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CHAIR'S COLUMN

Thank You Judge Page

by Madeline Marzano-Lesnevich

For more years than I wish to count, I have looked forward to receiving the issue of the *New Jersey Family Lawyer* containing "Recent Developments in Family Law." I would eagerly read it, seeing if I had missed any cases as they had come down or been published. I would review it and pass it on to other attorneys in my office. I would instruct all the other family law attorneys in my office to study his or her own issue. During the year, until the next edition of "Recent Developments," it was an invaluable resource.

This past year, I had the privilege of working with Judge Robert Page and learning how "Recent Developments" is developed.

Before each publication of the year's "Recent Developments" in the *New Jersey Family Lawyer*, Judge Page, along with the Honorable Thomas H. Dilts, one guest speaker family part judge and one guest speaker attorney, present "Recent Developments" as a lecture at the yearly judicial college. This past year, in November 2004, the Honorable Sallyann Floria was the bench guest presenter and I was the bar guest presenter. In preparation for this event, Judge Page distributed copies of the cases to each of the presenters, with the aid of William Woodsworth of the Administration Office of the Courts. The cases were then divided, by sections and then by presenter. Each one of us was to read all the cases and write a synopsis of those cases specifically assigned to us. We were given a schedule of when our draft synopses should be presented, and when we would meet to discuss, edit and revise the synopsis. Judge Page advised us that we should read each other's synopses. We were then to have a final meeting to agree upon revisions and discuss our verbal presentation.

It all sounded doable, but what was amazing about it was not only the welcoming tutelage of judges Page and Dilts, but the painstaking review of each synopsis presented. Judge Page was so cognizant of the limited amount of time members of the judiciary have while on the bench, hearing motions, listening to arguments

of counsel, making decisions. Judge Page stressed to us the need to have each word of the synopsis be as meaningful as possible, so that those sitting members of the judiciary had at their disposal a valuable, but quick and easy to read, resource manual. Judge Page was intimately familiar with each of the cases assigned to us.

During the months preceding the presentation at judicial college and the production of the "Recent Developments," Judge Page assigned additional cases to each of us, as they came down from the Appellate Division. Judge Page was equally intimate with every word of our synopses of these additional cases. Judge Page not only personally edited each synopsis, but discussed his suggested revisions with each of us, gently pushing us to be concise, yet always respectful of the pride of authorship.

Judge Page has been presenting to the judicial college, and has been the prime author and editor of "Recent Developments in Family Law," for over 18 years. He has served as a superior court judge since 1973, and had been a worker's compensation court judge since 1969. Judge Page has served as a frequent lecturer for the Institute for Continuing Legal Education, as a lecturer for the National College of Juvenile and Family Law, and as the U.S. delegate to the Judges Seminar on the 1980 Hague Convention in the Netherlands. He has lectured extensively throughout the United State on the unified trial court system, the role of the judge, children in court, and alternative dispute resolution.

Judge Page has served on the New Jersey Supreme Court Family Practice Committee, and on its Judicial Education Subcommittee. He has been an author of the bench manual for New Jersey Family Court judges.

Having received his B.A. from Dickinson University,

Continued on Page 133

FROM THE EDITOR-IN-CHIEF

Coverture Fractions: Can They be Used for More Than Stock Options and Pensions?

by Mark H. Sobel

The complex and often convoluted valuation analysis for equitable distribution of assets where some portion of those assets are acquired during the marriage but others are obtained either after filing of a complaint for divorce or perhaps never, has resulted in a myriad of decisions throughout the state. Initially, valuation of these assets for purposes of equitable distribution focused upon whether entitlement to that asset had *vested* during the course of the marriage. The key inquiry at that point was whether there was some fixed entitlement to receive the asset regardless of future efforts, or whether there were requirements or contingencies that had to be fulfilled subsequent to the filing of the complaint for divorce to receive the asset.

These determinations often became all or nothing disputes where either the entirety of the asset was placed into the marital pot if it had vested, or none of it was made subject to equitable distribution since full entitlement had not yet vested. There was, of course, logic to both sides of that argument. On the one hand, certainly there was an accumulation of some type of valuable asset during the course of the marriage, which had some potential to be received and may only merely require continued employment. Conversely, there was logic to the opposite position that such an individual was *forced* to remain in employment at that particular location in order to receive that asset, which had already been subjected to division and clearly required additional post-complaint non-marital effort.

In an attempt to deal with this often difficult decision, our courts then focused on the utilization of a coverture fraction to render a portion of this asset subject to distribution. While there are numerous cases that deal with the subject matter, one of the more recent decisions, *Whitfield v. Whitfield,*[1] almost matter-of-factly accepts and assumes the utilization of coverture fraction for division of a pension account. The coverture fraction has as its numerator, the number of years the parties were married during which the benefit was accumulated, and as its denominator, the number of years necessary for the benefit to be fully received. This is almost said in passing, and is virtually universally accepted in our cases as an appropriate means for resolution of equitable distribution of these pension and/or stock option types of assets.

While virtually uniformly and universally accepted within these limited areas, there has been surprising little use of coverture fractions for other types of assets. It is an inquiry that practitioners within our field should examine, and could provide a meaningful opportunity for division of assets in a variety of contexts.

Virtually any non-cash or non-cash equivalent asset subject to equitable distribution which is not to be immediately liquidated should at least form the subject matter of an inquiry into the utilization of a coverture fraction. For example, in numerous cases a non-working spouse with childcare responsibilities is often allowed to maintain and reside in the formal marital home for a period of time, until an objective date occurs, such as a child's graduation from high school. In such event, the sale of that home will not occur until post-divorce, and there are numerous negotiations that take place regarding the cost of the upkeep and maintenance of the house and the potential price to be received from the sale of the house.

As all of us who practice in this area know, if that period of time is significant, there are concerns on both sides. The non-occupying spouse's area of concern included the costs associated with upkeep of the house, property taxes, and, most importantly, whether or not the property will be maintained as it should be maintained. The occupying party's area of concern includes the fact that the efforts to maintain the house go at least 50 percent to the former spouse, and all of that non-marital effort to maintain the property should not be appropriately divided on a 50/50 basis.

These negotiations often form an elaborate part of the overall negotiation of a property settlement agreement, and require painstaking analysis of both the financial contributions going forward and the maintenance of the property, which is almost unsusceptible to objective standards being set forth in an agreement. Furthermore, one of the issues during negotiations often is

New Jersey Family Lawyer

Table of Contents

the potential tax ramification of a future sale. The difficulty in reaching a consensual resolution on such items flows from the uncertainty of the time of the future sale as well as the tax ramifications given the unknown future economic positions of the parties and the then existing tax laws.

Perhaps a way of dealing with all of these issues, is to instead utilize a coverture fraction regarding the current value of the house based upon the joint years of ownership as the numerator and the anticipated or agreed upon sale of the house some years forward, with that entire period of time comprising the denominator. If an agreement could be reached upon such a coverture fraction that elimination of all of the shared risks that both parties fear could be avoided, both parties would then share in some agreed upon proportion of all of the future risks and rewards.

This same logic could be applied to a variety of other assets. Vacation homes, timeshares, investments, partnerships and distribution of one litigant's interest in a particular business may also be susceptible to a coverture fraction. This is especially true if the case involves older individuals, where there is an established plan for the sale of a business. Instead of obtaining a fair market valuation of a business from a forensic accountant, the parties could instead opt for utilization of a coverture fraction. Such a coverture fraction could be one where the numerators reflects the value appreciation during coverture and the denomination the value appreciation for the period outside of coverture.

As we know, one of the things that often promotes extreme divisiveness in cases is when reasonable minds can differ. This happens more often than not when dealing with the valuation of a business. The ability to fairly resolve this issue becomes a difficult analysis for the court, when presented with diametrically opposed valuation theories and conclusions. Perhaps a way of dealing with this dichotomy in the event the parties can agree upon a future sales date is to utilize a coverture fraction. By so doing, the actual sales price will be known, and the marital efforts of the parties will be shared and the non-marital efforts will not. Such a resolution would eliminate the need for contested cases on valuation theories and valuation conclusions, which often comprise an enormous amount of court time and an enormous cost to the litigants.

It is important as practitioners in this area that we consider potential vehicles to resolve disputes that can reduce the cost of the litigation and prompt an immediate resolution of the matter. Instead of dealing with hypothetical sales, coverture fractions would deal with actual sales; instead of dealing with potential increases in value or decreases in value, actual numbers would replace theory. Neither party would receive an absolute win, but neither party should. Rather, both parties would share in the actual result, whatever that might be, in an appropriate relationship to the marital partnership period versus the period of acquisition and ultimate sale of the asset.

The expansion of the use of coverture fractions could resolve disputes that had seemingly been

Continued on Page 133

FROM THE EDITOR-IN-CHIEF EMERITUS

It's Time to Bite the Bullet

New Jersey Should Require Mandatory Continuing Legal Education

by Lee M. Hymerling

Several months ago, the Supreme Court's Ad Hoc Committee on the Skills and Methods Course I was privileged to vice chair recommended sweeping changes in New Jersey's skills and methods course. Those changes included revisions to the curriculum for new lawyers and a distinct program for experienced attorneys already admitted in other jurisdictions. From a reduction in class size to greater emphasis on professionalism and ethics, the ad hoc committee's recommendations deserve the bar's support, as well as favorable consideration from the Supreme Court.

Changes in the skills and methods curriculum are long overdue. The course was last significantly revised in 1987. Understandably, enrollees objected to class sizes and homework assignments, as well as the requirements imposed upon second- and third-year attorneys. While the bridge-the-gap concept in legal education is laudatory, and New Jersey has long been at its forefront, it is time for a change.

It is not, however, the purpose of this editorial to garner support for the ad hoc committee's recommendation, but instead to build upon that recommendation. It is now time for New Jersey to join the vast majority of states that require mandatory continuing legal education for all admitted attorneys. It is not enough to simply update our mandatory continuing education for new attorneys and those admitted in other states who seek New Jersey licenses; it is time for all New Jersey lawyers to acknowledge the fact that ours is not a static profession, but a calling that justifies requiring those who practice to pursue career-long education.

No area of the law stays the same. No area of the law remains unchanged. New legislation constantly revises our statutes. Similarly, new case law, not only from the appellate and Supreme Court benches but also from our trial courts, constantly interpret and expand our case law. Even in areas as basic as professionalism, our concept of what a lawyer does and how he or she should do it constantly changes.

In years past, many resisted the thought that we might be required to return to the classroom. Many cried that education should be voluntary. The argument was made that a resisting student was not one likely to learn. None of us should ever stop learning, and similarly none of us should resist a reasonable program of mandatory continuing legal education. Those few of us who have become certified by our Supreme Court as criminal, civil, family or workman's compensation attorneys are required to pursue continuing legal education in order to maintain certification. The requirements of certification should not, however, absolve all New Jersey attorneys from being required to pursue some continuing legal education.

In New Jersey, taking continuing legal education has never been a problem. For more than 40 years, the New Jersey bench and bar have been blessed by the traditions and presence of the New Jersey Institute for Continuing Legal Education (ICLE).A unique joint venture of the New Jersey State Bar Association, Rutgers University and Seton Hall University, ICLE has long provided attorneys and judges alike with the opportunity to take low-cost, high-quality courses, not only on timely subjects but on basic practice as well. From Eli Jarmal to Howard Keston to Bud Pacillo to Larry Maron, ICLE has been led by gifted executive directors, and has taught literally thousands of New Jersey attorneys.

Undoubtedly, were mandatory broad-based continuing legal education ever to come to New Jersey, ICLE and others would provide courses to meet every attorney's needs. Every year, the New Jersey Judiciary conducts its judicial college to provide instruction to our bench on timely topics as well as basic judging. Both new and seasoned jurists attend the judicial college. Would anyone ever seriously question the wisdom of spending public dollars on continuing New Jersey's judicial college? Not likely.

Those who ascend the bench should continue to learn throughout their careers.

The same holds true for lawyers. Yet, despite earlier cries and recommendations for change, somehow, for some reason, broad-based mandatory continuing legal education has never been adopted in New Jersey. It is not the purpose of this editorial to question why or criticize those who have in the past opposed mandatory continuing legal education. Instead, it is simply to respectfully suggest that the time has come for New Jersey to join most of its sister states that have imposed a continuing legal education requirement on its practicing bar.

My suggestion is that effective with the 2007-2008 court years, all New Jersey lawyers should be required to take no fewer than eight hours of mandatory continuing legal education each year, and that not less than four of those hours should be required in the areas of professionalism and professional responsibility. The individual attorney should be allowed to select the remaining course or courses. Credits should be given for programs whether sponsored by ICLE, county bar associations, or other authorized groups. Participation in inns of court should suffice not only for the elective credit, but also for the required basic courses.

The modest nature of the proposed requirement is intentional. Better that the concept be introduced than that the requirement be unduly onerous. Every one of us can find eight hours within a calendar year to devote to this purpose. Perhaps most of us already do, but there is no reason why those who do not should not be required to do so.

The advantages of such a program far outweigh any possible inconvenience.

And why should this be done now? The better question is why not? Why shouldn't New Jersey join the majority of the states who require mandatory continuing legal education? Why should New Jersey, which has so long boasted among the best courts in the nation, impose no such requirement upon its attorneys? The curious thing about all of this is that with mandatory continuing legal education in place in our neighboring states, why hasn't such a requirement crossed the Delaware or the Hudson? There is no good reason. Nor is there a better time to make the change. ■

Chair's Column

Continued from Page 129

his J.D. from Rutgers University, and his L.L.M. from the University of Virginia, Judge Page is the 1991 recipient of the Family Law Section's most prestigious award, the Saul Tischler Award. All of this is in addition to his daily work as the superior court, family part judge in Camden County, as well as the father of five children and the grandfather of five.

For those of us who rely upon the "Recent Developments in Family Law" on a daily basis, we thank you, Judge Page, for your obvious hard work and dedication to educating the bench and the bar in family law, and for this wonderful, concise resource. ■

From the Editor-in-Chief

Continued from Page 131

unresolvable, or at least not resolvable without a lengthy trial. It is an area of inquiry worth examining, and one that has received the acceptance of the court in established areas of stock options, pension plans, retirement accounts and a variety of assets whose value will be realized in the future. It is another mechanism whereby difficult disputes can be resolved, and I suggest it should be examined by lawyers in our area as another means to effectively resolve difficult issues. ■

ENDNOTE

1. A-2002-03T5 (approved for publication December 22, 2004).

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Recent Developments in Family Law

November 2003—November 2004

by Hon. Robert W. Page, Hon. Thomas H. Dilts, Hon. Sallyanne Floria, Madeline M. Marzano-Lesnevich and William F. Woodworth Jr.

(*Editor's Note:* The information reproduced here was provided to members of the judiciary at the judicial college in November 2004. The analyses and comments are those of the authors, and not that of the judiciary.)

JUVENILE

Statutes

Throwing bodily fluid

P.L. 2003, c. 283
N.J.S.A. 2C:12-13
(Effective January 14, 2004)

This new law amends N.J.S.A. 2C:12-13 to make the act of throwing bodily fluid at a state juvenile facility employee or probation officer an aggravated assault. If the act results in bodily injury to the victim it is a third-degree offense. All other offenses are fourth-degree offenses.

Directives and Memorandum

Entering dispositions with respect to juveniles held in a detention center.

Directive #08-04, issued by Richard J. Williams, administrative director, on June 24, 2004, provides direction and sets policy for family judges entering dispositions with respect to juveniles held in detention centers.

Inactivation

Memorandum dated April 27, 2004, from Richard J. Williams, administrative director, implementing a statewide uniform policy on inactivation of cases and excludable time.

Court Rules

R. 5:22-2. Referral without juvenile's consent. Rule has been amended to include *possession of a firearm during immediate flight* and *computer activity that would be a crime of the first or second degree* as conditions to be considered for waiver.

R. 5:24-4. Order of disposition. Rule has been amended to allow consideration of the functional equivalent of a pre-disposition investigation (*e.g.,* JISP report or violation of probation summary).

Case Law

Confession of a juvenile outside the presence of a parent or guardian may be admissible.

State v. Q.N., 179 N.J. 165 (2004)
[Justice Verniero]

The confession of a young juvenile obtained out of the presence of his or her parent or guardian may be admissible under this Supreme Court opinion. In reversing a trial court's decision to suppress, the Court noted that the standards set out in *State v. Presha*, 163 N.J. 304 (2000) provide for certain applicable exceptions.

Justice Verniero, speaking for the majority, noted that *Presha* directed that courts consider the totality of the circumstances surrounding the interrogation. The Court noted that trial courts may depart from the requirement of the presence of a parent or legal guardian for juveniles under 14 under two exceptions. These exceptions involve when the adult was unwilling to be present or "truly unavailable," and when the adult was unwilling to attend or voluntarily absented him or herself from the room as indicated under the facts of this case. Even though the majority acknowledged that it was the detective's initial suggestion that the mother leave the room, the Court emphasized, "there is nothing in the record before us to suggest that R.N.'s [mother's] absence was anything but knowing and voluntary." *Id.* at 174. "Having concluded that the State has satisfied an exception to the bright-line rule," *Id*. at 175, the Court went on to review the facts to determine whether the juvenile had made a knowing, voluntary and intelligent waiver of his right against self-incrimination. After consideration of the factors of the time of day, the limited interrogation, the use of age-appropriate terms, the fact that the mother was present at the earlier stage when the *Miranda* warnings were issued and at that time she directed her son to answer the questions, the Court concluded:

> We are satisfied that the State has carried its burden of demonstrating that Q.N.'s statements were the product of free will, which remains the central inquiry." *Id.* at 176.

Even though this confession was held to be voluntary, the Court reemphasized:

> ...[i]t behooves the police in the typi-

> cal case to refrain from suggesting that the parent or legal guardian depart the interrogation area. Further, as just noted, when the decision to exit the area originates from the adult, the police should inform the juvenile of the adult's continued availability." *Id.* at 177.

Justice Wallace, with the concurrence of Justice Long, dissented, noting that the bright-line rule of *Presha* that a parent be present for children under 14 should not be modified under these facts. The dissenters would place more emphasis on the "highly significant" fact that it was the police who suggested that the mother leave the room and "the juvenile must be given an opportunity to consult in private with the parent concerning the appropriateness of any waiver." *Id.* at 182.

Comment: This further expansion of the *Presha* standards re-emphasizes that the focus remains on the voluntary nature of a juvenile defendant's statement after consideration of the totality of the circumstances.

The court's decision to house a waived juvenile in an adult facility is highly discretionary.

State v. W.M., 346 N.J. Super. 155 (App. Div. 2003) [Judge Fall]

A trial court's decision as to the place of detention of a juvenile waived to adult court is "highly discretionary," and will not be disturbed on appeal where there is sufficient evidence in the record. In affirming a trial court's written decision to remand the juvenile to the adult facility after a plenary hearing, the appellate panel noted that its standard of review was set out as a three-part test in *State v. Roth*, 195 N.J. 334 (1984), as adopted in *State v. R.G.D.* 108 N.J. 1 (1987).

W.M., 17, was charged with second-degree aggravated assault and endangering the welfare of a child after investigation disclosed that the juvenile was wrestling with the child and his physical actions caused the death. The state filed a timely motion for waiver, which was granted in March 2003. At the required detention hearing to determine the place of confinement pursuant to N.J.S.A. 2A:4A-36 and Rule 5:22-3, the defense presented a psychologist, Dr. Matthew B. Johnson, who testified that the juvenile had significant academic deficits with an IQ of 79, and suffered from depression. Other fact witnesses indicated that W.M. was progressing well at that facility and expressed concern for his safety if transferred to an adult facility, since this was a highly publicized case of extreme child abuse. The warden of the adult facility also testified that waived juveniles are kept in the Essex County Jail in a separate area, "sight-and-sound segregated from the adult population." The family part judge, Judge Troiano, issued a written decision, noting that even if transferred to the adult facility the juvenile would be kept separate from the adult population and would not "suffer by this move."

In affirming the trial court's detention decision, Judge Fall noted that the scope of appellate review of trial court's fact-finding function is limited and their function was set out by the Supreme Court in *State v. R.G.D., supra.* He noted:

> *The best measure of a waiver decision will be found in the court's statement of reasons.* More is needed than the judge's individual call; *specific factors must be delineated* on the record. Once the particular standards legally applicable are followed and there is sufficient evidence in the record, the trial court decision should not be subjected to second-guessing in the appellate process. 108 N.J. 15. (emphasis supplied).

Judge Fall noted that the factual findings of the trial court were "supported by substantial credible evidence contained in the record." *Id.* at 168. And the trial court was free to disregard the defense's expert testimony even though it was unrebutted by the state.

Comment: This appellate decision re-emphasizes the need for trial courts to make detailed findings based on substantial credible evidence in order to provide a limited review of the exercise of their discretion.

A juvenile has the right to testify on his behalf at probable cause phase of waiver hearing.

State v. J.M., 364 N.J. Super. 486 (App. Div. 2003) [Judge Winkelstein]

A juvenile defendant should be permitted to testify on his own behalf at the probable cause phase of a waiver hearing under this Appellate Division opinion. In reversing a trial court's decision to waive the juvenile to the adult court, the appellate panel noted the trial court's refusal to allow the juvenile to testify, and the failure of the prosecutor to present a "statement of reasons" for the waiver application as required under *State in the Interest of R.G.*, 351 N.J. Super. 248 (App. Div. 2002).

In November 2001, the juvenile and co-defendants held up a gas station during the course of which the attendant was seriously injured by being struck with a baseball bat by a co-defendant. First-degree robbery, second-degree conspiracy and aggravated assault charges were filed, for which the state moved to prosecute J.M. as an adult. The juvenile was not permitted to testify at the waiver hearing that he had no knowledge of the action to strike the victim with a weapon. He also was not permitted to present his position that there was not probable cause for a first-degree robbery or "Chart 1" offense. After he was waived to the adult court, he entered a guilty plea to second-degree robbery, and was sentenced in the adult system.

On appeal, Judge Winkelstein noted at the outset the distinction between juvenile waiver hearings

involving Chart 1 offenses, which would include a first-degree robbery, as distinguished from others, in that the juvenile can only present evidence of rehabilitation as to the non-Chart 1 offenses. As to the importance of this distinction between Chart 1 and other offenses, the court noted:

> [w]hile a juvenile over the age of sixteen and accused of committing a Chart 1 offense may now more easily be waived to be tried as an adult, the *need for procedural safeguards* to be *available* to the juvenile *at the waiver hearing continues to be meaningful*. *Id.* at 491 (emphasis supplied)

Such basic rights of due process include a reasonable opportunity to be heard before the court determined the nature and extent of the probable cause in support of the charged crimes. The court indicated there is no precedent that "would abrogate a juvenile's right to testify in the probable cause portion of the waiver hearing." *Id.* at 492.

As further grounds for reversal, the court noted failure to comply with the requirement that the prosecutor prepare and file a statement of reasons for the waiver application "to assure state-wide uniformity in the exercise of prosecutorial discretion." *State in the Interest of R.C., supra.* at 248, 249-50. Without it "the court did not have the opportunity to review the statement of reasons to determine if the prosecutor had properly complied with the guidelines." *Id.* at 495. The appellate court then remanded the matter to the trial court for further hearing to determine at the outset if the failure to file the statement of reasons made the waiver "fatally defective," or whether it may be procedurally cured by a late submission. If so, a further hearing on the waiver was necessary in order to permit the defendant to testify on the issue of probable cause, which, if not established, would also involve a further hearing on his attempt to prove rehabilitation.

Comment: This opinion reemphasizes the "critical importance" of juvenile waiver hearings, and adds another option to juveniles to allow them to testify as to the nature and extent of their involvement. It also limits the finding of probable cause to a non-Chart 1 offense, which would allow them to then show probable rehabilitation.

Proof of necessary elements required for adjudication of delinquency for criminal sexual contact.

State in the Interest of G.B., 365 N.J. Super. 179 (App. Div., 2004) [Judge Parker]

Proof of the necessary elements was lacking in an adjudication of delinquency of a 12-year-old boy for criminal sexual contact of his four-year-old neighbor. In reversing a trial court determination, the appellate panel emphasized the need to prove all four elements of the charge, and quoted from the limited testimony of the child.

In August 2002 a 12-year-old boy was playing with his five-year-old brother and the four-year-old female victim in his home. When the child returned home and "was touching herself," in response to her mother's questioning she said "that G.B. had been touching her." *Id.* at 181. After the child told of the children showing their "pee-pees" and someone making sexually suggestive statements, the mother took her daughter to the pediatrician. The doctor found no evidence of injury, and the mother called the police. The police attempted to interview the child without success. The colloquy between the detective and the child was very limited, as was the child's "fairly inarticulate" testimony. The judge then attempted questioning, and in response to a leading question asking if the child remembered G.B. verbally making a sexually explicit demand, she replied yes. This apparently was the primary factual testimony against the juvenile.

Judge Parker, speaking for the unanimous panel, reviewed the four elements of criminal sexual contact, which, in addition to the relevant age factors, includes "an intentional touching of intimate parts and (4) a purpose of degrading or humiliating the victim or sexually arousing or gratifying the actor." *Id.* at 185. After ruling that the fourth element is essential, the appellate panel indicated:

> [w]e find no evidence to prove beyond a reasonable doubt the fourth element of sexual arousal/gratification or the victim's degradation/humiliation. Moreover, the trial judge made no finding that G.B. acted with a purpose to degrade or humiliate M.C. or to sexually arouse or gratify himself. *Id.* At 186.

Comment: This opinion highlights the difficulties of finding any criminal responsibility on instances of inappropriate touching or conduct among children.

Prohibition against expungement for conviction of sexual assault.

In Re Petition for Expungement of W.S., 367 N.J. Super. 307 (App. Div. 2004) [Judge Skillman]

The prohibition against expungement of convictions under N.J.S.A. 2C:14-2 includes *any* offenses listed in that statute in this appellate opinion. In reversing a trial court's grant of expungement for a conviction of "sexual assault," the court noted that the parenthetical reference to "aggravated sexual assault" is merely descriptive, and does not limit the scope of the prohibition against expungement of all sexual offenses included in that statute.

The petitioner was found guilty of an act of delinquency, which would have constituted sexual assault in violation of N.J.S.A. 2C:14-2. Fifteen years later, he petitioned for expungement of this adjudication, which was granted by the trial

court on the basis that N.J.S.A. 2C:52-2((b) refers "solely to aggravated sexual assault and not to sexual assault." Upon appeal, Judge Skillman, speaking for the appellate panel, noted that expungement for juvenile delinquency is governed by the same rules that govern adult defenses. In construing the statute prohibiting expungements for certain crimes, the court discussed the legislative intent, noting that when the Legislature wishes to specifically exclude the lesser degree, such intent was directly expressed. With respect to the sexual offenses under Section 2C:14-2 there is no distinction between the different degrees.

Comment: The court has made it clear that prohibitions against expungement for offenses listed under a particular statute includes all the offenses, unless there is a specific exception for a lesser degree.

Juvenile may not be adjudicated delinquent without having committed an act contrary to the Code of Criminal Justice.

State in the Interest of S.S., 367 N.J. Super. 400 (App. Div. 2004) [Judge Wecker]

A juvenile status offender may not be adjudicated delinquent for contempt of court for violating a court order to obey the rules of home and school under this appellate opinion. In reversing a trial court adjudication of delinquency, the appellate court specifically overruled a prior trial court reported decision allowing such practice in *State in the Interest of J.S.*, 266 N.J. Super. 423 (Ch. Div. 1993).

In August 2001, S.S., 15, came to the attention of the court on a juvenile family in crisis petition, which was filed because she was staying out late and running away. In March 2002, the family part judge ordered that S.S. "obey all Rules of Home, Rules of School and must attend counseling sessions." *Id.* at 403. That order included a provision that if she violated these terms a criminal contempt citation pursuant to N.J.S.A. 2C:29-9a would result, which was specifically acknowledged in writing by S.S. When she failed to return home on May 20, the trial judge found her in contempt of court, and adjudicated her delinquent, imposing a two-year probationary term.

In reversing that delinquency adjudication even though the juvenile was not then placed in a secure detention facility for delinquents, Judge Wecker noted that "Nonetheless, once adjudicated delinquent she faced that risk" and "acquired the label and the juvenile record that goes with an adjudication of delinquency." *Id.* at 405. The appellate court analyzed the criminal contempt provisions set out under N.J.S.A. 2C:29-2, noting that it "appears literally to apply to S.S.'s conduct." That court reviewed the expressed purposes of the Juvenile Justice Code, noting "the overriding goal of the juvenile justice system is rehabilitation, not punishment." *Id.* at 407. The statutes distinguish between juveniles involved in status offenses from delinquents, including sections providing for separate juvenile detention facilities, juvenile family in crisis intervention units and the different hearings provided under a family in crisis petition. Judge Wecker further noted:

> N.J.S.A. 2A:4A-88 prohibits placement of a juvenile who comes before the court under the family crisis jurisdiction in a secure detention or correctional facility for "juveniles accused of crimes or adjudged delinquent.

As to repeated violations of orders entered pursuant to the juvenile family crisis cases, the court noted the recent amendment to N.J.S.A. 2A:4A-87, which provided that in cases involving failure to comply with the orders, "the court may proceed against such person for enforcement of litigant's rights." *Id.* at 409. (R. 1:10-3). The statute does not include any reference to the criminal contempt statute, N.J.S.A. 2C:29-9, from which the appellate court indicated "it is plain that criminal proceedings are not intended as a means of enforcement." *Id.* at 410. This ruling was analogous to an earlier ruling of our Supreme Court in *State in the Interest of M.S.*, 73 N.J. 238 (1977), which held that a juvenile could not be charged with escape for leaving a shelter care facility.

In recognizing the dilemma faced by New Jersey juvenile court judges the court noted:

> We recognize the judge's understandable concern that the court must have some means of enforcing orders involving juvenile who repeatedly run away from home or are chronically truant. Nonetheless, we are convinced that N.J.S.A. 2C:29-9 is not the appropriate or intended means of enforcement.

The court then reviewed the divided rulings of other states in trying to deal with this "obvious tension between the judiciary's power (and need) to enforce its own orders and its duty to provide appropriate protection for a juvenile." *Id.* at 414. Inasmuch as New Jersey has not specifically addressed the issue by statute, the appellate court disagreed with the earlier trial court opinion in *State in the Interest of J.S., supra*. stating "we disagree with the rationales expressed in J.S. that such an approach is either in the best interest of the juvenile or consistent with the Code of Juvenile Justice." *Id.* at 428.

Comment: The Supreme Court granted certification. Until the Court's final determination, this significant opinion clearly removes the ability of family part judges to enforce their orders in status offenses by use of contempt charges, even in an effort to protect the juvenile from their immature and often self-destructive behavior. It remains for the Supreme Court or the Legislature to consider whether

the statute should be reinterpreted or amended to specifically authorize for such increased control of these children.

Juvenile adjudicated delinquent of criminal sexual contact is subject to Megan's Law notification provisions.

State in the Interest of J.P.F. 368 N.J. Super. 24 (App. Div. 2004) [Judge Lisa]

A 17-year-old juvenile who is adjudicated delinquent for criminal sexual contact against another 17-year-old must register and is subject to the notification provisions of Megan's Law under this appellate decision. In reversing a trial court's decision to not require Megan's Law registration, the appellate court, in a comprehensive opinion noted:

> The trial judge lacked discretion to withhold the mandatory requirement of Megan's Law registration from J.P.F.'s disposition. The circumstances of the case provide no occasion for judicial interpretation of N.J.S.A. 2C:7-2b(2) at variance with its plain language. *Id.* at 45.

The defendant and the victim were both within three months of their 18th birthday. The offense occurred when the defendant, "seeking to establish a romantic relationship," made unwanted sexual contact "against the victim's will." After an adjudicatory hearing, the trial judge found this amounted to criminal sexual contact, noting "there's no way that this particular touching was certainly authorized and/or consented to by the victim." *Id.* at 30. He then placed the juvenile on one-year probation, with credit for days that he served in detention. After acknowledging that "the literal reading of N.J.S.A. 2C:7-2b(2) requires such registration" under Megan's Law the trial judge declined to order the juvenile to register as a sex offender, noting that the rehabilitative purposes of the juvenile code "should not be interpreted to require Megan's Law registration where the juvenile and victim were about the same age" and near their age of majority. *Id.* at 30.

In reversing the decision not to require Megan's Law registration, Judge Lisa, speaking for the appellate panel, provided a comprehensive review of both the nondisclosure provisions of the Juvenile Code and the Megan's Law registration requirements. The court also reviewed the holding and principles set out by the Supreme Court in *In re Registrant J.G.,* 169 N.J. 304 (2001), wherein the Court held that Megan's Law does apply to juvenile offenders, but limited its requirements for the 10-year-old juvenile in that case. Judge Lisa noted that that modification did not apply, as it was limited to younger juveniles. The appellate court then specifically rejected "the notion that the juvenile code's non-disclosure provisions override Megan's Law." After full review of all of the cases and statutes involved, the appellate court determined that even under these circumstances this 17-year-old juvenile would have to register the same as any adult. and "these judgments are for the legislature, not the courts to make." *Id.* at 45.

Comment: The circumstances of this case highlight the Legislature's decision to provide zero tolerance to require registration of all persons who commit sexual offenses upon juveniles, including other juveniles.

Waiver to adult court may be denied upon analysis of statutory and psychological factors.

State in the Interest of D.D., 369 N.J. Super. 368 (Ch. Div.2004) [DiCamillo]

Waiver to adult court of a handicapped juvenile charged with attempted murder and armed robbery may be denied after analysis of statutory and psychological factors under this trial court opinion. In denying the state's motion to waive serious charges, the court made detailed findings and weighed the juvenile's potential for rehabilitation against the reasons for waiver.

The juvenile, age 15, and his 17-year-old co-defendant, went to a victim's home and demanded money, and during the course of the armed robbery the older juvenile shot the victim in the neck. After D.D. was charged with attempted murder, aggravated assault and armed robbery, the prosecutor's office moved to waive him to the Law Division, and a plenary hearing was held. After probable cause was established, the juvenile presented a forensic psychologist whose uncontroverted opinion was that he "could be rehabilitated prior to the age of nineteen with the resources available to the court." The expert's opinion was based on his evaluation of D.D., a review of the materials, tests, clinical data and interviews with family members and treatment staff at the detention center. The state "did not present an expert or any testimony refuting [the expert's] conclusions." *Id.* at 373. This juvenile had been tested as mildly mentally retarded as a classified special education student since 1997, with a troubled family history.

Judge DiCamillo, in a comprehensive opinion, reviewed the waiver statute N.J.S.A .2A:4A-26a, the case precedents, including *State in re C.A.H.*, 89 N.J. 326 and *State v. Scott,* 141 N.J. 457 (1995), and the factors and standards set out in each for trial courts considering the balancing of the competing interests. The court noted that the risk factors include prior offenses/delinquent behavior, substance abuse, leisure/recreation, personality functioning, attitudes orientation, education and employment history, and family relationships. The court further determined that the probability for rehabilitation outweighs the need for general deterrence. *Id.* at 383. The court ordered that "D.D. shall remain under the jurisdiction

of this court." *Id.* at 30. Upon an admission to armed robbery and aggravated assault, the court committed him "for four years at the Training School for Boys at Jamesburg." *Id.* at 383.

Comment: This comprehensive opinion includes psychological factors to be considered in determining the risk of re-offending and potential for rehabilitation.

Use of a paintball gun with the intent to damage property provides a factual basis for conviction for unlawful possession of a weapon.

State in the Interest of G.C., 179 N.J. 475 (2004) [Verniero]

The firing of a paintball gun to damage property rather than harm to a person provides sufficient basis for a conviction for a fourth-degree unlawful possession of a weapon under this Supreme Court decision. In reversing an Appellate Division ruling and reinstating a fourth-degree adjudication of delinquency, the Court determined that the use of this "weapon" to damage property under "circumstances not manifestly appropriate" includes actions directed at property as well as persons.

In June 2001, the 15-year-old juvenile shot a paintball gun at an automobile parked in the driveway, causing unspecified damage. He was charged with unlawful possession of a weapon under N.J.S.A. 2C:39-5d, to which he pleaded guilty and was committed to the state training school for one year. He appealed on two grounds: that a paintball gun is not a "weapon," and that its use against property did not pose a threat of harm to a person, which was required in order to sustain a conviction under that statute. In reversing the conviction, the appellate panel ruled that the state would have to show "the threat of harm to others," relying upon comments made by the Supreme Court in *State v. Lee*, 96 N.J. 156 (1984), that a "weapon" is anything that is capable of lethal use or of inflicting serious bodily injury.

In reinstating the adjudication of delinquency, the Supreme Court distinguished the ruling in *Lee,* indicating that those statements "must be viewed within the factual context of that case." *Id.* at 481. Justice Verniero noted that:

> [w]e conclude that the definition of 'weapon' does not preclude section 2C:39-5d from being applied to circumstances threatening only damage to property." *Id.* at 483.

Comment: In expanding the scope of prohibited conduct for this fourth-degree offense, the Court has exposed juveniles to a greater term of incarceration than a disorderly conduct degree, to which many mischievous acts are adjudicated.

Juvenile sex offenders under the age of 14 remain eligible for termination of Megan's Law registration requirements.

In the matter of L.E., et al., 366 N.J. Super. 61 (App. Div. 2004) [Judge Antell]

Juvenile sex offenders under the age of 14 remain eligible, when they become 18, for termination of their required registration under Megan's Law after a hearing in the Law Division under this appellate opinion. In reversing a trial court denial the appellate panel held that the recent amendment in the state law and the federal law did not "alter the import" of the Supreme Court's earlier determination in *In the Matter of Registrant J.G.,* 169 N.J. 304 (2001).

The applicants, L.E. and R.O., were 12 and 13 years old at the time of their sexual offenses. Upon reaching the age of 18, they moved in the Law Division to be relieved entirely of their obligations to register as sex offenders under Megan's Law. They relied on the Court's ruling in *J.G., supra*., that persons whose acts of juvenile delinquency took place when they were under 14 could apply to the Law Division to be relieved of the registration provisions upon clear and convincing evidence that they are not likely to pose a threat to the safety of others. After noting that Megan's Law "was amended" after *J.G.* to provide under N.J.S.A. 2C:7-2(g) that persons adjudicated of certain sex crimes were now "not eligible" to make application to terminate their registration obligation, the trial court denied their application, and "decided that the legislative will overrode the decision of the Supreme Court in *J.G*." *Id.* at 64.

Judge Antell, speaking for the panel, noted that the recent amendment to the law did not include any "specification in subsection g that the class of persons the Supreme Court singled out in *J.G.* was also to be covered by the amendment." *Id.* at 65. The appellate panel also noted the impact of the federal law, known as the Jacob Wetterling Act, 42 U.S.C.A. § 1407 (a)(1), had provided that states were not required to mandate registration for juveniles. Inasmuch as the trial court had also determined that both registrants met their burden by clear and convincing evidence, the appellate court "remanded to the Law Division only for the execution and filing of an order granting the relief requested." *Id.* at 67.

Comment: This opinion removes all barriers to juvenile sex offenders under the age of 14 continuing to apply for relief from the registration requirements of Megan's Law upon reaching the age of 18.

DOMESTIC VIOLENCE

Statutes

Amendments to PDVA Regarding Weapons Adopted January 14, 2004. P.L. 2003 c. 277

Any FRO or amended FRO issued shall prohibit a defendant from having a firearm "during the period in which the restraining order is in effect or two years, whichever is greater." An exception

from the two-year rule is made for law enforcement and military. N.J.S.A. 2C:25-29 (b). Therefore:

- court must check box prohibiting possession of firearms when FRO is issued;
- two-year prohibition applies only to FROs, not TROs;

The court may order search and seizure of "any firearm or *weapon* at any location where the judge has *reasonable cause* to believe the weapon is located." N.J.S.A. 2C:25-29 (b)(16).

Creates criminal offenses for possession of firearms and prohibits possession of firearms by persons convicted of crimes of domestic violence.

Servicemembers Civil Relief Act

PL 108-189
50 U.S.C. App. 501
(Effective December 19, 2004)

Members of military and national guard on active duty for over 30 days shall be granted a stay of all legal actions, including domestic violence proceedings, for at least 90 days, 50 U.S.C 522. Sets forth mandatory procedures applicable to all hearings involving service members, including rules relating to entry of default orders.

Directives and Memorandum

Domestic Violence Procedures Manual

The Domestic Violence Procedures Manual serves as a procedural guide and training reference in addition to setting uniform standards and best practices in the processing of domestic violence matters.

Court Rules

R. 5:25-4. Domestic Violence Hearing Officers. This new rule allows for the continued practice of the judiciary to appoint domestic violence hearing officers to handle cases and make recommendations in accordance with the Prevention of Domestic Violence Act and Rule 5:7A.

Case Law

Weapons seized in search resulting from defective TRO cannot be used in subsequent prosecution.

State v. Thomas Cassidy 179 N.J. 150 (2004) [Justice LaVecchia]

Weapons seized as the result of a search conducted in accordance with a defective *ex parte* TRO search warrant may not be used in a subsequent prosecution on the weapons charge according to this unanimous Supreme Court decision.

In February 1996, defendant Cassidy allegedly physically assaulted Natalie DeGennaro. One month later, she filed a domestic violence complaint with the local police. The municipal court judge spoke with DeGennaro and the officer by telephone. Neither was sworn in. There was no tape recording of the proceeding before the municipal court judge, and the municipal court judge failed to make any longhand notes summarizing what was said, as required by Rule 5:7A. The judge authorized a search for weapons. As a result of the search, 35 weapons were found, including many illegal weapons. Cassidy was indicted on five counts of third-degree unlawful possession of an assault firearm, and six counts of fourth-degree unlawful possession of large-capacity magazines. He moved to suppress the firearms evidence obtained as a result of the search conducted pursuant to the *ex parte* TRO search warrant. The criminal part motion judge concluded that the TRO was invalid because it was based on unsworn telephone testimony, but found the search to be valid because of the presence of "exigent circumstances." The Appellate Division affirmed, saying that the search was justified under the "emergency-aid exception to the warrant requirement."

The Supreme Court unanimously reversed the lower courts, holding that the TRO search warrant was invalid and the search was as an unjustifiable warrantless search. Justice LaVecchia, speaking for the Court, said:

> A TRO may be issued notwithstanding that the applicant is not physically present before the court, based 'upon sworn testimony or complaint of an applicant who is not physically present, pursuant to Court Rules.' N.J.S.A. 2C:25-28h. In such circumstances, *the judge must be 'satisfied that exigent circumstances exist sufficient to excuse the failure of the applicant to appear personally and that sufficient grounds for granting the application have been shown.' Ibid.* Thus, the Act expressly incorporates compliance with the Court Rules governing applications made by telephonic or other electronic means of communications. See *R.* 5:7(b). As we explained in *State v. Valencia*, 93 *N.J.* 126, 139 (1983), *the procedural requirements for a telephonic search warrant are fundamental to the substantive validity of the warrant*…We do not accord appellate deference to a judge's determinations upon the issuance of a telephonic warrant when those determinations lack the assurance of trustworthiness that we insist upon in the decisional process. *Id.* at 158. The 'warrant' simply is invalid. (Emphasis supplied.)

The Court noted that the municipal court judge did not make a "contemporaneous record of the sworn oral testimony," nor did the judge take any "longhand notes summarizing what was said." Additionally, there was no evidence that the officer or victim were ever sworn in. For these reasons, the search was treated as a warrantless search. Because none of the exceptions authorized under criminal law for warrantless searches were met, the illegal weapons seized were suppressed.

Delivery of letter to former spouse at her place of

employment does not constitute harassment.

Bresocnik v. Gallegos, 367 N.J. Super. 178 (App. Div. 2004) [Judge Ciancia]

The trial court's finding of harassment was overruled by the Appellate Division, and the FRO vacated because the defendant's conduct involved nothing more than having an investigator deliver a non-threatening letter to the plaintiff.

The parties separated after a six-year relationship and annulled marriage. The defendant sent letters and emails to the plaintiff, an elementary school teacher in New Jersey, that "referenced the recent spousal slayings that occurred at Fort Bragg and said that because of those he appreciated her a lot more." The offending conduct here was alleged to have been his decision to have an "investigator" hand deliver a letter to the plaintiff at the school where she taught. Her objection was that he knew where she was, and would have someone deliver the letter to her. She believed that she and the children she taught were in danger. She testified that when they dated, the defendant "actually said that he had contacts and could have somebody watched."

The Appellate Division vacated the FRO holding that there were no findings as to the defendant's intention to cause annoyance and alarm, and holding that, "no such finding was available on the facts." Because of the consequences of entry of an FRO, including fingerprinting, the risk of contempt for a violation, placement on the domestic violence registry and the consequences set forth in the order, the court should have denied the requested restraining order.

> Surely the law must have some tolerance for a disappointed suitor trying to repair a romantic relationship when his conduct is not violent or abusive or threatening but merely importuning.…in our view, a single hand delivered letter to a workplace does not legally invade privacy and, on these facts, is not reasonably likely to cause annoyance or alarm within the meaning of N.J.S.A. 2C:33-4(a). There was no history of threats, abuse or violence between the parties… plaintiff's reaction to defendant's efforts at communication does not supply a basis to infer that his purpose was to harass her." *Id.* at 182.

Defendant with a pattern of stalking and harassment may be barred from living in plaintiff's neighborhood.

Zappaunbulso v. Zappaunbulso, 367 N.J. Super. 216 (App. Div. 2004) [Judge Reisner]

The trial court may order a defendant to move out of a plaintiff's neighborhood in view of the defendant's documented history of stalking and harassing his ex-wife, according to this Appellate Division decision.

The former wife obtained a final restraining order in March 2003 on the basis of harassment. There was testimony of past threats and physical violence against the plaintiff and her property. In April 2003, the defendant planned on moving into a rented home 11 houses from the plaintiff's home, and with a direct sight line to the plaintiff's house. The plaintiff filed a motion to prohibit the defendant from moving to that location. While the motion was pending, the defendant moved into the new home and filed an emergent motion for custody of the children, requesting that his new home be considered the children's primary residence. A hearing was held on May 2, 2003, on the plaintiff's request that the defendant be ordered to move from the residence. Judge Allen-Jackson granted the motion, concluding that: "Now it appears that every time she wants to leave in order to go someplace she's got to pass by his house in order to get back to the main street." *Id*. at 224. The judge found that he had already been accused of parking on a neighbor's driveway in order to watch her after the original temporary order was issued, and the defendant was admonished that he should not do so. As to how close the defendant's new residence actually was to the plaintiff's residence, Judge Allen-Jackson examined both homes in a drive-by inspection without notice to the parties. The Appellate Division overruled the defendant's objection, finding that the trial judge "did not treat the site visit as evidence but as a procedure to aid the trier of fact in understanding the evidence." *Id*. at 228.

The appellate court concluded that "considering defendant's pattern of stalking and harassment, we are persuaded that the order barring him from residing in plaintiff's immediate neighborhood and ordering him to move out of his leased premises, was authorized by the Prevention of Domestic Violence Act and was necessary to effectuate the existing restraining order." *Id*. at 228.

Comment: This case is an expansion of the remedies expressly provided under the PDVA. This case shows the broad power of the court to protect victims of domestic violence.

Person convicted of simple assault against domestic violence victim is prohibited from possessing any firearm shipped in interstate commerce.

State v. Wahl, 365 N.J. Super. 356 (App. Div. 2004) [Judge Fall]

A person convicted of simple assault against a spouse is prohibited under 18 U.S.C. 922(g)(9) and New Jersey law from possessing any firearm shipped in interstate or foreign commerce under this Appellate Division decision. Such a person is "unfit" to possess a weapon as a matter of law.

In December 2000, the defendant assaulted his wife by choking her, slapping her and dragging her down a flight of stairs. A TRO was issued, and numerous firearms and bows were seized by the police. An FRO

was entered, and subsequently the defendant was convicted of the disorderly persons offense of simple assault. At a weapons forfeiture hearing, the court refused to return the weapons, notwithstanding the subsequent dismissal of the FRO, the consent of the victim to return of the weapons, and a report from the defendant's psychiatrist that his possession posed no danger to any person. In May 2003, however, the court, over objection from the prosecutor, did order return of the seized weapons. The trial court found that possession of the weapons by the defendant posed no danger to the public in general or a person or persons in particular. The trial court rejected the prosecutor's argument that the Mr. Wahl was prohibited from possessing a firearm pursuant to 18 U.S.C. § 922(g)(9). The prosecutor appealed.

The Appellate Division reversed, holding that because Mr. Wahl had been convicted of the disorderly persons offense of assault against his wife, that he was prohibited under 18 U.S.C. § 922(g)(9) from possessing any weapons that were shipped in interstate or foreign commerce. Judge Fall, speaking for the appellate panel, said:

> The term misdemeanor crime of domestic violence as defined in 18 *U.S.C.* § 921(a)(33)(a) must be construed—particularly in light of the Congressional intent in enactment of the Lautenberg Amendment—to include offenses that New Jersey law classifies as disorderly persons offenses, assuming the presence of the predicates elements. Thus, since defendant was convicted of a misdemeanor crime of domestic violence, perpetrated by the use of physical force against his spouse, the weapons-possession prohibition contained in 18 U.S.C.A. § 922(g)(9) applies to defendant." *Id.* at 374.

The appellate panel remanded this matter for purposes of taking testimony on whether the seized firearm, or any of its components have been shipped or transported in interstate or foreign commerce. If so, then the federal statute would prohibit possession and require forfeiture.

Comment: The impact of both federal and state prohibitions against weapon possession by domestic violence perpetrators is now clear.

Counsel fees may be awarded to plaintiff as part of the FRO.

Pullen v. Pullen, 365 N.J. Super. 623 (Ch. Div. 2003) [Judge Waldman]

Counsel fees may be awarded to a successful plaintiff as part of an FRO only upon compliance with Rule 4:42-9 and Rule 5:3-5(i) according to this trial court opinion.

The plaintiff, Mary Pullen, was awarded $6,000 in counsel fees. Judge Waldman engaged in a thorough consideration of Rule 5:3-5(c), Rule 4:42-9 and court decisions dealing with counsel fees in domestic violence cases. Judge Waldman concluded that counsel fees may be awarded to a successful plaintiff as part of a final restraining order provided that the court considers the following factors:

1. Plaintiff's need;
2. The financial circumstances of the parties;
3. The parties' ability to pay their own counsel fees;
4. The good faith of both parties; and
5. The reasonableness of the fees sought by plaintiff's counsel.

Applying these factors, Judge Waldman concluded that for five days of trial testimony and five appearances with respect to support, visitation and substance abuse evaluation, the $6,000 fee was reasonable, and required the defendant to pay it from his share of the proceeds from the sale of the marital home.

Comment: This trial court opinion is in conflict with the trial court opinion in *Schmidt v. Schmidt*, 262 N.J. Super. 451 (Ch. Div. 1992), where counsel fees were awarded as "compensatory damages." It is a question yet to be resolved by the appellate courts whether the award of counsel fees in domestic violence cases is dependent on need, ability to pay and other factors set forth in Rule 5:3-5, or whether a financially superior plaintiff may nonetheless be awarded counsel fees even where financial need does not exist.

DISSOLUTION/NON-DISSOLUTION

Statutes

Domestic Partnership Act, P.L. 2003 C. 246

The Domestic Partnership Act became effective July 10, 2004. Administrative Office of the Courts Directive 9-04, issued on August 31, 2004, and amendments to the Dissolution Operations Manual, implement the provisions of the Domestic Partnership Act relating to procedures for termination of domestic partnerships. The statute permits same-sex couples or opposite-sex couples over age 62 to establish a domestic partnership by filing an affidavit of domestic partnership at the local registrar's office. The application or complaint for termination of such a domestic partnership has the same fee as a dissolution action. It is assigned an FM docket number. The causes of action for termination of domestic partnerships are substantially similar to those to the cause of action for divorce. The procedures for termination of domestic partnership authorize the termination of domestic partnerships under New Jersey law, as well as out-of-state domestic partnerships. The Supreme Court, in July 2004, relaxed the court rules so as to apply the existing procedures for dissolution matters to termination of domestic partnerships. Those rules include process, complaint, answer, discovery, case information

statement, motions in family practice, venue and default. That is to say, the rules and procedures for terminations of domestic partnership are identical to those applicable to dissolution matters.

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

P.L., 2004, c.147 (S-150)
(effective September 14, 2004)

This new law replaces the Uniform Child Custody Jurisdiction Act (UCCJ), and is intended to provide uniformity in custody determinations and enforcement from state to state.

Servicemembers Civil Relief Act

PL 108-189
50 U.S.C.App. 501
(effective December 19, 2004)

Members of military and national guard on active duty for over 30 days shall be granted a stay of all legal actions for at least 90 days. 50 U.S.C. 522. Sets forth mandatory procedures applicable to all hearings involving service members including rules relating to entry of default orders.

Directives and Memorandum

Procedures for Termination of Domestic Partnerships

Directive #9-04, issued by Richard J. Williams, administrative director, on August 31, 2004, establishes procedures for the application or complaint for the termination of a domestic partnership in accordance with the Domestic Partnership Act.

Use of Warrants and Incarceration in the Enforcement of Child Support Orders

Directive #2-04, issued by Richard J. Williams, administrative director, on March 16, 2004, sets forth policy for the use of coercive incarceration in the enforcement of child support orders.

Child Support Obligee Address Change Procedures

Directive #11-04, issued by Philip S. Carchman, acting administrative director, on September 22, 2004, establishes uniform procedures for changing addresses, on ACSES, of child support recipients. The procedures are intended to minimize incidents of misdirection of child support payments.

Court Rules

R. 1:5-7. Non-Military Service Affidavit. The rule amendment requires the affidavit to be accompanied by a statement from the Department of Defense that the defendant is not in military service unless the affidavit is based on facts admissible in evidence.

R. 5:3-3. Appointment of Experts. Rule amendment substitutes the term "mental health" for the word "psychological," in paragraph (a), requires the evaluations in custody/parenting time disputes to be non-partisan, provides that parties' reports be shared with each other and the court, and codifies the court's authority to direct payment of appointed experts.

R. 5:3-5. Attorney Fees and Retainer in Civil Family Actions; Withdrawal. The rule was amended to include the availability of complimentary dispute resolution (CDR) programs in the statement of client rights and responsibilities in civil family actions (Appendix XVIII), and clarifies the 90-day timeframe for withdrawal relating to a scheduled trial date.

R. 5:4-2. Complaint. The rule was amended to require each party to submit to a confidential litigant information sheet (form prescribed in Appendix XXIV) upon any first pleading to a proceeding for alimony, maintenance or child support.

R. 5:5-4. Motions in Family Actions. Paragraph (d) was amended to require in matters falling under the "16-day rule" answers or responses to opposing affidavits and cross-motions to be served and filed no later than four days before the return date and no other response is permitted without the court's permission. In motions for modification of alimony, child support, custody or parenting time (29-day rule) answers or responses to cross motions must be filed and served no later than eight days prior to the return date and no other response is permitted without the court's permission. Paragraph (g) was added which states that exhibits attached to certifications are not subject to page limits, and that certified statements not previously filed shall be counted in page limit determinations.

R. 5:5-5. Participation in Early Settlement Programs. Rule amendment requires parties' submissions to the ESP coordinator in the county of venue and copies to panelists five days prior to the session.

R. 5:6-7. Separate Maintenance. This new rule allows for separate maintenance actions to be brought in summary actions unless designated as non-summary by the presiding family judge, or if the response contains a counterclaim for divorce.

R. 5:6A. Child Support Guidelines. In addition to technical amendments to the tax table and reference to the U.S. poverty guideline, the rule was corrected to indicate that federal earned income credit is excluded from gross income in the line instructions for the sole-parenting worksheet (Appendix IX-B).

R. 5:7-4. Alimony and Child Support Payments. The rule was amended to eliminate the requirement that child support payment obligations be enforced by the Probation Division of the obligor's county of residence, and provides that transfer of supervision be governed by policy established by the administrative director of the courts. Additionally, the rule requires the court to send to appropriate judicial staff a copy of the support order with the confidential litigant information sheet so an

account can be expeditiously set up on ACSES. Also, reference is made that the New Jersey Family Support Payment Center is designated as recipient of payments on support accounts administered by probation.

R. 5:7-6. Consolidated Enforcement and Modification Proceedings. The rule was amended to eliminate the requirement in cases in which the county of venue and the county of enforcement are different, that the entire motion be served upon probation by regular and certified mail. The rule also requires probation to submit a payment history rather than certification of arrears.

R. 5:8-1. Investigation Before Award. The rule was amended to include disputed parenting time issues as a genuine and substantial issue, to require that recommendations as to character and fitness be made by qualified professionals, and to determine the responsibility of investigations if one party lives outside the county of venue.

Appendix V. Family Part Case Information Statement. The family part case information statement was modified in accordance with recommendations made by the Supreme Court Family Practice Committee.

Case Law—Divorce

Martial lifestyle need not be determined in uncontested divorces.

Weishaus v. Weishaus, 180 N.J. 131 (2004) [Justice LaVecchia}

Actual marital lifestyle need not be determined by the trial court in uncontested divorces where there is a consensual agreement under this Supreme Court opinion. In revisiting the court's holding in *Crews v. Crews,* 164 N.J. 11 (2000), the Court provided that "trial courts must have the discretion" to allow parties to "freely decide to avoid the issue" while making an effort to "capture and preserve" available financial information.

The parties were married in 1985, and had three children. When they separated in March 2000, and filed for divorce that year, their case information statements indicated that their lifestyle was maintained not only by the husband's earnings but also by the expenses paid by his business and by gifts from his mother, as well as by liquidating marital assets. Their property settlement agreement provided for child support and decreasing three-year term alimony. At the final hearing on the uncontested divorce, the wife testified that she was "not at all" able to live on the standard of living enjoyed during the marriage, as the other assets would no longer be available to her. After the trial court found a lower than actual marital lifestyle, the wife appealed. The parties then entered into a second proposed property settlement agreement, including an agreement not to litigate that issue at that time. The trial court, following its interpretation of the *Crews* requirements, refused to approve the settlement, specifically objecting to the deferred determination provision.

On appeal, the appellate panel affirmed the trial court's decision not to allow the divorce to go through with a deferred determination of their actual lifestyle, but reversed the trial court's refusal to consider the contributions made by the husband's mother and the funds generated by the liquidation of the assets. The Supreme Court "Reversed in Part and Affirmed in Part as Modified," and remanded the matter back to the family part for further proceedings.

Justice LeVecchia, who authored the original *Crews* decision, noted that the court had instructed family courts in setting alimony awards to make findings establishing the marital standard of living, and determine whether the award will enable the parties to enjoy that lifestyle, even in uncontested cases. She also noted the collateral issue of determining the actual marital standard by including income derived from investments and parental cash subsidies. Justice LeVecchia reviewed the underlying principles, as originally established in *Lepis v. Lepis* 83 N.J. 139 (1980), and the need to establish a basis for further "changed circumstance" post judgment inquiries. She opined:

> We were *focused*, at the time, *on* underscoring the *importance of having the marital standard of living established when the information necessary* to such determinations was fresh and *could be presented readily*. In that respect, we looked to the CIS to capture the necessary information, although we acknowledged the shortcomings of that document for the purpose. *Id.* at 26-27. Our intention was to fashion an approach that would establish the marital standard at a time when it appeared most efficient to do so, namely at the time of the entry of a judgment of divorce. (emphasis supplied) *Id.* at 142.

After declining to "discard the *Crews* requirements," the court stated that it had now come "to the reluctant conclusion that...there are valid reasons to revisit the issue and allow flexibility to trial courts when entertaining settled divorce actions." *Id.* at 143. Recognizing that the courts favor "the use of consensual agreements to resolve marital controversies," *Konzelman v. Konselman*, 158 N.J. 185, 193 (1999), the Court revised its *Crews* standard.

> We now hold *that in uncontested divorce actions, trial courts must have* the *discretion to approve a consensual agreement that includes* a *provision* for support *without rendering marital lifestyle findings* at the time of entry of judgment. Our holding in *Crews* should no longer be read to require findings on marital lifestyle in every uncontested divorce. A trial court may forego the findings *when the parties freely decide to avoid the issue* as part of their mutually agreed-

> upon settlement, having been advised of the potential problems that might ensue as a result of their decision. Even if the court does decide not to make a finding of marital standard, *however, it nonetheless should take steps to capture and preserve the information* that is available (emphasis supplied) *Id.* at 144.

Noting the consideration by the Family Division Practice Committee of the "approach to address *Crews* marital lifestyle issues in the context of settling a divorce action," *Id.* at 139, the Court then referred the matter back to the Family Practice Committee "for its consideration and recommendation [of] the question of how to best capture marital lifestyle information efficiently and economically." *Id.* at 144.

Comment: This "final" determination of the Court as to the proper standard for trial courts in approving and granting divorces involving support issues was limited to uncontested agreements and remains yet to be redefined to establish practical procedures.

Case Law—Alimony

Ability to maintain marital lifestyle must be weighed to warrant modification of alimony.

Glass v. Glass, 366 N.J. Super. 357 (App. Div. 2004) [Judge Carchman]

A supported spouse's increased income and ability to maintain the marital standard of living must be weighed in conjunction with other relevant factors to warrant a modification of permanent alimony under this appellate opinion. In reversing a trial court decision to end alimony the court listed relevant factors including the adequacy of the agreement, the understanding of the parties, their reasonable expectations and the manner in which the parties acted and relied on the agreement.

The parties married in 1974, and two children were born. During the marriage, the husband worked as an attorney, and later as a sports agent and high school basketball coach. The wife undertook the childrearing responsibilities and did not work outside of the home during the marriage. Their 1986 property settlement agreement provided that the wife was to receive monthly child support and spousal support for an indefinite period. In 1999, the husband filed a motion to terminate his support obligation, asserting that the wife's subsequent employment constituted a change in circumstances, as she now had the means to maintain the marital lifestyle. The trial court granted the husband's motion to terminate support on the basis that the wife could not demonstrate a need for further support. After a limited remand "for a specific finding of the standard of living established during the parties' marriage," the trial court found that the parties lived a frugal lifestyle during the marriage, and the wife was able to fund such a lifestyle with her employment income, without the need for further support from the husband.

On appeal, the Appellate Division reversed, and again remanded the trial court's decision to terminate the husband's support. Judge Carchman noted:

> The *'numbers' inquiry and analysis was too narrow* and limited. Here, *related principles become relevant.* Both *Lepis* and *Crews* inform us that the marital standard of living is the 'touchstone' of a change of circumstances application, but other considerations are similarly compelling." 366 N.J. Super. at 372 (emphasis supplied)

Among the "other considerations" the court stressed that such a determination must be governed by principles of equity, and, "what, in light of all the facts presented to it, is equitable and fair…" *Id. (citations omitted).* Other provisions included waiving the wife's interest in the husband's business, the circumstances of the parties at the time of their entry into the agreement. At the time, the wife lived a "frugal lifestyle," was not employed, was caring for two children, and was clearly unable to maintain the household on the limited support provided by the husband. The court found that the parties contemplated that that the wife would return to work, and her so doing could therefore not constitute a change of circumstances.

Comment: The Appellate Division's decision clarifies that a supported spouse's increase in income does not, in and of itself, constitute a substantial change in circumstances warranting a reduction or termination of support, even when such an increase enables the supported spouse to maintain the standard of living enjoyed during the marriage, without the need for support.

Alimony should be based on payor's actual income and ability to pay.

Steneken v. Steneken, 367 N.J. Super. 427 (App. Div. 2002) [Judge Parrillo]

An alimony award should be based upon the payor's actual income and ability to pay, not the reasonable compensation established in the business valuation under this appellate opinion. In affirming a trial court's award, the court held that this method does not constitute impermissible "double counting" or "double dipping."

The parties married in 1971, had three children, and filed the divorce complaint in 1997. The largest marital asset was the husband's interest in a closely held company in which he was the sole shareholder and operator. The wife was employed as a science teacher, earning $42,465. The court ordered payment of $4,000 per month in alimony, and an award of 35 percent of the business value to the wife, based upon the valuation performed by the husband's expert that limited and understated his actual income.

After a limited remand, the judge increased alimony to $6,500 per

month, based upon additional evidence of the husband's income and ability to pay, the parties' marital lifestyle and the wife's needs and annual shortfall, taking into consideration her net income after taxes. The husband moved for reconsideration, arguing that use of his actual income in the alimony calculus improperly resulted in double dipping, because the wife had received a distributive share of the business value, including an increased value derived from the add-back of his "excess earnings." N.J.S.A. 2A:34-23(b)(10) provides, among the factors to be considered in an award of alimony, "the equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair."The husband contended that excess earnings should be removed from the alimony calculus considering the trial court's acceptance of the income capitalization method that formed the basis of the expert's valuation of his business.

Judge Parrillo, speaking for the appellate panel, rejected the argument that it constitutes impermissible double counting of a marital asset, once in property division and again in the alimony award. *Steneken*, 367 N.J. Super. at 436. He noted that New Jersey removes such assets from consideration in calculating alimony *only* as to pensions or assets purchased with divided pension benefits. N.J.S.A. 2A:34-23(b). Excess earnings used to value the goodwill component of a closely held corporation are only theoretical, not a separate asset subject to equitable distribution. Similarly, the capitalized value of the husband's future excess earnings represents only a portion of the value of a business. It is one of several factors, along with factors such as real estate, equipment, inventory and accounts receivable, that comprise corporate value. The double dip argument fails because the trial court does not really divide the future income, but rather the value of the business at a fixed point in time. Awarding alimony based on the husband's actual income is consistent with *Crews v. Crews*, 164 N.J. 11, 35 (2000), because it was that income, plus perquisites, which funded the marital lifestyle. To create an absolute ban on dual consideration of a marital asset as a source for both equitable distribution and for alimony would "impermissibly encroach on the judicial function to consider *all* relevant circumstances." *Id.* at 442. Judge Parrillo urged careful consideration of the interplay between property division and the statutory factors of an alimony award.

Comment: This matter is on appeal to the New Jersey Supreme Court.

Recovery from insurance proceeds limited to amount of outstanding alimony.

Konczyk v. Konczyk, 367 N.J. Super. 512 (App. Div. 2004) [Judge Cuff]

A former wife is limited to recovery from a husband's life insurance policy of only the amount necessary to cover her former husband's outstanding term alimony obligation under this appellate opinion.

The parties divorced in 1996. Their judgment of divorce provided for limited-term alimony for the wife in accordance with a set schedule that totaled $15,000. A separate provision of the judgment of divorce required the husband to maintain life insurance, as "alimony protection," initially in the amount of $20,000, but he was permitted to decrease the amount after the first five years, and ultimately terminate her benefits with the end of his alimony obligation. When he died, only $2,000 remained due on his alimony obligation. The wife filed a motion seeking the full $15,000 of life insurance proceeds. The trial court found that, "the life insurance was clearly and unequivocally designed to secure [husband's] alimony obligation," *Id.* at 514, and awarded the wife only $2,000 as the amount remaining on the husband's alimony obligation.

Judge Cuff, speaking for the appellate panel, affirmed Judge Sutor's trial court's analysis, noting that alimony and life insurance obligations were co-terminus, and that the life insurance was designed as a device to secure the alimony obligation.

Valuation of pension cannot be calculated until time of retirement.

Panetta v. Panetta, 370 N.J. Super. 486 (App. Div. 2004) [Judge Parker]

The valuation date of a federal employee's pension, and any other deferred distribution plan, cannot be calculated until the time of retirement, as reemphasized under this appellate opinion. In affirming the trial court's basic awards in this complex litigation that involved both public and private pensions and Social Security offsets, the court noted:

> The agreement incorporated in the judgment respecting equitable distribution of the parties' pensions demonstrates a lack of appreciation by both parties and their then-counsel of the difference between public and private pensions and the nuances of deferred distribution. The Pension Appraisers Report dated April 5, 1994, was of little help to the parties and their attorneys because it, too, failed to specify the differences in the pensions and failed to recognize that plaintiff's federal pension was a deferred distribution plan, the value of which could not be determined until he retired. 370 N.J. Super. at 494 (emphasis supplied)

The parties were married for 36 years. The wife worked for AT&T and the husband worked first in the private sector and then for the federal government. Their divorce agreement and subsequent consent orders provided for equitable distribution of their pensions. Pursuant to their judgment of divorce, a court order approved for process-

ing (COAP), rather than a QDRO, needed to be entered, incorporating the formula articulated in *Marx v. Marx*, 265 N.J. Super. 418 (Ch. Div. 1993). When the husband retired from his federal employment in May 2000, contrary to their written agreement, he designated his new wife as the survivor beneficiary of his federal pension, irrevocably preventing his first wife from being able to obtain the survivor benefits. In September 2002, a plenary hearing was held to determine the appropriate form of the COAP, including the formula for determining the wife's share of the husband's federal pension. The trial court adopted a form of COAP, including changing the valuation date from the date of the complaint for divorce to the date of the husband's retirement, which utilizes the *Marx, supra,* formula, and denied to offset any portion of the pension with imputed Social Security benefits, but added a COLA for the wife's share. The husband appealed, claiming that the *Marx* formula unfairly awarded the wife an increased share of the pension benefits, and seeking the Social Security credit based upon the benefits he lost by being a federal employee, and a reversal of the COLA award.

Judge Parker, who authored the opinion in *Marx* and wrote for the appellate panel, noted that the formula[1] established in *Marx* is appropriately applied to the husband's deferred distribution pension at the time the benefits are actually being paid out, as it is based upon multiple factors at the time of retirement. She observed the coverture fraction adjusts the actual pension benefit to the marital share, assuring that only the employee spouse receives the benefits associated with post-divorce employment.

Since Social Security benefits, unlike other retirement benefits including federal pensions, are not distributable (42 U.S.C.A. §407(a)), based upon the equitable goal of balancing the retirement benefits accrued by each of the parties, a federal employee may be entitled to an offset against a private employee's share of the federal pension for the Social Security benefit accumulated by the private employee spouse during the marriage. The husband incorrectly sought a credit in the amount of the Social Security benefits that he would have accumulated if he had been working in the private sector, rather than the Social Security benefit of the wife. Since under *Hayden v. Hayden*, 284 N.J. Super. 418 (App. Div. 1995), a trial court can refuse to reduce the valuation of a federal pension by the amount of the Social Security benefit the husband would have received, the trial court refused such a credit on equitable grounds, concluding that the husband's assignment of survivor benefits to his new spouse and his receipt of his own additional Social Security benefits during his private employment made it fair and equitable that he not receive a credit for the imputed Social Security benefit.

The appellate court did remand for revision of the COAP, consistent with the ruling that post-retirement COLAs are subject to equitable distribution to the extent that they are attributable to the portion of the pension that was earned during the marriage, citing *Risoldi*, 320 N.J. Super. 524, 536 (App. Div.), *certif. denied*, 161 N.J. 335 (1999).

Comment: Judge Parker's opinion underscores the importance of obtaining correct pension valuation information, including methodology, at the trial level, even in settled cases.

PSA hold harmless clause cannot be expanded to incorporate remedial measures.

Eaton v. Grau, 368 N.J. Super. 215 (App. Div. 2004) [Judge Parrillo]

The hold harmless clause in a property settlement agreement cannot be expanded to incorporate remedial measures when a divorced wife remains liable on the mortgage in foreclosure under this appellate opinion. In affirming a trial court denial of her post-judgment motion to compel her ex-husband to remove her name from the mortgage, that court held that the clause only protects her against liabilities to third parties and actual losses sustained by a party.

After their uncontested divorce judgment incorporated a property settlement agreement (PSA), which provided for the transfer of the wife's interest in the marital home to her husband, the wife signed a quitclaim deed. At the time of the divorce, the marital residence was in foreclosure, leading the parties to include a specific requirement that the husband would pay the mortgage arrears, bring the loan obligation current and "indemnify and hold the wife harmless from any and all further obligations from ownership of the property…" The husband then experienced financial difficulties, and both parties were served with a complaint for foreclosure. The wife was then denied a new mortgage on her home due to her bad credit rating. She filed a motion seeking to compel her husband to remove her name from the mortgage on the former marital home by either refinancing the debt or selling the property. Upon denial of her motion the wife appealed.

Judge Parrillo, speaking for the appellate panel, held that the wife's requested relief constituted an impermissible expansion of the equitable distribution portions of the PSA. Although, pursuant to Rule 4:50-1, exceptional circumstances could warrant modification or reformation of the property settlement agreement, the case lacked any evidence of mistake, newly discovered evidence, fraud, overreaching, unconscionability or other enumerated grounds for modification of the equitable distribution provision of the PSA. The hold harmless provision does not further require the husband to take "preventative or preemptive steps to avoid actual

loss to plaintiff." *Id.* at 224. To do so would insert new remedies into the PSA and make "a better contract for plaintiff than the parties themselves have seen fit to enter into," *citing East Brunswick Sewerage Authority v. East Mill Associates, Inc.*, 365 N.J. Super. 120, 125 (App. Div. 2004, *citing Washington Construction Co. v. Spinella*, 8 N.J. 212, 217 (1951). The Court rejected the plaintiff's secondary argument that the effects of the defendant's financial misfortune rose to the level of indirect control over the plaintiff in violation of the parties' agreement to live "separate and apart…free from interference, authority and control, direct or indirect, by the other…" noting that the plaintiff knew of the defendant's economic difficulties at the time of the divorce.

Comment: This opinion emphasizes the need for property settlement agreements and court orders to provide specifically for the necessary actions and steps to be taken to relieve a party from all contractual obligation.

Case Law—Child Support

Age of child adjustment is not applicable in modification of child support.

Accardi v. Accardi, 369 N.J. Super. 75 (App. Div. 2004) [Judge Parker]

The determination of issues involving upward adjustment of support provided for older children in the child support guidelines is controlled by the date of the first *pendente lite* order, and disputed "extraordinary expenses" require substantiated proof. Counsel fee awards must be based on affidavits of services and the factors set out in Rule 4:42 and Rule 5:3-5(c), as reemphasized under this appellate opinion.

The parties married in 1987 and had three children. A *pendente lite* support order was entered in September 1994, requiring unallocated support from August 1, 1994, when the eldest child was younger than six years old. In February 1996, a judgment of divorce followed with the husband ordered to pay $6,000 per month in child support and $2,500 per month in rehabilitative alimony for four years, from December 1995. In 1998, the husband moved to decrease child support based upon a reduction in his 1997 income. After a plenary hearing, the trial court reduced child support to $2,500 per month "subject to future increases if so warranted by defendant's future income." *Id.* at 78. In November 2000, the wife moved to increase child support based upon the husband's 1999 income. A litany of factual issues were decided without a plenary hearing, and one judge conducted all six marathon oral arguments resulting in three orders. Moreover, after the notice of appeal was filed on December 5, 2002, the judge continued to entertain arguments and enter orders on the issues pending appeal. 369 N.J. Super. at 50.

On appeal the husband's objections to the trial judge's various determinations included her award of the 14.6 percent upward adjustment for older children, which was inappropriately applied as he had been paying unallocated support since the oldest child was under six, and the awards of disputed extraordinary expenses without substantiation and counsel fees without the affidavits of service as required under Rule 4:42-3.

Among the reversed rulings, Judge Parker, speaking for the appellate panel, observed that Appendix IX-A, Paragraph 17 of the child support guidelines allows initial awards for children *over the age of 12* to be increased by 14.6 percent. Judge Parker noted the absence of any case law on the issue of fixing the date to determine the children's age, and the lack of any distinction between allocated and unallocated support. To promote uniformity and recognize that the wife had received the advantage of support that was "slightly overstated" in earlier years, the court held that the earliest date from which time child support was paid controls whether the enhancement must be applied.

In also reversing the trial court's award of extraordinary expenses without submitted proof or allocation, the court observed the need for a plenary hearing as originally ordered but never held. Judge Parker reviewed the principles set out in *Isaacson v. Isaacson*, 348 N.J. Super. The court noted:

> [t]he moving party bears the burden of proof to demonstrate that the expenses she is claiming are both legitimate and reasonable. *See Curley v. Curley*, 37 N.J. Super. 351, 355 (App. Div. 1995). A mere listing of the purposed expenses, without more, is insufficient. *Accardi*, 369 N.J. Super. at 52.

In reversing the counsel fee award, the court reiterated the requirements of Rule 4:42 and Rule 5:3-5(c), and the factors to be considered in fee applications. It appeared that fees were improperly awarded based solely on the disparity of the parties' incomes as reflected on their income tax returns.

Pursuant to R.2:10-5, the court exercised its original jurisdiction to remand with instructions that the trial court must fashion a more appropriate means of adjusting support than having the parties exchange tax returns annually.

Comment: This detailed opinion emphasizes the responsibility of family courts to expeditiously determine the issues, follow the established procedures, rules and case precedents and provide plenary hearings of contested facts.

SSI benefits cannot be considered when calculating child support.

Burns v. Edwards, 367 N.J. Super. 29 (App. Div. 2004) [Judge Fall]

Social Security Supplement Income (SSI) benefits may *not* be included in the child support calculus as income when such benefits

are the sole source of support of that parent, and income cannot otherwise be imputed, under this appellate opinion. In reversing a trial court award, the court reviewed both the federal SSI benefit structure and the New Jersey child support guidelines to conclude that a child support obligation could not be assessed against a parent in this scenario.

The father, age 41, was totally disabled and diagnosed with schizophrenia. He received SSI benefits of $576.25 per month, which was his sole source of income. The record supported the conclusion that he lacked any other ability to earn income, and that he was surviving solely on SSI benefits at the legislatively established minimum level of subsistence. *Id.* at 41. When the welfare board had filed a child support action against him and an order was entered requiring the father to pay $15 per week as child support, plus $10 per week toward an undisclosed amount of arrears, the father filed a motion (through the Community Health Law Project) seeking to terminate his obligation and to reduce the periodic payments on the arrears.

Judge Fall instructed that SSI is a "means-tested" government benefit to provide disabled indigents with minimally adequate incomes, which are payable only when his or her income and resources are insufficient to provide for basic needs. SSI benefits are exempt from attachment, garnishment, levy, execution for child support or alimony or any other legal process. 42 U.S.C.A. § 407(a); 20 C.F.R. §581.104; 42 U.S.C.A. §659(a). The court noted that it is "implicit in the SSI program…that these payments are for the benefit of the recipient, rather than the recipient *and* his or her dependents." *Burns* at 41. To base child support payments solely upon a parent's receipt of SSI benefits would be contrary to the stated intent of the SSI program. *Id.* at 45. New Jersey child support guidelines specifically exempt SSI benefits and other means-tested income from being listed either as gross income on Line 1 of a child support worksheet, or as non-taxable income on Line 4 of the worksheet or listed as government benefits for the child on either Line 12 of the sole parenting worksheet or on Line 11 of the shared parenting worksheet unless they are paid to, or on behalf of the child. The guidelines recognize that "extremely low parental income situations" can make the child support guidelines' awards inapplicable. Judge Fall explains the distinctions between SSI and social security disability (SSD) and other "non means" benefits that are properly included as income available for child support.

Comment: This instructive opinion clearly exempts the use of SSI as a "means" benefit in awarding child support.

Supplementing child support award necessary when income exceeds guidelines threshold.

Caplan v. Caplan, 364 N.J. Super. 69 (App. Div. 2003) [Judge Fall]

Where the parents' combined net unearned income exceeds the maximum threshold established by the child support guidelines, Rule 5:6A, Appendix IX-F, a four-step process applies:

1. Determine the reasonable needs of the children;
2. Determine the ability of the parties to generate earned income, in addition to unearned income in order to allocate the children's reasonable needs;
3. Determine the respective percentage of each party's net imputed earned and unearned income of their total combined net imputed earned and unearned income and apply those percentages to determine each party's share of the maximum basic child support guideline award;
4. Subtract the maximum basic child support amount from the court-determined reasonable needs of the children. Analyze the factors outlined in N.J.S.A. 2A:34-23(a) and determine each party's responsibility for satisfying the remaining needs.

The parties married in 1988 and had two children, born in 1989 and 1991. The plaintiff was a stay-at-home mother; the husband was employed from July 1987 until June 2001 as a mortgage trader, with income ranging from $1,796,326 in 1996 to $4,615,273 in 2000. One of the parties' children had special needs, including educational needs. Divorce proceedings commenced in 1998, and partially settled on January 30, 2001. The partial judgment left open the amount of the husband's obligation for child support and other expenses of the children, and the issue of counsel fees on the application for child support. In June 2001, the husband's employment was terminated due to a reduction in force. The husband remained voluntarily unemployed after his termination through the time of trial on the child support issues.

If parents' combined net income exceeds the maximum threshold of the child support guidelines, the court must apply the guidelines up to the threshold amount and then supplement the guidelines-based award with a discretionary amount based upon the remaining family income and the factors in N.J.S.A. 2A:34-23(a). Alternatively, the court may elect to either disregard the guidelines or adjust the guidelines-based award to accommodate the needs of the children or the parents' circumstances. Appendix IX-A to Rule 5:6A. The following four-step process must be followed to establish child support when the parents' combined net annual income exceeds the maximum threshold of the child support guidelines:

1. **Establish the reasonable needs of the children pursuant to *Isaacson v. Isaac-***

***son,* 348 N.J. Super. 560 (App. Div.), *certif. denied,* 174 N.J. 364 (2002).** *Issacson* defines "high earners" as "those…whose wage level substantially exceeds the child support guidelines, and who, for all intents and purposes, can, without dispute, afford any rationally based award" of child support. *Id.* at 580. To determine the "reasonable need" of the children, the court must consider non-economic dependent factors, including the age and health of the children, as well as the other assets or income of the children, including any debts. *Id*. Also, "[A] balance must be struck between reasonable needs, which reflect lifestyle opportunities, while at the same time precluding an inappropriate windfall to the child or in some cases infringing on the legitimate right of either parent to determine an appropriate lifestyle of a child." *Id.* at 582. Proof of the children's expenses must be substantial and credible, which, in this case, were not present. Some portion of the expenses incurred by the custodial parent must also represent the needs of the custodian. Judge Fall instructs that "reasonable allocation of such expenses based upon adequate, credible evidence is the goal." Expenses more easily identifiable as attributable to the children (*e.g.* camp, lessons, sports, personal hygiene costs) need not be apportioned.

2. **Determine the ability of the parties to generate earned, in addition to unearned income.** Even where the combined unearned income of the parents' exceeds the guidelines, earned income may be imputed to either party by considering: (1) what the employment status and capacity of that parent would have been if the family had remained intact or would have formed; (2) the reason and intent for the voluntary unemployment or underemployment; (3) the availability of other assets that may be used to pay support; and (4) the ages of the children in the parent's household and child-care alternatives. The trial court may not simply utilize the unearned income received by a party from assets, if he or she also has the ability to earn income. If the court, in determining a child support award, finds that either party is, without just cause, voluntarily underemployed or unemployed, it shall impute income to that parent according to potential employment and earning capacity.
3. **Apply the parties' proportionate shares of imputed earned and unearned income to the maximum basic child support guideline award for the number of children involved.** In this case, the court specifically instructed the trial court to consider the mother's enhanced care responsibilities for the parties' special needs child, in considering her ability to generate earned income.
4. **Subtract the maximum basic child support amount from the court-determined reasonable needs of the children.** The trial court must analyze the factors of N.J.S.A. 2A:34-23(a) (including but not limited to the net income of each parent) to determine each parent's responsibility for meeting the remainder of the children's reasonable needs. The court may not simply extrapolate or use a percentage-of-income formula to determine child support when the parents' income exceeds the maximum levels used in the child support guidelines.

Comment: This case is on appeal to the New Jersey Supreme Court.

Stock options not includable for purposes of child support calculation.

Heller-Loren v. Apuzzio, 371 N.J. Super. 518 (App. Div. 2004) [Judge Stern].

Stock options that were acquired and exercised post-divorce are not includable in the supporting parent's gross income for the purposes of child support by reason of the exclusions in this property settlement agreement (PSA) under this appellate opinion. In affirming the trial court's decision, the appellate court emphasized "that our decision is based on the particular PSA in question."

The parties married in 1985 and divorced in 1997, with two children. Their counseled PSA obligated the defendant (father) to pay $2,500 in child support, plus 11.6 percent of his gross income over $180,000 per year. Certain additional specified expenses were to be shared by the parties based upon a "proportionate share" of their "gross earned income," which the PSA defined as "all gross wages, commissions, salaries, bonuses and income from bonuses." The phrase "stock options" was not included in the definition, and the PSA expressly provided that property acquired in the future would remain free from claim by the other party.

In post-judgment proceedings, the mother argued that the stock options the father acquired and exercised post-judgment generated income to be included in the calculation of his gross income for the purposes of child support. The trial court excluded the funds generated by the father's post-judgment exercise of options from the child support calculus, calling the absence of the phrase "stock options" from the parties' definition of "income" an "intentional omission," indicating that the parties did not intend that these stock options be included with gross income.

On appeal Judge Stern, speaking for the appellate panel, noted:

> We first address whether the post-divorce grant of stock options, or their exercise or sale, constitute "gross income" under New Jersey law. We then consider the impact of the parties' PSA with respect to its inclusion in defendant's child support obligation. *We conclude that, absent the PSA, sale of the stock would be part of "gross income" in these circumstances, but agree with Judge Hansbury that the parties' PSA precludes its inclusion as part of his "gross income" for child support purposes. Id.* at 527 (emphasis supplied)

The appellate opinion recited the precedential history of determining whether stock options are subject to equitable distribution pursuant to *Pascale v. Pascale*, 140 N.J. 583 (1995), and its progeny and reviewed the definitions of "income" pursuant to N.J.S.A. 2A: 34-23a(3) and the child support guidelines. The court held that this PSA did not include post-divorce stock options within the definition of gross income for the purposes of calculating child support. Although post-divorce options were not specifically mentioned in the PSA, pre-divorce options were expressly excluded from equitable distribution, and the PSA provided that property acquired in the future would remain free from claim by the other party. The child support guidelines expressly exclude stocks and bonds from income unless they were purchased with an intent "to avoid the payment of child support," Pressler, Current N.J. Court Rules, App. IX-B at 2434-35 (2004), and "gross income" includes only income that is "recurring or will increase the income available to the recipient over an extended period of time." *Id.* at 2435. The record of this case did not indicate recurring stock options or an income-producing resource for the defendant that he could utilize without selling the stock at a profit.

Comment: The court specifically limits its ruling to the facts of the case, which included the exclusionary provisions of their PSA.

Case Law—Paternity

Paternity declaration may be pursued against defendant's fully distributed estate.

Fazilat v. Feldstein, 180 N.J. 74 (2004). [Justice Long]

An action for a declaration of paternity commenced within five years after the claimant reaches the age of majority may proceed against a fully distributed estate of the putative father under this Supreme Court opinion. Such action may not include child support against a distributed estate unless it is commenced within the limitations period set forth in the Probate Code.

Feldstein, deceased, commenced his extra-marital affair with Fazilat in 1992. In 1995, Fazilat named Feldstein as the father on her child's birth certificate. Feldstein told Fazilat that he would not differentiate between Elisabeth and his other children, and expressed his desire to support her but made no formal arrangements for child support before his death. Upon probate of his will on December 13, 1996, Feldstein's entire estate passed to his wife without provision for any of his children. Fazilat obtained Social Security benefits for Elisabeth, but waited until 1999 to file a complaint in New Jersey against Feldstein and his estate, seeking a declaration of paternity and child support from the estate. The trial court's dismissal of the paternity action was affirmed by the Appellate Division.

In reversing the lower courts and remanding for further hearing, Justice Long, speaking for the Supreme Court, held that an action for paternity could proceed against Feldstein's estate, under the New Jersey Parentage Act, in spite of the more constrictive time limits imposed by the Probate Code. She noted that the trial court neglected to consider the child's best interests, including the intangible psychological and emotional benefits of knowing her parentage. Since Fazilat failed to commence the action within the time within which an heirship claim must be filed under the Probate Code N.J.S.A. 9:17-45(f), she could not pursue a claim for child support against Feldstein's estate. Although ample authority exists to hold an estate liability for a decedent's support obligations, claims against the estate must be presented within six months after the granting of letters testamentary or of administration. The Court noted the public policy rationale of limiting the time for claims and the practical need to avoid unfair intrusions upon the rights of others (*i.e.* the heirs of the estates whose assets could be effected by third-party claims) and the state's interest in the orderly administration of estates.

Comment: Justice Long's opinion emphasizes the statutory distinctions between the Parentage Act and the Probate Code, and that each applies to its own statutory scheme.

Case Law—Custody

Habitual residence determination under the Hague Convention.

In Re Application of Sasson, 178 N.J.L.J. 268 (U.S. District Court) [Judge Bassler]

A six-year-old child of Israeli parents was found to be a "habitual resident" of the United States because her parents formed an intent to settle in the United States even if for only a limited duration, according to this United States District Court opinion.

The parents, Israeli citizens, and their daughter, Maya, rented an apartment in New Jersey in October 2002. The father returned to Israel in April 2003, without his wife and Maya, and claimed that he would be returning to them in the United States in a few weeks. The father then filed a request with the

U.S. Central Authority pursuant to the Hague Convention on the Civil Aspects of International Child Abduction seeking Maya's return.

An evidentiary hearing was held focusing on the *indicia* of habitual residence, and whether there was in fact a "shared intent" to settle in the United States. After meticulous findings as to *indicia* of a shared intent by the parties to remain, including a review of ties in Israel and in the United States, the court concluded as a matter of law that shared intent did exist in October 2002, and could not later be unilaterally altered by either parent. Judge Bassler denied the petition, finding that the habitual residence of Maya shifted from Israel to the United States when her parents brought her here in October 2002, and that she was a habitual resident in the United States immediately prior to her retention here by her mother in April 2003. Judge Bassler found that the mother's retention of the child in New Jersey was not wrongful under the Hague Convention, and the petitioner's request for Maya's return was denied.

Third-party non-relative has standing in obtaining custody.

P.B. v. T.H., 370 N.J. Super. 586 (App. Div. 2004)[Judge Axelrad]

A third-party, non-relative seeking standing to obtain custody must first prove "exceptional circumstances" as enunciated in *Watkins v. Nelson,* 163 N.J. 235 (2000) and *V.C. v. M.J.B.,* 163 N.J. 2000. In upholding the trial court's award of custody, the appellate panel reaffirmed that only after such an initial finding may the trial court use a "best interest" analysis to determine custody between a third-party, non-relative and a legal parent.

In 1996, a New York Family Court granted custody of infant, V.H. to T.H., the maternal aunt, to reside with her in New Jersey. The aunt became overwhelmed, and asked P.B., a friend/neighbor, to help care for the child. Over a period of time, the neighbor's involvement with the child's case increased substantially with the aunt's consent and assistance, including the child moving into the neighbor's new home. The aunt then approached the neighbor about the possibility of returning the child to the custody of her natural mother in New York and, after she objected, removed the child from the neighbor's care. The neighbor filed a complaint and order to show cause for the immediate return and custody of the child. After an extensive plenary hearing, the trial court had originally awarded custody to the neighbor based solely on a best interest analysis. In the earlier reversal and remand that appellate panel noted:

> [I]t *is the relationship of the child to the person seeking custody that determines the standard to be used in deciding the custody dispute.*" *Watkins v. Nelson*, 163 N.J. 235, 253 (2000). "*The standard* that controls a custody dispute between a third party and a parent *involves a two-step analysis*. The *first* step requires application of the parental termination standard or a *finding* of 'exceptional circumstances.'" *Ibid.* "If either the statutory parental termination standard or the '*exceptional circumstances'* prong is satisfied, the *second* step requires the court to *decide* whether awarding custody to the third party would promote the *best interests* of the child." *Id.* at 254. (emphasis supplied)

On remand, the trial court applied the standards set out in *V.C. v. M.J.B., supra.* In *V.C.* the court noted:

> (1) the biological or legal parent must have consented to and fostered the formation and establishment of a parent-like relationship between the third party and the child; 2) the third party and the child live together in the same household; 3) the third party has assumed the obligations of parenthood by taking responsibility for care, development and education without any expectation of financial compensation; and 4) such a parental role has extended for a sufficient period of time to establish a bonded and dependent relationship between the third party and the child. 63 N.J. at 223. (emphasis supplied)

The trial court then re-determined that the neighbor had standing and again awarded her custody of the child. Finding the trial court had now applied the correct legal standards, and based on factual testimony, the appellate court finally affirmed. The court held that the trial court had correctly determined that it was in the child's best interest to remain in the custody of the neighbor.

Judge Axelrad provided a comprehensive review of the principles established in both *Watkins v. Nelson, supra*. and *V.C. v. M.J.B., supra.*

Comment: This is a instructive opinion that sets out clearly the standards that family courts must follow in the determination of all third-party custody cases.

Case Law—Torts

Court-appointed psychologist entitled to absolute immunity.

P.T. v. Richard Hall Community Mental Health Care Center, 364 N.J. Super. 460 (App. Div. 2003) *cert. den.* 180 N.J. 150 (2004) [Judge Cuff]

A court-appointed psychologist, who performs an evaluation, and issues a report and recommendations to the family part, is entitled to absolute immunity. A treating psychologist is protected by the litigation privilege and the statutory DYFS reporting immunity, and owes a duty of care only to his or her patient, not the parents or other family members.

In an underlying divorce action, one of the plaintiffs to this action, a parent to a minor child, was accused of sexually abusing that child; the other plaintiffs were the grandparents of the child, who sought visita-

tion with the child. The defendants to this action were the court-appointed psychologist, Madelyn Milchman, Ph.D.; Amy Kavanaugh, the treating psychologist; and her employer, Richard Hall, a county agency. Both psychologists rendered opinions in the custody case that were adverse to the plaintiffs. The plaintiffs' claims against Milchman sounded in medical malpractice. The plaintiffs sued the other defendants—Amy Kavanaugh and her employer—for professional negligence by misdiagnosis of the child as having been the victim of sexual abuse at the hands of her father, and for alleged violations of their constitutional rights to raise and enjoy a child/grandchild.

Based upon the undisputed facts that she was appointed by the court to perform a custody evaluation and that she did so, Milchman filed a motion for summary judgment that was granted by the trial court. *PT. v. Richard Hall Community Mental Health Center*, 364 N.J. Super. 536 (Law Div. 2000). The trial court held that the court-appointed psychologist charged with performing an evaluation and issuing a report and recommendations to the family part is entitled to absolute immunity. Relying upon *Delbridge v. Office of Public Defender*, 238 N.J. Super. 288 (Law Div. 1989), *aff'd o.b. sub. nom.*, and likening the role of the court-appointed psychologist to that of the law guardian in *Delbridge*, the trial court found that Milchman's quasi-judicial role was to assist the family part with her evaluation and to look to the best interests of the child. Her performance of a role, which was integral to the decision making function of the court, entitles her to the immunity, which is afforded to the decision-making function itself.

Immunity further promotes the public policy of protecting the fundamentally important role served by the court-appointed psychologist, who should be free to perform her evaluation "decisively and with complete candor." The majority of decisions in other jurisdictions support the same conclusion under identical facts, and support a public policy that experts appointed to this role "be free to act independently and vigorously without fear of reprisal at the hands of aggrieved parents." *P.T.*, 364 N.J. Super. at 559, *citing Delbridge*, *supra*, at 302.

On a subsequent motion by Dr. Kavanaugh and her employer, the trial court held that a psychologist who evaluates and treats a minor child suspected to be the victim of sexual abuse, owes no duty of care to the grandparents of the non-custodial parent or to the non-custodial parent, who is accused of sexual abuse. Dr. Kavanaugh owed a duty of care only to her patient (the child), not to the plaintiffs, who lacked any relationship with the therapist. Absent a duty of care, no claim for negligence could proceed. *P.T.*, 364 N.J. Super. 561 (Law. Div. 2002).

The plaintiffs alleged as damages that Dr. Kavanaugh and the other defendants caused them to lose the enjoyment of a relationship with the minor child. The trial court found no proximate cause between the undisputed acts by the defendants and the alleged damages. The record reflected that the first two trial court judges who heard from Kavanaugh rejected her recommendation that the child be protected from the plaintiffs. The evidence showed that the mother held staunch beliefs that the child had been abused before Kavanaugh began treatment. The guardian *ad litem*'s recommendation and report was based upon her personal observations of the child, and her conversations with a different court-appointed psychologist and with the mother. Finally, there was no evidence that the child's belief in the truth of her own allegations of abuse by her father did not predate her contact with Kavanaugh. Therefore, the trial court granted summary judgment to the defendants on the grounds that the evidence was so one-sided that the plaintiffs could not prevail as a matter of law. *Id.*, *citing Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 536 (1995).

The trial court also rejected the plaintiff's claim that the defendants had violated their constitutional right to a relationship with the child, noting that the welfare and best interest of the child supersedes. *P.T.*, 364 N.J. Super. 460, *citing State v. P.Z.*, 152 N.J. 86 at 99 (1997). The plaintiffs had a full hearing in the family part, where constitutional rights might be asserted. Such claims could not proceed, however, against these defendants.

Finally, the treating psychologist was protected by the litigation privilege and the statutory DYFS reporting immunity. The privilege protects communications in the context of proceedings sanctioned by the court, authorized by the court and ancillary to the pending dispute for the purpose of ensuring complete candor in recommendations made to the court. Her initial and follow-up reports to DYFS were mandated by N.J.S.A. 9:6-8.14, and therefore protected.

Parental immunity for a child's acts.

Buono v. Scalia, 179 N.J. 131 (2004) [Justice Verniero]

The doctrine of parental immunity in tort applies to the exercise of parental authority and decision-making or the provision of customary child care under this Supreme Court opinion. In affirming a trial court dismissal of a personal injury suit against a five-year-old and his father, the Court noted there is no such immunity for injury if the parent has acted willfully, wantonly or recklessly, which depends upon the totality of the circumstances.

During a neighborhood block party, a five-year-old child, riding his bicycle, hit and injured a 16-month-old child. The father of the rider, standing five to eight feet away, witnessed the approach and yelled to the child to, "Watch out." The victim's mother, although nearby,

neither witnessed the accident nor heard the warning. The father of the 16-month-old filed suit against the five-year-old and his parents, claiming negligence by both parents and child. The trial court granted summary judgment for the defendants, concluding the plaintiff had not overcome the rebuttable presumption that a child is incapable of negligence and the doctrine of parental immunity barred the plaintiff's claims against the child's parents because there was no willful or wanton misconduct attributable to either of them. The plaintiff appealed only the parental immunity issue, arguing that immunity did not apply because the injured child was not the child of the defendants. The Appellate Division affirmed, and upheld immunity in favor of the defendant. *Buono v. Scalia*, 358 N.J. Super. 210 (App. Div. 2003).

On certification, a divided Supreme Court affirmed the lower court in a comprehensive opinion reviewing the underlying principles and factual standards. Justice Verniero, speaking for the majority, reviewed the history of the doctrine of parental immunity, as detailed in *Foldi v. Jeffries*, 93 N.J. 533 (1983), noting that a parent who exercises legitimate parental authority, or makes decisions surrounding customary child-care issues, retains limited immunity if his or her child injures another. Although parental immunity does not apply if the parent's conduct is willful or wanton, to fall within this definition the parent's actions must be "conscious…that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, [the parent] consciously or intentionally does some wrong act or omits to discharge some duty which produces the injurious result." *Id*. at 549. The plaintiffs unsuccessfully argued that a different standard of care should be imposed upon the five-year-old's father than the 16-month-old's mother. The Court eliminated this distinction, and stressed that the conduct of each parent "falls within the realm of activities which partake of the everyday exigencies of regular household existence." *Id.* at 550. In refusing to abandon the doctrine of parental immunity, the Court noted:

> There are many places, such as playgrounds, picnic areas, and local parks, where parents watch over their children in seemingly safe environments, but unfortunately where mishaps and accidents do occur. *If we were to force parents to defend against their negligent but otherwise honest errors of judgment in those settings, then we would risk opening the floodgates of intrusive litigation* in precisely the manner that *Foldi* sought to avoid. *Buono* at 142. (emphasis supplied)

In her dissent, Justice Long notes that the doctrine of parental immunity" has come under nearly universal criticism by legal scholars," *Id.* at 148, and should not be extended to bar the claim of an innocent third party.

Case Law—Probate

Surviving spouse should not be granted administration of intestate estate of divorce litigant.

In re Estate of Di Bella, 372 N.J. Super. 350 (Ch. Div. 2004) [Judge Berman]

Due to the inherent conflict of interest between the estate of a divorce litigant and her estranged spouse, the surviving spouse should not be granted administration of the intestate estate, despite N.J.S.A. 3B:10-2, which provides that the surviving spouse should be named administrator under this trial court opinion.

The decedent wife filed a complaint for divorce on October 31, 2003, but died intestate on December 28, 2003. Her son from a prior marriage sought appointment as administrator of his late mother's estate. Her estranged husband contested the appointment, arguing that a surviving spouse must be named as the administrator pursuant to N.J.S.A. 3B:10-2: "If any person dies intestate, administration of the intestate's estate shall be granted to the surviving spouse of the intestate…"

Referring to the historic backdrop for the preference toward appointment of the surviving spouse as the administrator of an intestate's estate, Judge Berman appointed the son, and concluded that when the surviving spouse has an "inharmonious" relationship with the deceased, the trial court should exercise its "inherent power to judge as to the qualification and fitness of an applicant for a administration." *Id.* at 352. *quoting In re Messler's Estate*, 16 N.J. Misc. 434 (N.J. Orp. 193) at 439. The surviving spouse also cannot claim an absolute entitlement to the appointment when he, in his personal capacity, might have adverse claims against the estate, which Judge Berman calls a "toxic conflict of interest." *Id*. at 353.

Case Law—Attorney Disqualification

Law clerk "personally and substantially" involved in handling a matter for a judge may not subsequently act as an attorney for either party.

Comparato v. Schait, 180 N.J. 90 (2004) [Justice Verniero with Justice Albin and LaVecchia dissenting]

A law clerk who is "personally and substantially" involved in handling a matter for the judge may not subsequently act as attorney for either party. Provided that the screening provisions of RPC 1.12 are followed, neither the law firm nor the judge is disqualified from participating in the subsequent litigation, according to this decision by a divided Supreme Court.

Priscilla Miller was a law clerk in Essex County, assigned to work with a family part judge. During her clerkship, the family part judge

handled three post-judgment enforcement motions and issued a warrant for the arrest of the plaintiff former husband. Subsequently, Miller became associated with an Essex County law firm that represented the defendant wife. While working with that law firm, on behalf of the defendant wife, Miller wrote an appellate brief and attended a deposition. After the deposition, the plaintiff husband filed a motion for the judge to disqualify himself because his former law clerk worked for the firm that represented his former wife, and moved to have the law firm disqualified because the former law clerk was actually involved in handling the case.The trial judge denied both motions, and the Appellate Division affirmed.

Justice Verniero, speaking for the Supreme Court majority, affirmed the lower court decisions to allow the judge to continue to hear the matter and to allow the law firm to continue to represent the defendant wife, with the understanding that Miller would be screened from future involvement in the case. Applying RPC 1.12(a), the Court held that given the facts of this case Miller did not participate "personally and substantially" as a law clerk in handling the matter. The court accepted her representation that she reviewed applications that were made to the court, attended oral arguments and prepared orders for the judge. She denied that she received any confidential information regarding the case. Justice Verniero wrote:

> Conduct rising to the level of 'personal and substantial' participation would involve a substantive role, such as the law clerk recommending a disposition to the judge or otherwise contributing directly to the judge's analysis of the issues before the court. *Id.* at 99.

Because Miller had not done this, the Court found that disqualification of the law firm from future handling of the matters on behalf of the defendant wife was unwarranted, unnecessary, and would be a burden that "would fall disproportionately and unfairly on the defendant." *Id*. at 103. The Court noted that directing Miller to "screen herself is intended not as a remedy to cure an ethical breach but as a prophylactic measure to avoid any future question that might emerge in this contentious case if Miller continued to participate in defendant's representation." *Id*. at 100.

The Court also held that the judge was not required to recuse himself, noting that the judge formed

> the bulk of his impressions regarding this litigation after he had presided over the initial trial and entered the divorce judgment, all before Miller commenced her clerkship. There is nothing in the record to suggest that Miller's subsequent representation of defendant has caused the judge to be predisposed to rule against plaintiff on any future question. *Id.* at 101.

The Court also observed that mandating the recusal of the trial judge from handling post-judgment matters "would work a hardship on the system as a whole and on the defendant in particular." *Id*. at 101. The Court concluded by directing the Professional Responsibility Rules Committee to review RPC 1.12 to determine whether it embodies an appropriate standard.

Justice Albin dissented in a strongly worded opinion joined in by Justice LaVecchia. Justice Albin was critical of the majority for its conclusion that Miller did not "personally and substantially" participate as a law clerk in the case. He wrote:

> Such a narrow interpretation of what it means for a law clerk to 'personally and substantially' participate in a case, I fear, will undermine the appearance of judicial impartiality and the public's confidence in the fair administration of justice. I would give clear direction to the Bar and to our judges that a law clerk, who digests or summarizes a motion, a brief, or a transcript; conducts research; prepares an order; or performs other substantive work on a case for a judge, has participated 'personally and substantially' in that matter. *Id.* at 104.

Comment: The division within the Court points to the likelihood that this issue will be revisited in the future.The absence of a bright-line approach, and continued use of the "personally and substantially" participation standard, insures that trial judges will face motions to disqualify law firms in the future. On the basis of the *Comparato v. Schait supra* decision, if the law firm screens former law clerks from handling cases in which he or she was involved while a law clerk, such motions would be denied.

Case Law—Contempt

Finding of contempt must not precede opportunity to explain.

In the Matter of Regina Lynch, 369 N.J. Super. 93 (App. Div. 2004) [Judge Pressler]

Judges may not hold attorneys in contempt of court pursuant to Rule 1:10-1 for failure to be present in court at a scheduled proceeding, according to this important Appellate Division decision.

Two public defenders were not present in the courtroom to which they were assigned. Both judges imposed sanctions—one in the amount of $75 the other in the amount of $250—because of their unexcused absences. One public defender explained that she was required to be before the county's presiding criminal judge at the designated hour, and the other explained that she was in a courtroom of another judge to whom she had been assigned. Both judges entered orders finding that the attorneys acted in a contumacious manner by their non-appearance and imposed the stated sanctions.

Both appealed, and the presiding criminal judge stayed both orders pending appeal.

Judge Pressler carefully sets forth the history of the use of the court's power of contempt *in facie curiae,* and quoted from *In the Matter of Daniels*, 118 N.J. 51, 61-62 (1990) to observe that:

> This extraordinary power [adjudication of contempt in *facie curiae*] then, should be exercised sparingly and only in the rarest of circumstances. When an attorney's conduct in actual presence of the court has the capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice, there can be no alternative but that a trial court assume responsibility to maintain order in the courtroom. This narrow exception to due process requirements permits the imposition of sanctions only for charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

Judge Pressler observed that Rule 1:10-1 was modified in 1994 to follow the spirit and instruction of *Daniels, supra*. The appellate court concluded that the procedural safeguards of Rule 1:10-1 for contempt in the face of the court were not followed in that "there was no recitation of the facts, no certification by the trial judge, and most importantly, no finding that the conduct—the non-appearance in each of the two cases—was willfully contumacious." *Id*. at 100. Substantively, the appellate court concluded that "the conduct of neither appellant was willfully contumacious." Referring to *In Re Yengo*, 84 N.J. 111 (1980), Judge Pressler explained that the rationale for contempt in the face of the court is not only the unexplained absence or tardiness, but that combined with "a refusal to explain or a wholly inadequate excuse that will constitute a direct contempt." *Id*. at 101. Judge Pressler continued, saying:

> We think it plain that because the non-appearance or tardiness cannot be adjudicated as a contempt in the face of the court without the court having first accorded the alleged contemnor an opportunity to explain the absence or lateness, the contumaciousness of a non-appearance is not adjudicable 'on the spot' and in the alleged contemnor's absence. And if the conduct itself is not adjudicable 'on the spot', it would appear to us there is no basis at all justifying the exercise of the extraordinary *facie curiae* contempt power. That is to say, the Rule only permits the facie curiae adjudication when, among other requirements, 'immediate adjudication is necessary to permit the proceeding to continue in an ordinary and proper manner.' R. 1:10-1(d). If by definition the non-appearance is not immediately adjudicable as a contempt and is not so adjudicable until the alleged contemnor has a reasonable opportunity to explain the absence, there is no reason, in terms of maintaining the authority of the court and its ability to proceed, to deprive the alleged contemnor of the procedural due process attendant with a contempt proceeding pursuant to R. 1:10-2." *Id.* at 101.

On this basis, the court concludes that failure to appear in court at the scheduled hour cannot be handled pursuant to Rule 1:10-1, but rather must be handled pursuant to Rule 1:10-2, "summary contempt proceedings on order to show or order for arrest." This rule requires that the matter may be begun by either order to show cause or order for arrest; prosecuted by the attorney general, county prosecutor, or other attorney designated by the court; and "not be heard by the judge who instituted the prosecution if the appearance of objectivity requires trial by another judge." Rule 1:10-2(c).

Comment: After this opinion, trial judges may not summarily impose monetary fines for failure to appear in court at a scheduled proceeding. Rather, an order to show cause pursuant to Rule 1:10-2 must be filed and the proceeding heard before another judge.

CHILDREN IN COURT

Court Rules

Rule 5:4-4. Service of Process in Paternity and Support Proceedings; Kinship Legal Guardianship. Rule amendment adds kinship legal guardianship as a cause of action falling under the rule's service requirements, and requires dismissal of the complaint subject to reinstatement if service cannot be effected by mail or other means.

Rule 5:9A. Actions for Kinship Legal Guardianship. The rule was amended to provide for service of process and to allow DYFS to amend its complaint rather than file a new petition in proceedings where kinship legal guardianship is an alternative disposition sought.

Rule 5:12-1. Complaint. The rule was amended to address emergent relief and to grant the court discretion in taking oral testimony at any stage of a disputed matter.

Rule 5:12-4. Case Management Conference; Hearings, or Trial. The rule was amended to require an order providing for the safety and wellbeing of the child, and the conduct of the litigants in lieu of a case management order.

Case Law—Abuse and Neglect

Protection of the physical and psychological wellbeing of the child must be considered over lifestyle changes of the mother.

New Jersey Division of Youth and Family Services v. C.S. and J.G., In the Matter of Guardianship of M.S., a Minor, 367 N.J. Super. 76 (App. Div. 2004), [Judge Collester],

cert. denied, DYFS v. C.S. 80 N.J. 456 (2004).

When determining whether to terminate parental rights, the ultimate objective is the protection of the physical and psychological wellbeing of the child, under this comprehensive appellate opinion. In reversing a trial court's factual determination to dismiss a guardianship action, the Appellate Division, in a comprehensive factual review, held that the trial court determination was "erroneously focused on lifestyle changes of C.D. [mother] rather than giving proper weight to the extent of harm C.S. caused to her daughter." *Id.* at 113.

Baby girl M.S. was born to C.S. (mother), and J.G. (father), in April 2000. At birth, both mother and daughter tested positive for marijuana. The parents were homeless and unemployed. After the hospital contacted DYFS, the child was released to DYFS' custody and placed in foster care. DYFS' initial permanency plan was reunification with the mother, but she failed to comply with the court-ordered plan, left the state and went to Missouri without notice to anyone. The mother had minimal contact with DYFS over the ensuing two-year period, and no contact with her child. After placement in three foster homes, a permanent placement was recommended for this child to live with M.B., her maternal aunt. After learning of the termination proceedings, the mother provided limited cooperation with DYFS and continued to give contradictory statements about her past and present relationships and her residence and stability.

Three psychologists testified at the trial that the father, J.G., could not provide a stable home for his child. As to the ability of the mother to parent her child, the DYFS expert determined that "her prognosis to change and become an appropriate parent for C.S. was poor," (*Id.* at 98) and the child M.S. was substantially bonded with her aunt and would suffer serious and enduring harm if that bond were broken. In defense, the mother's expert recommended reunification while agreeing that "most certainly" a change in custody would cause harm to the child. However, he claimed that the harm would be temporary, and could be addressed by a gradual reunification. The trial judge accepted the defense positions, making factual findings and conclusions that DYFS had failed to prove the complaint for guardianship.

Upon DYFS' appeal, the appellate panel reversed, holding:

> As a result of our review, we are constrained to reverse the orders of the trial court. We find that *crucial findings* made by the trial judge *are unsupported by substantial, credible evidence* in the record and presents error in his application of the facts to the legal issues presented. *Id.* at 113. (emphasis supplied)

Judge Collester, speaking for the unanimous panel, noted:

> A child cannot be held prisoner of the rights of others, even those of his or her parents. *Children have their own rights, including the right to a permanent, safe and stable placement." Id.* at 111....C.S. has demonstrated an inability to care for her daughter since her birth, and there is no realistic assurance that she is able to either cure the past harm to her daughter or prevent recurrent harm.... *The trial court again erred by focusing almost solely upon the parental rights of C.S. and failed to properly weigh and consider the rights of M.S. independent of her biological mother. Id.*. at 111, 118. (emphasis supplied).

The court reversed and remanded for entry of a judgment terminating the parental rights and placing the child into the guardianship of DYFS.

Comment: Certification to the Supreme Court was denied. This comprehensive factual opinion strongly emphasizes the child's needs and rights, independent of her parents'.

Factual determination of "aggravated circumstances" eliminates requirement for reasonable efforts toward unification.

New Jersey Division of Youth and Family Services v. A.R.G., In the Matter of C.R.G., R.L.G., and A.J.G. Minors. 179 N.J. 264 (2004), *aff'd in part, modified in part, and remanded.* [Justice LaVecchia joined by Justice Verniero]

In guardianship cases the factual determination of "aggravated circumstances" where the conduct is so severe or repetitive that reunification would jeopardize and compromise the safety and welfare of the child eliminates the requirement for reasonable efforts toward reunification under N.J.S.A. 30:40-11.3(a), under this Supreme Court opinion.

The parents lived in Virginia, where the mother filed for divorce, obtained a restraining order and moved to Florida with the children. After she died, the defendant father (A.R.G.) moved the children to New Jersey to reside in the home of his mother. Medical examinations documented old, new and healing scars resulting from the father's "serious savage beating" of his son, R.L.G. An emergency removal followed, the children were placed into foster care and criminal charges were filed against the father. The division then applied for a finding that it was not required to exert "reasonable efforts" to reunify the children in light of the aggravating circumstances of abuse inflicted upon the children by the father. *Id.* at 277. After a fact-finding hearing, the trial court granted the motion, finding that one of the children had been subjected to aggravated circumstances of abuse. The defendant appealed, based on claims of denial of due process and insufficiency of evidence to support the findings of "aggravated circumstances."

After the divided appellate panel affirmed in part and modified in part, in a comprehensive majority opinion by Judge Fall, the Supreme Court unanimously affirmed. Justice Long noted:

> In a scholarly and thoughtful opinion, Judge Fall, writing for the Court, culled from those sources the standard to which we have adverted. We are satisfied that the *standard faithfully carried out*, as specifically as is possible, the aims of the statute and *described the circumstances that can be deemed sufficiently aggravated to make family reunification efforts unnecessary*. *Id.* at 284. (emphasis supplied)

The Court expounded on this case-by-case method of determining "aggravated circumstances" using a "separate lines of inquiry" analysis, as follows:

> 1.) Whether the alleged conduct, in fact, took place. If not, the inquiry will end. If so, the inquiry will move to 2.) Whether the conduct was severe or repetitive. If not, reunification efforts are required. If yes, the court then must determine 3.) Whether reunification would jeopardize and compromise the safety and welfare of the child. *Id.* at 284.

The Court identified that the trial court's inquiry has two prongs. First, as noted by the appellate court, "where the parental conduct is particularly heinous or abhorrent to society, involving savage, brutal, or repetitive beatings, torture, or sexual abuse, the conduct may also be said to constitute 'aggravated circumstances'." *Id.* at 285. The Supreme Court observed that, "[t]he acts complained of, by their very nature are, so unnatural or depraved that the fundamental bond that is the basis of the reunification notion is deemed to be irremediably undermined." *Id*. at 285. The second prong is the class of cases that requires "inquiry beyond the mere conduct of the parent." *Id.* at 285 "In those cases the court may consider whether to admit expert testimony about the conduct and its relationship to the parent-child bond along with an assessment of whether the parents' remedial efforts are sufficient to eliminate an unreasonable risk of re-abuse." *Id.* at 285 In a concurring opinion on the issue of due process, Justice LaVecchia reviewed the trial court proceedings noting that "there was no constitutional due process deprivation in these circumstances." *Id.* at 286.

Comment: This instructive opinion sets out clear standards for the factual determination of "aggravated circumstances" which has a substantial impact in terminating parental rights.

Findings of harm to children cannot be presumed.

D.Y.F.S. v. S.S. and F.S., 372 N.J. Super. 13 (App. Div. 2004) [Judge Payne]

Necessary findings of harm to the children, as required in the determination of abuse or neglect, "cannot be presumed in the absence of evidence of its existence or potential" under this Appellate Division opinion. In reversing, a trial court determination that the mother of a 21-month-old child was an abusive parent because after she was beaten by the child's father while holding their son in her arms, she "sought to remain in the violent relationship," the appellate panel noted the "substantial potential effect" on this victim of domestic violence by the inclusion of her name in the Central Registry of 'substantiated abusers' pursuant to N.J.S.A. 9:6-8.11. *Id.* at 26. and there was no evidence of harm to the child.

In August 2002, a marital argument erupted into violence when the husband "placed his hand around the appellant's neck" and "violently choked...and pulled her hair" while the child was nearby. Although she called the police, with a result that the husband was arrested and charged with terroristic threats, the wife declined a restraining order and, after the husband was released from jail with a no-contact order, the local police referred the matter to DYFS. During the responding home visit by a DYFS caseworker, the wife initially refused to obtain a restraining order, and called the prosecutor's office in an effort to have the bail restriction removed so her husband "could return home for the weekend." The DYFS caseworker "determined that emergent *ex parte* removal of the child from the home was required." *Id.* at 18. The caseworker went to the home with the police and, "upon threat that the child would be placed in foster care, appellant eventually agreed to a 'voluntary' fifteen-day placement of her son with her parents...," (*Id.* at 18) and "she was not allowed to have unsupervised contact with her child, even in the parents' home." *Id.* at 18. The child was taken for a medical exam, which "disclosed no injuries of any nature." *Id.* at 19.

A fact-finding hearing was conducted during which "*the caseworker confirmed that no signs of abuse had been found on the infant, and the child was a 'cute little guy' who was 'friendly, happy and healthy.' She found no indicia of emotional trauma, and could not say that he had been emotionally harmed.*" (emphasis supplied) *Id.* at 20.

In defense, the mother presented testimony that she was a good mother with no testimony to the contrary. The family court judge then ruled that the mother's actions constituted abuse of her child under N.J.S.A. 9:6-8.21c(4)(b), sustaining DYFS' complaint. As a consequence of the determination of abuse by DYFS and the court's finding, the mother's name was entered and retained in the Central Registry of substantiated child abusers maintained by DYFS. N.J.S.A. 9:6-8.11.

In reversing the trial court, Judge Payne, speaking for the panel, noted that the court's determination that the mother:

> was an abusive parent lacked evidential support," and there was "no finding of actual or physical harm to the child." Rather the appellate court noted that the trial court's...rationale lies in the fact that "emotional harm to the child as the result of witnessing domestic abuse was assumed by the DYFS caseworker, the C.P.R. Board and by the fact-finding judge. *Id.* at 22.

Judge Payne concluded that the "evidential gaps" were fatal to the trial court's "conclusion that the appellant abused her child." While DYFS first had to assert jurisdiction in order to establish the grounds for providing the services, the court admonished family courts that they must "focus solely on the events at the time of removal if causes for concern have been significantly alleviated." Judge Payne further noted that "DYFS never met its initial burden of demonstrating harm to this particular child, as contrasted to harm to the appellant." *Id.* at 25. She reviewed other jurisdictions' holdings and articles as to the effects of domestic violence on children and the fact that courts "cannot assume…a present or potential negative effect on the child sufficient to warrant a finding of abuse against appellant—the battered victim." *Id.* at 26. The court further criticized the practical effect of including a battered woman's name in the Central Registry of child abusers where "there is no evidence whatsoever that she is a danger to children in general," concluding "we question why such women should ever be included therein." *Id.* at 28.

Comment: This important opinion reemphasizes the need for family courts to carefully make important findings based upon actual evidence of abuse, neglect or harm to the child, rather than some presumptions or differences of opinion between DYFS or parents. When read in conjunction with the standards set out by Judge Fuentes in the matter of *DYFS v. J.Y. and E.M.*, 352 N.J. Super. 245 (2002) the trial court's important role as an independent fact-finder cannot be overemphasized.

Case Law—Adoption

Kinship legal guardianship is not an alternative to termination of parental rights when adoption is feasible.

New Jersey Division of Youth and Family Services v. P.P., 180 N.J. 494 (2004) [Justice Poritz]

Kinship legal guardianship (KLG) is *not* an alternative to termination of parental rights under a guardianship action when adoption is feasible or likely and available under this Supreme Court opinion.

P.P. (mother) and S.P. (father) had two daughters, J.P. and B.P. Both parents had extensive histories of chronic substance abuse, and J.P. was born in February 1999 testing positive for heroin. At that time, the father was incarcerated, and when the mother entered an inpatient drug treatment program, she voluntarily placed the baby into foster care. The mother then relapsed and left the drug program. After her second child, B.P., was born also testing positive for drugs, DYFS filed an OTCS seeking care, custody and supervision of the children. J.P. remained in the physical custody of her maternal grandmother, and B.P. was placed directly from the hospital into the care of the paternal grandmother.

DYFS filed a complaint for guardianship in October 2001. Both the DYFS expert and defense experts opined that the parents were not capable of caring for the children now or in the foreseeable future. At that time, it was reported that each of the grandparents wished to adopt. After the trial court held KLG was "not an appropriate alternative to termination," the guardianship was granted to the division and the parents appealed. The Appellate Division reversed the trial court's decision and remanded for updated evaluation and consideration of KLG as an alternative to termination of parental rights.

The Supreme Court granted the state's petition for certification, and modified the appellate decision. Chief Justice Poritz, speaking for the majority, concluded that the evidence presented at trial "amply support[ed] the trial court's decision that termination of parental rights is in the best interests of the children." *Id*. at 511. The chief justice discussed provisions of the different statutes as to the best interest standards for termination of parental rights and noted the key difference, "a kinship legal guardian may only be appointed when 'adoption of the child is neither feasible nor likely." *Id.* at 509. The Court summarized the Kinship Legal Guardianship Act:

> When adoption is neither feasible nor likely, particularly in those cases where the caregiver's own child or sibling is the parent, an alternative, permanent legal arrangement is available for children and their caregivers. *Id.* at 508.

A limited remand to the trial court was ordered based on a DYFS report while the appeal was pending of a change in circumstances that the maternal grandmother no longer wished to adopt J.P. This would permit further evaluation of the natural parents, and consideration of any new changes in the grandparents' wishes with respect to adoption.

Justice Wallace concurred with the majority's result as to the remand, but dissented in the finding of termination of parental rights. He noted that since the children were with relatives from the date of placement, "greater consideration should have been given to a permanent plan with the necessity of termination of parental rights."

Comment: This definitive Supreme Court opinion clearly rules out the use of kinship legal guardianship as an alternative to the termination of parental rights

and available adoption.

Court has jurisdiction to resolve dispute regarding best permanent placement for child.

In the Matter of CR, 364 N.J. Super. 263 (App. Div. 2003), certif. *denied*, 179, N.J. 368 [Judge Lisa]

The Child Placement Review Act, provides jurisdiction for the trial court to resolve disputes regarding the placement of a minor who is in DYFS custody, under this appellate opinion. In reversing a trial court dismissal for lack of authority over DYFS' internal decisions, the court noted that our family courts have "an obligation…to determine what permanent plan is in C.R.'s best interest." 364 N.J. Super. at 364

Shortly after the birth of C.R., the division obtained legal guardianship of the child. The Greens (fictitious name), adoptive parents of three of C.R.'s siblings, petitioned DYFS to have C.R. placed in their home. After an internal administrative review, the division refused, stating that the home exceeded the child "population limitation" provided for in their policies. "Although those policies allow for waiver under certain circumstances, including the recognized desirability of keeping sibling groups together, DYFS refused to seek a waiver." *Id.* at 266. Both the law guardian and the Child Placement Review Board (CPRB) expressly disagreed with the division's position, and sought to have C.R. placed with siblings in the Greens' home. The law guardian petitioned the trial court to hold a summary hearing under the act, N.J.S.A. 30:4C-50 to 65, in order to determine what was in the best interests of the child. The division contended that the family part and CPRB did not have jurisdiction over placement decisions. The trial judge agreed and determined that the court lacked jurisdiction, noting that DYFS had exclusive discretion for placement of children in their custody with the only judicial review of the DYFS plan in the Appellate Division and not the family part.

The appellate court reversed the trial court's denial of jurisdiction and remanded for a full evidentiary hearing, holding "that the jurisdiction to resolve the dispute lies in the Family Part, which has an obligation to conduct a full evidentiary hearing to determine what permanent plan is in C.R.'s best interest." *Id.* at 268. Citing *In Re E.M.B.*, 348 N.J. Super. 31, (App. Div. 2002), the Appellate Division determined that, "the act contemplates an independent judicial review of DYFS's permanency plan." *Id.* at 276. Judge Lisa, speaking for the appellate panel, enumerated guidelines setting forth the roles of the division, the CPRB and the family part in determining final placement disputes. He instructed: 1) The best interests of the child is of paramount importance; 2) The trial court is not bound by the permanency plan recommended by the division or the CPRB, but by what it determines is in the child's best interests; 3) An independent judicial review of the plan is necessary because it is possible for a child to remain in foster care without a formal finding of best interests by the court; and 4) The court should make its own best interests determination based on the totality of the circumstances, including both the division and the CPRB's recommendations, and any other relevant information obtained from other sources. The appellate court held that the family part is:

> imbued with its traditional *parens patriae* responsibility and vested by the Legislature with the task of finally approving the permanency placement plans of children removed from their homes…*when a bona fide dispute is presented by parties with standing,* between competing plans that are reasonably plausible, it is *the Family Part that must resolve the dispute. Id.* at 283. (emphasis supplied)

Comment: Together with the opinion in *In Re E.M.B.,* 348 N.J. Super. 31 (App. Div. 2002), this important opinion establishes comprehensive jurisdiction for our family courts to conduct an "independent judicial review" of DYFS policies and placement decisions in the determination of the best permanency plan for children.

Independent rights of child must be weighed against parental rights of mother.

New Jersey Division of Youth and Family Services v. C.S. and J.G., In the Matter of Guardianship of M.S., a Minor, 367 N.J. Super. 76 (App. Div. 2004), [Judge Collester], *cert. denied, DYFS v. C.S.* 80 N.J. 456 (2004).

When determining whether to terminate parental rights, the ultimate objective is the protection of the physical and psychological wellbeing of the child, under this comprehensive appellate opinion. In reversing a trial court's factual determination to dismiss a guardianship action, the Appellate Division, in a comprehensive factual review, held that the trial court determination was "erroneously focused on lifestyle changes of C.D. [mother] rather than giving proper weight to the extent of harm C.S. caused to her daughter." *Id.* at 113.

Baby girl M.S. was born to C.S. (mother), and J.G. (father), in April 2000. At birth, both mother and daughter tested positive for marijuana. The parents were homeless and unemployed. After the hospital contacted DYFS, the child was released to DYFS' custody and placed in foster care. DYFS' initial permanency plan was reunification with the mother, but she failed to comply with the court-ordered plan, left the state and went to Missouri without notice to anyone. The mother had minimal contact with DYFS over the ensuing two-year period, and no contact with her child. After placement in three foster homes, a permanent placement was recom-

mended for this child to live with M.B., her maternal aunt. After learning of the termination proceedings, the mother provided limited cooperation with DYFS and continued to give contradictory statements about her past and present relationships and her residence and stability.

Three psychologists testified at the trial that the father J.G. could not provide a stable home for his child. As to the ability of the mother to parent her child, the DYFS expert determined that "her prognosis to change and become an appropriate parent for C.S. was poor," (*Id.* at 98.) and the child, M.S., was substantially bonded with her aunt and would suffer serious and enduring harm if that bond were broken. In defense, the mother's expert recommended reunification while agreeing that "most certainly" a change in custody would cause harm to the child. However, he claimed that the harm would be temporary and could be addressed by a gradual reunification. The trial judge accepted the defense positions making factual findings and conclusions that DYFS had failed to prove the complaint for guardianship. Upon DYFS's appeal the appellate panel reversed, holding,

> As a result of our review, we are constrained to reverse the orders of the trial court. We find that *crucial findings* made by the trial judge *are unsupported by substantial, credible evidence* in the record and presents error in his application of the facts to the legal issues presented. *Id.* at 113. (emphasis supplied)

Judge Collester, speaking for the unanimous panel, noted:

> A child cannot be held prisoner of the rights of others, even those of his or her parents. *Children have their own rights, including the right to a permanent, safe and stable placement." Id.* at 111....C.S. has demonstrated an inability to care for her daughter since her birth, and there is no realistic assurance that she is able to either cure the past harm to her daughter or prevent recurrent harm....*The trial court again erred by focusing almost solely upon the parental rights of C.S. and failed to properly weigh and consider the rights of M.S. independent of her biological mother." Id.* at 111, 118. (emphasis supplied).

The court reversed, and remanded for entry of a judgment terminating the parental rights and placing the child into the guardianship of DYFS.

Comment: Certification to the Supreme Court was denied. This comprehensive factual opinion strongly emphasizes the child's needs and rights, independent of her parents'.

ENDNOTE

1. Actual retirement benefit x years of employment during the marriage
   (divided by) 2

Hon. Robert W. Page *is a superior court judge in the family part, Camden County.* ***Hon. Thomas H. Dilts*** *is the presiding family part judge in Somerset, Warren and Hunterton counties.* ***Hon. Sallyanne Floria*** *is a superior court judge, family part, in Essex County.* ***Madeline M. Marzano-Lesnevich*** *is the Family Law Section chair and practices with Lesnevich & Marzano-Lesnevich.* ***William F. Woodworth Jr.*** *is the supervising hearing officer at the Administrative Office of the Courts.*

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