencement of these proceedings. Three referrals had been received by DYFS, all relating to S.F.'s substance abuse. When the last referral, dated March 10, 2003, was investigated, S.F. acknowledged using drugs. For the next two-and-one-half years, S.F. would engage in a pattern of treatment and relapse. She successfully completed two inpatient drug treatment programs and received treatment from a total of four to five programs, consistently relapsing. At the time of the KLG hearing, on June 12, 2006, she was not enrolled in an aftercare program, nor had she been involved for a considerable amount of time. S.F. had failed to undergo random urine screens, had no stable housing or employment, and refused to acknowledge that her older son had autism, despite the fact that he had been diagnosed, treated, and was attending a specialized school.

On April 14, 2003, the court granted DYFS's request for custody with respect to the older son and placed him with the paternal grandparents. S.F. became pregnant with the younger son, admitted using drugs during the pregnancy and signed a consent for 15-day placement (along with the father, T.L.); thus, the younger son was also placed with the paternal grandparents on Nov. 13, 2003.

On Dec. 8, 2003, the court awarded legal custody of the younger son to DYFS. On May 4, 2006, the court granted DYFS motion to amend the complaint to a KLG and scheduled the hearing for June 12, 2006.

T.L., the older son's father, testified at the hearing and admitted that he and S.F. used drugs together as late as May, 2006. The paternal grandparents testified to their commitment to raising the boys. The worker corroborated such devotion and described the relationship between the boys and their grandparents as "very close." S.F. testified and denied using drugs with T.L. and stated that the last time she used

was September 2004.The trial court granted KLG concluding that DYFS satisfied the statutory requirements by clear and convincing evidence.

In analyzing whether KLG was properly granted, the appellate court afforded deference to the trial court's decision and considered whether each prong in N.J.S.A. 3B:12A-6d(1) was supported by adequate, substantial and credible evidence in the record. The court, quoting *DYFS v. C.S.*, 367 N.J. Super. 76, 110 (App. Div. 2004), stated, "A child is not chattel in which a parent has an untempered property right."The appellate court stated:

> We agreed with [the trial court's] ultimate conclusion that S.F.'s drug addiction, when combined with her lack of involvement in her children's lives, demonstrated by clear and convincing evidence an 'incapacity...of such a serious nature as to demonstrate that [S.F.] is unable, unavailable or unwilling to perform the regular and expected functions of care and support' of her two children." 392 N.J. Super. at 211.

When analyzing the second prong the appellate panel noted that "the conduct satisfying the first prong 'informs and may support' the second element." *Id.* at 212 (*quoting In re Guardianship of DMH*, 161 N.J. 365, 378-79 (1999)). The third and fourth prongs were also affirmed for substantially the reasons set forth by the trial court. Quoting from C.S. and K.H.O., the appellate court noted the urgency in children obtaining "permanent, safe and stable placement[s]." *DYFS v. C.S.*, 367 N.J. Super. 76, 113 (App. Div. 2004); In re Guardianship of K.H.O., 161 N.J. *337*, 357-58 (1999).

Comment: In a footnote, this panel pointed out that the elements in KLG and termination of parental rights (TPR) mirror each other and that it is therefore "reasonable to apply the decisional law applicable to N.J.S.A. 30:4C-15.1 to KLG cases as well." 392 N.J. Super. at 212 n.5.

JUVENILE

STATUTES

P.L. 2007, c. 127 (S-448)

Criminalizes Possession or Use of Electronic Communications Devices in Certain Correctional Facilities

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebd05e465b47bbe/2007c127_Law.pdf

This law enacts N.J.S.A. 2C:29-10.

P.L. 2007, c. 31 (S-1280)

Broadens Definition of "Toxic Chemical" in the Drug Statutes to Include Nitrous Oxide and Other Substances

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb8b8007ee03de5/2007c31_Law.pdf

This law amends N.J.S.A. 2C:36-1, 2C:36-2 and 2C:36-3.

P.L. 2007, c. 24 (A-2991)

Enhances Penalties for Possessing, Receiving, and Transferring Community Guns

Link: http://www.njleg.state.nj.us/2006/Bills/PL07/24_.PDF

This law amends N.J.S.A. 2C:39-4.

COURT RULES

Amendment to R. 5:22-2

Referral Without Juvenile's Consent—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-22-02.pdf

This amendment provides that evidence presented at a referral hearing must be limited to the issue of probable cause.

Amendment to R. 5:24-2

Predisposition Evaluation—September 1, 2007

Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-24-02.pdf

This amendment provides that referring a juvenile to a predisposition evaluation is discretionary, not mandatory.

DIRECTIVES AND MEMORANDA

Assignment Judge Memorandum

Revised Juvenile Delinquency Model Orders—August 30, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebdaa24bbd0831d/ajmemo070830a.pdf

This memorandum distributes three revised juvenile delinquency model orders:

- Juvenile order of disposition [CN: 10812]
- Reasonable efforts order to prevent placement (for use in court) [CN: 10810]
- Reasonable efforts order to prevent placement (for use in chambers) [CN: 10811]

Assignment Judge Memorandum

Updated Guide for Juvenile Conference Committees—July 11, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb39270d59be9f9/ajmemo070711a.pdf

This memorandum distributes the revised Guide for Juvenile Conference Committees. The amended guide contains changes to the following sections:

- Appointments; terms; duties; organization
- Confidentiality requirement
- Committee operating procedures
- Publicizing the committee's existence

Directive # 05-07

Family/Juvenile—Functional Equivalent to Juvenile Pre-Disposition Report (PDR— Standardized Form—July 3, 2007

Link: http://www.judiciary.state.nj.

us/directive/2007/dir_05_07.pdf

This directive promulgates a new standardized functional equivalent to the predisposition report (PDR) form, which implements the R. 5:24-4(b) authorizing the use of PDR functional equivalents.

Assignment Judge Memorandum

Revision to Emergent Duty Procedures Manual (EDPM)—Criteria for Predisposition Juvenile Detention— March 16, 2007
Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eba91107f1ed6ec/ajmemo070316a.pdf

This memorandum distributes revised pages of the Emergent Duty Procedures Manual (EDPM). Revisions include:

- New criteria for placing juveniles in detention
- An emergent hearing for a juvenile placed in a non-secure shelter may be held on the following court day
- Out-of-home placement hearings for family crisis matters may wait until the next court day

CASE LAW

***A.A. v. Attorney General of New Jersey,* 189 N.J. 128 (2007) [Justice Wallace]**

Using DNA Test Results Maintained in the New Jersey DNA Databank

The New Jersey DNA Database and the Databank Act of 1994 is constitutional. All juveniles adjudicated delinquent for committing an act which, if committed by an adult, would be a crime (4th degree or higher) must, regardless of age, submit DNA sample which can be used to investigate crimes that were committed before or after the DNA sample was taken.

***State in the Interest of Y.S.*, _____ N.J. Super. _____ (Ch. Div. 2007) [Judge Cronin] FJ-07-1356-07**

Waiver of Juvenile Charged with Weapons and Drug Offenses to the Criminal Part

A juvenile charged with violation of the "guns and drugs statute," N.J.S.A. 2C:39-4.1, may be waived over to the Criminal Division for trial as an adult in accordance with this trial court decision.

This decision deals with the conflict between the juvenile waiver statute set forth in N.J.S.A. 2A:4A-26 and R. 5:22-2. The "guns and drugs statute," N.J.S.A. 2C:39-4.1, is listed among those offenses subject to waiver in the court rule (R. 5:22-2(c)(3)(C)) but not in the waiver statute. The case involves a question of statutory interpretation and is one of first impression in New Jersey. After reviewing legislative history and assessing the intent of the drafters of the waiver statute, the court concludes that waiver of guns and drugs statute violations is not permitted under the waiver statute. Judge Cronin continues, however, by his review of Rule 5:22-2 that the Rule expressly references the guns and drugs statute as an offense subject to waiver. Relying on *Winberry v. Salisbury*, 5 N.J. 240 (1950), Judge Cronin noted that in areas of substantive law, as opposed to procedural law, court rules must yield to legislation. Judge Cronin analyzed the rule and the history and concluded that R. 5:22-2 is procedural in nature. Judge Cronin states:

> Rule 5:22-2 pertains to the waiver or transfer of a case from the Chancery Division to the Law Division of the Superior Court. Contrary to defendant's contention, this rule does not "in and of itself" determine the outcome of the case. These outcomes are ultimately decided through subsequent proceedings (*e.g.* guilty plea, trial, dismissal motions) in the Chancery Division, in the event waiver is denied, or in the Law Division, in the event waiver is granted. Rule 5:22-2 provides a vehicle through which the case can be transferred from one division to the other for this ultimate determination in the recipient division...Accordingly, Rule 5:22-2 can be properly characterized as "one step in a series of steps in a ladder to final determination", and therefore a procedural matter within the Supreme Court's constitutional rule-making authority. *State in the Interest of Y.S.* at 12.

Therefore, this trial level decision concludes that the waiver hearing on the guns and drugs statute violation could proceed.

DISSOLUTION/NON-DISSOLUTION

STATUTES

P.L. 2006, c. 103 (A-3787)

Revises the Marriage Laws; Establishes Civil Unions; Establishes the New Jersey Civil Union Review Commission
Link: http://www.njleg.state.nj.us/2006/Bills/PL06/103_.PDF

This law enacts the following new statutes: N.J.S.A. 37:1-28 to 37:1-36; 2A:34-2.1 and 26:8A-4.1.

This law amends the following statutes: N.J.S.A. 37:1-1 to 37:1-4; 37:1-6 to 37:1-8; 37:1-11; 37:1-12; 37:1-12.1; 37:1-12.2; 37:1-13; 37:1-15 to 37:1-17; 37:1-17.1; 37:1-17.2; 37:1-18; 37:1-19; 37:1-27; 37:2-31 to 37:2-41; 26:8-1; 26:8-4; 26:8-17; 26:8-23 to 26:8-25; 26:8-27; 26:8-41 to 26:8-48; 26:8-50 to 26:8-51; 26:8-55; 26:8-60 to 26:8-64; 26:8-66 to 26:8-68; 2A:34-1; 2A:34-3; 2A:34-6 to 2A:34-15; 2A:34-18; 2A:34-21; 2A:34-23; 2A:34-23d; 2A:34-23.1; 2A:34-24.1; 2A:34-25 to 2A:34-26; 22A:2-10; 22A:2-12; 52:27D-43.24a; 10:5-5; 10:5-12; 34:11B-3; 2A:84A-17.

The new law amends and supplements the state's marriage statutes to include civil unions. Under the new law, a civil union is defined as a "legally recognized union of two eligible individuals of the same sex." According to the sponsors, the new law has two purposes: 1) to provide same-sex couples with the same rights and benefits as heterosexual

couples who marry and 2) to comply with the constitutional mandate set forth by the New Jersey Supreme Court in its recent landmark decision on Oct. 25, 2006 of *Lewis v. Harris*, 188 N.J. 415 (2006).

COURT RULES

Amendment to Appendix XVII

Temporary Support Order—September 24, 2007
Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb137e466fd074f/n070924b.pdf

Effective Sept. 24, 2007, the Supreme Court adopted corrective revisions to Appendix XVII (Temporary Support Order).

Amendment to R. 1:5-6

Filing—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule1-05-06.pdf

This amendment provides that filing requirements for family part motions are addressed by R. 5:5-4.

Amendment to R. 1:6-3

Filing and Service of Motions and Cross-Motions—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule1-06-03.pdf

This amendment provides that filing and service requirements for family part motions are addressed in Part V of the court rules.

Amendment to R. 5:5-4

Motions in Family Actions—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-05-04.pdf

This amendment sets forth new timeframes for motion practice in the family part. The motion must be filed and served no later than 24 days before the return date, a response must be filed and served no later than 15 days before the return date and answers to the response must be filed and served no later than eight days before the return date. This amendment eliminates the distinction between pre-judgment and post-judgment motions.

Amendment to R. 4:43-2

Final Judgment by Default—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule4-43-02.pdf

This amendment provides that defaults in the family part are addressed by Part V of the court rules.

Amendment to R. 5:1-2

Actions Cognizable—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-01-02.pdf

This amendment provides that the family part hears actions brought under the Domestic Partnership Act and the civil union statute.

Amendment to R. 5:3-4

Counsel: Appearance; Prosecutor—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-03-04.pdf

This amendment provides that the court will not assign counsel to indigent defendants in child support enforcement hearings.

Amendment to R. 5:4-2

Complaint—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-04-02.pdf

This amendment provides that the confidential litigant information sheet (CLIS) (Appendix XXIV of the Rules Governing the Courts of the State of New Jersey) will contain a certification and signature line pursuant to R. 1:4-4(b).

Amendment to Appendix XXIV

Confidential Litigant Information Sheet— September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/appendixXXIV.pdf

This amendment revises the CLIS (Appendix XXIV of the Rules Governing the Courts of the State of New Jersey) to contain a certification and signature line pursuant to R. 1:4-4(b).

Amendment to R. 5:4-4

Service of Process in Paternity and Support Proceedings; Kinship Legal Guardianship—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-04-04.pdf

This amendment requires an affidavit or certification of non-military service must be provided to the court before entering a default against a defendant.

Amendment to R. 5:5-2

Family Case Information Statement—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-05-02.pdf

This amendment requires parties to a matrimonial action to inform the court of any material change in the information supplied on the case information statement.

Adoption of R. 5:5-10

Default; Notice for Equitable Distribution, Alimony, Child Support and Other Relief—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-05-10.pdf

This new rule renumbers R. 5:5-2(e) to R. 5:5-10.

Adoption of R. 5:6-8

Affidavit or Certification of Non-Military Service—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-06-08.pdf

This new rule requires an affidavit or certification of non-military service must be provided to the court before entering a default against a defendant in summary support proceedings.

Adoption of R. 5:7-9

Affidavit or Certification of Non-Military Service—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-07-09.pdf

This new rule requires an affidavit or certification of non-military service must be provided to the court before entering a default against a defendant in a proceeding for divorce, nullity, separate maintenance or child support.

Amendment to R. 5:7-4

Alimony and Child Support Payments—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-07-04.pdf

This amendment provides that a child support obligee may request the assessment of post-judgment interest on a child support judgment.

Amendment to Appendix XVI

Uniform Summary Support Order—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/appendixXVI-Part2.pdf

This amendment adds to the New Jersey uniform support notices a provision that post-judgment interest may be charged for failure to pay support.

Amendment to Appendix XVII

Temporary Support Order—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/appendixXVII-Part2.pdf

This amendment adds the New Jersey uniform support notices to the temporary support order.

Amendment to R. 5:7-5

Failure to Pay; Enforcement by the Court or Party; Income Withholding for Child Support; Suspension and Revocation of Licenses for Failure to Support Dependents; Execution of Assets for Child Support; Child Support Judgments and Post-Judgment Interest—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-07-05.pdf

This amendment clarifies the remedy for failure to pay support. The amended rule deletes "contempt" and provides that failure to pay may result in a relief to litigants proceeding pursuant to R. 1:10-3.The motion will be brought in the county enforcing child support.The rule now also states that indigent obligees are not required to pay filing fees.

Amendment to R. 5:6-5

Enforcement of Orders—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-06-05.pdf

This amendment deletes "contempt," specifies that enforcement actions are brought under R. 1:10-3 and includes a reference to R. 5:3-7 (additional remedies on violation of orders relating to parenting time, alimony, or support).

Amendment to R. 5:25-3

Child Support Hearing Officers—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-25-03.pdf

This amendment deletes "contempt" and clarifies the procedures for addressing warrants.

Adoption of R. 5:7-10

Suspension Provisions of Child Support Orders—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/rule5-07-10.pdf

This new rule sets forth the various definitions of "suspension" of child support enforcement, the scope of enforcement proceedings when enforcement is suspended, and the frequency that the court reviews its orders that contain suspension provisions.

Amendment to Appendix IX-A

Considerations in the Use of Child Support Guidelines—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/appendixIX-A.pdf

This amendment provides that, in child support matters involving multiple family obligations, orders should be adjusted to distribute the obligor's available income among all children while taking into consideration both the obligee's share of the child support obligation and the obligor's self-support reserve.

Amendment to Appendix IX-F

Schedule of Child Support Awards—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/appendixIX-F.pdf

This amendment deletes rows $3,610 through $4,420 of the schedule of child support awards.

Amendment to Appendix IX-G

Schedule of Child Support Awards as a Percentage of Combined Net Income—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/appendixIX-G.pdf

This amendment deletes Appendix IX-G.

Amendment to Appendix IX-H

Combined Tax Withholding Tables for Use with the Support Guidelines—September 1, 2007
Link: http://home.aoc.judiciary.state.nj.us/2007_rules/appendixIX-H.pdf

This amendment deletes rows $3,600 through $4,420 of the combined tax withholding tables for use with the support guidelines.

Amendment to R. 5:5-4

Motions in Family Actions—July 31, 2007
Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb3c9d421dc2a84/n07073

1a.pdf

This amendment corrects R. 5:5-4(d), Advance Notice, to read, "Answers or responses to any opposing affidavits and cross-motions shall be served and filed not later than [four] eight days [(Monday)] (Thursday) before the return date."

Amendments to Rules 1:40-12, 5:4-4, 5:5-4 and 5:7-

Technical Corrections—July 25, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebb84f402721c82/n070725a.pdf

Effective July 25, 2007, the Supreme Court adopted corrective revisions to Rules 1:40-12, 5:4-4, 5:5-4 and 5:7-5.

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

Child Support Guidelines—February 13, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebcaa8012daba6a/ajmemo070215a.pdf

Effective Feb. 13, 2007, the Supreme Court adopted revisions to Appendix IX-A (Considerations in the Use of Child Support Guidelines), Appendix IX-B (Use of the Child Support Guidelines) and Appendix IX-H (Combined Tax Withholding Tables for Use with the [Child] Support Guidelines). Specifically, the following items were updated:

- Self-support reserve ($206)
- Shared parenting primary household income thresholds table
- Social Security tax withholding (on first $97,500 of gross earnings and maximum withholding of $6,045)
- Combined tax withholding table

DIRECTIVES AND MEMORANDA

Directive # 09-07

Family/Updated Procedures for Filing and Enforcement of Out-of-State (Foreign) Custody/Parenting/Visitation Orders—September 28, 2007

Link: http://www.judiciary.state.nj.us/directive/2007/dir_09_07.pdf

This directive supersedes Directive # 07-02, updating the filing and enforcement procedures for out-of-state custody/parenting time/visitation orders pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), N.J.S.A. 2A:34-53 to -95.

Assignment Judge Memorandum

Child Support Direct Payment Confirmation Letters—August 8, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebadcf44595168d/ajmemo070808a.pdf

This memorandum distributes two new standardized letters that are to be used to determine the amount of direct payments, if any, made by an obligor to an obligee in a child support case.

Assignment Judge Memorandum

Child Support Hearing Officer (CSHO) Program Standards—Amendment to Standard 7; and a New Standard (Standard 13)—July 24, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb629b0f44aef6c/ajmemo070720a.pdf

This memorandum amends Child Support Hearing Officer (CSHO) Program standards, standard 7, and adopts new standard 13. Standard 7 now permits the CSHO to hear complaints filed by the local board of social services that seek to establish paternity and/or child support in cases where the obligee has a final restraining order against the defendant/obligor. Standard 13 authorizes the CSHO to conduct hearings by telephone in appropriate cases.

Assignment Judge Memorandum

Civil Unions—February 20, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb876c0e4daa332/ajmemo070220a.pdf

This memorandum provides additional operational details on implementation of the civil union statute.

Assignment Judge Memorandum

Dissolution Operations Manual—Revisions—February 14, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebcaa8012daba6a/ajmemo070215a.pdf

This memorandum promulgates a number of revisions to the Family Division Dissolution Operations Manual. Section 18 and Appendix XII were amended to reflect statutory changes to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the adoption of AOC Directive # 7-02. The following new subsections and appendices were adopted:

- 1103.8 - Affidavit of Military Service
- 1201.4 - Conversion from Direct Pay to Pay Through Probation
- 1201.5 - Pay through Probation Appeal Process
- 1201.6 - Reopening a Closed Probation Enforcement Case
- 1300.6 - Permissive Intervention/Third Party
- Appendix XIV - Child Support Enforcement Standardization and Best Practices — Approved Report; Request for Implementation Plan
- Appendix XV - Direct Pay Conversion Forms

Directive # 01-07

Statewide Program for Mediation of Economic Aspects of Family Actions—Program Guidelines; Form Referral Order; Mediation Case Information Statement—February 6, 2007
Link: http://www.judiciary.state.nj.us/directive/2007/dir_01_07.pdf

This directive promulgates Program Guidelines for the Statewide Program for Mediation of Economic Aspects of Family Actions.

Assignment Judge Memorandum

Divorce—Dispute Resolution Alternatives to Conventional Litigation—Descriptive Material Required by Rule 5:4-2(h); Certification Forms—December 4, 2006
Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb916d46355e57b/ajmemo061204a.pdf

This memorandum promulgates the descriptive materials and certifications that may be used to satisfy the requirements of R. 5:4-2(h). This rule requires the first pleading of each party in a divorce action to include an affidavit or certification "that the litigant has been informed of the availability of complementary dispute resolution (CDR) alternatives to conventional litigation, including but not limited to mediation or arbitration, and that the litigant has received descriptive literature regarding such CDR alternatives." R. 5:4-2(h).

Assignment Judge Memorandum

Family/CDR—Clarifying Amendment to Rule 5:4-2(h)—Changing "Descriptive Literature" to "Descriptive Material"—November 20, 2006
Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb106140688a0d7/ajmemo061120a.pdf

This memorandum clarifies R. 5:4-2(h).

CASE LAW

Dissolution

***Pacifico v. Pacifico,* 190 N.J. 258 (2007) [Justice Long]**

Interpretation of Property Settlement Agreement Against One Party

An ambiguous term in a property settlement agreement (PSA) should not be automatically construed against the drafter absent unequal bargaining power.

The Supreme Court reversed an appellate court decision to apply the doctrine of *contra proferentem* to a PSA. (*Contra proferentem* is a rule of contractual interpretation which provides that a term which is found to be ambiguous should be construed against the party which imposed its inclusion in the contract. That is, the preferred interpretation will be the one most favourable to the party upon whom its inclusion was imposed. Or, more accurately against (the interests of) the party who imposed it." http://en.wikipedia.org/wiki/Contra_proferentem.)

Pursuant to a PSA incorporated into a final judgment, the parties agreed to sell the marital home when the youngest child reached age 19. The agreement was silent as to whether the current market value or the prior value at the time of signing the PSA should control. The trial court, without an evidentiary hearing, held wife's right to a buyout was to be at the current market value. The appellate court reversed, applying the doctrine of *contra proferentem*, reasoning the PSA was ambiguous. As husband's attorney had drafted the agreement, the purchase price was construed against the husband.

The Supreme Court held the appellate panel had "oversimplified the matrimonial settlement process." 190 N.J. at 268. Husband's attorney had completed the final draft of the PSA, but both parties had contributed to previous drafts. *Contra proferentem* only applies in cases of unequal bargaining power. Here, both parties were on equal footing and negotiated the agreement. Because the trial court cannot automatically construe the ambiguity against husband, wife maintains the burden of proof and must establish the actual intent of the parties.

Comment: Evidentiary hearings are required to resolve issues of ambiguities in marital settlement agreements.

***Johnson v. Johnson*, 390 N.J. Super. 269 (App. Div. 2007) [Judge Cuff]**

Plenary Hearing—Payment for Professional Services Related to Divorce

Request for payment of professional services cannot be resolved on conflicting certifications without plenary hearing.

The appellate court reversed a trial decision ordering defendant to pay 75 percent of an accountant's $54,440.00 bill. On remand, the evidentiary hearing required an examination of the reasonableness of the bill.

Seven years after a judgment of divorce, a court-appointed forensic expert filed motion to compel defendant to pay 75 percent of the fees due the accountant as agreed in the property settlement agreement. The expert contended he sent a bill to defendant approximately four months after the judgment of divorce explaining his services. The defendant stated he had not received a bill from the expert in the six years after his divorce. He refused to pay without a detailed accounting, asserting the fees were excessive. On conflicting certifications the motion judge found the expert was credible, the amount sought reasonable and ordered the defendant to pay the demanded amount. On appeal, defendant challenged not only the reasonableness of the fee but also the nature, scope and cost of the services alleged.

In *Mayer v. Mayer*, 180 N.J. Super. 164 (App. Div. 1981), *certif.*

denied, 88 N.J. 494 (1981), the appellate court held disputes over professional services cannot be resolved on conflicting certifications. This application required the hearing contemplated in *Mayer* where a party may:

> challenge and...test the various items contained in the certifications...filed in support of the...application[] for [professional] fees, and to enable him to test and to challenge the bill of...the expert[] by requiring [him] to detail the precise nature of all of the services rendered by him, the time spent and the rate or rates of compensation charged—including the right to introduce evidence in challenge to the reasonableness of the rates charged by [Rubin], the necessity for any part of the services performed, the time expended, etc. 390 N.J. Super. at 275.

Comment: Rule 4:42-11(a) provides any order to pay money bears simple interest, in the event a judge determines the defendant must pay any portion of a disputed fee.

Rule 5:3-5(c) limits an award of fees to "any party to the action." Rule 4:42-9(a)(1) or R. 5:3-5(c) do not allow a shifting of counsel fees to professionals seeking payment nor attorneys against their own clients.

***Sternesky v. Salcie-Sternesky*, _____ N.J. Super. _____, A-5932-05T3 (App. Div. 2007) [Judge Grall]**

Formula Established to Segregate Marital Portion From Disability Portion of Pension

Disability retirement benefits received prior to qualifying for regular retirement are distributed by determining the ordinary retirement allowance less the excess benefit based on accidental disability, then multiplying the remainder by a fraction, with a numerator as the number of years of service during the marriage and the denominator equal to the years required for ordinary retirement benefits.

The appellate court reversed a trial decision determining that the plaintiff's pension allowance was non-distributable income.

The plaintiff and the defendant were married in 1998. The plaintiff began working as a dispatcher for the Englewood Fire Department in 1996. He became a firefighter in 2000. In December 2003, the plaintiff was injured in a fire. He retired with an accidental disability retirement in December 2005. The complaint for divorce was filed in July 2005.The trial court determined that the plaintiff's pension was income and not subject to equitable distribution, or alternatively, the defendant would not be entitled to a share if it were subject to distribution.

The judgment reviewed was issued prior to *Larrison v. Larrison,* 392 N.J. Super. 1 (App. Div. 2007). *Larrison* held the non-disability portion of a Police and Fire Retirement System (PFRS) is subject to equitable distribution without providing a formula for that distribution. Here, the appellate court reaffirmed *Larrison* and *Avallone v. Avallone*, 275 N.J. Super. 575 (App. Div. 1994), and established a formula for determining the portion of the pension subject to equitable distribution where the employee is not yet eligible for ordinary retirement. The ordinary retirement allowance is calculated as one half of the employee's final salary for ordinary retirement at the earliest date. N.J.S.A. 43:16A-5. The percentage of final salary above the percentage payable on ordinary retirement is the excess allowance based on accidental disability due the retiree. The portion subject to equitable distribution is then equal to the employee's total benefits, minus one half of the employee's final salary times a fraction with a numerator as the number of years of service during the marriage and the denominator equal to the years required for ordinary retirement benefits. (The equation is (B-[B-{Sx.5}]x[M/R]) where B is the amount of benefits, S is the final salary, M is the years of service during the marriage and R is the years required for ordinary retirement.) This formula "will recognize the non-pensioner spouses' legitimate claims to a marital asset without attaching funds intended to compensate the pensioner-spouse for his or her disabilities." *Sternesky* at 15 (quoting *Larrison*, *infra*, 392 N.J. Super. at 18).

Comment: The portion of the disability pension not deemed to be a marital assert is still available for alimony. All income and assets are available for child support.

***Larrison v. Larrison*, 392 N.J. Super. 1 (App. Div. 2007) [Judge Fuentes]**

Equitable Distribution—Disability Pension

The portion of a disability pension intended as compensation for disability is not subject to equitable distribution.

The appellate court reversed a trial decision subjecting the entirety of a disability pension to equitable distribution.

The defendant retired on a police disability pension during the marriage, at age 36. The trial court determined the entire payment received by defendant to be a monthly retirement benefit and not compensation for lost wages after rejecting the testimony of defendant's expert.

The appellate court reaffirmed *Avallone v.Avallone*, 275 N.J. Super. 575 (App. Div. 1994), holding the portion of the pension "that serves to compensate the pensioner-spouse for his disability and economic loss should not be subject to equitable distribution." 392 N.J. Super. at 16. Even when the statute governing the pension does not provide a procedure for determining the portion of the pension meant to compensate for disability, the trial court must conduct an analysis to avoid "unjustly and improperly subjecting the full amount of a disability pension to

equitable distribution." *Id.* at 17-18.

Comment: As the statute governing the pension plan provides no procedure for determining the portion of a pension meant exclusively for disability, the trial court must explore other options to prevent an unjust distribution. This could include limiting the amount subject to equitable distribution to the pensioner's contributions that he would have received when he left employment, or limiting distribution to benefits received after a presumptive normal retirement date.

***Palmieri v. Palmieri*, 388 N.J. Super. 562 (App. Div. 2006) [Judge Coleman]**

Plenary Hearing Required to Determine Cohabitation—Interpretation of Property Settlement Agreement

A plenary hearing is necessary to determine whether cohabitation exists when the terms of the property settlement agreement are ambiguous and the certifications submitted by the parties contain disputes of material fact. The appellate court reversed the decision of the motion judge, terminating alimony and remanded for further proceedings.

The parties' property settlement agreement included a clause providing that alimony would terminate upon the wife's residing with an unrelated person regardless of the financial arrangements between the wife and said unrelated person. On a motion to terminate alimony, the trial court found that the wife's certification denying cohabitation was not credible in the face of an investigator's certification and report.

The appellate court questioned whether the language of the provision in question, coupled with the proofs provided, was sufficiently clear to justify the termination of alimony under the standard of enforceability recognized in *Konzelman v. Konzelman*, 158 N.J. 185 (1999). The appellate court went on to hold:

> An unlimited provision such as the one at issue may be perceived as arbitrary, capricious and unreasonable, since it would preclude plaintiff from providing shelter to an ailing relative or even allowing plaintiff to receive care from a live-in nurse if she needed such care. Though hypothetical situations such as these would purport to nullify plaintiff's right to receive alimony, such a literal construction of the property settlement agreement would lead to an absurd result. 388 N.J. Super. at 565.

Comment: An ambiguous clause in a property settlement agreement providing for an automatic termination of alimony upon cohabitation with any individual no matter what the financial arrangement, cannot be enforced in the face of questions of material fact without a plenary hearing.

***Hogoboom v. Hogoboom*, 393 N.J. Super. 509 (App. Div. 2007) [Judge Wefing, PJAD]**

Appellate Review Standards Following Arbitration

Parties to arbitration cannot by agreement create a direct avenue of appeal to the appellate court. The appellate panel reversed and remanded.

The parties were married in 1988 and divorced in 1999. Post-judgment applications by the parties were submitted to arbitration. After three days of hearings, the arbitrator entered two awards, which were subsequently incorporated into two orders entered by the trial court. The trial court did not make any findings with respect to the awards, but rather the orders entered were identical in every way to the arbitrator's awards. The parties subsequently appealed the orders of the trial court directly to the Appellate Division.

The appellate court found that the substantive merits of the matter were not properly before it and therefore declined to address them. The appellate court noted that while the new arbitration statute, N.J.S.A. 2A:23B-4c, provides that parties may expand the scope of judicial review of an award, the parties were not entitled to create an avenue of direct appeal to the appellate court. The court held:

> [T]he parties must seek initial review of the awards at the trial court. The trial court is charged with employing the standard of review the parties contractually agreed upon. 393 N.J. Super. at 516.

In addressing the grounds upon which an arbitrator's award may be vacated or modified the appellate court noted that there was no record for it to review and the court was not in a position to decide the issue.

This case demonstrates the need for carefully crafted arbitration agreements, the importance of which is expounded in *Kimm v. Kimm*, 388 N.J. Super. 14 (App. Div. 2006).

Comment: The parties cannot contractually create an avenue of direct appeal to the Appellate Division following arbitration. Rather, they must seek initial review at the trial court level.

***Addesa v. Addesa*, 392 N.J. Super. 58 (App. Div. 2007) [Judge Stern, PJAD]**

Confidentiality of Mediation

Private mediation sessions must be recognized as confidential or the process will have no beneficial impact according to this appellate court decision. This principle is especially true when the parties have signed a mediation agreement providing for confidentiality as an integral term of their agreement with the mediator.

The parties entered into private mediation in January 1999. The agreement they signed with their mediator provided, in part:

> To preserve the integrity of the mediation process, both clients agree that

> neither the mediator nor his records shall be subject to subpoena....Each [party] also makes this covenant with the mediator to induce the mediator to furnish mediation services under this Agreement. 392 N.J. Super. at 66-67.

At the time of mediation, neither party was represented by counsel. Mr. Addesa subsequently filed a complaint for divorce and a judgment of divorce was entered in May 2000, incorporating the mediated property settlement agreement.

Ms. Addesa subsequently brought an application to set aside provisions of the parties' property settlement agreement. Notably, the plaintiff's business interests, which had been valued at approximately $153,569 in mediation, had subsequently been sold for approximately $16 million within five months of the entry of the judgment of divorce. The first trial court judge dealing with the matter had ordered a plenary hearing, that the mediator submit to a deposition, and that the mediator's file was subject to examination. A subsequent judge conducted the plenary hearing and found that the PSA was unconscionable.

The appellate court found that the first judge's ordering of a plenary hearing as the result of Ms. Addesa's attack on the PSA was appropriate, although the judge's direction that the mediator be subject to a deposition and that his file be subject to examination was inappropriate. The appellate court noted that the first judge had entered that order prior to the enactment of N.J.S.A. 2A:23C-1.2.13, the Uniform Mediation Act, which provides for confidentiality. The appellate court was satisfied that the second judge who held the plenary hearing made his own independent findings that the PSA was unconscionable, and that his observations regarding the mediator's role in determining the value of the business were not dispositive to his findings.

Comment: The confidentiality of the mediation process must be preserved, and a mediator must not be subject to subpoena, and the mediator's file must not be subject to review in the context of future litigation.

***Devaney v. L'Esperance*, 391 N.J. Super. 448 (App. Div. 2007) [*Per Curiam*]**

Palimony—Cohabitation Requirement

Palimony will not be awarded in the absence of cohabitation. The trial court's order denying relief was affirmed. The New Jersey Supreme Court certification has granted certification.

The parties were involved in a long-term intimate relationship beginning in 1983 and continuing until the subject action for palimony was filed in 2004. The record is clear that the parties never cohabited. After a six-day bench trial, the trial court found in the defendant's favor and plaintiff appealed alleging promises made to her by defendant during their 20-year relationship.

The appellate court reviewed the recent line of cases dealing with the issue of palimony and the essential element of cohabitation. Specifically citing to *Levine v. Konvitz*, 383 N.J. Super. 1, 10-11 (App. Div. 2006), the court set forth the policy rationale behind the law's insistence on cohabitation as a necessary element to a successful cause of action for palimony as follows:

> Requiring cohabitation as an element of a palimony action also provides a measure of advance notice and warning, to both parties to a relationship, and to their respective family members, that legal and financial consequences may result from that relationship. In this context, cohabitation requires the demonstrable act of setting up a household together. 391 N.J. Super. at 452.

Thus, the court distinguished cohabitation from a relationship that is merely an extra-marital affair.

Comment: In accord with the recent line of cases decided by the appellate court, cohabitation is an essential element that must be proven before a party can succeed in a palimony action. The Supreme Court has granted certification.

Also, note the decision of Judge Hayden in *Carino v. O'Malley*, 2007 U.S. Dist. Lexis 22231 (March 2007), that calls into question the bright line rule requiring cohabitation as an essential element for a palimony claim.

***Garrett v. Matisa*, 394 N.J. Super. 468 (App. Div. 2007) [Judge Grall]**

Notice Requirements on Motion to Withdraw

An attorney has an obligation to make a diligent effort to locate an absentee client in order to provide notice of a motion to withdraw as counsel. As the result of counsel's failure to do so, her motion to withdraw was denied without prejudice.

The plaintiff had filed a post judgment motion for parenting time with her son. The defendant opposed the motion. During the pendency of the matter, the plaintiff seemingly disappeared and her attorney was not able to locate her despite efforts made to contact her via mail and through family members. Counsel filed a motion to withdraw. The trial court instructed counsel to serve the motion on her client or, if she could not locate her, to provide a certification of diligent inquiry sufficient to justify service by publication. The plaintiff's attorney then filed the instant motion seeking permission to withdraw based on her client's failure to communicate with her.

The appellate court noted that neither the appellate courts nor the Advisory Committee on Professional Ethics have addressed what notice an attorney owes a client who has effectively disappeared. The appellate court explored this duty to provide notice given the unique and special relationship

between attorney and client. After a review of advisory opinions of other ethics authorities, as well as case law from other jurisdictions, the appellate court found that counsel must engage in diligent effort and so certify to the court. The appellate court held:

> [S]he must demonstrate that she has exhausted additional reasonable efforts to locate her client, including an internet search, a search of public information—nsuch as voting or motor vehicle records—or inquiries of other family, friends, or professionals who may know her whereabouts. 394 N.J. Super. at 476-77.

The appellate court went on to hold that if counsel locates her client then actual notice shall be given. If the client cannot be located, then she shall be notified by publication. The client's failure to communicate and inform her lawyer as to her whereabouts does constitute grounds for withdrawal in this case.

Comment: When making an application to withdraw as counsel given the disappearance of a client, an attorney must certify that diligent effort has been made to contact that client. Such effort should include an Internet search; a search of public information; and inquiries of family members, friends, and other professionals.

Genovese v. Genovese, 392 N.J. Super. 215 (App. Div. 2007) [Judge Lihotz]

End Date of Marriage for Equitable Distribution Purposes

The bright line rule of *Painter v. Painter*, 65 N.J. 196 (1974), cannot be applied in all circumstances. The appellate court affirmed the trial court's decision that the end date of the marriage for equitable distribution purposes was a date preceding the complaint date resulting in the entry of the judgment of divorce at issue.

The parties were married in 1974. Mr. Genovese moved from the former marital home in 1993. Thereafter, he filed a complaint for divorce in New York in 1994 and a judgment of divorce was entered in 1997. Mr. Genovese remarried. Ms. Genovese appealed the entry of a judgment of divorce attacking the grounds for divorce. The judgment of divorce was set aside. Thereafter, Mr. Genovese filed four consecutive complaints in New Jersey; the first three of which were dismissed for lack of jurisdiction. Ms. Genovese filed a counterclaim to the fourth complaint in New Jersey. That action resulted in a judgment of divorce after a three-day bench trial. The trial court found that the coverture period for purposes of equitable distribution of Mr. Genovese's pension was the date of the marriage through the date of filing of the first divorce complaint in New York. Ms. Genovese asserted that the end date should have been the date the instant action was filed in New Jersey.

The appellate court reviewed the case law of *Painter v. Painter* and it's progeny, noting that the *Painter* rule remains the most practical rule to ascertain when a marriage has ended for the purposes of equitable distribution, *i.e.*, the day a valid complaint for divorce is filed that commences a proceeding culminating in a final judgment of divorce. The court also acknowledged that the entry into an agreement by the parties prior to the filing of the divorce complaint would likewise constitute an end date. In the instant case, however, the court held:

> [W]e remain mindful that the division of property upon divorce is responsive to the concept that marriage is a shared enterprise...[M]arital assets acquired in the course of that joint undertaking fairly should be included in the marital estate subject to equitable distribution. Logic also dictates that the assets acquired after the enterprise or partnership ceases should not so be included. 392 N.J. Super. at 226.

The appellate court found that, in the instant case, the facts provided incontrovertible evidence that the marital partnership terminated prior to the filing of the New Jersey divorce complaint. The court concluded that a mechanical application of the *Painter* rule would work an injustice in this case.

Comment: Application of the *Painter* rule providing that a cutoff date for equitable distribution is the date of the filing of a complaint for divorce, unless an agreement has been entered into previously, is appropriate in most cases. There are, however, circumstances where its application would bring about an unjust result.

Brundage v. Estate of Carambio, 394 N.J. Super. 292 (App. Div. 2007) [Judge Fuentes]

Attorney's Ethical Obligation to Disclose Pending Appeal

An attorney has an ethical obligation to inform the appellate panel hearing a matter that the same issue is on appeal before another appellate panel.

On Oct. 29, 2004, the plaintiff, Carol Brundage, filed a complaint seeking palimony based on an alleged oral promise by defendant who was deceased. Prior to the commencement of this action, plaintiff's counsel was attorney of record for the plaintiff in *Levine v. Konvitz*, 383 N.J. Super. 1 (App. Div. 2006). The *Levine* case dealt with the question of whether cohabitation was a crucial element of a cause of action for palimony. While the *Levine* appeal was pending, defendant, in *Brundage*, moved for summary judgment of the palimony claim on the grounds that plaintiff never cohabited with the deceased. The plaintiff's counsel did not advise his adversary or the trial court of the pending appeal in the *Levine* matter. The trial court denied the defendant's summary judgment motion and the defendant moved for leave to appeal on

an interlocutory basis. In his brief opposing the defendant's motion for leave to appeal in the instant case, plaintiff's counsel did not disclose the pending appeal in the *Levine* matter to the appellate panel assigned to consider the motion. The appellate panel denied the defendant's motion for leave to appeal. Shortly thereafter, the parties entered into settlement discussions and an agreement was reached by which the plaintiff was to receive a $175,000 lump sum payment in return for a release of all claims. Said payment was to be paid by Feb. 1, 2006. On Feb. 6, 2006, the *Levine* decision was published making it clear that cohabitation was an essential element to a successful palimony claim. The defendant immediately moved before the family part to set aside the agreement.

The appellate court noted that the plaintiff's counsel had an ethical duty, pursuant to N.J. Court Rules, RPC 3.3(a)(5), and under the requirements of the case information statement, to disclose the fact that the issue of cohabitation was scheduled for appellate review in the pending *Levine* appeal. This was a material fact in the *Brundage* motion for leave to appeal. Under these circumstances, the plaintiff's counsel knew or should have known that his decision to withhold this information from the *Brundage* appellate panel was reasonably certain to mislead that tribunal in its consideration of defendant's motion for leave to appeal.

The appellate court went on to hold that counsel's failure to inform the court and his adversary of this pending appeal in *Levine* significantly affected the plaintiff's counsel's actions. The tainted settlement must be set aside.

Comment: In an appellate matter, counsel has an ethical obligation to make the appellate panel aware of other matters pending before another appellate panel dealing with the same issues. Failure to do so is a violation of RPC 3.3(a)(5) requiring candor toward the tribunal.

***Uberek v. Sathe,* 391 N.J. Super. 164 (App. Div. 2007) [Judge Fisher]**

Access to a Child's In Camera Interview

Absent a pending custody dispute, litigant is not entitled to a transcript of a child's *in camera* interview.

The appellate court affirmed a trial court decision holding R. 5:8-6 does not require release of a transcript of an *in camera* interview unless there is ongoing custody litigation.

The trial judge conducted an *in camera* interview with the parties' child when they were divorced in 2002. Four years later, defendant requested a copy of the transcript pursuant to R. 5:8-6, which provides a copy of the transcript of an in-camera interview "shall be provided" upon request.

The appellate court held the rule must be read in its entirety. While due process mandates parties be provided with a copy of the transcript, the court must balance those concerns with the privacy rights of the child.

Rule 5:8-6 "presupposes and is wholly dependent upon there being a pending custody dispute." 391. N.J. Super. at 167.

Failure to consider and safeguard the privacy interest of the child would severely hamper the ability of the courts to gain the best evidence available. Children may not feel free to speak openly if the court makes transcripts of in-camera interviews more readily available than mandated by due process.

Comment: Prior child interviews, and by extension, earlier custodial evaluations in the court file, are only discoverable where an active custody proceeding is pending before the court.

***Shinn v. Schaal (In re Estate of Shinn),* 394 N.J. Super. 55 (App. Div. 2007) [Judge Fisher]**

Enforceability of Premarital Agreement

A failure to make full and fair financial disclosure will void both a pre-marital property settlement agreement and a pre-marital waiver of the elective share of the spouse's estate.

The appellate court reversed a trial court determination enforcing a wife's pre-marital waiver of an elective share of her husband's estate on a theory of equitable estoppel.

The husband insisted on his betrothed's execution of a pre-marital agreement and refused to provide material financial details when requested. On his death, his wife, the plaintiff, sought to enforce her elective share against the estate. The pre-marital agreement materially misrepresented the scope of the deceased's financial holdings.

Both the Uniform Pre-martial Agreement Act, N.J.S.A. 37:2-31, *et seq*., and N.J.S.A. 3B:8-10, authorizing waiver of a spouse's elective share, require full and fair disclosure of a party's financial circumstances (or express waiver of such financial disclosure) to be enforceable.

While the trial court reached the appropriate conclusion that the statutes precluded enforcement of the spouse's waiver of the elective share, the subsequent application of the doctrine of equitable estoppel was mistaken.

> [T]he maxim that "equity follows the law" required the judge's adherence to the public policy against enforcing such an agreement in these circumstances [non-disclosure]. 394 N.J. Super. at 68.

Comment: The case reiterates the strong public policy against enforcement of pre-marital agreements where there has been inequitable conduct or failure to disclose material facts.

***J.P. v. Division of Medical Assistance and Health Services,* 392 N.J. Super. 295 (App. Div. 2007) [Judge Reisner]**

Definition of Income—Medicaid

This decision upholds the creation of a special needs trust for a 48-year-old nursing home patient funded by alimony payments. Alimony received by the trust and utilized by the physically disabled wife pursuant to the divorce decree does not constitute income for Medicaid purposes where alimony was not paid to the wife but paid directly to the trust.

***Sheppard v. Sheppard (In re: Notice of Removal)*, 481 F. Supp. 2d 345 (D.N.J. 2007) [Judge Irenas, S.U.S.D.J.]**

Health Insurer's Right to File Removal Petition in Federal District Court

A health insurance company does not have right to file for removal to the federal district court in response to a family division judge's ruling in a pending divorce case that the company must insure the wife or, if previously terminated from insurance, to reinstate coverage immediately. Only a "defendant" has the right to remove—and in this case, the health insurance company was not a party to the state action. 28 U.S.C.A. §1441.

CUSTODY/PARENTING TIME

CASE LAW

***MacKinnon v. MacKinnon*, 191 N.J. 240 (2007) [Chief Justice Zazzali]**

Applicability of Baures Standards to International Removal

The legal standards established in *Baures* are equally applicable to international and interstate removal cases.

The New Jersey Supreme Court affirmed the appellate and trial court determinations to apply the *Baures* criteria to a request for international removal as well as the courts' finding that the wife's removal to Japan with the child was appropriate.

The parties met in Japan, returned to the United States, and after an 11-year marriage separated, with the wife exercising primary custody of the child. In the ensuing divorce litigation, the wife sought leave to return to Japan with the minor child.

The case involved typical long distance removal issues, but was complicated by the fact that Japan is not a signatory to the Hague Convention. The trial court concluded the *Baures* criteria were equally applicable to the international setting as to interstate removal.

Both interstate and international removal contexts involve the same issue:The custodial parent's interest in self-determination and the need to seek a better life. Therefore, the *Baures* test appropriately balances the concerns in either situation, and provides flexibility to courts determining the appropriateness of foreign removal. Admittedly, international removal is more complex than interstate.

> [C]ourts can employ the twelfth [Baures] factor—a catch-all that considers "any other factor bearing on the child's interest"—to sufficiently address other concerns implicated by international removal, such as Hague Convention membership, cultural and social concerns, feasibility of visitation, and enforceability of parental rights. 191 N.J. at 251-52.

Finally, the court endorsed the decision in *Abouzahr v. Matera-Abouzahr*, 361 N.J. Super. 135 (App. Div. 2003), in refusing to require that a country be a signatory to the Hague Convention before international removal could be considered. While such status remains a factor, it is not dispositive.

Comment: Procedurally, international removal cases are to be handled in the same fashion as an interstate removal.

***Innes v. Carrascosa*, 391 N.J. Super. 453 (App. Div. 2007) [Judge Lyons]**

Hague Convention—Jurisdiction

New Jersey courts will not surrender jurisdiction to a foreign country's tribunal where the Hague Convention confers jurisdiction on this state, and the foreign authority disregarded or misapplied the international treaty's express terms.

In this complex knot of international procedural maneuverings, the appellate court upheld a trial court decision finding jurisdiction in New Jersey, denying international comity to decisions of the Spanish court, approving the custodial determination, and upholding the enforcement orders, including severe economic sanctions and the incarceration of the child's mother.

Four years after their marriage the parties separated and entered into a written custody agreement designating the wife as the primary custodial parent, providing the husband visitation, and including an express agreement that neither party would remove the child from the state. The wife was a Spanish national who had resided in this country since 1992. The husband filed a complaint for divorce in New Jersey, and wife thereafter filed for an annulment in Spain. Without notice or consent, the wife then removed the child from New Jersey to Spain. Parallel litigation proceeded until the husband filed an action under the Hague Convention in Spain to compel the return of the child.

In applying the Hague Convention, the Spanish courts made a finding that New Jersey was the child's "habitual residence." Instead of then referring the custody determination back to New Jersey, the court inexplicably exercised jurisdiction and approved the wife's removal of the child as appropriate

under Spanish law. The wife subsequently appeared in New Jersey to defend the matrimonial litigation. At the conclusion of the trial, due to her continuing express violation of the court's order to return the child to New Jersey, the wife was incarcerated and sanctioned $148,000.

The appellate court determined that the Hague Convention is designed to determine which competing foreign jurisdiction is the appropriate location for the custody determination to be made, not to address the substantive issue of custody.

> Once it is determined under the Hague Convention, that a particular country is a child's habitual residence and the child should be returned there, "a custody determination is left to the law of the state to which the child is returned. 391 N.J. *Super.* at 484 (citing *Roszkowski v. Roszkowski*, 274 N.J. Super. 620, 630 (Ch. Div. 1993)).

Where a foreign country fails to comply with the express provisions of the Convention, its unlawful decisions will not be honored under principles of international comity or *res judicata*. Further, decisions of an ecclesiastical court, not expressly approved and authorized by the civil courts of the foreign state, will likewise not be binding on this state's courts. Finally, the appellate court expressly approved the use of incarceration and severe economic sanctions to compel the return of a child illegally removed from the jurisdiction.

Comment: Although a profound tragedy for the parties, the case provides a detailed working example of how the Hague Convention should be applied, as well as principles of comity and *res judicata* in international custody disputes.

Griffith v. Tressel, 394 N.J. Super. 128 (App. Div. 2007) [Judge Grall]

UCCJEA—Appropriate Venue

Despite having "exclusive, continuing jurisdiction" under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the court must still analyze whether another state is a more appropriate venue under an inconvenient forum analysis.

In this post-judgment custody application, the appellate court reversed the trial court determination that New Jersey continued to be the appropriate forum despite mother and child residing in Maryland. The defendant husband filed this motion to change custody, and the plaintiff filed a cross-motion seeking to have venue transferred to Maryland.

Pursuant to the 2001 divorce judgment, the plaintiff/wife and child had permanently relocated to Maryland. Most significant contacts and evidence relevant to the proceedings were located in Maryland, although the parties had designated New Jersey the "home state" for future litigation, and New Jersey had "exclusive continuing jurisdiction" under UCCJEA. The trial court denied the plaintiff wife's venue motion before ordering increased parenting time, which determination was previously remanded by the appellate division on an interlocutory application.

This case is controlled by the UCCJEA. As a result of the prior divorce proceedings, New Jersey obtained "exclusive, continuing jurisdiction" which continued as one parent still resided there, and a "significant connection" with the state still existed. Such exclusive jurisdiction continues so long as there is either a "significant connection" or "substantial evidence" in New Jersey.

A finding of continuing jurisdiction, however, does not resolve the question of whether another state is a more convenient forum.

> The focus of that inquiry is whether "the court of another State is in a better position to make the custody determination." 394 N.J. Super. at 148 (*citing* UCCJEA comment at 683).

The court must weigh the eight statutory factors set out at N.J.S.A. 2A:34-71 to determine whether this state should decline to exercise its exclusive, continuing jurisdiction and permit the litigation to proceed in the more appropriate forum.

At such juncture, the court must stay proceedings in New Jersey upon condition that a child custody proceeding be promptly commenced in the other jurisdiction.

Comment: The case provides a detailed analysis of jurisdictional requirements under the UCCJEA and an explanation of the application of an inconvenient forum argument.

Rente v. Rente, 390 N.J. Super. 487 (App. Div. 2007) [Judge Axelrad]

Grandparents Visitation Statute —Proving Harm to the Child

Visitation rights under the Grandparents Visitation Statute (GVS), even on a *pendente lite* basis, may not be ordered without the grandparents first establishing a prima facie case of requisite harm to the child.

The appellate court reversed a trial decision providing for paternal grandparents visitation rights over the objections of the mother.

The paternal grandparents, who were serving as supervisors for their son's alternating weekend visitation, brought this action to compel additional visitation time for themselves. Pending receipt of a court ordered expert, the court authorized the grandparents to exercise additional visitation, in spite of the fact that they had not articulated the requisite harm to the child. Although the expert report was similarly insufficient to establish the requisite harm required under *Moriarity v. Bradt*, 177 N.J. 85 (2003), the court entered an order providing for alternating weekend visitation, in addition to their weekends supervising

their son's visitation.

In *Moriarity*, *id.* at 114-15, our Supreme Court held that "grandparents will be given visitation against the wishes of a fit parent if they can prove by a preponderance of the evidence that such visitation is necessary to avoid harm to the child." Judge Axelrad, speaking for the appellate panel, concluded that there is no separate standard for an interim or *pendente lite* determination, saying:

> [O]nly after the court determines the grandparents' proofs are sufficient to overcome the presumption in favor of parental decision-making, should it proceed to the next step and direct a visitation schedule. 390 N.J. Super. at 494.

Comment: In grandparents' visitation rights cases, the court should not utilize a best interest analysis and may not grant such visitation unless and until the requisite harm to the child has been proven.

***Hand v. Hand*, 391 N.J. Super. 102 (App. Div. 2007) [Judge Graves]**

Trial Court Determination to Conduct Plenary Hearing

In an application to modify custody, mere conclusory allegations by the moving party are insufficient to establish the prima facie case necessary to warrant holding a plenary hearing.

The appellate court affirmed that the trial court had correctly concluded on review of the motion certifications that there was no need for a plenary hearing.

Since the divorce in 2001, the parties had exercised joint legal custody with the father being the parent of primary residence and mother exercising weekend visitation. The plaintiff mother filed this post-judgment application asserting parenting inadequacies, alcohol abuse, and alleging that defendant may be physically abusing the children. The certification included a letter from a licensed clinical social worker (LCSW) who had briefly met with the children and confirmed their unhappiness with the present custodial arrangement with their father. The trial court concluded the father's detailed responsive certification and absence of any articulated fact supporting the allegations negated the necessity of a plenary hearing.

In order to prevail on an application for a change in custody, a moving party must first establish facts, not mere conclusory allegations, establishing the existence of a prima facie case. In discussing the appellate standard of review, Judge Graves noted that family court judges are frequently called upon to make difficult and sensitive decisions regarding the safety and welfare of children. Where such a determination is supported by substantial credible evidence on the record and is consistent with controlling legal principles, an appellate court should not second-guess the findings and discretion of the family part judges.

Comment: The opinion provides strong support for appellate deference to the decision of the family art when supported by substantial credible evidence in a judge's finding of fact and conclusion of law.

CHILD SUPPORT

CASE LAW

***R.A.C. v. P.J.S. Jr.*, 192 N.J. 81 (2007) [Justice Albin]**

Time Limitation for Seeking Recovery of Child Support Against Biological Parent

The 23-year age limitation of the Parentage Act is a statute of repose; as such it cannot be equitably tolled except in extraordinary circumstances according to this unanimous Supreme Court decision.

RAC (Ray) (Pseudonyms have been used to protect confidentiality) and BEC (Bonnie) were married in 1957 and had two children. They became friends with PJS (Patrick) and his wife. Bonnie and Patrick engaged in an extramarital affair between 1968 and 1969. Bonnie became pregnant and was aware that there was strong possibility that Patrick was the father of DC (Darren). Ray had no reason to doubt that he was Darren's father. Patrick had two children with his wife. Both of his children died of muscular dystrophy.

Ray and Bonnie were divorced in 1980. The divorce was not related to Bonnie's affair with Ray. Bonnie observed that, as Darren matured, he did not resemble his siblings and her suspicion grew that Patrick was his father. After Darren announced that he was to be married, Bonnie decided that she must inform Darren that Patrick was his father because Darren might be a carrier of the muscular dystrophy gene. Bonnie advised Patrick that he was Darren's father. Bonnie did not inform Ray until 1999. Ray continued to treat Darren as his son and Darren reciprocated.

Ray filed a complaint against Patrick under the Paternity Act to establish that Patrick is Darren's father; and to recover child support from Patrick. Ray, Bonnie and Patrick agreed to DNA testing. The trial court ordered Patrick to submit to a DNA test, which confirmed that he was Darren's father.

The only issue before the Supreme Court was whether Ray's claim under the Parentage Act (*i.e.*, whether Ray was entitled to a reimbursement of all child support provided to Darren because Patrick was Darren's biological father) was time barred. The Supreme Court, after discussing both substantive and procedural differences between a statute of repose and a statute of limitation, concluded that the 23-year limitation in the Parentage Act was a statute of repose. As such, Ray's action against Patrick, when Darren was approximately 30 years of age, was time barred. The Supreme Court noted that, if Patrick

engaged in active or overt deception, the "outcome might be different." 192 N.J. at 104. In addition, Darren was not a party to the action. The Court opined, however, that Darren's need to know his biological background for health and family planning purposes might be an "extraordinary circumstance" warranting the tolling of the Parentage Act to allow DNA testing.

Comment: A statute of repose is a substantive rule of law that operates "as a grant of immunity serving primarily 'to relieve potential defendant from anxiety over liability for acts committed long ago.'" *See* Michael Shapiro, *The Law of Products Liability*, Paragraph 30.12 (4th ed. _____).

_J.S. v. L.S._, 389 N.J. Super. 200 (App. Div. 2006) [Judge Coleman]

Recovery of Child Support Against Custodial Parent

Child support paid by a party later determined not to be the biological father may not be recovered from the mother; instead recovery may be pursued against the biological father according to this appellate court decision.

The parties, married in August 2001, were separated after the defendant was incarcerated in February 2004. One child was born of the marriage. The plaintiff filed a complaint for divorce on April 22, 2004 and her unopposed motion for *pendente lite* support was granted. The defendant was ordered to pay $133 per week as child support.

The divorce action was settled. The plaintiff agreed to submit to a paternity test. The PSA provided for equitable distribution. Based on the assumption that the paternity test would confirm that the defendant was the child's father, the PSA also provided for custody, child support and parenting time.

The parties settled the divorce subject to resolution of the paternity issue:

> All other claims between the parties have been waived that are not set forth in this agreement. As I noted before, there will be a paternity test and various issues will have to be revisited if paternity is not found but we are proceeding on the basis that paternity is found. 389 N.J. Super. at 202.

The paternity test established that defendant was not the child's biological father. The defendant made an application to set aside equitable distribution, to terminate child support and for the plaintiff to repay *pendente lite* child support.

The trial court granted the defendant's motion with respect to future child support for the child. The court denied the defendant's request to require the plaintiff to return any child support paid prior to the determination of paternity and the request to revisit equitable distribution observing that there was "no nexus between non-paternity and the equitable distribution provisions." *Id.* at 203.

In the absence of specific provisions in the PSA, the appellate court concluded that defendant's non-paternity affected only child-related expenses and not equitable distribution.

The appellate court did not grant the defendant's request for a return of *pendente lite* child support since: 1) there is a statutory presumption that a child born during the marriage to the wife is the husband's child; 2) child support belongs to the child and is for the child's benefit; 3) reimbursement from the mother would "inevitably result in a depletion of resources for the child," *Id.* at 206, and would be contrary to the best interests of the child; 4) the wife was not unjustly enriched since child support runs from the parent to the child, not parent to parent; and 5) the defendant can recover as against the biological father pursuant to *J.R. v. L.R.*, 386 N.J. Super. 475 (App. Div. 2006), for reimbursement of any child support that the defendant paid for the benefit of the child. 389 N.J. Super. at 206.

Tretola v. Tretola, 389 N.J. Super. 15 (App. Div. 2006) [Judge Axelrad]

Emancipation—Plenary Hearing

A court must make a full and sensitive inquiry as to all prevailing circumstances prior to deciding whether to emancipate a child according to this appellate decision.

The parties were divorced on Oct. 10, 1996. Their son, Daniel, attends Bergen Community College (BCC) at night, which allows him to work at the Bergen County Surrogate's Office during the day. Daniel will transfer to Rutgers University upon graduation from BCC.

The PSA provided that emancipation would occur upon the later of either: (a) reaching the age of 18 years or the completion of post secondary education; or (b) engaging in full time employment. The father sought to emancipate Daniel and to eliminate child support since Daniel is employed full time, despite the fact he attends BCC. Daniel earned $20,000 in one year.

The trial court, without a plenary hearing, ruled that Daniel was a full-time student, worked only part-time, and that he was entitled to child support. The trial court did not have any documentation to support Daniel being a full-time student or any statement as to his earnings at the surrogate's office, or the availability of financial aid.

The appellate court found that the plaintiff was entitled to confirmation as to the number of credits Daniel was taking at college, particularly where he learned that his son was working 35 hours per week at the surrogate's office. The information was essential to evaluate whether Daniel was still dependent on his family for support. Citing *Fusco v. Fusco,* 186 N.J. Super. 329 (App. Div. 1982), the appellate court found that the Family Part judge

failed to recognize that material facts were in dispute, that evidence beyond the motion papers was necessary for resolution of the matter, and that these issues could not be resolved without a plenary hearing.

In determining whether to emancipate a child, the court must make a fact sensitive inquiry that "involves a critical evaluation of the prevailing circumstances including the child's need, interest, and independent resources, the family's reasonable expectations, and the parties' financial ability, among other things." *Newburgh v. Arrigo,* 88 N.J. 529 (1982).

The appellate court found that even if the trial court determined that Daniel's income was temporary or insufficient to render Daniel economically self sufficient to justify emancipation, his income of $20,000 per year would constitute a change of circumstances that warranted a review of child support.

Comment: When material facts are in dispute, a plenary hearing must be held. In any determination of whether a child is to be emancipated, the court must evaluate all of the prevailing relevant circumstances.

Crespo v. Crespo, 395 N.J. Super. 190 (App. Div. 2007) [*Per Curiam*]

Definition of Income—Supplemental Security Income

Social Security Income (SSI) is not income for child support purposes according to this important appellate court decision.

The parties were granted a judgment of divorce (JOD) in 1990. One child, Selena was born of the marriage. The defendant was ordered to pay child support of $65 per week.

The defendant was found disabled by the Social Security Administration and received SSI benefits of $579 per month. The defendant had no additional source of income.

The defendant made an application in 2005 to emancipate Selena and to terminate child support since Selena was 18 years of age and for a suspension of enforcement on arrears. The court emancipated Selena and terminated child support as of the date the motion was filed. The court denied the defendant's application to suspend enforcement and ordered the defendant to pay the arrearage at $30 per week.

The defendant moved for reconsideration. On April 4, 2006, the court modified its prior order: emancipated Selena as of her eighteenth birthday (Feb. 24, 2000); provided a credit to the defendant as against arrearage for the period Feb. 24, 2000 through Dec. 27, 2005; fixed arrearages as of April 5, 2006; denied defendant's motion to suspend enforcement on arrears; ordered that the defendant pay $30 per week until his total arrears are eliminated.

On appeal, the defendant asserted that he was disabled and received SSI benefits of only $579 per month, and that the family part judge erred in denying his motion to suspend payment on arrears.

The appellate court first reviewed the general rule that SSI benefits are not income for child support purposes and concluded that SSI is not subject to attachment, garnishment, levy or execution. *Burns v. Edwards*, 367 N.J. Super. 29 (App. Div. 2004). The appellate court emphasized that, since the obligor in this case has no income in addition to SSI, that collection of any arrears must be suspended "until such time as defendant has the ability to pay the arrears from income or assets, actual or imputed, other than SSI." 395 N.J. Super. at 195.

Comment: Social Security disability (SSD) payments are not means tested public assistance benefits. They are based on prior earnings of the recipient and not on the financial need of the recipient. Accordingly, SSD payments are properly considered income as are Social Security retirement benefits.

On the other hand, SSI is a means tested benefit designed to assure that a recipient has income at the minimum necessary for subsistence. SSI is not a substitute for lost income due to a disability and is not considered income for purposes of determining child support and may not be garnished or attached.

Rule 5:7-10 was adopted, effective September 2007, to define the parameters of an order suspending enforcement of child support orders.

Diehl v. Diehl, 389 N.J. Super. 443 (App. Div. 2006) [Judge Grall]

Social Security Disability Benefits

SSD benefits are replacement earnings under R. 5:6A, Appendix IX-B, and are treated as a credit against child support obligations.

The parties were granted a JOD, which provided that the plaintiff was to pay child support for his only child in the amount of $180 per week effective Jan. 1, 2003. The plaintiff was injured at work in July 2002 and was receiving workers' compensation benefits when the JOD was granted. The plaintiff never returned to work. Instead, in February 2003, the plaintiff applied for SSD benefits, which were granted in March 2005 retroactive to July 2002. The child received a lump sum payment of retroactive SSD benefits in the amount of $11,611.

On April 26, 2003, the plaintiff moved to modify child support. The family part applied the child support guidelines and reduced child support to $52 per week, as of April 26, 2003, based upon the plaintiff's income consisting of the SSD annual benefit of $14,868 and the defendant's current income of $50,390 per year. The judge awarded the plaintiff a credit equivalent to the entire $11,611 paid to the child. On appeal, the defendant challenged the credit.

The appellate court held that where child support is established or modified and a child, as a result

of the parent being disabled, receives a known SSD benefit, the child support guidelines allocate the credit for that benefit. N.J. Super. 389. at 448. The question of an equitable credit arises when the child support obligation was fixed prior to disability and does not account for the SSD benefit paid to the child.

The appellate court concluded:

1. Since there was no child support order in effect, for the period July 2002 to Jan. 1, 2003, the plaintiff was not entitled to an equitable credit. *Id.* at 450-51.
2. The plaintiff was obligated to pay child support from Jan. 1, 2003, to April 25, 2003, at the rate of $180 per week. Since the plaintiff's SSD benefit of $115 per week is less than his child support obligation of $180 the plaintiff was entitled to a credit equivalent to the SSD benefit received during this period. *Id.* at 451.
3. The family part properly provided the plaintiff with a reduction in child support as of April 26, 2003 but failed to provide the plaintiff with a credit for the SSD benefit received by the child, which reduces the basic child support amount. Basic child support was determined to be $208 per week. The child's benefit of $115 must be deducted from the $208 leaving $93 per week. The plaintiff's share of the remaining $93 obligation is $23 per week or 25 percent of the parents' combined net income. *Id.* at 452.
4. Since the SSD benefit terminated when the child reaches 18 years of age, the child support after June 25, 2004 is $52 per week ($208 x 25 percent). *Id.* at 453.

***Forrestall v. Forrestall*, 389 N.J. Super. 1 (App. Div. 2006) [Judge Seltzer]**

Definition of Income—Employer's Contribution to 401K Plan

An employer's contribution to a 401K plan, together with income generated in the plan, is properly excluded from the recipient's income for child support purposes according to this appellate decision.

The parties, married in 1992, were granted a judgment of divorce in 2001. Two children were born of the marriage. The PSA provided that the husband's child support obligation would be computed in accord with the child support guidelines. The parties agreed to exchange financial information on April 15 of each year. Child support was then to be modified based on their then current income.

The wife moved for a modification of child support. The trial court excluded from the husband's income the contribution of his employer to his voluntary 401K plan and any income generated by the plan.

The wife filed a motion for reconsideration, asserting that the court failed to consider her untimely filed submissions. The trial court cured any such issue by ultimately addressing the argument made in the later submissions.

Rule 5:6A, Appendix IX-B, defines what constitutes income in computing child support. It contains a non-exclusive list of income sources such as compensation for services, including wages and tips. The list also includes annuities or interest in a trust and profit sharing plans. As a result, the appellate court found that an employer's contribution to the plan is income. Nevertheless, the appellate court held that the employer contribution to the plan, together with income generated in the plan, is not to be included in the child support calculation because any such income must be income available to the recipient. The appellate court concluded that the funds could not be withdrawn by the husband without incurring substantial penalties and taxes.

As a result, the appellate court sustained the trial court decision that the employer contribution and income is properly not considered for child support purposes. The appellate court pointed out that the recipient was not voluntarily deferring income to a plan nor had he artificially reduced his salary.

Comment: While the employer contribution to a plan is "income" as defined in Appendix IX-B, the funds could not be withdrawn without substantial penalties and taxes. As a result, neither the employer contribution nor any subsequent income generated in the plan is includable in the father's income for child support purposes.

***Marshak v. Weser*, 390 N.J. Super. 387 (App. Div. 2007) [Judge Reisner]**

UIFSA and Duration of Child Support

Pursuant to the Uniform Interstate Family Support Act (UIFSA), the duration of child support entered in one state cannot be modified by the court of another state according to this appellate court decision.

The parties, married in 1981, were granted a divorce in Pennsylvania in 1999. Two children were born of the marriage. Pennsylvania issued a child support order in 1999. Thereafter, both parties and the children moved to New Jersey. A second child support order, reducing the level of support was then issued in Pennsylvania.

The parties executed a consent order on June 12, 2002, recalculating child support for the second child anticipating the emancipation of the first child. The consent order stated that "[n]othing in the [consent order] shall be construed to modify the nature, term, duration or extent of child support under [Pennsylvania Law]." 390 N.J. Super. at 389. On June 21, 2002, the first child was emancipated by Pennsylvania court order, having turned 18 years of age.

The defendant filed a motion in New Jersey to emancipate the younger child upon turning 18 years of age. The plaintiff filed a

cross-motion to "unemancipate" the older child, deny the defendant's application to emancipate the second child and to have the defendant contribute to college costs. Pennsylvania does not require a parent to pay college expenses for a child who has reached the age of majority.The trial court ordered the defendant to pay college expenses since all the parties lived in New Jersey.

The appellate court held that the trial court had erred since N.J.S.A. 2A:4-30.107(a) specifically provides that "the law of the issuing state governs the nature, extent, amount, and *duration* of current payments and other obligations of support and the payment of arrearages under the order." (Emphasis added). In addition, UIFSA provides, "A tribunal of this State may not modify any aspect of a child support order that may not be modified under the law of the issuing state." N.J.S.A. 2A:4-3, 114(c).

The appellate court held that the law of the issuing state controlled the duration of a child support obligation. Since Pennsylvania law did not require a parent to pay college expenses for a child who reached age 18, UIFSA precludes a New Jersey court from modifying the Pennsylvania order to require the defendant to pay for college expenses despite the fact all parties moved to New Jersey.

The appellate court distinguished *Phillip v. Stahl*, 344 N.J. Super. 262 (App. Div. 2001) since the court there did not address the issue of whether duration was nonmodifiable.

Comment: In 2001, the model UIFSA statute was modified to address specifically this issue, and provides:

> In a proceeding to modify a child support order, the law of the State that is determined to have issued the initial controlling order governs the duration of the obligation for support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this State.

Campbell v. Campbell, 391 N.J. Super. 157 (App. Div. 2007) [Judge Rodriguez]

UIFSA—Registration of Foreign Child Support Order

The UIFSA provides a procedure to register a foreign child custody order and the right to contest the registration that is to be strictly construed according to this appellate court decision.

The parties were married and divorced in Australia. One child was born of the marriage. The parties entered a consent order on Jan. 2, 1990, providing for the defendant to pay child support at the rate of $150 per month. In 1997, the Australian Family Court modified the child support order to $120 per week.The defendant failed to pay at least some portion of child support.

The plaintiff registered the Australian child support order pursuant to N.J.S.A. 2A:4-30.110(c). The defendant accumulated child support arrearage exceeding $31,000. The defendant, self-represented, argued against the registration and for an abatement of arrears. The court registered the Australian child support order. The defendant did not appeal the court's decision.

In 2006, the defendant moved to vacate the support order and for an abatement of the arrears.The appellate court sustained the family part judge's denial of the defendant's motion to vacate the registration.

N.J.S.A. 2A:4-30.103, provides for registration of orders from other states and countries. Upon receipt of designated documentation, "the registering tribunal shall cause the order to be filed as a foreign judgment." N.J.S.A. 2A:4-30.105.b. In order to contest the registration, the opposing party must contest the validity or enforcement of the registered order within 20 days after mailing or personal service of notice of registration.The opposing party may seek to vacate the registration by one of the defenses set forth in N.J.S.A. 2A:4-30.110(a).

The appellate court held:

> [T]he language of the statue is clear and unambiguous. Once the registration of the foreign order is confirmed, whether by operation of law or after notice and hearing, it "*precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.*" N.J.S.A. 2A:4-30.111 (emphasis added). 391 N.J. Super. at 163.

Comment: The right to contest the registration of a foreign child support order will be strictly construed.

Giordano v. Giordano, 389 N.J. Super. 391 (App. Div. 2007) [Judge Fisher]

Federal Child Support Recovery Act—No Preemption of State Law

Federal law does not prohibit New Jersey from compelling an obligor to pay child support arrearage at a rate greater than imposed by the federal court applying the Child Support Recovery Act (CSRA), 18 USCA §228(a)(3), according to this appellate decision.

The parties were married and had three children. They were divorced in 1988.The defendant failed to pay child support and was convicted of willfully failing to pay child support pursuant to N.J.S.A. 2C:24-5. Thereafter, the defendant paid child support for four months in 1995, but "disappeared" for five years. In 2000, the defendant was located through the efforts of a federal program, Project Save Our Children, prosecuted pursuant to the CSRA.

Subsequently, the defendant pled guilty to violating the CSRA, which makes unlawful an obligor's willful failure to pay child support with respect to a child residing in another state if such obligation has remained unpaid for longer than two years or is in an amount greater than $10,000. The federal judge ordered the defendant to pay child

support of $232,934.42 at the rate of $400 per month.

The defendant appealed a family part order, entered in November 2004, that emancipated the two older children and required the defendant to pay $147 per week in child support for the youngest child and $100 per week against the child support arrearage. The appellate court affirmed the trial court order on May 12, 2006. On May 31, 2005, during the pendency of that appeal, the federal judge modified his prior order and directed the defendant to pay the child support arrearage at the rate "of at least $100 each month."

On Sept. 30, 2005, the family part judge emancipated the third child, declared that $250,777.42 in child support remained due and ordered the defendant to pay the arrearage at the rate of $247 per week. The defendant moved for relief from the September 2005 order. The family part judge, on Jan. 23, 2006, modified the order, directing the defendant to pay the arrearage at the rate of $150 per week, which was in excess of the federal order.

The defendant, self-represented, appealed the January 2006 family part order because it ordered arrearage to be paid at a rate higher than the federal court order of "at least $100 each month." The appellate court interpreted the defendant's argument to be that the CSRA "preempts state law and prevents state courts from imposing or enforcing child support orders in a manner different from or in more onerous terms than that imposed by federal courts." 389 N.J. Super. at 395.

The appellate court rejected the defendant's contentions. First, while clearly Congress has the power to preempt state law, Congress did not expressly or impliedly preempt state law. Second, the court found that since the defendant could comply with the New Jersey order and thereby meet his obligations under the federal order, "conflict preemption" did not apply. The appellate court found that the Family Part has statutory and common law authority to modify and enforce child support orders unhampered by federal law guided only by equitable notions and considerations. *Id.* at 400. The appellate court found "nothing is inequitable about an order that requires defendant to repay child support arrearage of approximately $250,000 at the rate of $150 per week," *id.* at 400 n. 2, since it would take the 61-year-old defendant 30 years to pay the arrearage.

Lissner v. Marburger, 394 N.J. Super. 393 (Ch. Div. 2007) [Judge Ostrer]

Modification of Child Support Based on Retirement

A new test to be used in determining whether a reduction of child support is appropriate due to an obligor's voluntary early retirement was set forth in this trial court decision.

The parties, married in 1987, were granted a judgment of divorce in 2001. One child was born of the marriage. The plaintiff is 61 years of age. The plaintiff voluntarily retired from his teaching position before the 2006-2007 school year. The plaintiff had earned $111,500 per year in his teaching job and as a recreation director in the summer. Upon retirement the plaintiff received a $60,000 per year pension.

The plaintiff asserted that since he was over 55 and had 25 years of service, he was entitled to retire without penalty. On the other hand, had plaintiff continued to work, his pension would increase based upon additional years of work together with any increase in salary. The plaintiff certified that he wanted to retire due to the challenge of teaching his student population after four decades and travel issues. The plaintiff also cited health issues, which were not substantiated.

The court began its analysis by citing the general rule that pursuant to *Lepis v. Lepis*, 83 N.J. 139 (1980), both child support and alimony were subject to modification due to a change of circumstances. "However, an income decrease resulting from retirement does not necessarily justify a modifying support." 394 N.J. Super. at 399.

The court then reviewed the early retirement factors set forth in *Deegan v. Deegan*, 254 N.J. Super. 350 (App. Div. 1992), *Silvan v. Sylvan*, 267 N.J. Super. 578 (App. Div. 1993) and the child support factors set forth in N.J.S.A. 2A:34-23.b. The court concluded that the needs of the child set forth in statutory factors (1), (5), (6), (7) and (9) were not addressed under *Deegan* and *Silvan*. 394 N.J. Super. at 402. The court also determined that the expectations of the parties, perhaps central to a retirement decision as between the parties "should not weigh heavily at all in the child support context." *Id.* The court observed that, normally, when a parent reaches age 65, his child's college obligations have been met. The court stated:

> It is reasonable to conclude that a person who decides to become a parent late in life voluntarily takes on the responsibility of working and saving for that child beyond the age that would otherwise be expected. *Id.* at 403.

The court held the following factors were to be considered:

> (1) the benefits to the retiring parent, based on his or her age, health, timing, finances, assets, reasons for retiring, and whether the parent can control the disbursement of retirement payments to enable him or her to maintain support for the child despite retirement; (2) the impact on the child of reduced support, based on his or her needs, age, health, assets, and standard of living to which he or she has grown accustomed, and any proffered advantages to the child from the parent's retirement; (3) the fairness of the decision, based on the obligor's motivation, good faith, and voluntariness of the retirement; and (4) any

other factors. *Id.* at 405.

Applying the foregoing, the court found that the plaintiff failed to meet his burden, and the court, therefore, did not reduce child support despite plaintiff's retirement at age 65.

NAME CHANGE

Hesson v. Hesson, 392 N.J. Super. 94 (Ch. Div. 2007) [Judge Rauh]

Granting Name Change Prior to Entry of Final Judgment of Divorce

A litigant's request for a name change may properly be considered by a court despite the death of the other spouse prior to the entry of the final judgment.

In this divorce action, the trial court granted entered plaintiff's request for a name change back to her maiden name, despite the fact the defendant died prior to the final hearing date.

The plaintiff had previously filed default and served a notice of equitable distribution, when defendant passed away. At the plaintiff's request the court granted her a name change back to her maiden name, contemporaneously dismissing the balance of the divorce relief requested under the complaint.

The court acknowledged that a divorce complaint abates upon the death of a spouse. *Cimiluca v Cimiluca*, 245 N.J. Super. 149 (App. Div. 1990), standing for the proposition that a name change request should be liberally construed, however, authorized the relief to which the plaintiff was otherwise entitled.

> [I]n exceptional circumstances certain reliefs may be granted after a spouse's death in a divorce action and prior to the entry of a final judgment. 392 N.J. Super. at 98.

Comment: The case provides a summary of the law granting a name change ancillary to a final judgment of divorce.

DOMESTIC VIOLENCE

STATUTES

None

COURT RULES

None

DIRECTIVES AND MEMORANDA

Assignment Judge Memorandum

Domestic Violence Procedures - Electronic Filing of Complaints and Temporary Restraining Orders (E-TRO)—July 5, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/ebe6c90ab6f4615/ajmemo070705c.pdf

This memorandum relates the Supreme Court's approval of the statewide implementation of the E-TRO Project on a permanent basis. The program provides an efficient means of filing domestic violence complaints and entering temporary restraining orders after normal court hours.

CASE LAW

State v. Dispoto, 189 N.J. 108 (2007) [Justice LaVecchia]

Domestic Violence Search Warrant and Subsequent Criminal Search Warrant

While an invalid domestic violence search warrant for weapons is to be complied with by defendant and the weapons found are to be seized, the evidence seized as a result of the search, including the weapon, are considered "fruit of the poisonous tree" and are to be suppressed in any resulting criminal proceeding according to this unanimous Supreme Court decision.

In 2001, the state police received information of broad-ranging criminal activities from an informant regarding Vincent Dispoto. The informant also advised that Dispoto asked the informant whether he knew "anybody who would kill [defendant's] wife." 189 N.J. at 114. A few days later, on a revisit, Dispoto told the informant that he did not want to kill his wife because he would be the prime suspect. The state police decided there was no basis to conduct a murder for hire investigation but did tell Dispoto's wife that the police had received information that she was in danger. The court noted that the police did not inform her that the information was "uncorroborated." Nor did he inform her about the exculpatory statements defendant had made to the informant earlier that day. The police encouraged Dispoto's wife to obtain a TRO. After the TRO was issued, the state police requested a warrant for weapons under the Prevention of Domestic Violence Act (PDVA). The warrant was executed and an illegal firearm was found. Based upon statements made by Dispoto during the weapons search, a criminal search warrant was obtained and the resulting search yielded large quantities of marijuana.

Dispoto moved to suppress the weapon and marijuana on the basis of an illegal search. The trial court granted the motion and the appellate court upheld the suppression of evidence. The Supreme Court affirmed, saying:

> [P]ermeating the series of events that transpired is the sense that the domestic violence search warrant was being used by law enforcement representatives to uncover evidence of criminal behavior unrelated to defendant's alleged acts of domestic violence. *Id.* at 123.

The Court said:

> [T]he remedial protections afforded under NJPDVA are intended for the benefit of victims of domestic violence and are not meant to serve as a pretext for obtaining information to advance a criminal investigation against an alleged abuser. *Id.* at 120.

The Supreme Court expressly disapproved, in part, the appellate court decision in *State v. Johnson*, 352 N.J. Super. 15 (App. Div. 2002). The Court held that a PDVA weapons search warrant is invalid unless the record discloses:

(a) "a proper basis for a finding of exingency for the telephonic application;
(b) "probable cause to believe that the offense of domestic violence has occurred; and
(c) "a reason to permit a search for weapons in a location removed from the place where the domestic violence allegedly occurred." *Id.* at 120-121.

Comment: In order to authorize a search warrant for weapons, the court must find "probable cause" that the three *State v. Johnson* factors exist. That is, the judge must find probable cause (versus reasonable cause) that:

(a) an act of domestic violence has been committed by the defendant;
(b) defendant possesses or has access to a firearm or weapon; and
(c) defendant's possession or access to that weapon poses a heightened or increased risk of danger to the victim. 352 N.J. Super. at 39.

Evidence supporting the finding of "probable cause" must be on the record, and the judge must make specific findings on all three factors, and sufficiently describe the weapon and its location.

_M.A v. E.A._, 388 N.J. Super. 612 (App. Div. 2006) [Judge Sabatino (t/a)]

Definition of Victim—Stepchild

A 15-year-old who allegedly was sexually assaulted by her stepfather is not the "victim of domestic violence" and her mother's complaint under the PDVA was properly dismissed according to this appellate decision.

The mother filed the complaint on behalf of her daughter, M.P., who was allegedly sexually assaulted by her stepfather two days before the filing of the complaint. The complaint also alleges that the defendant threatened the mother's life alleging that he "is going to kill me." At the trial the plaintiff testified to a past lengthy history of physical violence against her by her husband. The trial dismissed the plaintiff's complaint, concluding that she had "failed to establish that the defendant committed domestic violence against her individually." *Id.* at 616.

The appellate court upheld the trial court ruling that the 15-year-old was not the "victim of domestic violence" because the Legislature had carefully created limited exceptions to the requirement that the plaintiff be 18-years-of-age or older. Those exceptions are:

(a) when plaintiff and defendant have a child in common;
(b) when plaintiff anticipates having a child in common with defendant, if one of the partners is pregnant; or
(c) when plaintiff and defendant are or have been in a dating relationship.

Because the 15-year-old does not fall into any of these categories, the appellate court agreed that the complaint of sexual assault upon the 15-year-old was properly dismissed. While upholding the dismissal of the complaint based on allegations of sexual abuse against the 15-year-old, the appellate court remanded the matter for further testimony regarding allegations of domestic violence against the plaintiff mother herself. The appellate court wrote: "For reasons that are not altogether apparent to us, the Legislature has circumscribed the definition of a 'victim' under the Act beyond common notions of victimization." *Id.* at 618. It further observed that: "Any remedy to cover the situation must be sought by the Legislature." *Id.* at 618.

Comment: Legislation was introduced and is pending to strengthen N.J.S.A. 9:6-8.55. That section now provides, in part: "The court may make an order of protection in assistance or as a condition of any other order made under this Act. The order of protection may set forth reasonable conditions of behavior to be observed for a specific time by a person who is before the court and is a parent or guardian responsible for the child's care or the spouse of the parent or guardian, or both. Such an order may require any such person: (a) to stay away from the home, the other spouse or the child; (b) to permit a parent to visit the child stated; (c) to abstain from offensive conduct against the child or against the other parent or against any person to whom custody of the child is awarded; (d) to give proper attention to the care of the home; and (e) to refrain from acts of commissions or omission that tend to make the home not a proper place for the child."

M.P., the 15-year-old in this case, would qualify as a victim of child abuse under Title 9. The appropriate remedy would have been for DYFS or the mother to file a Title 9 complaint and request that the court enter an order of protection under N.J.S.A. 9:6-8.55.

***Frazier v. North State Prison, Dept. of Corrections*, 392 N.J. Super. 514 (App. Div. 2007) [Judge Skillman]**

Future Possession of Weapons—Conviction of Simple Assault by Menacing

Conviction for committing simple assault by menacing as prohibited by N.J.S.A. 2C:12-1(a)(3) is not a misdemeanor crime of domestic violence and therefore, does not trigger the provisions of the Lautenberg Amendment, 18 U.S.C.A. § 922 (g)(9), prohibiting future posses-

sion of weapons, according to this appellate court decision.

The defendant was a senior corrections officer who was terminated from employment solely because he pled guilty to violating N.J.S.A. 2C:12-1(a)(3), simple assault by menacing and it was determined by the Merit System Board that as a matter of law he was prohibited from possessing a firearm pursuant to 18 U.S.C.A. § 922(g)(9). This decision was upheld by the administrative law judge and the defendant appealed his termination of employment to the Appellate Division. The unanimous appellate panel reversed the termination and remanded for further proceedings saying:

> The offense committed by appellant does not satisfy the second criteria for identification of a 'misdemeanor crime of domestic violence' as defined by the Lautenberg Amendment. 392 N.J. Super. at 519.

The reason for this result is that the offense of menacing "does not have as an element of the offense the use or attempted use of physical force." *Id.* at 515. Judge Skillman noted that it does not matter that the charges themselves allege physical violence because:

> A court may only consider whether the subject offense has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon. A court may not look to the defendant's underlying acts to consider whether the required elements are present. *Id.* at 520.

Judge Skillman distinguished *State v. Wahl*, 365 N.J. Super. 356 (App. Div. 2004) saying that the weapons prohibition in *Wahl* was based on violation of N.J.S. 2C:12-1(a)(1), which *does* have physical violence as an element.

The matter was remanded for further consideration because the Merit System Board decision was based solely on misapplication of the Lautenberg amendment and the appellate court recognized given the prior allegations against appellant that the "appellant's conviction, and the conduct upon which it is based, may warrant disciplinary action independent of the Lautenberg Amendment." *Id.* at 520.

McGowan v. O'Rourke, 391 N.J. Super. 502 (App. Div. 2007) [Judge Lyons]

A Single Act Constituting Domestic Violence

A single act can constitute domestic violence for the purpose of the issuance of an final restraining order (FRO), and the defendant sending pornographic photographs to the plaintiff's sister and threatening to send them to her son and coworkers constituted harassment justifying issuance of the FRO according to this appellate decision. Further, counsel fees are deemed compensatory damages and *Pullen v. Pullen,* 365 N.J. Super. 62 (Ch. Div. 2003), is expressly disapproved.

The parties' dating relationship was ended by the plaintiff. The defendant endeavored unsuccessfully to have the plaintiff contact him so he could retrieve his camera. He then mailed 12 pornographic photographs of the plaintiff to her sister and included a note asking for return of his camera. The next day, the defendant telephoned the plaintiff and asked how her sister liked the photographs that he had taken and mailed, saying that if she did not like them maybe her son or coworkers would.

The trial court entered an FRO holding that the defendant's conduct constituted harassment and that he had the requisite intent to annoy and alarm the plaintiff.

Speaking for the appellate court, Judge Lyons stated:

> A single act can constitute domestic violence for the purpose of the issuance of an FRO, and the judge found on competent, credible and supportable evidence that an act of harassment occurred. 391 N.J. Super. at 505.

The court rejected the defendant's argument that the trial judge failed to make sufficient findings of fact because all six factors listed in N.J.S.A. 2C:25-29(a) had not been addressed quoting the Supreme Court decision *Cesare v. Cesare*, 154 N.J. 394, 401-402 (1998), which held:

> [B]ecause some of the above factors, such as the financial circumstances of the parties and the best interests of the child, are relevant only to [ ] fashion [ ] a domestic violence remedy, N.J.S.A. 2C:25-29(a) does not mandate that a trial court incorporate all of those factors into its findings when determining whether or not an act of domestic violence has been committed. 391 N.J. Super. at 506.

The decision also upholds the award of $4,617.50 attorney's fees, and expressly disapproved the published trial court opinion of *Pullen*, *supra*. This decision resolves the disagreement among three published trial level decisions regarding the proper standard for awarding attorney fees to a prevailing plaintiff in domestic violence cases. The appellate decision recognizes attorney's fees as compensatory damages that may be awarded regardless of plaintiff's actual need for same, saying:

> The Act specifically provides for an award of attorney's fees and, therefore, they are permitted by the Court Rules. See R. 4:42-9(a)(8). The reasonableness of attorney's fees is determined by the court considering the factors enumerated in R. 4:42-9(b). That rule incorporates the factors stated in R.P.C. 1.5. If, after considering those factors, the court finds that the domestic violence victim's attorney's fees are reasonable, and they are incurred as a direct result of domestic violence, then a court, in an exercise of its discretion, may award those fees. *Id.* at 507.

***M.S. v. Millburn Police Department*, 395 N.J. Super. 638 (App. Div. 2007) [Judge Rodríguez]**

Revocation of Firearms Purchaser Identification Under New Statutory Provision

A firearms purchaser identification (FPI) card shall not be issued to any person whose firearm is seized pursuant to the Prevention of Domestic Violence Act, and whose firearm has not been returned. Moreover, the 45-day requirement for the prosecutor to seek forfeiture of firearms seized does not apply to application by the prosecutor to the court for revocation of a FPI card.

M.S. was issued a FPI card in January 1995. An FRO was entered against him two years later. The FRO did not prohibit M.S. from possessing firearms. The police did, however, seize five weapons and the FPI card from M.S. The prosecutor timely filed a petition seeking forfeiture of the five weapons. A consent judgment was entered. Although the judgment did not refer to revocation of the FPI card, the FPI card remained in the possession of the Millburn Police Department.

In April 2005, after the FRO was dismissed, M.S. moved to vacate the forfeiture judgment in order to receive his FPI card back from the Millburn Police. Ultimately this action was filed in the Civil Division as an action in lieu of prerogative writs to require the police department to return the FPI card. M.S. moved for summary judgment, arguing that the domestic violence matter had been previously dismissed. Summary judgment was granted by the Civil Part judge who ordered return of the FPI card. The prosecutor appealed.

The appellate court agreed that M.S. was not disqualified from possessing the FPI card by virtue of domestic violence statute or N.J.S.A. 2C:58-3c(6). Also, he was not prevented from having the FPI card because at the time of his application he was not subject to a domestic violence order.

On Jan. 4, 2004, N.J.S.A. 2C:58-3c was amended at subpart 8. That section provides that an FPI card shall not be issued "to any person whose firearm is seized pursuant to the Prevention of Domestic Violence Act of 1991...and whose firearm has not been returned." N.J.S.A. 2C:58-3c.

The appellate court denied M.S.'s argument that N.J.S.A. 2C:58-3c(8) was not in effect at the time of the forfeiture judgment and should not be applied to his application. The court said:

> We conclude that it should be applied because it was the governing law at the time that M.S. moved for the return of the FPI. It is inconsequential that up until January 4, 2004, the prohibition set by section 3c(8) did not exist. The Legislature, by enacting that section, provided the standard to be applied for future application for a FPI, or by inference, return of a seized FPI. In deciding M.S.'s application, which was filed in 2005, the judge had to apply the existing standard. By its terms, N.J.S.A. 2C:58-3c(8) applies to prior seizures of firearms. Yet, there is nothing in the statute that "grandfathers in" seizures that preceded the enactment of this section. Moreover, such an exemption would not advance the policy embodied in section 3c(8). 395 N.J. Super. at 642-43.

The appellate court held that the county prosecutor may make application to the court for revocation of an FPI card at any time it determines that "the holder no longer qualifies for such a gun permit."

Comment: This case definitively decides that the 2004 amendments limiting firearm and weapon possession are to be applied in the cases involving domestic violence prior to the enactment date of January 2004. Also, even though the prosecutor is to make application for forfeiture of firearms within 45 days, an application to seize the FPI card may be made any time the prosecutor believes that the holder no longer qualifies for the gun permit.

***D.V. v. A.H.*, 394 N.J. Super. 388 (Ch. Div. 2007) [Judge Blaney]**

Definition of Victim—Caregiver with Legal Custody of Defendant's Child

A sister-in-law who has been awarded custody of the defendant's child comes within the definition of "victim of domestic violence" because they share a "child in common" pursuant to this trial court decision.

The plaintiff and her husband had been awarded custody of the defendant's child one week after her birth in 1997. Under the terms of the custody order, the birth father had regular unsupervised parenting time. The plaintiff alleged that the defendant harassed her by using offensive and threatening language and by calling at extremely inconvenient hours.

Judge Blaney held that the plaintiff was the "victim of domestic violence under the PDVA because she and defendant did, by virtue of the custody arrangement, share the "child in common" and thereby came within the definition of victim that includes "any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common." N.J.S.A. 2C:25-19(d). Judge Blaney held that because the term "child in common" was not defined, the PDVA should be "liberally construed to achieve its salutary purposes" that include protection of victims of violence that occur in a "family or family-like setting." *Id.* at 391.

Finding jurisdiction existed, and that the defendant had committed the offense of harassment against his sister-in-law, the court entered an FRO in default.

GENERAL APPLICATION/OTHER

STATUTES

None

COURT RULES

None

DIRECTIVES AND MEMORANDA

Directive # 08-07

Public Access to Surrogates' Judiciary Records—September 25, 2007

Link: http://www.judiciary.state.nj.us/ directive/2007/dir_08_07.pdf

This directive supplements Directive #15-05, which sets forth the procedures approved by the Supreme Court to be followed in providing access to court records. Directive #8-07 is intended to make clear the application of the provisions of Directive #15-05 to Surrogates' Judiciary records.

Assignment Judge Memorandum

Review Process for Complaints Against Mediators in Court-Approved Mediation Programs—August 7, 2007

Link: http://ttnapacheweb1.courts.judiciary.state.nj.us/wps/wcm/resources/file/eb18e844a983091/ajmemo070807a.pdf

This memorandum sets forth the process for reviewing complaints against mediators in court-connected mediation.

CASE LAW

***All Modes Transport, Inc. v. Hecksteden, et al*, 389 N.J. Super. 462 (App. Div. 2006) [Judge Skillman]**

Court Intervention in Trial Testimony

It is improper for a trial court judge to warn a testifying party that continuation of the testimony could result in the court referring the matter to the appropriate criminal authority.

The appellate court reversed the trial judge, finding that the court's improper admonition may have had the capacity to improperly coerce the defendant into settling his case. The court vacated the settlement and remanded the case for a new hearing on whether the settlement, entered immediately after the court's intersession, had been voluntary.

The defendant, who had worked as the CEO of the plaintiff corporation, was being sued for fraud and breach of fiduciary duty. After testifying in his defense, corporate counsel began cross-examining defendant with allegations of tax fraud. The court declared a recess, met with counsel in chambers, and advised that if there was any further damaging testimony, it was going to send a *Sheridan* letter.

Immediately thereafter, the case settled on terms extremely favorable to the plaintiff corporation. The defendant's subsequent motion to vacate the settlement was denied by the trial court.

The appellate court held that the trial court should not interrupt a witness to advise that there may be criminal consequences to the testimony, which may be referred to the prosecuting authority.

> A trial court has no obligation to warn even a potential witness who is not represented by counsel that his or her testimony may be self-incriminating. 389 N.J. Super. at 463.

Such warnings are the lawyer's responsibility, not the court's, and may have the unintended capacity to be coercive when coming from the bench.

Comment: In combination with last year's *Attor v. Attor,* 384 N.J. Super. 154 (App. Div. 2006), the appellate court is sending trial courts a clear message not to intercede in trial testimony to raise Fifth Amendment incrimination issues.

ADOPTION

***In the Matter of P.B. and S.B. for the Adoption of L.C., an Adult,* 392 N.J. Super. 190 (2006) [Judge Mendez]**

Adult Adoption—Age Difference Between Parent and Adoptee

Adult adoption should be denied when there is no compelling evidence it would be in the adoptee's best interest to waive the statutory age difference requirement.

The trial court denied the petition for an adult adoption where the statutorily required minimum age difference of ten years between the adopter and adoptee was not satisfied.

A married couple, ages 50 and 53 respectively, sought to adopt an unmarried 52-year-old female, who resided with the couple for over 10 years. The parties wished to formalize their familial relationship.

N.J.S.A. 2A:22-1 provides standards for adult adoptions.

> [t]he adopting parent or parents are of good moral character and of reputable standing in their community, and...the adoption will be to the advantage and benefit of the person to be adopted.

N.J.S.A. 2A:22-2 further stipulates that an adult adoption will not be granted unless: 1) there is an age difference of at least 10 years between adopting parents and the adoptee. The court is permitted to waive the age difference requirement if the court is "satisfied that the best interest of the person to be adopted would be promoted by granting the adoption." The trial judge reviewed the legislative intent and concluded that the age difference requirement was intended "as a method of insuring that at least a semblance of a parent child relationship existed between the adult parties." 392 N.J. Super. at 197.

The court must inquire into the adoptee's best interest if the statutory requirements are not met and the parents seek a waiver of the requirements. The trial judge found no evidence of a parent child relationship in this "team of equals." Nor could it find compelling evidence that it would be in L.C.'s best interest to grant the adoption and

waive the age requirement where the parties testified they were not seeking the adoption to establish inheritance, tax or other such purposes. *Id.* at 200.

Comment: No case law in this state has previously addressed the issue of whether an adult adoption should be granted when the statutorily required minimum age difference between adopter and adoptee was not satisfied. Denial of the petition does not stop the parties from providing L.C. with love and affection, a provision in their wills or the opportunity for her to change her last name to theirs without an adoption decree.

In re Adoption of a Child by Nathan S., **_____ N.J. Super. _____ (Ch. Div. 2006) [Judge Koblitz]**

Adoption of Grandchild by Grandparent and Only Terminating Parental Rights of One Parent

New Jersey statutes and case law do not allow for a grandfather to adopt his grandchild in order to coparent with his own child, thus terminating the parental rights of the biological father.

Tanya (the names used in this opinion are fictitious to protect the privacy of the parties and child) was the only child of the marriage between John and Donna. She lived in the care of her mother and her maternal grandparents, Nathan and Jeanette, from the time she was a year old. Tanya's father, John, was diagnosed as bipolar, had a substance abuse history spanning over 28 years, and a criminal history including 27 arrests and multiple incarcerations. Despite previous DYFS involvement, John's parental rights were never terminated, and a complaint for guardianship was never filed.

Nathan filed a complaint for adoption, stating that he wanted to provide his granddaughter with emotional, financial, and physical stability. Nathan remained married to Jeanette, Tanya's grandmother and Donna's mother. Donna and John were divorced. John opposed the adoption and filed for summary judgment.

The court found that "the legislature has already contemplated the situation Nathan and other grandparents may find themselves in and has provided adequate remedies outside of adoption." *In the Matter of the Adoption of a Child by Nathan S.* at 4. The rights of the child, the grandparents, and the biological father are best served by maintaining the current legal status. "The New Jersey Legislature did not intend for two persons outside of a marriage or partnership to adopt children together." *Id.* at 6. The courts have considered various forms of "non-traditional" families, such as same sex partners and grandparent adoptions where parental rights are terminated. Here, the court sees no reason for expanding the case law to include this family's structure.

***Thomas H. Dilts** is the presiding judge of the family part for Somerset, Hunterdon and Warren counties. **William R. DeLorenzo** is a family part judge in Bergen County. **Octavia Melendez** is a family part judge in Camden County. **E. David Millard** is the presiding judge of the family part for Ocean County. **Patricia B. Roe** is the presiding judge of the family part for Burlington County. **Amy Z. Shimalla** is a partner in the Warren firm of Copeland, Shimalla & Wechsler. **David Tang** is a staff attorney at the New Jersey Administrative Office of the Courts.*

Family Part Judges

Continued from Page 5

some cases videotaped.These judges must maintain their composure despite being challenged by emotional litigants (many *pro se*) best described by the old adage "the best people on their worst behavior."

As we have all observed, family part judges are often required to work beyond regular court hours to address urgent matters. More than this, I have personal knowledge of judges coming in to work on court holidays (Thanksgiving included), and even one judge (who after learning how to operate the tape machine) coming in on a Saturday to take testimony in a case that required an emergent decision on child custody.

Because the demands of bench time are so rigorous, family part judges must regularly devote part of their evenings and weekends to addressing the paperwork that accumulates during the normal court day (*i.e.* reading and deciding motions; writing and settling forms of orders; writing opinions; etc.). They do not receive extra compensation or extra time off, notwithstanding that they must devote their personal time to getting the job done.Those family part judges who truly loved their work but elected to leave, tell me that they left because of burn out, their own health concerns and general stress over the fact that they (and sometimes their families) had become the target of unhappy litigants.

In the end, the demands are great, the task is tall, and the rewards must come from within. Even before the shameful treatment of Judge Kieser, there were only a few judges who were willing to make the commitment to this difficult assignment. Now a colder chill blows, discouraging jurists who might otherwise be willing to tempt the fates. For those of us with judges in our vicinage who have elected to remain on the family bench, be kind to them…they are truly an endangered species. ■

Facts

- Alcohol is the most widely used and destructive drug in America.
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