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CHAIR'S COLUMN

A New Year With a New Outlook

by Andrea Beth White

It is an honor to be writing to you as the chair of the Family Law Section. It is a privilege to practice family law and have an opportunity to meet and work with all of you. By way of this column, I hope to reach out to every family lawyer in this state to ask that you participate in the Family Law Section this year.

One of my goals during my year as chair is to heighten awareness of the alternatives to courtroom litigation.

It is clear that now, with more and more cases going to arbitration, there is a need for matrimonial litigation beyond the courtroom. As we all know, not every case can be settled, not every issue can be resolved. There is no reason for a family to be left without any recourse but to file a complaint in the family part, where their lives will be laid bare in the public eye.

Despite the fact that so many more cases are going to arbitration, there is no court rule or form of order to guide practitioners. More troubling is the fact that there is often a lack of support by the Judiciary in making sure that the cases going to arbitration (instead of trial) are given precedence. Litigants must know that when they make a decision to pursue alternative dispute resolution (ADR) the matter will be given as much credibility and weight as a case put on a court's calendar. It is unfair that litigants who opt to go to arbitration are required, together with their attorneys and/or their experts, to make appearances in court, thereby causing them to incur fees they hoped to avoid by the arbitration process. Further, a litigant should not be told he or she must dismiss their complaint for divorce in order to have the ability to go to arbitration.

It is time for litigants and their counsel, who choose not to be in the court system, to have better protection. A client who chooses arbitration should not be given less deference than the client who chooses to be in the court system. We need to know that when we commit to an ADR process and commit to firm arbitration dates we can be available to participate in proceedings on those dates without interruption. Last year, as chair-elect of the Family Law Section, I moderated the Family Law Bench-Bar Conference in Atlantic City at the Annual Meeting. We addressed the issue of alternative dispute resolution, which included arbitration. The attendees heard many different voices and many different opinions about this issue. It was clear by the end of that conference that until there is a court rule that specifically protects those who chose a form of arbitration, the problems and concerns we have today will continue.

The time has come for change. Those of us who have tried divorce matters to conclusion in court know that continuous trial dates are not realistic or feasible. Litigants sometimes wait months between trial dates, and when the trial is finally concludes they can wait months for the decision. This does not provide families with a timely resolution to their issues. There must be a better way.

One of my goals this year is to work on and propose a New Jersey Court Rule addressing arbitration of family law matters. I encourage all of you to provide your thoughts and ideas on this issue, as well as on any other family law issue.

I also encourage you to participate in the Family Law Section events this year, which began with a seminar on privacy issues in family law on September 13 and will include:

- **Oct. 15, 2011** Hot Tips Seminar at the Law Center in New Brunswick
- **Nov. 7–11, 2011** NJSBA Mid Year Meeting in Dublin, Ireland
- **Dec. 6, 2011** Family Law Holiday Party at the PNC Arts Center in Holmdel
- **Jan. 27–28, 2012** Family Law Symposium

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EDITOR-IN-CHIEF'S COLUMN

Do Kids Really Count?

by Charles F. Vuotto Jr.

When I began my year as chair of the Family Law Section in 2009, I had several goals that I wanted to achieve. Chief among them was rededicating our section and all family law attorneys to the children who are negatively impacted by divorce. Children are the true victims of divorce. For many years the prevailing view has been that divorce was not only traumatic for children, but contributed to negative life outcomes for the majority of those whose parents divorced. The fact is that children going through divorce are negatively impacted now, and to different degrees in the future. I do not believe that the bench, bar and Legislature has focused on this issue in a way that has made a meaningful difference.

In 1999, the Legislature passed the Parents' Education Act.[1] The act requires all parties who have filed an action for divorce, nullity or separate maintenance, where custody, parenting time or support of the minor child(ren) is an issue, to attend the Parents' Education Program. While many counties already had a program in place when this act was passed, the legislation provided for specific issues the program should include.

Pursuant to N.J.S.A. 2A:34-12.3, the purpose of the Parents' Education Program is to promote cooperation between the parties, and to assist parents in resolving issues that may arise during the divorce or separation process, including, but not limited to:

1. Understanding the legal process and cost of divorce or separation, including arbitration and mediation;
2. Understanding the financial responsibilities for the children;
3. Understanding the interaction between parent and child, the family relationship and any other areas of adjustment and concern during the process of divorce or separation;
4. Understanding how children react to divorce or separation, how to spot problems, what to tell them about divorce or separation, how to keep communication open and how to answer questions and concerns the children may have about the process;
5. Understanding how parents can help their children during the divorce or separation, specific strategies, ideas, tools, and resources for assistance;
6. Understanding how parents can help children after the divorce or separation and how to deal with new family structures and different sets of rules; and
7. Understanding that cooperation may sometimes be inappropriate in cases of domestic violence.

While each county handles its Parents' Education Program a little differently, it seems the underlying goals of the Parents' Education Act are being met: parents are being educated about the divorce process, and more importantly, they are being educated regarding the affects divorce has upon children.

Because the Parents' Education Program is mandatory for matrimonial litigants where custody or parenting time is an issue, it would only seem logical that a parallel program be implemented for children going through a divorce. While parents can take their children to private therapy, there is no program offered by the courts for children, similar to the Parents' Education Program. Many families are not in a financial position to be able to send their children to therapy; therefore, many children will never have the opportunity to understand the divorce process, nor a chance to express their feelings to their parents in a safe environment.

Realizing there was a great need for all children going through divorce to have an outlet, Judge Joseph P. Testa, J.S.C. (Ret.) of Cumberland County, Family Division, and custody/parenting time mediator Pamela R. Homan, M.A., developed a program called Kids Count. Kids Count was a program available to children ages five through 15 whose parents were going through a divorce. The program sought to dispel misconceptions about the court process and to let children know they were not alone. Parents were invited to bring their children to the courthouse after hours, so the children would have the chance to view the courtroom and speak with Judge Testa regarding their concerns. They then had the opportunity to express their feelings regarding divorce through drawings and creative writings.

Judge Testa would start by

addressing all the parents and children together, discussing what could be expected during the program. The parents sat in the gallery of the courtroom, while all the children sat up front near counsel tables. On average, there were 15 to 20 children per session. After addressing the group as a whole, the children were split up into two groups, divided by age (five–nine and 10–15) and taken to separate conference rooms in the courthouse with court staff mediators. The children were provided a workbook and given art and writing supplies. The pages in the workbook provided them the opportunity to express their feelings in a non-confrontational manner.

The children were asked to fill in blanks, such as "If I could make a wish about divorce, I would wish…," "Name something good about divorce…" or "Divorce is…." The workbook also encouraged the children to write a letter to their parents and to draw a picture of divorce. While the children completed their workbooks, Judge Testa would continue speaking with the parents, and remind them they were the best people to make the decision regarding their children's future, rather than he, a total stranger.

The materials created by the children were collected and then released to the parties' attorneys, only to be viewed in the attorney's office and not to be given to either parent to take home.[2] As a silent reminder about the impact of divorce, Judge Testa used to hang the children's drawings on bulletin boards in his courtroom and throughout the Cumberland County Courthouse. In fact, one picture, drawn in response to the question "what does divorce mean to you," struck Judge Testa so much that it became the logo for Kids Count.

The Kids Count Program ran from 1997–2000 in Cumberland County with great success. Such a simple, two-hour program, had momentous results. Of all the children who attend the program, 99 percent of their parents were able to resolve their custody disputes after viewing the art and writing their children had created during the program. Judge Testa believed it was truly essential to give children going through divorce a voice in the process, and based on the results of Kids Count, clearly, he was right.

A long-time friend and colleague of Judge Testa, Judge Michael K. Diamond, P.J.F.P. (Ret.), the former presiding judge of the family part in

Passaic County, also implemented Kids Count during his judicial tenure. Judge Diamond's program ran from 2000–2010, approximately four times per year, and mirrored Judge Testa's program, using art and creative writing as an outlet for children going through divorce. The director of the Passaic County Kids Count Program has advised that it would be returning sometime this fall.

During his judicial career, Judge Testa has presented Kids Count to the National Judicial College in Reno, Nevada; the New Jersey Supreme Court; and many other judicial meetings and conferences, in an effort to gain support and enthusiasm in making the program mandatory statewide. Now in his retirement, he seeks to revitalize the Kids Count Program, but can only do so with the support of the family bar and our Legislature.

There are so many programs and services available for parents going through divorce, whether through the courthouse, community or private therapy. It would only seem logical that a program for children going through divorce be offered through the state. Kids Count is a trial-tested and proven program. As with any program, implementing Kids Count statewide would obviously take time, hard work, dedication and minimal funding, but fortunately there is already a great foundation established by Judge Testa and Judge Diamond. Once established, Kids Count would not be time-consuming, or costly to maintain, as all it really takes is a few people to volunteer their time and energy and some art and writing supplies. As it has in the past, Kids Count would yield great results for judges, lawyers, litigants, and most importantly, children. ■

ENDNOTES

1. N.J.S.A. 2A:34-12.1–2A:34:12.8.
2. If the parties were self-represented, Judge Testa made the materials available to the parents at the courthouse, or during case management conferences and settlement conferences.

Special thanks to Judge Joseph P. Testa, J.S.C. (Ret.) for sharing his wonderful program and ideas for this column. The author also thanks Lauren E. Koster, Esq., former judicial law clerk to Judge Testa and associate with Tonneman, Vuotto & Enis, LLC, for her assistance with this column.

SENIOR EDITOR'S COLUMN

Best Practices in FD Custody Matters Are Not Necessarily Best

by Bea Kandell

Since its inception, best practices has been a controversial issue in the practice of family law. While it is a useful goal to move matters forward toward resolution for the benefit of the court and litigants alike, it often is used as a hammer by judges who are concerned that they must meet their 'numbers' and cannot have a case on their docket that lingers beyond the one-year mandate imposed in dissolution matters. As attorneys, we know that this artificial time frame is often impossible or impractical to meet due to complicated financial discovery and the time needed to obtain expert reports relative to those aspects of the case and the emotional stress the litigants may be experiencing coping with the dissolution of their family and difficult custody and parenting issues. The discretionary relaxation of the time frame has been encouraged by the Appellate Division in such cases as *Ponden v. Ponden*[1] and *Leitner v. Toms River Regional Schools*.[2]

Litigants and their counsel often feel compelled to voluntarily dismiss a case and re-file to alleviate a discovery and trial schedule that will not be extended by the court for any reason proposed. While this may satisfy the needs of the court, it does not always make sense to the parties who may have to begin anew with a different judge, or may view the procedure as a gimmick that has little merit and makes no sense in the context of their respective litigations.[3]

Non-dissolution cases, matters in which the litigants are not seeking to dissolve a marriage, fall under the FD dockets, and include issues regarding paternity, custody, parenting time, grandparent visitation, and child support. FD matters are summary in nature, and are processed primarily in accordance with Court Rules 5:6 through 5:6-6, as well as Rule 5:8. An action for separate maintenance is also designated as non-dissolution, and is brought as a summary action "unless designated as non-summary in nature by the Family Part Presiding Judge."[4]

When dealing with FD cases, the overriding problem plaguing the family part and its judges is finding finality for FD litigants. Although true of all family part litigation, establishing finality in FD cases is particularly challenging for many reasons. For one, FD litigants may file complaints at no cost, except for an occasional $6 filing fee. This results in judges' daily calendars being inundated with hearings.

Family Division staff is given guidance and direction in the filing and management of matters that are in the system by way of the *Family Non-Dissolution Operations Manual* most recently revised in December 2007.[5] However, the party who 'loses' in these hearings may simply walk down the hall and file another post-dispositional complaint after the case is concluded.[6] FD litigants are keenly aware of this option, and often may not appear on their scheduled date, knowing that even if a complaint is dismissed they can file another one for a more convenient date.

There are some guidelines for how long a party must wait to file a complaint if an issue has already been determined by a judge, but the enforcement of these guidelines is lax at best, and even when enforced, there are simple methods of circumventing the system, such as raising a slightly different issue. Moreover, as is the case across the board in family matters, there is little uniformity from county to county.

In some counties, non-dissolution judges may have daily calendars with as many as 20-25 FD hearings scheduled, on top of various other proceedings they must adjudicate. Among those numerous cases, there will generally be some where no one appears, and the complaint will be dismissed but inevitably re-filed. Frequently, only one party will appear for a hearing, making the task of achieving finality nearly impossible for a judge, because he or she must choose between adjourning the proceeding or having the non-appearing party file their own complaint if they do not agree with the judge's decision.

Some FD cases will be relatively straightforward, and the judge or a hearing officer can make a determination in a short period of time. However, buried among the chaos of the FD docket is the occasional FD case that is as complex, if not more so, than its FM counterpart. The consequence of having such an enormous caseload is that the rare

FD cases that involve more complex issues of child custody can be severely prejudiced.

As demonstrated in a recent Appellate Division case, the attempt to help FD litigants expedite the resolution of contested custody matters is actually counterproductive, and can do more harm than good. In *McCain v. Schultz*,[7] decided Oct. 13, 2010, the Appellate Division held that a trial judge in an FD proceeding abused his discretion by dismissing a case for failing to adhere to the time-goal and treating that goal as a "rule" justifying his decision to dismiss the case.[8]

In *McCain*, the parties appeared at the initial hearing on July 16, 2009, and the judge calculated child support, directed the parties to mediation for their parenting time issues, temporarily ruling on custody in favor of plaintiff. At a second hearing, on Aug. 12, 2009, the parties informed the judge that their parenting time issues were not resolved in mediation. The trial judge re-listed the matter for Oct. 30, 2009, ordered discovery to be complete by that date, and ordered a custody evaluation done by the Bergen Family Center at a cost of $1,500 to each party. The Oct. 30, 2009, date was adjourned because the court-appointed custody expert did not complete the report until Nov. 16, 2009. The hearing date was again adjourned from Nov. 19, 2009, until Dec. 9, 2009.

On Nov. 25, 2009, nine days after the custody evaluation was issued, the defendant's attorney requested an adjournment to permit the defendant to retain his own expert pursuant to Rule 5:3-3(d) and Rule 5:3-3(h) because he disagreed with the findings of the court-appointed expert.[9] The adjournment was denied, and only the defendant and his attorney appeared for the Dec. 9, 2009, hearing, at which time the trial judge stated he was dismissing the matter without prejudice because of the request for an adjournment. In so doing, the trial judge explained "there were rules" that he had "to live by," which mandated the dismissal. The appellate court noted that this was a reference to the New Jersey Judiciary court management case processing time frame goal for non-dissolution cases, which mandates three months from filing to final disposition.[10]

The defendant argued that he was prejudiced and prevented from effectively pursuing a claim for custody without his own expert report. The judge, in dismissing the case, stated that "dismissing the case…doesn't disadvantage you in any way." Defense counsel again raised the fact that Rule 5:3-3(d) and Rule 5:3-3(h) allow him to obtain an expert, but the judge, interestingly, said that "if you were talking in an FM context…I would agree with you. I don't agree with you."[11]

The court made it clear that the defendant had a choice—he could either proceed then and there without his own expert report or the case would be dismissed.

The Appellate Division addressed whether the defendant was entitled to proceed on his counterclaim and obtain an adjournment for the purpose of retaining an expert. The court agreed with the defendant and reversed the trial court's action, holding that the judge should *not* have relied on a time-goal as a rule, citing *State v. Madan*[12] for the premise that judicial determinations that are left to the sound exercise of discretion must be made in light of governing statutes, court rules, and judicial opinions.

The court went on to discuss Rule 5:8-6, which provides for a hearing on a custody dispute to be scheduled no later than six months after the filing of the last responsive pleading.[13] In this case, the hearing was scheduled within that time frame, and the Appellate Division specifically found that "Rule 5:8-6 does not require or authorize dismissal of a case as a remedy to be invoked when a case is not adjudicated within that time. But Rule 5:8-6 must be construed 'to secure a just determination, simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.' R. 1:1-12(a)." The court continued, stating "even if R. 5:8-6 required dismissal, it is a rule that can be relaxed when adherence will result in an injustice."[14]

What was significant about the *McCain* case is that the Appellate Division highlighted the inconsistency in the perceived procedural mandate that would require the adjudication of a complaint or counterclaim based on the "requirement" that it be completed within a three- (or even a six-) month time period or suffer the consequences of a dismissal. The dismissal would leave the defendant without the ability to compel the plaintiff's cooperation for discovery purposes, or with his expert, since no litigation was pending. The necessity to then re-file would inevitably require the parties to use a court-appointed expert and attend mediation again, since it would technically be a new proceeding, thereby defeating the trial judge's goal of expeditious resolution. Finally, another reality was that the parties could have wound up before a different judge after six months of proceeding before the original trial judge, who was familiar with the facts of their case.[15]

It is unlikely the facts of *McCain* are unique. There is the hope that trial courts will take the decision to heart and give litigants embroiled in custody disputes filed under FD dockets the ability to prosecute their actions without the fear that they will not be able to present the court with a fair and complete set of facts on which the case can be decided within a sufficient time frame. Even the six months required by Rule 5:8-6 is not sufficient when counsel knows that experts take a considerable amount of time to produce their reports.

With so many FD cases confronting family part judges hearing non-dissolution matters, the complex case may fall victim to proce-

dural shortcomings. However, we live in a time where many children are part of families in which their parents are unmarried, and those custody cases will be filed as FD matters.

There are also cases that are filed as non-dissolution matters because the parties have not resided in New Jersey a sufficient amount of time to permit them to file for divorce, yet they have serious custody and support issues that need to be addressed. While judges are equipped with limited time and resources from which to adjudicate innumerable non-dissolution cases, the litigants and their children should not be denied the time they need to present their cases to the court. To demand contrived procedural requirements—such as the dismissal of a pending matter—meant to keep the docket in line with best practices is not what is best for these families. The unfortunate consequence in these circumstances is that a procedure designed to expedite cases winds up substantially delaying important matters that may affect a child's future welfare. ■

ENDNOTES

1. 374 N.J. Super. (App. Div. 2004).
2. 392 N.J. Super. 80 (App. Div. 2007).
3. This publication devoted Vol. 32, No. 1 to the discussion of best practices.
4. R. 5:6-7.
5. *See Family Division's Non-Dissolution Operations Manual*, Revised Edition Dec. 12, 2007.
6. *Id*. at §1201.
7. 2010 WL 4007604 (N.J. Super. AD.).
8. *Id*. at 1.
9. *Id*. at 3.
10. *Id*. at f.n.1.
11. *Id*. at 5.
12. 366 N.J. Super. 98, 108-110 (App. Div. 2004).
13. 2010 WL 4007604 (N.J. Super. AD.)
14. *Id*. *See* R. 1:1-2(a); R. 5:8-6.
15. *Id.* at 6.

Bea Kandell *practices family law at Skoloff & Wolfe, P.C. in Livingston.* *She would like to thank Thomas DeCataldo of Skoloff & Wolfe for his valuable contribution to this column.*

Meet the Officers

Andrea Beth White (Chair) is a partner in the family law department of Lomurro, Davison, Eastman & Munoz, located in Freehold. Ms. White has been certified by the Supreme Court of New Jersey as a matrimonial law attorney. She was one of the 2006 recipients of the Women of Achievement Award from the Women Lawyers in Monmouth. Ms. White is a senior editor for the *New Jersey Family Lawyer*, and is qualified pursuant to Rule 1:40 to mediate family law cases.

Ms. White is the chair in the New Jersey State Bar Association's Family Law Section and served three terms as the co-chair of the Monmouth Bar Family Law Committee. In addition, she is a past chair of the New Jersey State Bar Association's Certified Attorneys Section. Ms. White is also a member of the American Association for Justice–New Jersey Chapter, the Monmouth Bar Association, the Ocean County Bar Association, the Women Lawyers of Monmouth County, and the Jersey Shore Collaborative Law Group. In addition, she serves as a panelist in the Monmouth County Early Settlement Program and lectures on family law issues.

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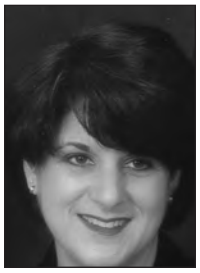
Ms. Lawrence was recently honored by NJBiz as one of New Jersey's best 50 Women in Business. She received the Kean University Distinguished Alumna Award in 2009, was honored in 2008 as an outstanding woman by the Somerset County Commission on the Status of Women, and in 2007 received the NJSBA's Young Lawyers Division's Professional Achievement Award and the Annual Legislative Recognition Award. She is also a graduate of the National Institute of Trial Advocacy and a member of the Central New Jersey Inns of Court, and serves on the District XIII Attorney Ethics Committee.



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Ms. Trigg earned her B.A. from Brandeis University and her J.D. from Emory University School of Law.

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As a member of the New Jersey State Bar Association (NJSBA), he has contributed to the NJSBA's *amicus curie* brief submitted in the matter of *Lewis v. Harris*, 185 N.J. 415. As a former legislative chair for the Family Law Section, he has testified on behalf of the NJSBA before state legislative subcommittees involving open adoption. For his lobbying efforts, he received the state bar's annual Distinguished Legislation Award for 2006. He has litigated the following reported cases: *Anyanwu v. Anyanwu*, 339 N.J. Super. 278 (App. Div. 2001) and *Steneken v. Steneken*, 367 N.J. Super. 427 (App. Div. 2004) trial level, unreported.

Mr. Snyder has lectured on family law matters on behalf of the NJSBA, the New Jersey State Bar Foundation and the New Jersey Institute for Continuing Legal Education (ICLE). He is a member of the Association of Trial Lawyers of America and a graduate of the National Institute of Trial Advocacy. Mr. Snyder graduated from Seton Hall School of Law and served as judicial law clerk for the Honorable Peter B. Cooper, Superior Court of New Jersey, Essex County. ■

Separate and Unequal

Are Children of Unmarried Parents Disadvantaged By Summary Procedures in Non-Dissolution Actions?

by Allison C. Williams

The New Jersey Family Court system has a stellar reputation throughout the United States for its progressive approach to many issues that plague families in this state. Our court system has established many different case types to deal with family matters, though many of them deal with the same issues. For instance, families can litigate custody in a divorce action (handled under the FM docket) or in a non-dissolution action (handled under the FD docket). Child support and spousal support can be handled under either docket type.

Though the same issue can be litigated under different docket types, the policies and procedures dealing with these two cases are quite different. Perhaps the different policies stem from the need for efficiency in the administration of justice. Or, perhaps, the historical difference in treatment of children going through a divorce (FM cases), verses children going through a non-divorce family dissolution (*i.e.,* children of non-married persons or children whose parents are married but not yet going through a divorce, (FD cases), warranted different policies and procedures. The answer is unclear, but whatever the reason for the differential treatment, one must question if the children involved in these two types of family actions are receiving equal treatment.

To understand why this is a problem, an understanding of the historical overview of the different treatment of children of divorce verses children of non-married persons is necessary. This article provides that overview, together with a brief discussion of some of the ways differential treatment renders these children separate and unequal.

BASTARDY PROCEEDINGS: HISTORY OF ILLEGITIMATES IN NEW JERSEY

At common law, a child born in wedlock was presumed to be the legitimate offspring of the husband and wife.[1] That principle has deep roots in New Jersey, dating back to 1907.[2] A distinction in English common law arose with respect to a child born of unmarried parents.[3] At common law, an illegitimate child was *filius nullius,* the son of no one, or *filius populi,* the son of the people.[4] The child had no mother or father recognized by law, and therefore had no legal rights. Because the child could not inherit property, the impetus to bear the paternal surname was diminished. "[C]ustom did not dictate the name by which an illegitimate child would be known; the child bore the name gained by reputation in the community."[5]

A man presumed to be the father of a child born out of wedlock (known as the 'putative' father) was under no obligation to support his illegitimate offspring.[6] The duty of support came by statute, which was either triggered by motion of the overseer of the poor or other local representative to exonerate the municipality and then at the instance of the mother or other interested person on behalf of the child itself. Such 'illegitimate' children were referred to as 'bastards' and had few rights. The mother of an illegitimate child was granted exclusive custody and control of the child and retained the power to consent or withhold consent to access for the putative father.[7] This protocol was based upon the ancient common law concept that a bastard is *nullius filius*, the child of no one.[8] The putative father was not then obligated to support his illegitimate child, and the rights of inheritance by or from such a child were severely restricted.[9]

The harsh common law doctrine that an illegitimate child was *nullius filius,* and inherited from neither mother nor putative father, has been abrogated in New Jersey.[10] This was first accomplished by the New Jersey Parentage Act, which became effective May 20, 1983.[11] The Parentage Act established the principle that the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.[12] Under the provisions of the statute adopted in 1929, the mother now has a right to seek support from the natural father for her illegitimate child.[13]

Prior to that enactment, the father could have been compelled to support only if the "child would otherwise be a public charge."[14] Since the enactment of the statute, there has been a discernible trend in the decisional law in this state

and other jurisdictions toward recognition of the rights and obligations of a putative father more comparable to those of a natural father than under old common law concepts.

Given these changes in the law, one would expect that the litigation procedures governing the children of non-married people would mirror or at least approximate the litigation procedures governing the children of married couples. Unfortunately, this has not been the case. Litigation involving the children of non-married couples is governed by the *New Jersey Judiciary Family Division Non-Dissolution Operations Manual* released by the Administrative Office of the Courts.[15] This manual provides for various procedures that differ greatly from those set forth in the New Jersey Court Rules. Many of the procedures create efficiency and streamline the process for non-married persons to access the Courts, but, at what cost?

HOW FDS ARE TREATED DIFFERENTLY THAN FMS

One principle difference in the treatment of children in FD cases verses FM cases is in the area of child support. In FM cases, an applicant for child support must supply a case information statement (CIS).[16] If modification of support is sought, both the previously filed CIS and an updated CIS are required.[17] By contrast, in FD cases, for either the initial establishment of child support or the modification of a prior support order, a summary of income and assets is allowed.[18] Both case types require some financial disclosure, but FM cases require significantly more information, which is provided under oath.

The asset and liability disclosure required by the family part CIS often leads to a fairer result when establishing and/or modifying support. For example, New Jersey case law allows for imputation of income to an obligor based upon his or her investments in income-producing equities.[19] When a spouse with under-earning investments has the ability to generate additional earnings, without risk of loss or depletion of principal, but fails to do so, a court may impute a more reasonable rate of return to the under-earning assets, comparable to a prudent use of investment capital.[20] That principle applies equally to spousal support and to child support.[21] Inquiry into assets and liabilities is commonplace in FM cases, though rare in FD cases.

As society has evolved, more and more couples are choosing to have children together without entering marriages.These couples often have significant assets, which should be considered when child support is being addressed.

The very initiation of litigation in FD cases varies from FM cases. In FM cases, a party properly served with a complaint must file an answer or general appearance within 35 days or risk being defaulted.[22] Conversely, in FD cases the manual provides that a counterclaim *may be* filed before a hearing has been held on the original complaint.[23] Further, the Court Rules also provide that in such cases, no answer is required.[24] If a party to an FD case chooses to file a counterclaim, no time period is specified for the filing of the counterclaim. Clearly, having full, timely notice of what relief is being sought and what defenses are being raised to an action increases the ability of the trial court to make the fairest determination based upon all of the facts and circumstances of the parties and of the children involved. By dispensing with such notice in FD cases, allowing a party to simply appear in court to address an application filed by the adverse party, the possibility of a party being surprised in court is great. How fair can the result be when an opportunity to be heard does not carry with it fair notice of that which is to be addressed?

Another significant difference also exists between FM and FD cases when dealing with the issue of custody. In FM cases, parties are mandated to attend a Parent Education Seminar.[25] The purpose of the program is "to promote cooperation between the parties and to assist parents in resolving issues which may arise during the divorce or separation process, including, but not limited to:

1. Understanding the legal process and cost of divorce or separation, including arbitration and mediation;
2. Understanding the financial responsibilities for the children;
3. Understanding the interaction between parent and child, the family relationship and any other areas of adjustment and concern during the process of divorce or separation;
4. Understanding how children react to divorce or separation, how to spot problems, what to tell them about divorce or separation, how to keep communication open and how to answer questions and concerns the children may have about the process;
5. Understanding how parents can help their children during the divorce or separation, specific strategies, ideas, tools, and resources for assistance;
6. Understanding how parents can help children after the divorce or separation and how to deal with new family structures and different sets of rules; and
7. Understanding that cooperation may sometimes be inappropriate in cases of domestic violence.[26]

These laudable goals should not be a mandatory component of custody matters for *only* divorcing parents. These should apply equally to non-married parents; however, they do not. In FD cases, the court *may* require "any person involved in a custody or visitation dispute to attend a parent education seminar. Family Division staff should be guided by the availability of this service

in their county and follow established county procedures when referring parties to a parent education seminar."[27] Though referrals may be made to the Parent Education Seminar in FD cases, they are not required.

Disintegration of an intact family does not harm a child any less because the parents are ending a relationship rather than ending a marriage. Yet, the non-dissolution manual makes attending this course optional for non-married parents, thereby providing their children less protection than the children of divorcing parents.

Procedures for accessing the courts in emergent situations also differ between FM cases and FD cases. When the Division of Youth and Family Services (DYFS) refers a parent to the family court system to file an order to show cause, the standard for the court to determine if a genuine emergency exists is governed by the seminal case of *Crowe v. DeGoia.*[28] *Crowe* establishes a four-part test for the entry of interim restraints whereby the movant bears the burden by clear and convincing evidence: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying law is well settled; 3) the material facts are not substantially disputed, and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief. [29]

This case does not differentiate between interim relief sought for children of divorcing parents verses children of non-married parents. Nevertheless, the manual provides that if someone comes into court and DYFS refers them, application is "*not* treated as an emergent matter, unless extenuating circumstances are satisfactorily presented to the Court."[30] This different standard in FD cases seems to create a presumption against entering an order to show cause, whereas if presented in an FM case, the *Crowe* standard applies and the application would be governed by Rule 4:52-1 or, if restraint is sought, Rule 4:67.

The New Jersey Judiciary prides itself on its accessibility to the public. However, this accessibility does not apply equally for litigants in FD and FM cases. If a party files a motion in an FM case, that application is scheduled to be heard in less than a month.[31] If the matter is adjourned, it is typically rescheduled to be heard two weeks thereafter. However, scheduling of FD cases varies from county to county. In most counties, matters are scheduled in six to eight weeks or longer. If a matter is adjourned, it is typically not rescheduled to be heard for another six to eight weeks. Thus, children of non-married parents must wait significantly longer to receive support and have their custodial status determined.

Many differences exist by rule in FM and FD cases. However, in many circumstances, the rules may be equally applicable in FM and FD cases, though applied differently in each forum. For instance, many practitioners can attest to having seen significant differences in the treatment of expert reports in FM versus FD cases. New Jersey court rules provide that expert reports may be submitted into evidence, *in a manner consistent with the Rules of Evidence*.[32]

In FM cases, typically it is by consent of both attorneys that all expert reports come into evidence. This is permissible because both attorneys will have an opportunity to cross examine the adverse expert regarding his or her report. In FD cases, however, how often are reports relied upon without the opportunity for cross examination? If the court orders DYFS to investigate allegations of child abuse or neglect, how often are those reports then handed to the court and relied upon without ever having the professional who penned the report in to give testimony?

Expert reports may be submitted into evidence, but only in a manner consistent with the Rules of Evidence. In FM cases, to test the scientific reliability of expert analysis, it is not uncommon to have *Frye* hearings.[33] Further, an expert must be qualified as an expert. In FD cases, *Frye* hearings are rare. 'Expert' credentials are often not questioned, and conclusions in expert reports often form the basis of the court's decision on critical issues such as custody with no opportunity for cross examination. Such procedural deficits may promote efficiency, but they are a far cry from equal treatment as between children of divorcing parents versus children of non-married parents.

THE IMPACT OF DIFFERENTIAL TREATMENT

Some might argue that these differences do not create an inequality between the children of divorcing parents and children of non-married parents. After all, the governing standard in any custody case is best interests of the child, which must be applied in any custody case. And, if a party raises a concern about the adverse party's assets, the trial court certainly has the authority to require a party to file a CIS, in lieu of the summary support form.

The problem of differential treatment does not lie in the trial court's refusal to follow the applicable case law governing child-related issues, but rather in the party's requirement to raise the issue in the first instance. Most litigants in FD cases are self-represented. While the New Jersey Court Rules require that a self-represented litigant know the law and the rules, the reality is that they seldom do. Consequently, in an FD case, a parent's lack of knowledge may result in custody or support orders that fail to protect the best interests of the child solely as a result of the procedures enacted for that very purpose. In the view of this practitioner, uniformity of practice and procedures in FM and FD cases would go a long way toward achieving the goal of the Parentage Act that "the parent and child rela-

tionship extends equally to every child and to every parent, regardless of the marital status of the parents."[34] ■

ENDNOTES

1. *Sarte v. Pidoto*, 129 N.J. Super. 405, 410 (App. Div.1974).
2. *Wallace v. Wallace*, 73 N.J. Eq. 403, 67 A. 612 (E. & A.1907).
3. *Gubernat v. Deremer*, 140 N.J. 120, 131 (1995).
4. *Id., citing D.R.S. v. R.S.H.*, 412 N.E.2d 1257, 1261 (Ind. Ct.App. 1980).
5. *Id*. *See also*, *Secretary of Commonwealth v. City Clerk of Lowell*, 373 Mass. 178 (1977) ("It has been reported that under English law an illegitimate child acquired no name at birth, and could only acquire a surname by reputation"); and *M.D. v. A.S.L.*, 275 N.J. Super. 530, 533 (Ch. Div. 1994)("He acquired the name of neither mother nor father and only assumed a surname later in life based on some factor other than lineage.").
6. *Kowalski v. Wojtkowski*, 19 N.J. 247 (1955).
7. *M. v. M.,* 112 N.J. Super. 540 (Ch. Div. 1970).
8. *Id.* at 542.
9. 10 Am. Jur. 2d, Bastards, s 8.
10. *Matter of Estate of Calloway*, 206 N.J. Super. 377, 380 (App. Div. 1986).
11. N.J.S.A. 9:17-38, *et seq*., replaced N.J.S.A. 9:16-2 in 1983.
12. *Id*.
13. N.J.S.A. 9:16-2, *et seq*.
14. *Ousset v. Euvrard,* 52 A. 1110 (Ch. 1902).
15. *See*, *Family Division's Non-Dissolution Operations Manual,* Revised Edition issued Jan. 5, 2004.
16. R. 5:5-2(a).
17. *Id.*
18. *Family Division's Non-Dissolution Operations Manual*, Section 1202. *See also*, R. 5:5-3.
19. *Miller v. Miller,* 160 N.J. 408, 423-25 (1999).
20. *Overbay v. Overbay*, 376 N.J. Super. 99, 108 (App. Div. 2005).
21. *Connell v. Connell,* 313 N.J. Super. 426, 434 (App. Div. 1998).
22. R. 5:4-3(a). *See also*, R. 4:5-3 setting forth the requirements for an answer or general appearance.
23. *Family Division's Non-Dissolution Operations Manual*, 1112 Counterclaim (New Cases).
24. R. 5:4-3(b).
25. *See*, N.J.S.A. 2A:34-12.1 – 12.8 (if custody, visitation or child support is listed in a complaint/counterclaim for divorce, client must attend the workshop).
26. N.J.S.A. 2A:34-12.3(c).
27. *Family Division's Non-Dissolution Operations Manual*, Section 1608 (Parent Education Seminar).
28. 90 N.J. 126, 132-134 (1982).
29. *McKensie v. Corzine*, 396 N.J. Super. 405, 413 (App. Div. 2007)
30. *Family Division's Non-Dissolution Operations Manual*, Section 1106 (DYFS Referrals).
31. *See*, R. 5:5-4 Motion Practice.
32. R. 5:3-3(g).
33. *See*, N.J.R.E. 702.
34. N.J.S.A. 9:17-38.

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Chair's Column

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- **Feb. 13, 2012** Family Law Executive Committee Open Meeting at the Law Center in New Brunswick
- **March 28–31, 2012** Annual Family Law Retreat at the Boca Raton Hotel & Resort in Boca Raton, Florida
- **May 16–18, 2012** NJSBA Annual Meeting at the Borgota in Atlantic City

Of course I would like to see you at each and every event; however, knowing that is not always possible, I especially urge you to attend the Annual Retreat in Boca Raton, Florida, at the Boca Raton Beach Club & Resort. It is an opportunity to continue to build relationships with each other, the bench and other professionals in our field.

I again ask that all of you be as active as possible in the Family Law Section, and thank you in advance for your anticipated participation and guidance this year. I look forward to a great year as chair. ■

Forensic Child Interviewing: Dos And Don'ts

by Madelyn Simring Milchman and Charles F. Vuotto Jr.

Interviewing children incident to divorce or any other legal proceeding is, to put it bluntly, a minefield. There are many issues to be aware of before embarking upon what many may view as a rather mundane task. Let's face it, most of us have children and occasionally speak to them. How difficult can it be, right? Wrong. When interviewing children incident to divorce, abuse allegations or other related matters, the interviewer, whether a judge or forensic expert, must be aware of both the law and the psychological impact of the interview process, environment, questions and responses to answers.

This article will outline the law as it pertains to interviewing children incident to divorce, and then address the psychological issues involved when interviewing children incident to divorce and related legal matters, such as abuse allegations and termination of legal rights. The article will also provide an outline of what to do and what not to do.

THE LAW

When determining custody of a child, New Jersey courts consider "the preference of the child" as one of 14 statutory factors that must be examined prior to rendering a custody decision.[1] Although the court must consider the child's preference when determining custody, it has discretion to determine whether an interview with the child is necessary, or whether the best interest of the child is served in the absence of such an interview.

Specifically, the Rules of Court provide:

> As part of the custody hearing, the court may on its own motion or at the request of a litigant conduct an *in camera* interview with the child(ren). In the absence of good cause, the decision to conduct an interview shall be made before trial. If the court elects not to conduct an interview, it shall place its reasons on the record. If the court elects to conduct an interview, it shall afford counsel the opportunity to submit questions for the court's use during the interview and shall place on the record its reasons for not asking any question thus submitted. A stenographic or recorded record shall be made of each interview in its entirety. Transcripts thereof shall be provided to counsel and the parties upon request and payment for the cost. However, neither parent shall discuss nor reveal the contents of the interview with the children or third parties without permission of the court. Counsel shall have the right to provide the transcript or its contents to any expert retained on the issue of custody. Any judgment or order pursuant to this hearing shall be treated as a final judgment or order for custody.[2]

The court did not always have discretion when determining whether to conduct an interview with a child. Prior to an amendment of the Court Rules in 2002, the court's interview of a child was mandatory, if requested by a litigant, for any child aged seven years or older, before the court could render a custody determination. Trial courts were consistently reversed for failing to comply with the mandatory interview.[3]

The impetus for the change from mandatory to discretionary child interviews is encompassed in the concurring opinion of Judge Howard Kestin in the 1998 case of *Mackowski,* wherein the judge criticized the mandatory requirement of an interview, emphasizing the emotional damage that can be caused to the child as a result thereof.[4] Judge Kestin further cautioned, "Even the most talented, sensitive and conscientious judges are poorly suited to conduct child interviews in custody cases. It is entirely too facile to suggest that a bit of training can equip any of them with the resources that years of professional training and experience confer on those relatively few mental health practitioners who have special aptitude for the assignment."[5]

Despite the newly granted discretion provided to the court pursuant to the 2002 amendment of Rule 5:8-6, the higher courts of New Jersey continue to reverse custody determinations due to the lower court's failure to conduct an interview with the child.[6]

Improper child interviewing risks tainting the child's statements. To protect against taint, the New Jersey Legislature proposed a bill that, if enacted, would require mental health professionals to videotape all sessions with any child who is the subject of an allegation of abuse or neglect.[7] The statement to the bill explains that it will protect the interests of psychologists and children should issues or questions arise regarding the therapy provid-

ed during the sessions. At the time this article was completed, the bill had not passed into law.[8]

PSYCHOLOGY

The potential pitfalls can, however, be reduced by improved interviewing techniques developed primarily for sex abuse cases. The initial polarization of leading academic researchers (whose work emphasized the fallibility of children's memories) versus clinicians (whose work emphasized the trauma of accurately disclosing true abuse memories),[9] is gradually being transcended in favor of a shared recognition of the interviewing techniques needed to elicit accurate reports about alleged sexual abuse.[10] As a result, protocols have been developed codifying best interview practices.[11] Two widely institutionalized ones are Finding Words[12] and the National Institute of Child Health and Development (NICHD) Investigative Interview Protocol.[13]

OFFICIAL INVESTIGATIVE INTERVIEW PROTOCOLS

Finding Words was developed in the United States by CornerHouse, a child advocacy center, in partnership with the National Center for Prosecution of Child Abuse. It is used in many states, including New Jersey. It organizes interview questions into stages (rapport, anatomy identification, touch inquiry, abuse scenario, closure), leaving particular questions to the interviewer's discretion.

The NICHD protocol was developed in the United States and Israel. It too provides an interview sequence (introduction, rapport, episodic memory training, transition to substantive issues, investigation, eliciting undisclosed information, questioning prior disclosures, closing).[14] It is more structured than Finding Words, providing the interviewer with specific questions and a decision tree to follow responses to the child's answers. It has been the mandatory investigative protocol for all child sexual and physical abuse investigations in Israel for more than 10 years.[15]

Finding Words provides a five-day intensive training seminar.[16] Research on the use of the NICHD protocol finds that compliance with their recommended practices is higher with continuous training, including workshops, supervision, and feedback.[17] This may not be true of Finding Words because it is a simpler protocol. The interviewing practices presented here are a brief summary and integration of the practices contained in Finding Words[18] and NICHD protocols.

BEST INTERVIEW PRACTICES

Interviewing Don'ts

Best interview practices avoid pressure and suggestion coming from the interviewer's demeanor and/or statements. The interviewer's demeanor should be friendly while avoiding positive reinforcement (*e.g.*, smiling, nodding, vocalizing approval) for abuse-consistent answers and negative reinforcement (*e.g.*, frowning, interrupting, vocalizing disbelief or disapproval) for abuse-inconsistent answers. Questions should avoid suggestions produced by incorporating information from sources other than the child.

Question types range from unstructured to structured. Unstructured or open questions best reduce the risk of taint. The most open questions ask for free recall (*e.g.,* "Tell me about that"), followed by who, what, where, when, and why questions, and then by directed or focused questions that clarify or elaborate the child's prior statements (*e.g.,* "You mentioned you were at the shop. Where exactly were you?"). Direct questions should be followed by a return to open ones (*e.g.*, "Tell me about that shop").

If the child's answer leaves details missing or unclear, the interviewer should continue using questions that are as minimally structured as possible and returning to open ones (*e.g.*," Where in the shop were you? Can you tell me more about that?").[19] This sequence of focused questions followed by open ones should also be used to elicit information not mentioned by the child (*e.g.,* "I heard that you talked to [X]. Tell me what you talked about").[20]

More structured questions pose a greater risk of taint, and should only be used when unstructured ones have been unproductive. The safest structured questions provide multiple alternatives. In New Jersey, interviewers using Finding Words often pose the alternatives in one question (*e.g.*,"You said he touched you in your butt. Did it happen when he was wiping you or giving you a bath or putting cream on you or something else?").

The NICHD protocol splits the alternatives into several questions. However, this practice tends to require yes and no questions. These pose the greatest risk of tainting the child's answers, especially if the child is very young and/or compliant, because such children may be more likely to try to guess an answer that would please the interviewer. Furthermore, continuing to question a child who has answered a question may pressure or confuse the child (*e.g.,* "Did he touch you over your clothes? [Child answers.] Tell me about that. Did he touch you under your clothes? [Child answers.] Tell me about that").[21] Pairing alternatives with the open request to tell more may reduce the risk of taint.

Interviewing Dos

Opening Communication. Finding Words and the NICHD protocol begin with preliminary conversations that introduce the interviewer, communicate the purpose of the interview, give the child permission to express lack of understanding or knowledge and to correct the interviewer and establish rapport. Both protocols direct interviewers to express interest in the

child's life, discuss topic(s) the child offers, and continue until the child is comfortable conversing spontaneously. Finding Words is particularly strong in its attention to the nonverbal characteristics of communication. It advises interviewers to sit at the same level as the child, remove symbols of authority (*e.g.,* a badge), and appear friendly. Further, it emphasizes the need to observe the child's behavior and emotion in addition to the child's statements.

Assessing Truthfulness. During the preliminary conversations, the NICHD protocol assesses truthfulness by misidentifying a physical characteristic of some object and asking the child if the misidentification is true or not (*e.g.,* "If I say that my shoes are red…is that true or not true?" [Child answers] "That would not be true, because my shoes are really [black...]").[22] Finding Words does not use such a 'truth test' because they equate lies with mistakes. Furthermore, they fail to assess the child's moral understanding of, and commitment to, truthfulness.

Determining Testimonial Competency. During the preliminary conversations, Finding Words advises interviewers to observe the child's developmental level, general vocabulary and narrative ability. It is particularly valuable in its recommendations for the use of drawings, anatomical diagrams and dolls for rapport building and as communication and memory aids.

The NICHD protocol is particularly valuable in its instructions to assess the child's ability to report events. Using a full description obtained from an adult for an accuracy check, it directs interviewers to ask the child about a special event, a past (yesterday's) event, or—if those are insufficiently detailed—an event that occurred the day of the interview. Interviewers are directed to question the context leading up to the event, the sequence of details within the event, and the event's aftermath, paying attention to the child's use of time concepts. These conversations also train the child to report events as completely as possible.

Transition to Allegations. Finding Words transitions from discussing neutral topics to discussing abuse allegations by assessing the child's experience with types of touches, inquiring about good and bad or liked and disliked touches. This practice assumes that all sexual abuse feels bad and is disliked, which may not be the case. The NICHD protocol transitions by discussing the purpose of the interview in more detail, referencing the interviewer's knowledge of a problematic event, and using an open question to ask for more detailed information (*e.g.,* "My job is to talk to kids about things that may have happened to them….Tell me why you are here" or "Tell me why you think your [dad] brought you").[23]

Investigating Allegations. The NICHD protocol and Finding Words both relate best interview practices to the child's willingness to disclose. NICHD is more detailed. With the child who has made a prior disclosure, NICHD directs interviewers to remind the child of the prior statement and request a free recall narrative (*e.g.,* "You told me that [child's statement]. Tell me about that.").[24] With the child who has not made a prior disclosure, the interviewer should refer to the source of the suspicion and, without mentioning an alleged perpetrator or giving details, request a free recall narrative (*e.g.*, "I heard you talked to [X] at [time, place]. Tell me what you talked about.")[25] In both cases, the free narrative should be followed by a sequence moving from open to focused questions, in the same way that the interviewer proceeded when probing non-abuse-related events. After the child is finished, the interviewer can elicit more details, first by asking, "Is there anything else?" and then by clarifying any statements that are ambiguous. Finally, interviewers can repeat statements reported by others (*e.g.,* "I heard you said [and/or] someone saw…")[26] and ask for more information or clarify any confusion using as open a question as possible.

Finding Words teaches interviewers to understand the process of disclosure, recognize resistance, and understand the reasons for it. Research on applying the NICHD protocol shows that interviewers faced with a resistant child may be sorely tempted to narrow the focus of their questions and repeat them, which risks leading and pressuring the child.[27] This dynamic may have been operative in the *Michaels* case[28] with some children. The NICHD protocol recommends anticipating this problem and formulating questions in advance of the interview, or offering to take a break when the child becomes resistant and using the break as an opportunity to formulate those questions. The interviewer should use questions with a more narrow focus, but refrain from mentioning the name of the accused or the details of the allegation (*e.g.*, "Did somebody hit you?"). If the child still resists, interviewers should refer to the situation in which the allegation arose (*e.g.,* "Your teacher told me that you touched another children's wee-pee…, and I want to find out if something may have happened to you" followed, if necessary by "Did somebody touch your wee-pee…? Tell me everything about that.").[29]

NICHD and Finding Words agree that interviewers should not persist if the child continues to resist. Trying to overcome continued resistance is likely to backfire. It is likely to make children who are reluctant to disclose even *more* resistant, *less* informative, and *more* confused.[30] When faced with this situation, the interviewer should abort the interview

Closing. Finding Words recommends ending the interview by discussing safety issues and being respectful.[31] The NICHD protocol advises interviewers to thank the child, give the child the opportunity to ask questions, explain what

will happen next if appropriate, and discuss a neutral topic (*e.g.,* ask the child, "What are you going to do today after you leave here?").[32]

MOVING FORWARD: GRAPPLING WITH PROTOCOL LIMITATIONS

Assessing Truthfulness

Interviewers must grapple with the forensically critical need to assess the child's commitment to truthfulness versus the absence of scientifically based best practice recommendations about how to do so. An alternative to trying to assess the child's *conceptual* knowledge (*e.g.*, "What does it mean to tell the truth? To lie?"), could be to assess the child's *use* of those concepts. Questions such as, "Do you know anyone who ever told a lie? Tell me about that. What was the lie? What happened to the child who told it?" address the child's ability to use the concept. Questions such as, "What do you think should have happened to the child who lied?" and "Have you ever lied? Can you tell me about that? What happened to you because you told that lie?" could be used to elicit the child's commitment to truthfulness in general. Questions such as, "What do you think would happen if you lied to me today? What do you think should happen?" could be used to elicit the child's commitment to truthfulness in the forensic interview. Such questions should be asked *after* the interviewer has established rapport, and the child is speaking freely, and *before* discussion of the allegations. They should be asked one at a time, and paced to respond to the child's answers. They replace a truth *test* with a truth *inquiry*, using the same open question format that represents best practice in other portions of the interview.

Resistance

Interviewers must balance the suggestibility risks of interviewing a resistant child versus the risks of leaving an abused child unprotected and an abuser unpunished by aborting an interview. An alternative would be to shift the focus from substantive issues to the child's resistance. Interviewers could comment on the child's reluctance to communicate and probe the reasons for it. Questions such as, "You don't want to talk about this?" and "Why not?" use the same open question format that represents best practice in other portions of the interview. If the child gives a substantive answer, interviewers could try to address his or her concern honestly, in the hope that doing so will weaken the child's resistance. If it does not, interviewers may have no choice but to abort the interview and refer the child to a mental health professional for evaluation.

CONCLUSION

In summary, we start with Judge Kestin's sage words: "Even the most talented, sensitive and conscientious judges are poorly suited to conduct child interviews in custody cases. It is entirely too facile to suggest that a bit of training can equip any of them with the resources that years of professional training and experience confer on those relatively few mental health practitioners who have special aptitude for the assignment."[33]

Looking to mental health techniques developed primarily for sex abuse cases, however, family part judges can reduce or eliminate some of the inherent problems associated with interviewing children. The techniques include:

1. Developing a rapport with the child by beginning the interview with preliminary conversations that introduce the judge, communicate the purpose of the interview, give the child permission to express lack of understanding or knowledge and to correct the judge;
2. Sitting at the same level as the child and removing evidence of authority such as robes;
3. Appearing friendly;
4. Testing the child's propensity to tell the truth by exploring the child's concepts of or experience with his or her own exposure to untruths in his or her life;
5. Avoiding pressure and suggestion coming from the judge's demeanor and/or statements;
6. Using unstructured or open questions, which best reduce the risk of taint;
7. Observing the child's behavior and emotion;
8. Observing the child's developmental level, general vocabulary and narrative ability;
9. Assessing the child's ability to report events by asking about special events using a full description obtained from an adult;
10. Requesting a free recall narrative followed by a sequence moving from open to focused questions;
11. Understanding the process of disclosure, recognizing resistance, and understanding the reasons for it;
12. Declining to persist on questions (or the entire interview) if the child continues to resist;
13. Thanking the child, giving the child the opportunity to ask questions, explaining what will happen next, if appropriate, and discussing a neutral topic;
14. Finally, judges must balance the risks of interviewing a resistant child versus the risks of leaving a child in an unhealthy situation by aborting the interview.

Of course, no singular approach to interviewing a child can provide a foolproof mechanism without the risk of taint or emotional harm to the child. However, by applying the Dos and Don'ts delineated above, one can better insure that the scale between benefit and harm to the child is tipped in favor of benefit, and that any risk of taint is kept at a minimum. Of course, before inter-

viewing any child, the seminal question is not which method of interviewing to apply, but rather whether the interview itself is in the best interests of the child. If the answer is that an interview is in the child's best interests, then the authors hope that this article offers meaningful guidance moving forward with the interview. ■

ENDNOTES

1. N.J.S.A. 9:2-4(c).
2. Rule 5:8-6.
3. *Mackowski v. Mackowski*, 317 N.J. Super. 8 (1998); *P.T. v. M.S.,* 325 N.J. Super. 193 (App. Div. 1999).
4. *Mackowski,* 317 N.J. Super. at 15 (Kestin, J.A.D., concurring).
5. *Id.*
6. **Published Cases**: *Peregoy v. Peregoy*, 358 N.J. Super. 179, 206 (App. Div. 2003) (reversing a trial court's custody determination due, in part, to the court's failure to either conduct an interview with the nine-year-old child or place findings on the record as to why such an interview was not necessary); *New Jersey Division of Youth and Family Services v. L.A.*, 357 N.J. Super. 155, 168 (App. Div. 2003) (reversing and remanding in a parental termination case due to the trial court's failure to conduct an interview with a thirteen year old child). **Unpublished Cases:** *Jannarone v. Jannarone*, N.J. Super. (App. Div. 2011) (reversing and remanding a trial court's modification of a parenting time schedule, due to the trial court's failure to interview the child and consider her wishes, stating the 'value of a properly conducted interview' "of a sixteen-year-old child"'outweighs the possibility of harm' "that could result to the children from the interview" (*citing Mackowski v. Mackowski*, 317 N.J. Super. 8, 14 (App. Div. 1998)). *Drakeford v. Rivers*, N.J. Super. (App. Div. 2010) (reversing and remanding a trial court's denial of an application for a change of custody, due to the trial court's failure to conduct a plenary hearing and interview of the children when there is a substantial and genuine custody issue, noting 'the failure to conduct a plenary hearing and to interview the child was inconsistent with R. 5-8:6 (*noting Mackowski v. Mackowski*, 317 N.J. Super. 8, 11 (App. Div. 1998)). *Newman v. Newman*, N.J. Super. (App. Div. 2007) (reversing and remanding a trial court's denial of an application for joint legal custody and expanded parenting time, requiring that said application have an appropriate hearing and an interview with the teenage child be conducted, in light of conflicting certifications and the age of the child).
7. Bill No. S1741, A3288, 5/8/2008 Introduced in the Senate, Referred to Senate Health, Human Services and Senior Citizens Committee
8. S1741 did not pass in the previous two-year session. The new bill in the current 2010/2011 session of S1741 is S57 and was referred to the Senate Health and Human Services Committee. A3288 was also re-introduced as S57 and there is not an identical Assembly version. This status was prepared by the Legislative Information and Bill Room, Office of Legislative Services, New Jersey State Legislature.
9. In 1998, the polarization in the sex abuse memory wars was sufficiently intense to prevent a synthesis of the two positions in the "Final report of the American Psychological Association Working Group on investigation of memories of childhood abuse," Psychology, Public Policy, and Law, 4(4), 931-1068. All that was possible was a juxtaposition of the two positions.
10. Stephen J. Ceci, 2009; Ceci *et al.*, 2007. However, even before 1998, change was already beginning to occur. Researchers whose work was often cited in support of the accuracy of children's memory had already acknowledged the significant problems posed by children's suggestibility, especially when they were exposed to leading interviews. William C. Thompson, K. Alison Clarke-Steward, and Stephen J. Lepore, in "What did the janitor do? Suggestive interviewing and the accuracy of children's accounts," *Law and Human Behavior*, 21 (4), 405-426, stated that, under certain circumstances, "the children rapidly came to believe that [the false] suggestions were true" (p. 421 and that their suggested false beliefs were maintained after a delay even when they were questioned in a non-leading fashion. While Stephen J. Ceci, the pioneering researcher on children's suggestibility whose work has informed the standardized protocols used here, still argues that mental health professionals base their belief in the accuracy of children's traumatic memories on "unwarranted assumptions," he also acknowledged that exposure to suggestions does not inevitably produce tainted reports (Stephen J. Ceci, Sarah Kulkofsky, J. Zoe Klemfuss, Charlotte D. Sweeney, & Maggie Bruck (2007), "Unwaranted assumptions about children's testimonial accuracy," *Annu. Rev. Clin. Psychol.*, 3,311-28). Furthermore, while his keynote address at the NJ ICLE Dec. 5, 2009, Child Custody Symposium "Questions, Controversies, and Consensus Regarding Interviewing Young Children: Highlights," emphasized suggestibility and presented a videotape of a false rape allegation by a preschool child. During the Q & A

period, he acknowledged that his laboratory does not conduct research on children who are reporting actual trauma; that the closest research analogue consists of certain kinds of medical procedures, which he does not study but which are studied by Gail Goodman and colleagues, known for their emphasis on children's memorial accuracy; and that he has not yet collected measures of affect (displayed emotion) in the children whose suggested statements he has studied. His answers indicated the evolution of the field because they acknowledged the differences between the data upon which clinicians and academic researchers historically relied. Hershkowitz *et al.* (2005).

11. Erna Olafson (2003). Introduction to new series of papers by major trainers about child forensic interview training programs. *APSAC Advisor*, Winter 2003, Vol. 15, No. 1, p. 2. Lori S. Holmes and Victor I. Vieth, (2003). Finding Words/Half a Nation: The forensic interview training program of CornerHouse and APRI's national center for prosecution of child abuse. *APSAC Advisor*, Winter 2003, Vol. 15, No. 1,4-8.
12. American Prosecutors Research Institute/APRI, Holmes & Vieth, 2003.
13. Hershkowitz *et al.*, 2005.
14. *Supra* note #10. These terms paraphrase the titles of each interview step in the NICHD protocol.
15. Irit Hershkowitz, Dvora Horowitz, & Michael E. Lamb, Trends in Children's Disclosure of Abuse in Israel: A National Study, 29 *Child Abuse & Neglect* 1203 (2005).
16. Holmes & Vieth, *supra,* note 12.
17. Lamb *et al.*, *supra*, note 15.
18. In describing the Finding Words interview practices, Dr. Milchman draws on her professional experience reviewing N.J. prosecutors' interviews as well as the published materials.
19. Lamb *et al.*, 2007, pp. 1224-1225
20. Lamb *et al.*, 2007, pp 1226-1227
21. Lamb *et al.*, *supra*, note viii 1227.
22. Lamb *et al.*, *supra*, note viii 1217.
23. Lamb *et al.*, *supra*, note viii 1221.
24. Lamb *et al.*, *supra*, note viii 1223.
25. Lamb *et al.*, *supra*, note viii 1227.
26. Lamb *et al.*, *supra*, note viii 1228.
27. Hershkowiitz *et al.*, 2006.
28. *State v. Michaels*, 136 N.J. 229 (1994), the seminal case regarding appropriate procedures for interviewing children in sex abuse cases. The Supreme Court held that a pretrial hearing was necessary since it was evident that the interrogations involved coercive and suggestive measures that may have tainted both the children's out of court statements and the children's in-court testimony.
29. Lamb *et al.*, 2007, p. 1223.
30. Hershkowitz *et al.*, *supra*, note xxi.
31. CornerHouse, *supra*, note xvi.
32. Lamb *et al.*, *supra*, note viii 1231.
33. *Mackowski, 317* N.J. Super. at 15 (Kestin, J.A.D., concurring).

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The Divorce Case Involving Children with Special Needs

Areas to Consider When Constructing a Matrimonial Settlement Agreement

by Jerry S. D'Aniello and A. Nichole Cipriani

Children with special needs may qualify for and receive much-needed government benefits. As matrimonial attorneys, first we need to determine if the matter involves a child with special needs. This can be achieved in an initial consultation by asking the right question: Do any of the children have special needs? However, that question alone may not suffice, as some parents may not consider their child as disabled or having "special needs." Ask follow-up questions such as: Do any of the children have any learning disabilities or problems in school? Is there an individualized education program (IEP) in place for any child? Do any of the children have physical impairments, hearing or vision problems, psychological issues, autism spectrum disorders, etc.? Asking a variety of questions is better, since some parents may not know or think their child has special needs.

Once it has been determined the matter involves a child with special needs, the issue must be examined thoroughly. This article will discuss and explain some of the prominent government benefits, and will provide a critical analysis of the important issues. The article also will offer practical tips and considerations when dealing with a divorce involving a child with special needs.

The goal of the divorce lawyer handling a case involving a child with special needs should be to effectuate settlement or final resolution without disrupting government benefits that may be available to a child. The *problem* is that resolving many divorce issues the traditional way may detrimentally affect a child's eligibility to benefit from government programs. For example, resolving support issues the conventional way, by paying outright child support payments to a former spouse, will trigger the disabled child's ineligibility for 'means-tested' programs. The reason is that although child support is paid to a custodial parent, it is considered to be an asset of the child for purposes of determining eligibility for means-tested governmental programs.[1]

The *solution* is to have the final settlement agreement direct that funds that would otherwise be considered child support be paid into a special needs trust in order to avoid disqualifying the child from government benefits. This is a solution because child support payments paid directly to a special needs trust are not considered income to the child.[2]

The above is one of many considerations that surface when dealing with a divorce affecting a child with special needs. This article will examine special needs trusts and supplemental benefits trusts and explain how their use can aid in settling the divorce case while not disrupting any government benefits available to the child with special needs.

PUBLIC ASSISTANCE PROGRAMS AND POTENTIAL PROBLEMS

The state and federal governments offer several programs designed to assist special needs individuals, including Supplemental Security Income (SSI) and Medicaid. Special needs children may be eligible for SSI and Medicaid. As SSI and Medicaid are means-tested programs, payment of child support, obtaining private health insurance coverage, or payment of life insurance proceeds to a disabled beneficiary can disqualify the beneficiary from receiving these valuable government benefits.

SSI is a federal welfare program that provides the recipient with a monthly cash benefit to cover basic needs, such as food and shelter.[3] In 2011, the maximum SSI benefit for a New Jersey resident is $705.25 per month.[4] To be SSI-eligible, a person must have little or no income,[5] and his or her countable resources may not exceed $2,000 (excluding the person's house, car and prepaid funeral contract).[6] Parental income and resources are deemed available for children under 18 who reside with the parent.[7] In New Jersey, all SSI recipients are automatically eligible for Medicaid.[8]

The New Jersey Child Support Guidelines presume that every dollar of child support is broken down into 38 percent for fixed costs such as housing, 25 percent for controlled costs such as clothing, and 37 percent for variable costs such

as transportation and food.[9] Those are the same 'basic needs' covered by SSI. There also is an assumption that the custodial parent always has responsibility for the controlled costs, and that the variable costs move with the child.

Payment of child support the conventional way, directly to a parent, will diminish a child's SSI benefits. This can be illustrated as follows: When determining a child's monthly SSI benefit, program rules under the Social Security Act exclude from countable income one-third of the monthly child support payment. The remaining child support payment is subject to a $20 general income exclusion. The balance reduces the child's monthly SSI benefit dollar for dollar. For example, if a minor child who receives SSI also receives $600 per month in child support, the $600 is reduced by one-third, to arrive at $400. The $400 figure is further reduced by the $20 general income exclusion, resulting in total countable income of $380. In this example, the child's SSI monthly benefit would be reduced by $380 due to receipt of the $600 in monthly child support. However, with proper planning, there is a way to retain all the governmental benefits.

Medicaid covers a broad range of services, including coverage for hospital stays, community-based healthcare and nursing services with no deductibles, co-payments or coverage limits.[10] To qualify for Medicaid, an applicant must be determined to be financially eligible via a means test. The means test looks at the applicant's monthly income and available resources. Generally, to qualify for the highest level of benefits, under the Medicaid Only program, an individual's monthly income may not exceed $2,022 (in 2011) and countable resources may not exceed $2,000.[11] Under the Medically Needy program, a lower level of benefits is available for individuals who have a monthly income exceeding $2,022 (in 2011) but whose resources do not exceed $4,000.[12] Under the Community Care Waiver program, Medicaid can waive the qualification rules if a child has profound medical needs that would require institutionalization if the child did not receive Medicaid.[13]

An additional government benefits program is Social Security Disability (SSD), which, unlike Medicaid and SSI, is not means-tested. SSD provides a monthly cash benefit to a person who became disabled prior to age 22, and is based on the earnings record of the person's retired or deceased parent.[14]

New Jersey has a separate program though the Division of Developmental Disabilities (DDD), which provides day and residential services to people with developmental disabilities originating prior to age 22.[15] DDD requires contribution of income to an individual's care and maintenance for residential services only; otherwise all other support services are fully subsidized by the state.

ESTATE AND TRUST PLANNING—THE SOLUTION

One priority of a divorcing parent of a special needs child should be to revise his or her estate plan and to update beneficiary designations on retirement accounts and insurance policies. Any gifts or bequests to a special needs child should be directed to a supplemental benefits trust rather than outright to the child or into an ordinary trust. Properly drafted trusts can hold assets, including child support, insurance proceeds and inheritance, for the disabled child's benefit, while ensuring that such assets will not be counted as available resources that would disqualify the child from means-tested benefits such as Medicaid and SSI.

A supplemental benefits trust (sometimes called a third-party special needs trust) is an excellent vehicle to hold lifetime gifts or inheritance from parents, grandparents and other family members, life insurance benefits and retirement plan benefits. A special needs trust (also called a first-party special needs trust) is needed to hold child support payments and any other assets owned by the child. Because the supplemental benefits trust is created by and funded with the assets of a third party, upon the death of the disabled child, there is no payback provision as there is with a special needs trust.

The special needs and supplemental benefits trusts complement government benefits programs and allow parents to use support traditionally found in the divorce settlement to provide for more quality-of-life expenditures for a special needs child. An estates and trusts attorney with knowledge of special needs planning issues should be retained to draft the special needs and supplemental benefits trusts. These can be drafted as standalone trusts or can be incorporated into matrimonial settlement agreements utilizing a Callahan trust.[16]

Often, children with special needs require special therapy or extracurricular activities to help them thrive and achieve the most they can despite their disability. These 'extras' can be costly. The assets contributed to these trusts can be spent on extra therapies such as elective surgery, dental care, supplemental medical insurance, transportation, recreation, and other enhancements to the child's life, such as summer camp, airline tickets for travel, sporting events, concerts, electronics/video games, sporting equipment (such as trampolines), sport shoes (such as golf/bowling shoes), bowling balls, basketballs, tennis equipment, swimming or horseback riding lessons, supplies for hobbies and interests, and grooming. Since these extras are not specifically provided for by any government benefits, as they are not 'basic needs,' they may be paid for with trust assets without affecting a child's governmental benefits.

Special Needs Trust

Federal and state law authorize an exception to the Medicaid, SSI and DDD asset availability rules for

transfers made to a special needs trust. In order to qualify as a special needs trust, the trust must be established for the benefit of an individual who is disabled and under 65 years of age; it must be established by a court, or the parent, grandparent or legal guardian of the disabled individual; the trust must be funded with assets of the disabled individual; and the trust must be irrevocable.[17] In addition, the trust is required to contain a 'payback' provision, which states that upon the death of the beneficiary any governmental agency that has a valid right of recovery may claim the remaining assets in the trust up to an amount equal to the value of the total benefits paid to or on behalf of the beneficiary.[18]

Because outright child support payments to a former spouse may trigger the disabled child's ineligibility for means-tested programs, the matrimonial settlement agreement should direct that child support payments be made to the special needs trust. As the disabled child will be the sole beneficiary of the trust and the custodial parent will serve as trustee, the support monies will be used for the child without disqualifying him or her from benefits. Also, the matrimonial settlement agreement should memorialize the parties' understanding that the child support paid into the trust might not be used entirely each month and could accumulate, but that such accumulation should not be used by the payer as a basis to seek reduction of child support payments in the future.

The special needs trust generally provides that the trustee has complete discretion to distribute trust income and principal to or for the sole benefit of the child to provide for his or her supplemental care and support. The trustee must give notice to Medicaid when a distribution in excess of $5,000, or representing a significant portion of trust assets, is to be made to the child or for his or her benefit.[19] Upon the child's death, the trust will terminate, and any governmental agencies which at that time have a valid right of recovery will be entitled to reimbursement from the trust proceeds for amounts expended on behalf of the child.[20] To the extent the trust funds exceed any such reimbursements, or if no reimbursements are required, the trust property may be distributed pursuant to the will of the disabled individual, if he or she has the capacity to make a will. If the individual does not have the capacity to make a will, or does not have one, then any remaining funds would be distributed under the laws of intestacy of the state where the child resides at the time of his or her death.

Supplemental Benefits Trust

A supplemental benefits trust, also sometimes called a third-party special needs trust, is designed to receive lifetime gifts or inheritance, including life insurance proceeds, from a divorcing parent or any other person, such as grandparents or other family members, made for the disabled child's benefit. Gifts or inheritances the child receives outright could trigger his or her ineligibility for government benefits. Instead, gifts or inheritances made to the trust may then be paid or applied in the discretion of the trustee to or for the child's benefit to provide for his or her supplemental care and support without jeopardizing benefits eligibility.

Life Insurance is frequently used in a matrimonial settlement agreement to secure the child support obligation of a parent in the event of that parent's untimely death. Naming a disabled child as a beneficiary of the life insurance policy can trigger the termination of means-tested government benefits and claims for reimbursement by the agencies providing services. Accordingly, divorcing parents should have a supplemental benefits trust in place prior to finalizing the matrimonial settlement agreement, which should direct that the insurance proceeds be paid directly to that trust. In this case, the beneficiary designation for life insurance must name the trust as the life insurance beneficiary.

Private healthcare insurance coverage through a parent's benefit package might duplicate the coverage of a child already receiving Medicaid, thereby jeopardizing the special needs child's Medicaid coverage. The matrimonial settlement agreement can provide that if a child is receiving Medicaid, whatever funds were to be spent to obtain private insurance coverage be directed into the child's supplemental benefits trust for extra needs, such as a private room, VCR, vacations, a computer, vitamins, therapeutic treatments or therapies, experimental procedures, private-duty nursing care and private companion services. When drafting the settlement agreement, the practitioner should not indicate that the contribution of funds is in lieu of insurance coverage, but rather, should state, for example, "Homer Simpson shall contribute $10,000 annually no later than December 31st of each year to the then-serving trustee of the Bart Simpson Supplemental Benefits Trust under agreement dated November 1, 2010, to be administered consistent with the terms thereof."

Divorcing parents also should execute new wills directing that any assets passing to the disabled child upon the parent's demise be distributed to the supplemental benefits trust. Each parent should review the beneficiary designations on retirement accounts, such as individual retirement accounts (IRAs) and qualified retirement plans, to be sure the supplemental benefits trust, and not the child, is named as beneficiary of the plan.

Since a supplemental benefits trust is funded with assets owned by third parties and not assets of the child, there is no requirement that the trust pay back any government benefits on the death of the disabled beneficiary. The parent or parents creating the trust can direct that upon the disabled child's death, any trust assets not expend-

ed on the child's care during his or her lifetime will be paid upon his death to the child's descendants, if any, or otherwise to the child's siblings, other family members, or even to charities. If the divorcing parents cannot agree on the contingent beneficiaries of the supplemental benefits trust, then separate trusts should be established.

GUARDIANSHIP

For a child whose disability is likely to preclude him or her from making important decisions upon reaching age 18, the divorcing parents should consider which parent, if not both, will become the child's guardian. Depending on the extent of the disability, the child may require the appointment of a general or limited guardian.[21] A general guardian is appointed if the individual is incapacitated, meaning without the ability to govern himself or herself, or manage his or her own affairs.[22] A general guardian has the legal responsibility to make decisions regarding healthcare, welfare, finances, living situation and other reasonable areas of concern. A limited guardian is appointed if the individual is incapacitated and lacks the ability to do some, but not all, of the tasks necessary to care for himself or herself, such as manage his or her finances, or make medical decisions.[23] A guardian can be a parent of a special needs child, another family member or a third party.

The matrimonial settlement agreement should memorialize who will be responsible for becoming the guardian of the special needs child upon reaching 18 years of age, and who is responsible for paying the legal fees and costs associated to appoint the guardian. For example, the settlement agreement might state the following: "The parties anticipate that their daughter Maggie Simpson will not be a competent adult. The parties agree that prior to Maggie reaching age eighteen, Marge Simpson will commence proceedings in the Superior Court of New Jersey to have Maggie judicially declared incapacitated and to have Marge appointed general guardian of the person and property of Maggie. The parties will split the cost of the attorneys' fees and court costs related to such proceeding, with each party contributing fifty percent of such fees and costs."

The divorcing parents also should nominate guardians of the disabled child in their wills, in the event either or both parents pass away while the child is a minor or an incapacitated adult.

The custodial parent should draft a letter of intent or letter of instruction for a future guardian. The letter holds no legal authority, but in the best interests of the special needs child it should list factual information about the child such as educational and medical history, location of vital records, their aspirations for the child (*i.e.*, goals and living arrangements), and day-to-day information such as bedtime rituals. The letter also should list contact information for the child's doctors, regularly scheduled appointments, medications, results of testing, routines and any other important healthcare or personal information about the child.

EDUCATION AND CUSTODY

Federal law provides that children ages three to 21 with disabilities affecting their learning are entitled to special education services at no cost to parents.[24] In New Jersey, local school districts are responsible for special education, with the oversight of the New Jersey Department of Education.[25] Federal law provides that each child must receive a program that meets his or her unique needs, and school districts must develop a written individualized education program (IEP) that includes goals and details of services to be provided.[26] A copy of the child's IEP will provide information about the child's diagnosis and therapies, and is crucial to the custody case.

In situations of divorce or separation, disputes may arise as to which school district is financially responsible for educating a special needs child. Such disputes can lead to a disruption in educational and busing services for the child, or may cause an issue when one school district seeks reimbursement from another school district for educational costs and services. The resolution of this issue centers on the child's "domicile."[27] Parents can agree on the best school district to educate the child. Such an agreement should be memorialized in the matrimonial settlement agreement by use of a provision stating that the residential parent will not move out of the district absent mutual consent.

Traditionally, a child's domicile is that of his or her parents.[28] Problems arise when a special needs child resides in two different towns because of divorce or separation. New Jersey courts have provided guidance on the domicile of a special needs child when his or her parents are divorced. A special needs child is domiciled in a school district of his or her parent who has residential custody, regardless of whether the child lives with that parent or in a group home in another district.[29] In a joint custody situation, when a special needs child lives with each parent on alternating weeks, the two districts are required to equally contribute to the child's educational costs.[30]

Family law attorneys need to take into consideration educational services and school district responsibility for those services when negotiating and finalizing custody and parenting time arrangements in matrimonial settlement agreements. A special needs child may need to be in the primary residential care of one parent over the other based on the school district paying for the educational services. Custody evaluators, if any, should be provided with this important information so that it may be considered as a factor in their evaluation. This may also be a factor to consider in allowing one parent to remain in the former marital home and basing support accordingly.

DISCOVERY PROCESS

Often in a family with a child that has special needs, one of the parents has more information than the other regarding medical conditions, benefits information, etc. In preparation for settlement negotiations leading to the finalization of a matrimonial settlement agreement, it is important to obtain from the other party detailed information concerning the government benefits and programs for which a special needs child is eligible or is receiving benefits. The discovery process should focus on these areas prior to resolving support. Below is a list of sample discovery questions to include for cases with special needs children.

1. Itemize and identify any and all government programs in which the special needs child is eligible and/or is receiving benefits, including:
- Name of the program;
- Name of government agency administering the program;
- Benefits provided by the program; and
- Eligibility requirements and restrictions of the program.
- Please produce any and all documents related to the programs and benefits.
2. Itemize and identify all education and related services, including but not limited to, schools, day care, after-school care, busing, camps, and any other educational programs in which the special needs child is eligible/and or is receiving benefits, including:
- Name of educational program or service and a copy of the IEP, if applicable;
- School district or agency responsible for or administering the program;
- Benefits provided by the program; and
- Eligibility requirements and restrictions of the program.
- Please produce any and all documents related to the programs and benefits.
3. Itemize and identify any and all prescription and over-the-counter medications of the child, including brands and dosages, medical devices used by the child and other therapies.
4. Itemize and identify any and all sources of income or assets of the special needs child.

CONCLUSION

As a family law practitioner, it is imperative to ascertain whether a matter involves a child with special needs and to understand government benefits available to a special needs child when negotiating and drafting a matrimonial settlement agreement. It may be wise to seek assistance from a professional who can assist with the estate and disability planning issues that arise. By failing to do so, the special needs child may be rendered ineligible to receive public assistance benefits and his or her educational programs and benefits may be disrupted. If you represent a parent of a special needs child, stop and think about the benefits the child is entitled to (or may be entitled to in the future) and how to preserve those benefits, *before* the parties enter into a matrimonial settlement agreement. ■

ENDNOTES

1. POMS SI 01120.200(G)(1)(d); POMS SI 01120.201(C)(2)(b).
2. *Ibid*.
3. 42 U.S.C. 1381 *et seq.*
4. 42 U.S.C. 1382f(a); 74 Fed. Reg. 55,614 (Oct. 29, 2009); SSA Publication No. 05-11148.
5. 42 U.S.C. 1382(a)(1); 74 Fed. Reg. 55,614 (Oct. 28, 2009).
6. 42 U.S.C. 1382b(a); 20 C.F.R. 416.1205(c); 20 C.F.R. 416.1210. UGMA accounts and §529 college savings plans in the disabled child's name are considered assets of the child and are countable assets that could disqualify the child from meeting the means-tests of SSI and Medicaid. Be sure to ask your client if his or her special needs child has either type of account.
7. 20 C.F.R. 416.1202.
8. 42 U.S.C. 1396k(a); 42 C.F.R. 435.610. If the child receives $1.00 of SSI, he or she qualifies for Medicaid.
9. New Jersey Court Rules,Appendix IX-A(14)(g)(1), (2011).
10. 42 U.S.C. 1396 *et seq*.; N.J.S.A. 30:4D-1 to 52.
11. 74 Fed. Reg. 55,614 (Oct. 28, 2009).
12. 42 U.S.C. 1396(a)(10)(C); 42 C.F.R. 435.310(a).
13. 42 U.S.C. 1915(c).
14. 42 U.S.C. 402(d); 20 C.F.R. 404.350.
15. N.J.S.A. 30:6D-1 *et seq*.
16. 142 N.J. Super. 325, 330 (Ch. Div. 1976).
17. 42 U.S.C. § 1396p(d)(4)(A); N.J.S.A. 3B:11-36; N.J.A.C. 10:71-4.11.
18. *Ibid.*
19. 42 U.S.C. § 1396p(d)(4)(A); N.J.S.A. 3B:11-36; N.J.A.C. 10:71-4.11.
20. *Ibid.*
21. N.J.S.A. 3B:12-24.1.
22. N.J.S.A. 3B:12-24.1(a).
23. N.J.S.A. 3B:12-24.1(b).
24. 20 U.S.C. 1400 *et seq.*
25. N.J.A.C. 6A:14-1.1 *et seq.*
26. 20 U.S.C. 1414(d)(1)(A).
27. N.J.S.A 18A:1-1.
28. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L.Ed.2d 29, 46 (1989).
29. *Roxbury Bd. of Ed. v. West Milford Bd. of Ed.*, 283 N.J. Super. 505, 521-22 (App. Div. 1995), *cert. denied*, 143 N.J. 325 (1996); *West Windsor Bd. of Ed. v. Delran Bd. of Ed.,* 361 N.J. Super. 488, 502, (App. Div. 2003), *cert. denied*, 178 N.J. 454 (2004); N.J.S.A 18A:7B-12.
30. *Somerville Bd. of Ed. v. Manville Bd. of Ed.*, 332 N.J. Super. 6, 17 (App. Div. 2000), *affirmed*, 167 N.J. 55 (2001).

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The Impact of Disability Income Upon Support-Related Issues

by Michael A. Weinberg

This article will explore and compare Supplemental Security Income and Social Security Disability benefits, as well as the impact of these disability benefits upon child support. The article also will address the impact, if any, spousal support paid to the 'disabled' party may have upon Supplemental Security Income and Social Security Disability benefits. Finally, the article will address the evidentiary effects of an adjudication by the Social Security Administration that a party is disabled upon the imputation of income to that party for purposes of determining support and related issues.

OVERVIEW AND COMPARISON OF SUPPLEMENTAL SECURITY INCOME AND SOCIAL SECURITY DISABILITY

A distinction must be drawn between a government benefit that is means tested and a government benefit that is a non-means-tested benefit. As will be discussed below, this distinction is significant because of its impact upon support-related issues.

A government benefit is means tested if eligibility for the benefit or its amount is determined on the basis of the income or the resources of the party.[1] Supplemental Security Income (SSI) is a means-tested benefit that provides disabled indigents with minimally adequate resources. SSI benefits are not a substitute for lost income due to a disability. Instead, they are designed to supplement the recipient's income to assure that his or her income is maintained at a level viewed by Congress as the minimum necessary for subsistence.[2]

A government benefit is a non-means-tested benefit if the income or resources of the party do not determine eligibility for that benefit. Social Security Disability (SSD) is a non-means-tested benefit program that is financed from payroll deductions. Unlike SSI benefits, SSD payments are designed to replace income lost due to an employee's inability to work because of a disability. As a non-means-tested benefit, SSD payments represent money an employee has earned through employment, and that his or her employer has paid for the benefit of the employee into a common trust fund under the Social Security Act.[3]

An applicant's disability serves as the common qualifying requirement for both SSI benefits and SSD benefits. The United States Social Security Administration defines the term "disability" as follows:

> …the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment(s) that makes you unable to do your past relevant work (see §416.960(b)) or any other substantial gainful work that exists in the national economy.[4]

As a means-tested benefit, SSI benefits are payable only when the disabled person's income and resources are insufficient to provide for that individual's basic needs. By comparison, SSD benefits are payable if the individual satisfies the disability requirement and also has sufficient lifetime earnings with contributions into the Social Security Trust Fund to be insured for disability.[5] In the event that a disabled person is determined to be ineligible for SSD benefits, he or she may still be eligible for SSI benefits under the applicable means test.

When a parent is receiving SSD, the parent's dependent child may be able to receive SSD dependent benefits from the Social Security Administration. The amount of the child's benefit will depend upon the parent's work history, and will generally equal one-half of the insured parent's SSD benefit amount. The payment to the dependent child does not affect the amount of the SSD benefit paid to the disabled parent. Moreover, the dependent child does not have to be in the custody of the disabled parent in order to receive the benefit.[6]

By comparison, if a parent is approved for SSI disability benefits, that parent's dependent is not entitled to a benefit, as SSI is means tested. Thus, even though the disability requirements are the same, SSI benefits are based upon the needs of the individual and are only paid to the qualifying person.

IMPACT OF SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SOCIAL SECURITY UPON CHILD SUPPORT AND RELATED ISSUES

Impact of SSD Benefits Upon Child Support and Related Issues

The different types of Social Security benefits are treated differ-

ently when determining child support. As stated above, SSD benefits are considered a substitute for earned income. Thus, SSD benefits are considered income under the New Jersey Child Support Guidelines. Appendix IX-B to the guidelines specifically includes "disability grants or payments (including Social Security disability)" as a source of "gross income" in determining child support.[7]

While SSD benefits are generally not subject to attachment or other legal process pursuant to Section 207(a) of the Social Security Act, they have been determined to be attachable for child support purposes. Within this context, the Social Security Act provides that when an entitlement to payments from the federal government is based upon remuneration for employment, the payments are subject to income withholding or other legal process brought by a state IV-D agency or an individual obligee for purposes of enforcing child support obligations.[8]

As stated above, a child of a parent receiving SSD benefits may also be eligible to receive SSD dependent benefits. In that event, the dependent child's SSD benefits may be deducted from the payor parent's child support obligation. In *Herd v. Herd*, the Appellate Division held that SSD payments made to a minor dependent of an SSD recipient reduce the amount of the basic child support obligation to be apportioned between the parties.[9] Accordingly, the basic support obligation must be reduced by the child's benefit before the obligation is apportioned between the parties.

This holding is consistent with Appendix IX-B to the New Jersey Child Support Guidelines, which provide, in part:

> If a child is receiving government benefits based on either parent's earning record, disability, or retirement, the amount of those benefits must be deducted from the total support award (regardless of the effect of the child's benefit payments on benefits paid to the parent). Such benefits include, but are not limited to: Social Security Retirement or Disability, Black Lung, and Veteran's Administration benefits. Also included are non-means-tested government benefits meant to offset the cost of the child such as adoption subsidies (N.J.A.C. 10:121-2). SSI, public assistance (TANF), and other means-tested benefits are not government benefits based on a parent's earnings record, disability or retirement and should not be included on Line 12….[10]

The deduction of the SSD benefit amount from the basic child support obligation is provided because the receipt of such benefits "reduces the parents' contributions toward the child's living expenses (*i.e.,* the marginal cost of the child)."[11]

If the SSD benefit amount received by the child "is greater than the total child support award (*i.e.*, the amount of the total support award after deducting the government benefit is zero or less), the amount of the government benefit that is being paid to or for the child represents the amount of the support award."[12] In that event, the SSD benefit amount "should be made payable directly to the obligee (*i.e.*, from the government agency to the obligee; not through Probation)."[13] On the other hand, if the SSD benefit amount is less than the total child support obligation, the SSD benefit amount is to continue to be paid directly to the obligee and the "residual amount" is to be paid through Probation.[14]

In *Sheren v. Moseley*, the Appellate Division addressed the impact of a lump sum SSD benefit paid to dependent children against a parent's support arrearage and future obligations.[15]In *Sheren*, the father's child support obligation for the parties' two children was determined to be $75 per week at the time of the parties' divorce.[16] As a result of a subsequent medical disability, the father remained out of work and failed to pay the child support.[17]A post-judgment order established his child support arrearage at $5,667.82 as of Jan. 1, 1995.[18] On Sept. 15, 1997, the Social Security Administration awarded the father retroactive children's benefits in the amount of $8,952. This sum was sent to the children's mother, as she was their primary residential parent.

The *Sheren* court found that the father was entitled to a $5,667.82 credit against the arrearages that accrued during the period of his disability, but *not* entitled to a credit against his future child support obligations where he was no longer disabled. The court explained that during the supporting parent's disability period, the supporting parent is unable to work and the SSD payment is considered as "substitutionary for the lost earning power."[19] However, in finding that the father was not entitled to a retroactive credit for that part of the lump sum SSD benefit paid to his dependent children that exceeded the amount attributable to the period of his disability (*i.e.*, $3,284.18), the court explained:

> That amount belongs to his dependent children even though it exceeds the amount of child support ordered in the judgment of divorce….Allowing a credit to [the father] for future support when he is no longer disabled would frustrate the primary purpose of social security disability payments for dependent children which is to meet the "current needs of the dependents" in "regular, periodic installments. Although the children here will receive more than the judgment of divorce required [the father] to pay as such support, such a result is equitable.[20]

Finally, in *Diehl v. Diehl*, the Appellate Division held that when a child receives a lump sum payment benefit due to a parent receiving Social Security Disability retroactively, that parent can only receive a credit for the period of time in which the obligor had a child support obligation, and only in the amount of that child support obligation.[21] The *Diehl* court explained: "Absent a special showing of

inequity under the circumstances, an obligor should be credited with a retroactive payment of social security disability benefits that do not exceed the obligor's support obligation during the benefit period."[22]Further, the court held that if the child received payments for a specific time in which the obligor did not have a child support obligation, the benefits that were received during that time were not to be credited against any arrears.[23]

Impact of SSI Upon Child Support and Related Issues

The New Jersey Child Support Guidelines specify that as a means-tested benefit, SSI is only meant to replace the lost earnings of the parent.[24] As such, SSI benefits are not considered as income in determining child support awards.[25]

The impact of a parent's SSI benefits upon child support was addressed in *Burns v. Edwards*.[26] The issue before the *Burns* court was whether SSI benefits received by a disabled parent could be considered income when calculating a child support obligation when the benefits were the parent's sole source of support and income could not be imputed to the parent.

The *Burns* court explained:

> We recognize the basic obligation of parents to support their children is deeply rooted in our jurisprudence, as well as the intent of Congress to require parents to support their children in order to lessen the need for public assistance. However, it is undeniable that American society is also confronted with the problem of disabled parents who are unable to support themselves, much less their children….
>
> A state court confronted with the issue of whether SSI benefits are to be considered as income when calculating a parent's child support obligation faces the dilemma of recognizing the federal mandate of PRWORA to maximize child support establishment and collection based upon consideration of all sources of income, with the clear federal intent of Congress to provide a recipient of SSI benefits a minimum level of income necessary for subsistence.[27]

Based upon its finding that the husband was totally disabled and surviving solely on SSI benefits, the court held that the "intent of the child-support framework to ensure that parents support their children has no application to those parents whose sole source of income is SSI, and where such parents have no ability to generate additional income."Thus, the court concluded: "To require SSI benefits to be diverted under such circumstances for child-support purposes would undercut the purpose of Congress in enacting the SSI program…."[28] Nevertheless, the *Burns* court found that a child support order may be entered against a parent who is an SSI recipient where it is determined that the parent is earning, or has the ability to earn, additional income.[29]

Notably, children's receipt of SSI benefits due to their own disability cannot be credited against the parent's child support obligation. In *Gifford v. Benjamin*, the family part reduced the father's child support obligation by the amount of the SSI benefit received by the parties' disabled child.[30] The Appellate Division reversed, finding that the child's SSI benefits were not to be credited against the father's child support obligation. The Appellate Division explained that to permit otherwise "would take away from the child benefits based on her own disability and intended to bring the child's income to a minimum subsistence level."[31]

Finally, unlike SSD benefits, SSI benefits are not subject to garnishment.[32] The rationale for this is that SSI payments are not based upon remuneration for employment, and are instead provided based on need.

THE IMPACT OF SPOUSAL SUPPORT UPON SSD AND SSI BENEFITS

Another significant distinction between SSD benefits and SSI benefits is the potential impact of spousal support paid to the disabled party.

The receipt of spousal support does not impact a party's eligibility for SSD or the SSD benefit amount, since spousal support is unearned income. By contrast, receipt of spousal support might affect a party's ability to receive SSI benefits. As SSI is means-tested, an applicant's "countable resources" (income and assets) are taken into consideration when determining SSI eligibility.[33] Spousal support is included in the applicant's countable resources.[34] Thus, the receipt of spousal support affects a party's eligibility and might reduce the SSI benefit depending on the amount received.

If the amount of spousal support received by an applicant results in his or her countable resources exceeding the permitted threshold amount, the applicant will be ineligible to receive SSI benefits. If a party's spousal support does not cause his or her countable resources to exceed the permitted threshold amount, the SSI benefit may be reduced depending on the spousal support amount. Thus, an individual's receipt of spousal support may make him or her completely ineligible for SSI or reduce the amount of his or her SSI benefits.

THE RELATIONSHIP BETWEEN A FINDING OF DISABILITY FOR SOCIAL SECURITY PURPOSES AND THE FAMILY PART'S IMPUTATION OF INCOME

Income may be imputed to a party who is voluntarily unemployed or underemployed.[35] A party asserting an inability to work due to disability bears the burden of proving the disability and must ordinarily produce evidence to meet that burden.[36] In *Golian v. Golian*, the Appellate Division examined the relationship between a finding of disability by the Social Security Administration (SSA) and a party's burden to prove their disability in the family part.[37]

In *Golian*, although it was established that the wife had been deter-

mined to be disabled by the SSA and was receiving disability benefits, the trial judge determined that she failed to meet her burden of proving an inability to work, since she had not presented any medical evidence at trial. On appeal, the wife contended that her SSA disability status should have resulted in a presumption of her inability to work, with the burden then shifting to her husband to rebut that presumption before income could be imputed to her.[38]

The Appellate Division explained that the SSA adjudication of the wife's disability "required a finding that her physical and mental impairments were 'of such severity that [s]he is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.'"[39] The Appellate Division stated that deference must generally be given to administrative determinations if supported by credible evidence, and noted that the husband had assisted his wife in obtaining the SSA award.

Thus, based upon the foregoing, the Appellate Division held:

> In the circumstances of this case, we hold that the SSA adjudication of disability constitutes a *prima facie* showing that plaintiff is disabled, and therefore unable to be gainfully employed, and the burden shifts to defendant to refute that presumption. Accordingly, we remand for further proceedings, in which the trial judge shall consider such additional evidence which defendant may present to attempt to overcome this presumption. Of course, plaintiff may present rebuttal evidence. Such evidence may consist of lay testimony, expert testimony or medical records, consistent with the Rules of Evidence, as the trial court deems appropriate.[40]

Approximately three years later, in *Wasserman v. Parciasepe*, the issue before the family part was the degree of proof needed to overcome a presumption of an inability to work raised by a party's receipt of Social Security Disability payments.[41] The matter involved a post-judgment application of the plaintiff, who sought discovery of the defendant's medical records in support of the ultimate relief she was requesting, a termination or modification of her alimony obligation to the defendant.[42]

The parties in *Wasserman* were divorced on June 26, 2002, following a trial on all issues. Prior to the trial, the SSA had found the defendant to be disabled. Following the trial, the defendant was awarded permanent alimony in the amount of $400 per week, based upon the court's finding that the plaintiff's income was $130,000 per year and that the defendant's sole source of income was the Social Security Disability benefits that totaled $13,000 per year.[43]

In support of her post-judgment application to modify or terminate alimony, and consistent with *Golian v. Golian*, the plaintiff was required to refute the presumption of the defendant's inability to work raised by the SSA's adjudication of his disability. In reviewing the matter, the court noted the policy established by New Jersey courts that "no spouse should be turned out of a marriage without sufficient funds to continue to live in a lifestyle reasonably similar to that established in the marriage."[44]

Consistent with this policy, the court concluded:

> …as to alimony, the opponent of the presumed evidentiary fact must offer proof that is clear and convincing in refuting the evidential fact. Only then will the proponent of the evidential fact have the responsibility to offer more proof in order to sustain its burden of proof. Clear and convincing evidence seems logically required in the case at bar, since the evidence supporting the elemental fact (that the Social Security Administration determined the defendant to be disabled) included a physical exam and review of numerous medical records giving rise to a well supported elemental fact.[45]

Notably, the *Wasserman* court found that the presumption of disability was overcome by the expert testimony of the plaintiff's two witnesses, a nephrology specialist and a licensed rehabilitation counselor who testified that the defendant was able to work full time, even with his other medical issues. The court noted that this information rebutted a finding of disability by clear and convincing evidence.[46] Thus, the court concluded that the defendant could engage in employment such as photography and bookkeeping, and ruled that it would impute income to him in the range of $35,000 to $40,000 per year. Therefore, the court reduced the defendant's alimony from $400 to $150 per week.[47]

The *Wasserman* court's holding demonstrates the ability of the payor spouse to successfully contest an alimony claim notwithstanding the fact that the dependent spouse had been declared by the SSA to be disabled. That being said, however, it is submitted that a cost-benefit analysis would have to be performed to carefully evaluate the matter based upon the specific facts and circumstances presented.

CONCLUSION

As illustrated above, Supplemental Security Income and Social Security Disability benefits are distinct. Each has a different impact on support determinations in family matters. It is imperative that the differences between these benefits be clearly explained to the trial court. Moreover, when presenting a matter to the family part for adjudication, an attorney must keep in mind the evidential impact of a finding of disability by the Social Security Administration. The chart on the following page summarizes these issues. ■

Benefit	Purpose	Means Tested	Criteria	Included in Income of Obligor Under Guidelines	Reduces Child Support	Subject to Garnishment	Impact on Alimony
SSI received by obligor	Financed from general revenues in order to provide disabled indigents with minimally adequate resources. Not a substitute for lost income due to a disability. Designed to supplement the recipient's income to assure that his/her income is maintained at a level viewed by Congress as the minimum necessary for subsistence.	Yes	Payable when the disabled person's income and resources are insufficient to provide for that individual's basic needs.	No	N/A	No	Receipt of alimony might reduce or eliminate a party's eligibility for SSI depending on the amount alimony received.
SSD received by obligor	Financed from payroll deductions. Designed to replace income lost due to an employee's inability to work because of disability.	No	Payable if the individual satisfies the disability requirement and also has sufficient lifetime earnings with contributions into the Social Security retirement to be insured for disability.	Yes	Yes. The SSD benefits received by the child may be deducted from the obligor's child support obligation. The child's SSD benefit is deducted from the basic child support amount before the obligation is apportioned between the parties.	No generally, but yes as to child support.	Receipt of alimony has no impact on a party's eligibility for SSD.
SSI received by child	If a parent is approved for SSI disability benefits, there is no provision for his dependents because SSI is a "means-tested" benefit. A child may receive benefits based on his/her own disability. A child's receipt of SSI based upon his/her own disability is not to be credited against the parent's child support obligation.	Yes		N/A	A child's receipt of SSI benefits due to his/her own disability cannot be credited against the parent's child support obligation (*Gifford v. Benjamin*).		
SSD received by child	When a parent is receiving SSD benefits, the dependent child of that parent may be able to receive SSD benefits from the SSA based upon the parent's benefits. The benefit received by the child does not impact SSD paid to the disabled parent. The amount of the benefit to be received by the dependent child will depend upon the parent's work history, and will generally equal one-half of the disabled parent's SSD benefit. The child need not be in the custody of the disabled parent to receive the benefit.	Yes	The amount of the benefit to be received by the child will depend upon the parent's work history, and will generally equal one-half of the insured parent's SSD benefit. Child need not be in custody of disabled parent to receive benefit.	N/A	Yes		

ENDNOTES

1. 8 C.F.R. §213a.1.
2. *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981).
3. 42 U.S.C. §405.
4. 20 C.F.R. § 404.1505.
5. *See* 20 C.F.R. § 404.130 which sets forth four different rules for determining if a person is insured for purposes of establishing a period of disability or becoming entitled to disability insurance benefits.
6. 20 C.F.R. § 404.350, § 404.353 and § 404.366.
7. Appendix IX-B to the New Jersey Child Support Guidelines, "Lines 1 through 5 - Determining Income," subparagraph m.
8. § 459(h)(1)(A)(ii)(I) of the Social Security Act, 42 U.S.C. 659(h)(1)(A)(ii)(I).
9. *Herd v. Herd*, 307 N.J. Super. 501 (App. Div. 1998). It should be noted that *Herd* was pending at the time the child support guidelines were substantially revised.The trial court did not follow the revisions within the New Jersey Child Support Guidelines, and the Appellate Division reversed and remanded for calculation of the child support pursuant to the guidelines.
10. Appendix IX-B to the New Jersey Child Support Guidelines, "Lines 12 Deducting Government Benefits Paid to for the Child." *See Potter v. Potter,* 169 N.J. Super. 140 (App. Div. 1979); *De La Ossa v. De La Ossa*, 291 N.J. Super. 558, (App. Div. 1996); and *Pasternak v. Pasternak*, 310 N.J. Super. 483 (1987).
11. Appendix IX-A to the New Jersey Child Support Guidelines, "Line 10c. - Adjustments to the Support Obligation."
12. Appendix IX-B to the New Jersey Child Support Guidelines, "Line 12 - Deducting Government Benefits Paid to for the Child."
13. *Ibid*.
14. *Ibid*.
15. *Sheren v. Moseley*, 322 N.J. Super. 338 (App. Div. 1999).
16. *Id.* at 340.
17. *Ibid*.
18. *Ibid*.
19. *Id*. at 341-342.
20. *Id*. at 344.
21. *Diehl v. Diehl*, 389 N.J. Super. 443 (App. Div. 2006).
22. *Id*. at 450.
23. *Id*. at 450-451.
24. Appendix IX-A to the New Jersey Child Support Guidelines, "Line 10c. – Adjustments to the Support Obligation."
25. *Ibid*.
26. *Burns v. Edwards*, 367 N.J. Super. 29 (App. Div. 2004).
27. *Id*. at 40-41.
28. *Id*. at 41.
29. *Id*. at 50; *see also Crespo v. Crespo*, 395 N.J. Super. 190 (App. Div. 2007).
30. *Gifford v. Benjamin*, 383 N.J. Super. 516 (App. Div. 2006).
31. *Id*. at 519-520.
32. 42 U.S.C.A § 407(A), 20 C.F.R. § 581.104, and 42 U.S.C.A. § 659(a).
33. 20 C.F.R. § 416.1100.
34. 20 C.F.R. § 416.1120 and § 416.1121.
35. *See Dorfman v. Dorfman*, 315 N.J. Super. 511 (App. Div. 1998).
36. *Golian v. Golian*, 344 N.J. Super. 337 (App. Div. 2001).
37. *Ibid*.
38. *Id*. at 338-339.
39. *Id*. at 341.
40. *Id*. at 342-43.
41. *Wasserman v. Parciasepe*, 377 N.J. Super. 191 (Ch. Div. 2004).
42. *Id*. at 194-95.
43. *Id*. at 194-95.
44. *Id*. at 199-200; *citing Crews v. Crews*, 164 N.J. 11 (2000) and *Weishaus v. Weishaus*, 180 N.J. 131 (2004).
45. *Id*. at 200.
46. *Id.* at 200-01.
47. *Id*. at 201.

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