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Chair's Column

The (Mis)-Use of Unreported Opinions

by Brian Schwartz

In the mid-90s, I worked at Skoloff & Wolfe. Each morning, Gary Skoloff would receive a facsimile from the *New Jersey Law Journal* containing blurbs from the prior day's reported decisions. (When he was done reading those, I would deliver to him that day's *New York Post* and *Daily News* for more stimulating reading.) If there was a family law decision, or something else of interest, he would circle the case and post it in the kitchen. How cutting edge, I thought at the time. Quite often, the posted case would be useful in a matter I had been handling. How 'smart' I appeared when I quoted this new case to the judge and/or my adversary at oral argument or case management conference. Later, when the whole case was published in the 'blue pages,' Cary Cheifetz would always read it first, copy it and distribute it to the other lawyers within the firm. At a time before the Internet, this truly was the best way to remain abreast of the flurry of changes in the law; it kept those of us who read the cases ahead of our peers.

Fast-forward approximately a decade, and daily digests delivered via email would replace facsimiles. Each morning, via the *New Jersey Lawyer*'s daily briefing, anyone who subscribed would receive a blurb of the reported decisions from the prior day. Anyone interested in reading the entire case could order it and have it delivered that day, replacing the need for review of the blue pages. Once again, I took advantage of this service. Once again, I was reading important, relevant reported decisions on the day after the opinion was issued. Also, by this time I had developed friendships within the practice, so I was receiving important, relevant *unreported* decisions. Receipt of these unreported decisions had a black-market feel—it was almost as if these were to remain secret, not to be revealed to anyone. After all, these unreported decisions had no precedential value. That said, on occasion there was a terrific unreported decision covering an important area of family law for which there was no precedential case. One example I clearly remember was the Honorable Michael Diamond's

unreported decision on intrastate relocation, which predated the Honorable Robert A. Fall's Appellate Division decision in *Schulze v. Morris*.[1]

Fast-forward once again, to Sept. 16, 2005. On that date, the presiding judge for administration, Appellate Division, the Honorable Edwin H. Stern, issued a notice to the bar. On that day, Judge Stern announced the Supreme Court had approved the posting of all Appellate Division opinions, *including unpublished opinions*, on the Judiciary's website. In my mind, this action was groundbreaking. Each morning, with my first cup of coffee, I review the unreported family law decisions. Reading these opinions is a daily refresher course on family law. Each case brings with it the lessons previously learned (and likely long forgotten). Regularly, these opinions will point to existing case law on matters I currently have pending, and remind me of the legal analyses on these issues. In this regard, the publishing of unreported decisions is a stroke of brilliance by the Court.

Yet, within that same notice, Judge Stern specifically warned:

> Attorneys are reminded of the provisions in R. 1:36-3 which are not affected by this new procedure in posting of unpublished opinions. That rule provides:
>
> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel including those adverse to the position of the client.
>
> Counsel are reminded of the significance of the last sentence of R. 1:36-3 when citing unpublished opinions to the court.

It is this admonition that is routinely ignored by practitioners. How bad is the abuse? As just a small sample, within the last six months I have received two separate legal memoranda submitted to the trial court by two adversaries. In one, a post-judgment request for reduction in support based upon changed circumstances, three separate unreported cases were cited; yet, the attorney never once mentioned *Lepis*.[2] Similarly, in a memo submitted on the issue of third-party discovery, the attorney cited no reported decision, only two unreported decisions favorable to that attorney's client. Ugh!

The comments to Rule 1:36-3 within the Rules Governing the Courts of the State of New Jersey list nearly a page of citations emphasizing that unreported decisions are of no precedential value. In fact, there is even a case that notes "the court itself may not cite an unpublished opinion except to the limited extent required by the application of preclusionary legal principals or case history."[3] In other words, it is only in the rarest of circumstances that you may even cite an unreported decision.

That noted, even on that rare occasion that you cite an unreported decision, there are other parts of the rule that require compliance. First, if you are citing an unreported decision, you must provide copies of that opinion to the court and opposing counsel. Although many comply with this simple requirement, there are many who fail to perform even this minimal task.

Most often ignored is that portion of the rule requiring that if you cite an unreported decision, you must also provide copies of *all other relevant unpublished opinions known to counsel including those adverse to the position of the client*. I would like to say that I can count on one hand the number of attorneys who have provided adverse opinions—but that hand would have to have no fingers. I have never once had an attorney cite an unreported decision and provide me with any (let alone all) of the adverse unreported opinions. And the adverse opinions are there when one does research on either WestLaw or Lexis—listed in the same place as the opinions that support your position.

What is the reason for overreliance on unreported decisions? Is it a proliferation of cutting-edge issues without prior precedential guidance? (Not likely.) Is it the brilliant prose of the unreported decision that demands notice in our own briefs? (Maybe sometimes.) Is it lazy/disinterested/overtaxed lawyers? (Hmmmm.)

Unreported decisions are a tremendous resource and educational tool. These opinions provide an overview of the prior case law and statutory interpretation and serve

to educate (and re-educate) lawyers on the law. But when drafting a brief or legal memorandum, or when arguing to the court, your argument needs to be rooted in existing, reported case law and statute. And remember, if you are going to ignore my advice and continue to cite unreported opinions to me, please make sure you send me all of the adverse opinions as well.

Endnotes

1. 361 N.J. Super. 419 (App. Div. 2003).
2. 83 NJ 139 (1980).
3. The Rules Governing the Courts of the State of New Jersey, comment to R. 1:36-3, *citing Newark Ins. V. Acupac Packaging*, 328 N.J. Super. 385, 394, n. 4 (App. Div. 2000).

Inside this issue

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

Editor-in-Chief's Column

Contested Uncontested Hearing: Impermissible Questions From the Bench

by Charles F. Vuotto Jr.

It is certainly not uncommon for judges, in the context of uncontested hearings with marital settlement agreements (MSA), to conduct *sua sponte voire dire* of the parties concerning their understanding of, and voluntariness in entering into, the MSA. As we put through our uncontested divorces, we have all heard the judge state clearly that he or she has not read the MSA; that he or she does not know what the terms of the MSA are; that the only finding being made is that the parties have entered into the MSA freely and voluntarily, and that both parties agree the MSA is fair and equitable. That is why the final judgment of divorce states the MSA may be incorporated, with the understanding that the "court took no testimony and made no findings of fact as to the adequacy or sufficiency thereof and therefore does not pass judgment on the adequacy or sufficiency thereof, but the court does find that the parties entered into the agreement knowingly and voluntarily."

This is all well and good. Why, then, have some judges recently begun questioning our clients on the particulars of the agreement?

It has come to my attention that some judges, in uncontested hearings where the MSA is silent on the issue of an alimony waiver by one or both spouses, may occasionally ask parties not receiving alimony if they understand they are "waiving" alimony now, and for all time, and that they can never come back to request alimony in the future. This has occurred in circumstances where one spouse is paying alimony to the other. In these cases, the MSA may or may not provide for any waiver of alimony on the part of the non-recipient payor. The issue of whether any specific reservation might exist with regard to the right of the payor to receive alimony in the future may be explicit, or left open-ended. It may be that the MSA simply includes fairly typical provisions regarding the alimony obligations owed to the other party. It is this author's view that such questioning by a judge presuming a waiver of alimony, which is not contained in the MSA itself, is problematic for the following reasons:

1. The court is making the assumption that, because a party is not 'pursuing' alimony at the time of divorce, the party is making a 'waiver' of alimony;
2. The court's mistaken assumption is leading to a question that suggests a substantive term, which may not be expressly agreed upon between the litigants;
3. The court's *voir dire* in such cases has the potential of scuttling a negotiated agreement on the day of the put-through; and
4. The court's questioning along these lines stands to neutralize the strategic advantage of one attorney in favorably negotiating the MSA on the one hand, while potentially undermining the relationship of the oppositional counsel and his or her client on the other.

Based on an unintentional misapplication or misinterpretation of the law or training protocol, some judges are asking questions at uncontested hearings that suggest the existence of a substantive term that some parties may not have incorporated into their MSAs. That should not happen. It is improper for the court to add substantive terms to a fully executed agreement.[1] Further, the fact that a waiver was not negotiated does not render the agreement of the parties a nullity. The fact that the parties disagree on how their fully executed and comprehensive MSA may be interpreted in the event a circumstance arises in the future based upon facts that do not currently exist (or did not exist at the time the MSA was signed), is not a basis to fail to enforce the agreement.[2] The opinion of one or both of the parties regarding how language in an executed agreement would be interpreted constitutes parole evidence.[3]

It is questionable why a court would feel the need to direct questioning to a party regarding a provision not set forth in the body of the MSA. Such questioning

goes beyond the mandates of New Jersey Court Rule 5:5-2(e), adopted in response to *Weishaus v. Weishaus*[4] (which modified and clarified *Crews v. Crews*[5]) relating to marital lifestyle. Rule 5:5-2(e) provides that in any matter in which an agreement or settlement contains an award of alimony, the parties must do one of the following: 1) declare the marital standard of living is satisfied by the parties' agreement of settlement; 2) define the marital standard of living; 3) preserve copies of each party's filed case information statement (CIS); or 4) for any party who has not filed a CIS, prepare Part D (monthly expenses) of the CIS and serve a copy on the other party and preserve the completed Part D until alimony is terminated.

The comments to Rule 5:5-2(e) state that: "Because of the significance of establishing the standard of living at the time of the divorce, dissolution or termination in order to address post-judgment motions, and because of the burdensomeness of a court determination thereof in every case, the rule offers various alternatives through the mechanism of the case information statement."[6] Judges asking about waivers of alimony, however, go far beyond any directives under Rule 5:5-2(e). Moreover, pursuant to *Pacifico v Pacifico*,[7] courts are not supposed to add a term to agreements that the parties have not agreed to themselves. Thus, judges raising questions on waivers of alimony when the parties did not so negotiate for such waivers appears to run afoul of established Supreme Court precedent and the rules of court.

Many divorce agreements that provide for the supporting party to pay the dependent party some form of spousal support do not generally include a waiver of the right to support by the supporting spouse. Conversely, neither do they set forth a reservation by the supporting spouse of his or her right to seek support at some point in the future. Typically (or at least very often), these terms are left unaddressed. Certainly, if the payee spouse does not request a waiver from the payor spouse, the payor spouse would be foolish to offer it up for no consideration. A waiver of alimony by a divorcing litigant is a term that has value and is not the equivalent of failing to pursue alimony.[8] In fact, the courts of this state have refused to enforce alimony waivers under certain circumstances, such as where there is a lack of consideration.[9]

Relatively few agreements include a waiver of the right of either party to assert changed circumstances warranting a modification of the MSA. Judges raising waiver questions, however, run the risk of failing to recognize the potential for changed circumstances arising that may suffice to cause the flow of alimony to reverse.

If the court were to try the otherwise settled case on all issues, it could not then direct that the supporting spouse would be waiving alimony in the future from the supported spouse. To do so would be the functional equivalent of ordering a unilateral non-modifiability clause. There is no provision in the law for such a judicially imposed resolution, which would be contrary to *Lepis v. Lepis*.[10] That would be against public policy and the case law of this state.[11] Although it may be desirable, from a court backlog perspective, to limit the number of litigants attempting to come back after the entry of a divorce to seek certain relief, including but not limited to alimony, instructing litigants who did not pursue alimony at the time of their divorce that they are effectively waiving it is flawed. Among other things, it amounts to a prohibited prospective bar to litigation on this specific issue.

As a side note, one may argue that the general waiver language in the boilerplate parts of the MSA actually constitutes an alimony waiver by the party not receiving alimony. This author believes it does not. Public policy and the operation of the law can often be relied upon to provide necessary relief, notwithstanding general, and even specific waiver language under appropriate circumstances.

This author contacted the Administrative Office of the Courts (AOC) regarding this issue and has been advised that the Conference of Presiding Family Part Judges has been consulted. Apparently, the training message to judges may have been inadvertently misinterpreted by some. As such, the presiding judges intend to modify the basic training on this point, and the AOC will work on getting out the message to all sitting judges. ■

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Endnotes

1. *See Miller v. Miller*, 160 N.J. 408, 419 (1999); *Peskin v. Peskin*, 271 N.J. Super. 261 at 275 (explaining that "[c]ourts play an important role in effecting settlement. However, that role must always be exercised appropriately and with full recognition that the court must remain fair and impartial in order to ensure that the 'settlement [is] wrought by the parties, not by [the court].'").
2. *See Peskin v. Peskin*, 271 N.J. Super. 261, 275-76 (App. Div. 1994). *Peskin* provides in pertinent part: "If a settlement is achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent thereto, the settlement agreement must be set aside." *Id*. at 276.
3. *See Atlantic Northern Airlines, Inc. v. Schwimmer*, 12 N.J. 293, 301-02 (1953).
4. 180 N.J. 131 (2004).
5. 164 N.J. 11 (2000). The *Crews* Court required parties "to place on the record the basis for the alimony award including, in pertinent part, establishment of the marital standard of living, before the court accepts the divorce agreement." *Id*. at 26.
6. Sylvia Pressler and Peter Verniero, Current N.J. Court Rules, Comment R. 5:5-2(e), (Gann).
7. See *Pacifico v. Pacifico*, 190 N.J. 258 (2007). The *Pacifico* Court stated that "[a]s a general rule, courts should enforce contracts as the parties intended." *Id*. at 266.
8. *See Morris v. Morris*, 236 N.J. Super. 237, 241 (App. Div. 1993) (stating that "the parties can with full knowledge of all present and reasonably foreseeable future circumstances bargain for a fixed payment or establish the criteria for payment to the dependent spouse, irrespective of circumstances that in the usual case would give rise to *Lepis* modifications of their agreement." *Id*. at 241.
9. *E.g.*, *Stefanacci v. Stefanacci*, 2009 N.J. Super. Unpub. LEXIS 597 (App. Div. March 23, 2009).
10. 83 N.J. 139 (1980).
11. *See Harrington v. Harrington*, 281 N.J. Super. 39, 46 (App. Div. 1995); *Peskin*, 271 N.J. Super. 261 at 274-75.

Executive Editor's Column

Will Custody Go Up In Smoke When a Parent Uses Marijuana for Medical Purposes?

by Ronald Lieberman

On Jan. 18, 2010, then-Governor Jon Corzine signed into law Public Law 2009, Chapter 307, called the New Jersey Compassionate Use Medical Marijuana Act, later codified at N.J.S.A. 24:6I-1 through -16. After much back and forth negotiations and acrimony between current Governor Chris Christie and the New Jersey State Legislature, the act went into effect. As a result, New Jersey became one of 19 states and the District of Columbia that permits the use of marijuana for medical purposes,[1] and joined Arizona as the only other state to allow doctors to prescribe marijuana. Two states, Colorado and Washington, went further and actually legalized the recreational use of marijuana.

Commencing Dec. 6, 2012, Governor Christie permitted the creation of licensed dispensaries to make medical marijuana available to patients in New Jersey who enrolled in the state's Medical Marijuana Program (MMP)[2] and have a state-issued identification card for the use of medical marijuana for a two-year period.[3] So, medical marijuana can be made available in this state.

Practitioners know that parental drug use is a common refrain in custody and parenting time disputes. So the issue now arises regarding whether the determination that a person is eligible for use of medical marijuana, or the actual use of medical marijuana, or both, could, or even should, be a factor for a judge to consider in determining or modifying any award of custody or parenting time under the state's custody statute.[4]

A Brief Review of the Act

Under the act, a person, called a "qualified patient," can be prescribed and then use marijuana if he or she has a "debilitating medical condition," defined to mean a condition that resists conventional medical therapy, or suffers from other conditions causing "severe or chronic pain."[5]

Minors under 18 years of age may be prescribed medical marijuana in the same mode and manner as an adult, provided an adult is the primary caregiver of the minor and supplied consent.[6]

The act provides some immunity for a qualifying patient or primary caregiver who is acting in accordance with the provisions of the act, as follows:

> A qualifying patient [or] primary caregiver…shall not be subject to any civil or administrative penalty, or denied any right or privilege, including but not limited to, civil penalty or disciplinary action by a professional licensing board, related to the medical use of marijuana as authorized under this act.[7]

None of the terms listed in the act under immunity are defined, however.

A qualified patient who is prescribed medical marijuana under the act faces limitations on his or her activities. He or she cannot operate a motor vehicle while under the influence, smoke medical marijuana in public places, or smoke it in other places where smoking in general is prohibited.[8] A qualifying patient also cannot resell medical marijuana.[9]

Why Is This Issue Ripe Now?

The issue of medical marijuana usage is now a reality, and likely will start creating factual conundrums as the process unfolds through New Jersey. Although the act was signed into law three years ago, it was not until Dec. 2012 that Governor Christie permitted dispensaries to be created to distribute medical marijuana to qualified patients. So, the theoretical has now become reality.

The use of medical marijuana may be of recent vintage in New Jersey but it already has created issues worthy of scientific study. On May 27, 2013, the *Journal of the American Medical Association (JAMA) Pediatrics* published a report titled "Pediatric Marijuana Exposures in a Medical Marijuana State."[10] The report stemmed from a study that, according to the report's abstract, sought to

compare the proportion of marijuana ingestions by young children in Colorado who needed medical attention before and after that state's modification of its drug laws in Oct. 2009, to permit possession of medical marijuana.[11]

The study published in *Pediatrics* revealed that the proportion of children younger than 12 years of age who were seen by children's hospital emergency rooms for exposure to marijuana or marijuana-laced food products increased after Sept. 2009.[12] It was this correlation between the increased examples of marijuana ingestion and exposure visits and the changes in Colorado's enforcement laws for marijuana possession that prompted the report's authors to conclude that "[t]he consequences of unintentional marijuana exposure in children should be part of the ongoing debate on legalizing marijuana."[13]

Which Custody Factor Might Be Implicated by Use of Medical Marijuana?

Of the 12 custody factors only one, "the fitness of the parent," would appear to be on point in the instance of a parent who was determined to be a qualified patient for the use of medical marijuana.[14] Regarding that specific custody factor, the custody statute provides that "[a] parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child."[15] The term "fit" means that at a minimum, both parents must be "…physically and psychologically capable of fulfilling the role of parent…."[16] This discussion is not meant to involve a consideration of outside placement or guardianship of a child.[17]

The question becomes, does a parent who is suffering from a "debilitating medical condition" for which he or she can be prescribed and is then receiving medical marijuana end up placing his or her fitness to parent in issue? Are not the two inextricably intertwined, whereby a parent who is so 'debilitated' may lack the ability to care for a child? And doesn't a child require a parent who is not suffering from a debilitating medical condition in order to be safe? Is the condition precedent of suffering from a debilitating medical condition an appropriate area of consideration for a judge in determining custody or parenting time?

What about the use of medical marijuana itself? The new *JAMA Pediatrics* report raises questions about the safety of the home environment of a qualified patient, and revealed the increased risk of accidental marijuana exposure by a minor living in a home with a parent legally using marijuana. New Jersey has already established that use of legal products such as cigarettes in the home can inflict harm upon a child.[18] A child's exposure to secondhand smoke was considered "a health and safety factor" for a judge to consider in a custody situation.[19]

If exposure to secondhand smoke is a factor for a court, would not the risk of unintentional exposure to or ingestion of marijuana by a child living with a parent/qualified patient similarly implicate a health and safety factor for a judge to consider in a custody or parenting time dispute? Given the risks to minors, as outlined by the *JAMA Pediatrics* report, could one parent prove marijuana use endangers the child's physical health or negatively impacts the child's wellbeing?

There are no definitions provided in the act for the terms "penalty" or "right or privilege," let alone any other of the immunities listed. That lack of clarity has the potential for a practitioner to argue that affecting custody or parenting time imposes a penalty or denies the parent a right or privilege.

Given the lack of clarity, can a practitioner invoke the immunity provision of the act, and argue successfully before a judge that affecting custody or parenting time because of the use of medical marijuana would cause the patient to suffer a civil penalty or be denied a right or privilege? A practitioner currently is limited only by his or her creative advocacy.

Practitioners know that absent alcoholism or a drunk-driving conviction, judges generally do not consider use of alcohol a factor in custody or parenting time disputes. What prevents a judge from viewing a parent who legally uses medical marijuana in the same way a court would view a parent who occasionally drinks alcohol in front of the children? As the law evolves, perhaps these and other questions will be answered.

What Did Another Jurisdiction Do in a Similar Situation?

The closest basis of comparison that presently exists for deciding if marijuana use can be considered in determining custody or parenting time is a review of law in Colorado.

Colorado voters amended the state constitution in 2012 by passing Amendment 64, permitting private recreational use of marijuana. That vote was in addition to a prior one permitting use of medical marijuana. In that state, the mere fact that a parent can possess marijuana and use it medicinally has been held to not be grounds to find harm or risk to a child.

In a 2010 divorce case in Colorado, the trial judge ordered the implementation of a parenting plan limiting the father's parenting time to supervised visits because he had a history of using marijuana, and he was ordered to undergo a hair follicle test to prove he was no longer using the drug.[20] The father then obtained a license for use of medical marijuana, and sought to lift the restrictions on his parenting time. He did not, however, argue that preventing the use of marijuana while around the child was inconsistent with the best interest of the child.[21]

The court of appeals lifted the restrictions against the father.[22] The court found "…the record does not show that father's use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested any risk of harm. Thus, father's use of medical marijuana cannot support the trial court's restriction on his parenting time."[23] Despite that ruling, the court made it clear it was ruling on the facts presented in the case before it, where harm was not shown and it was "not express[ing] an opinion as to whether medical marijuana use may constitute endangerment."[24]

So, Colorado apparently rejected a blanket determination that the mere use of medical marijuana would be considered a threat to a child's health or safety or constituted a risk of harm to the child without a showing of specific harm to the child.

Potential Wrinkle in the Equation

Just as practitioners were waiting to determine how the factual scenario in this state was unfolding with use of medical marijuana, A-765 was introduced and passed in the New Jersey Assembly, which would make the use of medical marijuana on par with the use of any other prescribed medication.[25] The companion bill in the New Jersey Senate, S-1220, has not yet been considered by that body as a whole.

Neither bill would eliminate the argument that a parent could have difficulty parenting if he or she suffers from the condition precedent of a debilitating medical condition.

The issues presently at hand—whether a qualified patient's status as suffering from a debilitating medical condition and his or her use of medical marijuana should or could be considered by a judge in a custody or parenting time dispute—remain ripe for advocacy by practitioners and for determination by the Judiciary. ■

Endnotes

1. Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont, and Washington.
2. N.J.S.A. 24:6I-4b, c.
3. N.J.S.A. 24:6I-4a, d.
4. N.J.S.A. 9:2-4.
5. N.J.S.A. 24:6I-3.
6. *Id*.
7. N.J.S.A. 24:6I-6b.
8. N.J.S.A. 24:6I-8 a, b.
9. N.J.S.A. 24:6I-6a.
10. *JAMA Pediatrics*, May 2013, Vol. 167, No. 5.
11. *Id*.
12. *Id*.
13. *Id*.
14. N.J.S.A. 9:2-4c.
15. *Id*.
16. *Beck v. Beck*, 86 N.J. 480, 498 (1981).
17. N.J.S.A. 9:2-9, 9:2-10.
18. *Unger v. Unger*, 274 N.J. Super. 532 (Ch. Div. 1994).
19. *Id*.
20. *Marriage of Parr*, 240 P. 3d 509 (Colo. App. Div. 1 2010).
21. *Id*. at 512.
22. *Ibid*.
23. *Ibid*.
24. *Id*. at 513.
25. A-765 passed the New Jersey Assembly by a vote of 67-9-2-2 on May 20, 2013. The companion bill in the New Jersey Senate is S-1220, where it was reported favorably out of the Health, Human Services, and Senior Citizens Committee on March 4, 2013. Both A-765 and S-1220 would amend the act to read that use of medical marijuana by a qualified patient is the equivalent of using any other properly prescribed medication.

Commentary:
Jacoby v. Jacoby—A Missed Opportunity for Clarity

by Derek M. Freed

The Appellate Division's 2012 decision in *Jacoby v. Jacoby* was met with bemusement from New Jersey family law practitioners.[1] While *Jacoby* addressed the relationship between a parent's obligation to pay child support and contribute to a child's college tuition and expenses, it ultimately represents a missed opportunity to provide clarity to litigants and matrimonial attorneys. This article will review a parent's obligation to contribute to the support of their child past the age of majority under New Jersey law.[2] It will also analyze the *Jacoby* decision and address its potential impact on litigants and family law practitioners.

The Obligation of Parents in New Jersey to Contribute to Their Children's Support After Attaining the Age of Majority

College Tuition Obligations for a Child Who Has Attained the Age of Majority

Starting in 1949 and continuing until the early 1970s, the New Jersey courts authored various opinions that addressed the obligation of a parent to contribute to a child's support past the age of majority (inclusive of contributing to a child's college tuition and expenses.)[3] In 1982, the New Jersey Supreme Court issued its seminal decision of *Newburgh v. Arrigo*.[4] The *Newburgh* Court held, "in appropriate circumstances, the privilege of parenthood carries with it the duty to assure a necessary education for children."[5] The Court provided a list of 12 non-exclusive factors to examine when "evaluating the claim for contribution toward the cost of higher education."[6] These '*Newburgh* factors' provided attorneys and litigants with a test they could apply to their cases to evaluate the likelihood that a court would compel contribution to a child's college tuition and expenses. These factors are routinely referenced in both court decisions and marital settlement agreements through today.

After *Newburgh*, questions continued to arise regarding the extent of the obligation of a parent to support their child after attaining the age of majority. In 2000, when it decided *Finger v. Zenn*, the Appellate Division was faced with addressing whether budgetary limits should be placed on a child's attendance at college.[7] The defendant in *Finger* contended he could not "be compelled [to contribute] an amount in excess of the cost of a New Jersey resident student at Rutgers or some equivalent New Jersey state college."[8] He asserted his property settlement agreement vested him with "joint decisional authority," and as such, he had the power to "unilaterally limit his college contribution to the cost of a New Jersey state college."[9]

The *Finger* court rejected the defendant's contention as being "antithetical to a fair consideration of the best interests of the child."[10] Indeed, *Finger* went so far as to "specifically disapprove" of the Appellate Division's prior decision in *Nebel v. Nebel* to the extent that it was "read to hold that there is a ceiling on a college contribution by a divorced spouse to the cost of a state university or any public or private college."[11] While noting that a parent's ability to pay for college is a "critical factor in the selection of a college," the Appellate Division stated:

> unless the parties otherwise agree, selection of a college for a child of the marriage should not be governed by an artificial bottom line. As one of the most significant joint custodial decisions, the choice of a college requires divorced spouses to defer lingering hostility in order to determine the best interest of their child consistent with economic reality.[12]

While the above-stated language is sweeping, the Appellate Division did *not* issue a blank check for children of divorced or divorcing families for their college educations. The *Finger* court acknowledged, "Family finances may limit college options or even make college an unfulfilled wish."[13]

Child Support for a Child Who Has Reached the Age of Majority

While *Newburgh* and *Finger* addressed a parent's obligation to pay for their child's college tuition and expenses under certain circumstances, the issue of the payment of child support for that same college-attending child remained unclear. The New Jersey child support guidelines were only "intended to apply to children who are less than 18 years of age or more than 18 years of age but still attending high school or a similar secondary educational institution."[14] The guidelines "shall not be used to determine parental contributions for college or other post-secondary education (hereafter college) expenses nor the amount of support for a child attending college."[15] The reasons for not applying the guidelines in such circumstances are stated as follows:

a. There is a concern of duplicate expenditures, as many of the costs associated with college attendance are included in the guidelines' child support award.[16]

b. The guidelines only considered spending on children up to age 18 and not progressed beyond high school.[17]

c. The guidelines are based on average costs, and since the cost of college is significant and variable, the expense could not be incorporated into the guidelines.[18]

d. The guidelines represented basic needs of a child only. As college is not a basic need within the framework of the guidelines (*i.e.*, it is a discretionary cost), the expense could not be included.[19]

Appendix IX-A to the guidelines did, however, provide a partial methodology for determining child support in scenarios where a child was attending college. It states:

> [When] determining whether continued financial support for children attending college and/or parental contributions to college education are appropriate, the court shall consider relevant case law and statutes. In all cases, primary consideration shall be given to the continued support of minor children remaining in the primary residence by reapplying the child support guidelines for those children before determining parental obligations for the cost of post-secondary education and/or continued support for a child attending college.[20]

This suggests that a court should apply the guidelines for any younger siblings of the college-age child and then determine the obligations of the parent to contribute to the college expenses or child support based on "relevant case law and statutes."[21] There was, however, a dearth of 'relevant case law' on this topic until the Appellate Division issued its decision in *Jacoby v. Jacoby*.

In *Jacoby*, the Appellate Division was "asked to review whether child support should be reduced when a child resides on campus while attending college."[22] When the parties in *Jacoby* were divorced in 2001, their marital settlement agreement provided that they would contribute to their children's college costs based on "their respective incomes, after the exhaustion of available grants, loans, scholarships, and other financial aid."[23] When the parties' older child attended college, they returned to court to resolve the issues of college contributions and child support.[24] The trial court created a formula for the payment of child support using the theories of the guidelines, which resulted in the defendant father paying $170 per week of child support for the two children.[25] Neither party appealed from the trial court's decision.[26]

In 2009, the parties' younger child entered college, residing away from home.[27] In 2011, the defendant father applied for a modification of child support based on a host of factors and asked the trial court to apply the "established formula" from the prior proceedings to reduce his child support obligations relative to his younger child while attending and residing at college.[28] The plaintiff wife opposed the application, seeking an increase in the child support, among other relief.[29]

The trial court declined to apply the purportedly established formula from the prior proceeding, and instead recalculated child support under the guidelines.[30] The defendant father appealed from this decision.

After addressing several issues raised by the defendant father in its decision, the *Jacoby* court addressed the issue of calculating child support for a child residing away from home and attending college. The Appellate Division stated the guidelines were not to be applied to children older than 18 who live away at college.[31] The Appellate Division found the trial court failed to explain why it applied the guidelines in light of the plain language set forth in Appendix IX–9.[32] As such, the *Jacoby* court reversed the trial court's decision, stating the trial judge was to "compute the applicable support necessary to provide for the parties' children, taking into account that the children reside on campus and participate in a school sponsored housing and meal plan."[33]

The *Jacoby* court rejected the "Defendant's conclusion that his child support obligation must be reduced now that the children reside on campus," as the court found the defendant had offered "no evidence showing that either child's support needs have lessened since attending college."[34] Citing *Hudson v. Hudson*, the Appellate Division held that "the payment of college costs differs from the payment of child support for a college student."[35]

Instead of ceasing its decision at that point, the *Jacoby* court provided *dicta* that, unfortunately, raises more questions than it answers. The Appellate Division stated, "Although the child support needs lessened in certain areas such as room and board, which falls within college costs, arguably other necessary expenses may increase when a child goes to college."[36] In support of this "arguable" claim, the *Jacoby* court cited its prior decision in *Dunne v. Dunne*,[37] and a scholarly article written by Madeline Marzano–Lesnevich and Scott Adam Laterra.[38]

It is unclear why the *Jacoby* court chose to include "arguable" claims in its decision. It is respectfully submitted that at least one of the goals of a reported decision should be to provide clarity for future litigants and courts to help avoid future disputes, and that the *Jacoby* court's speculation and reference to disputable claims fails to achieve that goal.

Each of the citations made by the Appellate Division is problematic in its own way. The Appellate Division's decision in *Dunne* pre-dates the guidelines, thereby calling its overall applicability into question.[39]

The *Jacoby* court characterized the Marzano-Lesnevich/Laterra article as follows: "arguing the myriad of college costs should be provided in addition to the amount of child support allowed in the Guidelines."[40] By its very characterization of the article, the *Jacoby* court reveals the article does not fully support the court's ultimate holding. The Marzano-Lesnevich/Laterra article recommends consideration of the following protocol for determining child support for college students:

a. Start with the guidelines award;
b. Adjust the guideline award to avoid duplicate expenses; and
c. Adjust the guideline award to contemplate the time the child will be home.[41]

The protocol starts with the child support guidelines because, "First, as a practical matter, it is simply easier to start with something and make the appropriate reductions to account for duplicate expenses than it is to reconstruct a new figure from start."[42] The authors lauded the New Jersey child support guidelines for the detail they provide, thereby making them possible to serve as a starting point for an analysis of an appropriate child support award for a child attending college.[43] It is unclear why the *Jacoby* decision did not discuss using the guidelines as a potential starting point for an analysis of child support on remand, with proper adjustments made based upon the actual facts of the case. Had the *Jacoby* court embraced such an approach, it is respectfully submitted that the Marzano-Lesnevich/Laterra article would have been more apt. This represented a missed opportunity for clarity for litigants and courts.

The remainder of the *Jacoby* decision reveals the viability of the protocol suggested by the Marzano-Lesnevich/Laterra article. The *Jacoby* court provided a partial list of "some child support expenses" that "remain even when a child heads to college."[44] While acknowledging that many of these expenses were in the guidelines, the court stated that because many were not, it "further demonstrate[ed] the inapplicability of a Guidelines support award and the need for a trial judge to review the child's needs."[45] This statement, however, ignores the protocol of the Marzano-Lesnevich/Laterra article, which suggests using the guidelines as a *starting point* for an analysis.

The *Jacoby* court then stated, "the trial judge must consider and determine the child's obligation to pay defined expenses, within his or her ability."[46] The *Jacoby* court continued its analysis, stating, "the computation of child support cannot be made in a vacuum as there is a close relationship between college cost and support: the higher the child support order the less money remains available to contribute to college expenses. It also may be more appropriate for a parent to provide direct payments to the student for some of the child's support needs rather than to the other parent. The fact sensitive nature of each of these determinations explains why the Guidelines are ill-suited to make such a support calculation."[47] The *Jacoby* court remanded the matter to the trial court, which was directed to determine child support "based on evaluation of the factors enumerated in N.J.S.A. 2A:34–23a."[48]

The trial court was also to consider "the other aspects impacting such an award, as we have discussed in this opinion."[49] The trial court was afforded discretion to determine whether a plenary hearing was necessary on remand or whether the issues could be resolved without testimony.[50]

These statements further illustrate how *Jacoby* largely constituted a missed opportunity to illustrate precisely

why the guidelines could not be used as a starting point for an analysis. Instead, these statements provide grounds for opposing litigants to virtually ensure plenary hearings to resolve their future disputes.

Additional Problems Presented by *Jacoby*

In addition to the problems set forth above, the *Jacoby* case presented other areas of great concern to attorneys and litigants. For example, the *Jacoby* court seemed to ignore its prior decision of *Colca v. Anson*[51] when it referenced compelling a child to contribute to his or her own support.[52] In *Colca*, the Appellate Division stated, "A child's assets may not be used to fulfill a financially able parent's support obligation."[53] It went so far as to state that the applicant's "argument that the child's earnings, received from working in defendant's office two days per week, would have affected her support lacks sufficient merit to warrant additional discussion."[54] *Jacoby* seems to suggest that a child's earnings *are* relevant to a determination of a fair amount of child support. Unfortunately, the *Jacoby* decision did not attempt to distinguish its analysis from the *Colca* decision.

Jacoby also potentially heightens the involvement of an unemancipated child in the negotiations regarding college tuition and child support. A scenario under *Jacoby* can be envisioned in which a child is precluded from applying to a certain college by one parent because that same parent fears paying 'increased' child support while that child attends college. A child will potentially be forced to broker a deal between his or her divorced parents to ensure he or she can attend the school of their choice. Moreover, under that scenario the child's educational needs become adverse to their custodial parent's need for increased child support.

Jacoby also creates timing issues. Children apply to colleges six months to a year before they matriculate. Will child support for the child need to be fixed that far in advance for the child? Grants, part-time employment, and work-study funds may not be available until the child accepts admission to the school in question. Does a parent have to reserve their rights to 'object' to contribute based upon the future determination of these potential sources of funds?

This list is not meant to be exhaustive. It is merely meant to illustrate the lack of clarity provided by the Appellate Division in the *Jacoby* decision. Had *Jacoby* referenced the potential use of the guidelines as a starting point for an analysis, the fear of these unknowns could have at least been partially mitigated.

Conclusion

The *Jacoby* court declined to create a *per se* rule when it stated that a "child's attendance at college is a change in circumstance warranting review of the child support amount. However, there is no presumption that a child's required financial support lessens because he or she attends college."[55] The Appellate Division stated that when evaluating the child support associated with a child attending college and residing away from home, the trial court must "assess all applicable facts and circumstances, weighing the factors set forth in N.J.S.A. 2A:34-23a."[56] However, the *Jacoby* court missed an opportunity to provide clarity to the child support/college tuition analysis when it *did* create a *per se* rule, stating that, "Resort to the Child Support Guidelines (Guidelines), R. 5:6A, to make support calculations for college students living away from home is error."[57]

It is respectfully submitted that the *Jacoby* court could have used the facts presented to it to illustrate precisely how the guidelines could serve as a *starting point* for an analysis. Alternatively, it could have provided something beyond the speculation that it offered if it wanted to provide litigants, trial courts, and matrimonial practitioners with guidance to resolve future matters. Instead, it is feared that the only thing offered by *Jacoby* is a heightened likelihood of plenary hearings to resolve disputes surrounding child support and college tuition for children of divorced parents. ■

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Endnotes

1. *Jacoby v. Jacoby*, 427 N.J. Super. 109 (App. Div. 2012).
2. *Newburgh v. Arrigo*, 88 N.J. 529 (1982).

3. *See Khalaf v. Khalaf*, 58 N.J. 63, 71–72 (1971) (directing father to contribute to child's college expenses). *See also Limpert v. Limpert*, 119 N.J. Super. 438, 442–443 (App. Div. 1972)(directing father to continue support payments for a 20-year-old child as long as that child was a full-time student in regular courses toward a college degree). *See also Nebel v. Nebel*, 99 N.J. Super. 256, 261–263, (Ch. Div.), *aff'd o. b.*, 103 N.J. Super. 216 (App. Div. 1968); *Jonitz v. Jonitz*, 25 N.J. Super. 544, 556 (App. Div. 1953); *Cohen v. Cohen*, 6 N.J. Super. 26, 30 (App. Div. 1949).
4. 85 N.J. 479 (1980).
5. *Newburgh*, 88 N.J. at 543.
6. *Newburgh*, 88 N.J. at 545. The factors that a court was directed to consider "included" the following: 1. Whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; 2. The effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; 3. The amount of the contribution sought by the child for the cost of higher education; 4. The ability of the parent to pay that cost; 5. The relationship of the requested contribution to the kind of school or course of study sought by the child; 6. The financial resources of both parents; 7. The commitment to and aptitude of the child for the requested education; 8. The financial resources of the child, including assets owned individually or held in custodianship or trust; 9. The ability of the child to earn income during the school year or on vacation; 10. The availability of financial aid in the form of college grants and loans; 11. The child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and 12. The relationship of the education requested to any prior training and to the overall long-range goals of the child.
7. *Finger v. Zenn*, 335 N.J. Super. 438 (App. Div. 2000), *cert. denied* 167 N.J. 633 (2001).
8. *Finger*, 335 N.J. Super. at 443.
9. *Finger*, 335 N.J. Super. at 443–44.
10. *Finger*, 335 N.J. Super. at 444.
11. *See Nebel v. Nebel*, 99 N.J. Super. 256 (Ch. Div.), *aff'd o.b.*, 103 N.J. Super. 216 (App. Div. 1968).
12. *Finger*, 335 N.J. Super. at 445. The reference to "unless the parties otherwise agree" has led to the issue of a "Rutgers-cap" being addressed at the time of the negotiation of the marital settlement agreement or at the time of final hearing in appropriate matrimonial matters.
13. *Finger*, 335 N.J. Super. at 445. One can only speculate whether the economic circumstances of New Jersey impacted the *Finger* decision. The unemployment rates (national and for New Jersey) provide an interesting backdrop to evaluate the *Newburgh*, *Finger*, and *Jacoby* decisions. The average national unemployment rate for the operative years according to the Bureau of Labor Statistics were as follows: 1980: 7.175 percent (when petition for certification was granted in *Newburgh*), 2000: 3.97 percent (when *Finger* was decided), 2011: 8.925 percent (when the litigant applied for relief in *Jacoby*). The New Jersey unemployment rate essentially mirrors the national rate for the same time periods: 1980: 7.29 percent, 2000: 3.67 percent, 2011: 9.316 percent. *See* http://www.bls.gov/data/#unemployment.
14. Sylvia Pressler and Peter Verniero, *Current N.J. Court Rules*, Appendix IX-A(18) to R. 5:6A at 2559 (2013). Notably, the court is provided with discretion to apply the child support guidelines "to support for students over 18 years of age who commute to college."
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*
19. *Id.* at 2560.
20. *Ibid.*
21. *Ibid.* Notably, ¶21 of Appendix IX-A also provided the court with a basis to deviate from the guidelines to address college payments. This paragraph states, "at the court's discretion, the following factors may require an adjustment to a guidelines-based child support award: … (e) Educational expenses for children (i.e., for private, parochial, or trade schools, or other secondary schools, or post-secondary education.)" *See also* ¶25 of Appendix IX-A, which states that if child support is appropriate for a child who has attained the age of majority and completes secondary school, it shall be determined in accordance with N.J.S.A. 2A:34-23 and relevant case law.

22. *Jacoby v. Jacoby*, 427 N.J. Super. 109, 113 (App. Div. 2012).
23. *Jacoby v. Jacoby*, 427 N.J. Super. 109, 114 (App. Div. 2012).
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*
28. *Id.* at 115.
29. *Ibid.*
30. *Ibid.*
31. *Id.* at 119–20.
32. *Id.* at 120. The *Jacoby* court did leave the door open to the potential application of the guidelines by a trial court, stating: "In the unusual circumstance where it is determined support for a college student living away from home should be calculated with reference to the Guidelines, the judge must specifically recite all findings underpinning such a conclusion."
33. *Ibid.*
34. *Id.* at 120–21.
35. *Id.* at 121. *Hudson v. Hudson*, 315 N.J. Super. 577 (App. Div. 1998).
36. *Ibid.* It remains unclear why the Appellate Division would include a claim that was "arguable." The term "arguable" is defined as "open to argument, dispute, or question." *See Merriam-Webster's Dictionary.*
37. *Dunne v. Dunne*, 209 N.J. Super. 559, 570 (App. Div. 1986).
38. Madeline Marzano–Lesnevich and Scott Adam Laterra, Child Support and College: What is the Correct Result?, 22 *J. Am. Acad. Matrimonial Law.* 335, 373–79 (2009).
39. *See Dunne*, 209 N.J. Super. at 566 (stating "a parent should be compelled to pay such amount for child support as the circumstances of the parties and the nature of the case renders fit, reasonable and just. Many factors must be taken into consideration to determine the proper and reasonable amount for child support. The touchstone to determine that amount is always the welfare of the child….When support is at issue, the general considerations are the children's needs and the supporting spouse's ability to contribute to the fulfillment of those needs.") (Internal citations omitted.)
40. *Jacoby,* 427 N.J. Super. at 121. (Emphasis added.)
41. *Id.* at 380.
42. *Id.* at 381. The authors provided a second reason to start with the guidelines, as well. "The second reason why it is beneficial to start with the basic child support award is that when we start with the basic child support award, we know what that figure represents: it represents the amount of child support that would be appropriate for a child given the income levels of that child's parents (and other easily identifiable criteria that goes into determining the basic child support award). One of the benefits of the child support guidelines in general is that similarly situated children are treated similarly; so we know when the guidelines produce a figure, it is the same figure that will apply for all children with the same circumstances as the subject child. Accordingly, when we start with the guideline figure, it is easier to identify what are and are not the appropriate reductions based upon the existence or absence of potential duplicate expenses."
43. *Ibid.* The authors wrote, "To proceed in this fashion, it is important to identify exactly what expenses are intended to be covered by the basic child support award. In New Jersey, Appendix IX-A, ¶8 specifically and exhaustively defines what expenses are covered by a basic child support award. Without knowing what expenses are intended to be covered by basic child support, it is impossible to know what expenses are duplicated in the form of college expenses. Surprisingly, New Jersey's child support scheme is unique in this regard. Very few other states' guidelines provide the costs that are intended to be covered by a child support award; and no other state is as detailed as New Jersey, which breaks the expenses covered by child support down into seven general categories— housing, food, clothing, transportation, unreimbursed medical expenses, entertainment, and miscellaneous items—and then further breaks each individual category down in excruciating detail."

44. *Jacoby*, 427 N.J. Super. at 121–22. This list included: "transportation (possible automobile maintenance or payments, gasoline, parking, or alternate travel expenses); furniture (such as lamps, shelves, or dorm set-up and small appliances); clothing; linens and bedding; luggage; haircuts; telephone; supplies (such as paper, pens, markers or calculators); sundries (such as cleaning supplies, laundry detergent); toiletries (soap, shampoo and other personal hygiene necessaries); insurance (automobile, health and personal property); entertainment for college events and organizations; and spending money. Some of these expenses may be incurred once, others may vary in need or amount year to year, while the remainder are constant."
45. *Id.* at 122.
46. *Ibid.*
47. *Ibid.*
48. *Ibid.*
49. *Ibid.*
50. *Id.* at 123.
51. *Colca v. Anson*, 413 N.J. Super. 405, 416 (2010).
52. *Jacoby*, 427 N.J. Super. at 122.
53. *Colca v. Anson*, 413 N.J. Super. 405, 416 (App. Div. 2010).
54. *Id.* at 416, fn 2.
55. *Jacoby*, 427 N.J. Super. at 113.
56. *Ibid.*
57. *Ibid.*

Is Life Insurance a Distributable Asset Pursuant to N.J.S.A. 2a:34-23.1?

by Lisa P. Parker and Laurence J. Cutler

Under New Jersey's equitable distribution statute, the definition of "property" is expansive and denotes many forms of ownership, including tangible and intangible assets as well as future interests. In *Kruger v. Kruger*,[1] the Supreme Court held that "[t]he right to receive monies in the future is unquestionably "an economic resource." In his concurring opinion in *Kikkert v. Kikkert*,[2] Justice Morris Pashman confirmed that the definition of "property" is to be construed broadly to "include a wide range of economic resources." In *Moore v. Moore*,[3] the Supreme Court viewed the receipt of future monies as an economic resource.[4]

In *Mahoney v. Mahoney*,[5] the Supreme Court found:

> Regarding equitable distribution, this Court has frequently held that an "expansive interpretation is to be given to the word 'property,'" *Gauger v. Gauger*, 73 N.J. 538, 544 (1977). *Accord Kruger v. Kruger*, 73 N.J. 464, 468 *1977); *Painter v. Painter*, 65 N.J. 196, 217 (1974). New Jersey courts have subjected a broad range of assets and interests to equitable distribution including vested but unmatured private pensions. *Kikkert v. Kikkert*, 88 N.J. 4 (1981); military retirement pay and disability benefits, *Kruger v. Kruger*, *supra*; unliquidated claims for benefits under workers' compensation, *Hughes v. Hughes*, 132 N.J. Super. 559 (Ch. Div. 1975); and personal injury claims, *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 80-82 (App. Div. 1974). This expansive view of inclusion is a policy-driven determination that all economic resources acquired during a marriage are to be shared.

Given such an expansive view of the definition of property, would a contract: 1) entered into during the marriage; 2) funded with marital assets; 3) which pays a definite sum of money at an indefinite point in the future; 4) which could be sold in the open market; and 5) which has been found to be a distributable asset in other jurisdictions, be deemed to be a marital asset under New Jersey law? Would it be viewed as an economic resource?

What has just been described is a life insurance policy. In New Jersey, the equitable distribution of life insurance policies has been largely limited to the element of cash surrender value. Yet, is there not a substantial argument that a life insurance policy, whether whole or term, is a distributable asset under N.J.S.A. 2:34-23.1? This article addresses the intellectual debate over whether a life insurance policy should be considered a distributable asset to be valued beyond its cash surrender value.

Life Insurance as Security

Matrimonial lawyers in New Jersey have historically looked to life insurance as primarily a means to secure a payor's obligation to provide support. Indeed, in virtually all agreements in which there remains an ongoing support obligation, efforts are made to have a corresponding obligation to continue life insurance for as long as that support obligation remains.

The Legislature recognized the importance of life insurance as a form of security for support obligations when the alimony statute was amended in 1988 to authorize the court to order a payor to purchase life insurance for the protection of a former spouse or children, and case law has long authorized this use.[6] While the importance of continuing life insurance obligations concurrently with support obligations remains, practitioners may be overlooking the fact that life insurance policies themselves may be valuable assets subject to equitable distribution in accordance with N.J.S.A. 2A:34-23.1.

Life Insurance as a Distributable Asset

As early as 1911, Justice Oliver Wendell Holmes, writing for the U.S. Supreme Court, recognized that life insurance possessed all of the ordinary characteristics of property, thereby representing an asset that could be transferred by the policy owner.[7] Despite the longstand-

ing recognition that life insurance policies are assets, lawyers routinely do not properly consider whole and term life insurance policies as distributable assets. Traditionally, life insurance policies were not considered marital assets separate from the cash surrender value of the policy or investment funds owned by the policies.

Similarly, lawyers often summarily dismiss term life insurance policies as not being assets subject to equitable distribution, reasoning they do not have quantifiable values. Indeed, there is often debate among attorneys over whether a term life insurance policy should even be identified as an asset on a case information statement.

> There are a multitude of reasons why life insurance policies have value justifying the policy imperative to create a distributable asset. The framework for analysis is New Jersey's expansive view of assets. Since all assets of the parties are presumed to be subject to equitable distribution (and it therefore falls upon he or she who asserts an immunity therefrom to prove the immunity), it is the exception, not the rule, when a court finds an asset is not distributable. That expansive policy exists for clear and compelling policy reasons.

Given this expansive view of the definition of property, which includes assets acquired with marital funds, a substantial argument exists that a life insurance policy constitutes an economic resource subject to equitable distribution. When life insurance is purchased during the marriage and the premiums are maintained with marital funds, the party who retains the policy receives more than what the asset appears to be worth (or not worth) on its face. *In almost all cases, the present cost of replacing a life insurance policy is greater than the premiums paid during the marriage*, particularly in long-term marriages where the policy has been in existence for an extended period of time. Under such a scenario, the current premium rate will likely be much greater than the premium rate paid during the marriage with marital funds. Moreover, many term life insurance policies include the right to convert the policy to a whole life policy, at a predetermined premium rate, without the need to meet medical eligibility requirements. That predetermined rate is often significantly less than what a new premium would be for a comparable whole life policy.

Stated another way, obtaining at the time of divorce the same policy that was acquired years ago during the marriage, assuming a party even remains insurable, would cost the policyholder substantially more. As a result, consideration should be given to whether the spouse who does not retain ownership of the policy should be compensated for the value acquired and, arguably, enhanced, during the marriage through marital funds. The value might be the difference between replacement value for a new policy and the cost of the policy purchased during the marriage or, alternatively, the value of the premiums paid during the marriage.

Separately, value is created in the ability to renew the life insurance in *futuro*. As a direct result of the payments made during the marriage to maintain the policy, the insured is afforded the benefit of being able to continue life insurance at affordable rates long after the marriage has ended, and for the benefit of his or her estate, which often does not include the former spouse. The spouse who does not retain the policy, and who might need to go out and secure a new policy post-divorce, would have to do so at increased rates, and against the risk of not being insurable or not having the same opportunity the owning spouse has. Should that spouse receive some value for the policy acquired during the marriage that can then be applied to a new policy? Determining a mechanism for valuing that interest remains a separate but equally important issue.

Consider the case of spouses, each age 55, with two high school-age children and a 15-year marriage. During the marriage, the parties obtained a 20-year term life insurance policy owned by the husband on his life. The policy acquired during the marriage provides the husband with the option to convert to a whole life policy at a predetermined premium prior to the expiration of the term. The wife has no pre-existing insurance on her life.[8] Under an agreement where the wife will maintain primary custody of the children, the husband typically will retain the pre-existing policy and the wife will be required to obtain a policy to insure her obligations for child support and post-secondary expenses. The wife's new policy will need to be purchased at rates that prevail at the time of divorce, based on the wife's present age and health. The husband will continue to pay the rates the parties bargained for some 15 years earlier, and which were paid for 15 years with marital funds. There will be no increase for the husband at the time of the divorce based on his present age and health. The husband may also exclusively retain the right to convert the policy to a whole life policy at a discounted rate. If the husband opts

to take advantage of the right to convert the term policy to a whole life policy, he will continue to retain the whole life policy, and the eventual value created therein, long after the parties are divorced.

Why is there not an argument that the wife should receive some benefit for the years of premiums paid with joint funds, or the benefit given to the husband to be able to convert the policy to a whole life policy, which was only made possible by the maintenance of the term policy during the marriage with joint funds?

Case law in other jurisdictions suggests she should receive some benefit. If joint funds were used to obtain a future benefit, why does one spouse receive the economic advantage at the exclusion of the other spouse?

Other Jurisdictions Where Life Insurance Has Been Found to Be a Distributable Asset

Other courts have recognized the inherent values of whole and term life insurance policies. Even term life insurance policies with no cash surrender value have been held to be assets subject to distribution at the time of a divorce. In the California case of *In re Marriage of Gonzalez*,[9] the California Court of Appeals considered the lower court's ruling dissolving a 22-year marriage and distributing two life insurance policies, neither of which had a cash surrender value, one to each party. On appeal, the husband argued the policies should not have been awarded without determinations of their values.

In considering this novel issue, the court in *Gonzalez* analogized the value of a term life insurance policy to employee pension rights and accrued vacation time, each representing a form of deferred compensation constituting an asset earned during the marriage that is subject to distribution. The *Gonzalez* court noted both pension rights and accrued vacation time are contractual in nature, and are not merely an expectation.[10]

Gonzalez relied upon Christian Markey, *California Family Law, Practice and Procedure*, Section 24.45[3][e], pp. 24-55, 56, in which the author noted:

> Although there are no cases on the subject, it could be argued that policies are worth more than their cash surrender value, or in the case of term insurance, more than nothing, based on their replacement value. *Replacement value may be significantly higher than cash surrender value in situations where the insurability of the insured is lessened because of advancing age or declining health, and the existing policy cannot be cancelled or contains guaranty of insurability.* (Emphasis added)

The court in *Gonzalez* agreed with Markey, and found merit to the argument that the value of a life insurance policy might be something greater than its cash surrender value in the case of a whole life policy, and something greater than no value in the case of a term life insurance policy. In reaching this conclusion, the *Gonzalez* court also relied upon the reasoning set forth in *Biltoft v. Wootten*,[11] which involved a term life insurance policy in which the husband changed the beneficiary from his wife to his children during the pendency of the action and died before the matter was adjudicated. One of the beneficiaries argued that the wife was not entitled to share in the life insurance benefit because term insurance only provides insurance for the premium period and each renewal period represents a new contract.

The *Biltoft* court rejected this argument, instead finding that "the decedent's community efforts for the 20 years prior to the separation maintained the policy in force."[12]

The court noted the following *dicta*:

> The court in the dissolution action may simply determine the value of the community interest in the same way it does any other right in community property. The value of those rights might well depend upon the nature of the benefits realized as a result of the acquisition of the contract during the marriage.
>
> Relying thereon, the *Gonzalez* court found this analysis "compelling" and concluded that a "*term life insurance policy is divisible property with an ascertainable value—not mere expectancy.*"[13]

Gonzalez acknowledged the difficulty in valuing and dividing a term life insurance policy. However, the court disavowed the notion that difficulty in valuing the assets should render the asset valueless:

> Why, then, should term life insurance be labeled a mere expectancy rather than property divisible upon dissolution? If ease of valuation has something to do with the definition of divisible community property the Mona Lisa could not qualify because it is literally priceless. *Yet it would be ludicrous to suggest such property should be awarded to one spouse without a corresponding credit to the other, however arbitrarily determined.*[14]

This is precisely the view the New Jersey courts have taken—an asset is not ignored just because it is difficult to value.[15]

The court in *Gonzalez* offered guidance on how value could be determined. One mechanism was to look at the replacement costs for the policy in question. Another suggested approach was the consideration of the sum of the contributions made during the marriage.[16]

In any event, on remand, the trial court was directed to determine the value of the policy in question by considering several factors, including: 1) the face value of the policy; 2) the amount of the premium; 3) the life expectancy of the insured; 4) whether the policy may be converted to a whole life policy; and 5) when, if ever, is the policy deemed fully paid.[17]

The California appellate court reached a different result in the case of *In re Estate of Logan*.[18] In that post-judgment matter, the wife appealed a lower court's denial of her application to receive a portion of her deceased former spouse's term life insurance policy. The parties had been divorced for some 18 years at the time of the husband's death, and the parties' judgment of divorce directed the husband to maintain his children as beneficiaries of his employer-sponsored group life insurance policy. The *Logan* court affirmed the lower court and denied the wife an interest in the deceased's term life insurance policy. However, the *Logan* court's analysis turned on the issue of whether the former husband was insurable at the time he began paying the premiums with post-separation earnings. Specifically, the *Logan* court found:

> With respect to the element of the right to renew coverage for additional terms, term life insurance has either a significant value or no value at all. The right to renewal upon payment of the premium for the next term is significant because the insured possesses the right even if he or she has become uninsurable in the meantime. Usually, as Markey points out, policies require increasing premiums and/or decreasing amounts of coverage as the insured gets older. If, as is usually the case, the insured is insurable at the end of the term purchased with community funds, the renewed policy, that is, the term policy purchased by the payment of the premium with postseparation earnings which are separate property pursuant to [the California Code], or by the employer as a post-separation fringe benefit, changes character from community to separate property.

The *Logan* court concluded the correct rule to be applied to the division of term life insurance policies is that the policy remains joint property only for the period beyond the date of separation for which community funds were used to pay the premium. As a result, if a former spouse dies during the premium period attributable to marital efforts, the policy is distributable. Otherwise, the policy would not constitute distributable property.

More recently, courts in other jurisdictions have considered the issue and found term life insurance policies are assets whose value should be subject to distribution. In *Willoughby v. Willoughby*,[19] the federal district court considered a narrow issue on a summary judgment basis of whether a life insurance policy was property subject to an order restraining the disposal of property during the pendency of a divorce action. There, the husband had changed the beneficiary of his life insurance policy after the divorce was filed and then committed suicide during the pendency of the action. The *Willoughby* court found a life insurance policy was marital property, not mere expectancy, in a case in which the policy was purchased during the marriage and at least some of the premiums were paid from the husband's earnings during the marriage. The finding was consistent with law that: 1) recognized the statutory principle that each spouse maintains a vested, albeit undetermined, interest in all property individually or jointly held; and 2) applicable case law that a life insurance policy is property subject to division in a divorce.[20]

Disavowing the Theory That Value Only Exists After the Policyholder is Deceased

In valuing life insurance policies in a divorce action, there is a counter-argument that may be made to the effect that there is no value to the policy owner since value will only materialize after the owner is deceased. To follow the arguments in *Gonzalez* through, the owner of the policy will essentially pay the non-owner for some inherent value in the policy the owner will never realize during his or her lifetime.

However, this argument fails to consider that the owner of a policy receives an *immediate benefit* in retention of the previously existing policy insofar as the premiums are likely less than prevailing rates; are not subject to increased premiums due to health concerns; and the value

that has been accumulated over years of a marriage with marital funds may give rise to the option to convert the policy to whole life, which affords the owner value that can be utilized prior to death. Consider what would occur if no life insurance policy existed. Would there be a need to set aside funds from future earnings in order to provide security for heirs? This is what the non-owning spouse must do. Therefore, if the owning spouse retains a pre-existing policy, shouldn't the non-owning spouse receive something for the value of that asset?

Although there does not appear to be any case on point in New Jersey, there is the assumption in common practice that, aside from cash surrender value, there is no asset value created in the life insurance policy until the death of the insured. To those who have never made the argument advanced in this article, they might find comfort in *Volunteer State Life Ins. Co. v. Hardin*,[21] in which the court found proceeds of a life insurance policy belong to the payee, and only become property upon the contingency of death and, therefore, cannot constitute the property of a husband or wife during the lifetime of both of them.

However, other jurisdictions have dealt with such contingencies in other ways. In a case of first impression in Kansas, the court of appeals in *In re Marriage of Day*[22] considered the equitable distribution of life insurance policies with little or no cash surrender values insuring the life of a third party. In *Day*, the parties had worked the husband's parents' family farm for some 23 years of the marriage. Several years prior to the parties' divorce, they obtained a whole life policy for $10,000 and a term policy for $90,000 on the husband's mother's life, with the husband named as the beneficiary. The husband's mother testified that the term life insurance policy was purchased by the parties so the farm could be maintained after her death.[23] The majority of the premiums for the policy were paid with the parties' marital funds. The whole life policy had little cash value and the term life insurance policy had no cash value, but the premiums were set according to a predetermined schedule. The whole life policy was later converted to a term policy. Both parties acknowledged on their proposed property divisions that the policies had no value.

At trial, the husband asked to retain the policy with no setoff to the wife. The wife sought to have the husband continue the policies, maintain the premiums, and, upon the husband's mother's death, pay the $100,000 death benefit to the wife. The trial court ordered the husband to preserve his ownership interest in both life insurance policies and to continue paying all premiums necessary to maintain the two policies and, upon the husband's mother's death, the life insurance proceeds should be divided equally between the parties. The husband appealed.

On appeal, the court of appeals in *Day* primarily focused on the issue of insurability, but further addressed the trial court's characterization of term life insurance. The *Day* court concluded that if the premium is fixed for a determinate period of time in the future, the right to renew the policy without a premium increase could have significant value. Weighing the public policy considerations against equitable principles, the trial court held *if the husband elected* to continue the coverage on his mother's life, the trial court's ruling to divide the life insurance proceeds between the parties should be carried out. In essence, the appellate court affirmed the trial court that awarded the wife a percentage interest in the proceeds of the policies to be paid at an indeterminate time in the future. Thus, differing from the trial court's blanket 50 percent of the proceeds, the appellate court determined the wife's future equitable distribution would be the product of the death benefit times a fraction in which the numerator would be 50 percent of the marital contribution toward the premiums and the denominator would be the total numbers of years before the life insurance proceeds were realized.[24]

The *Day* decision implicates significant questions concerning ability to distribute term life insurance policies. The right to renew a life insurance policy, regardless of one's age or health, is a valuable right, since there is no question the cost of term life insurance will inevitably increase with the mere passage of time, age and health concerns. Where the insured has the right to purchase life insurance in the future at less than fair market value because of efforts made during the marriage, the right to renew must have some value.

Consider the hypothetical of the divorcing couple posed above in which the husband will retain the life insurance policy purchased during the marriage. The parties bargained for a fixed-premium rate some 15 years earlier and paid years of premiums with marital funds. The premiums were fixed and, arguably, set a higher rate to recompense the insurance provider for not being able to increase the premiums in the future. No argument exists that if the husband were to go out today and attempt to secure a new term policy, it would likely be at higher rates than when he was 39 years old. Depend-

ing on the husband's health, he may not even be able to obtain a new policy, or the rates would be so prohibitive obtaining a new policy would be economically unfeasible. Moreover, the husband retains the ability to convert the policy to a whole life policy at a predetermined rate that may very well be below fair market value.

Isn't some value created in all of the benefits to the husband? Should the wife, who may now need to go out and retain her own policy, at prevailing rates, without the benefit of the joint marital efforts of some 15 years, receive something in turn for that value?

Valuing Life Insurance Interest

Determining the value of a life insurance policy is a separate, albeit more complicated, issue. This complexity should not act as a deterrent to the inclusion of life insurance policies in the marital estate. As discussed, the *Gonzalez* court suggested that cost of a replacement policy might be a proper measure of the value subject to distribution. Another approach would be to present expert testimony by an actuary regarding the value of the right to renew. However, the cost of such an expert might outweigh the value in the life insurance policy.[25] The difficulty presented in valuing the asset should not create an impediment that should render the asset valueless.

Similarly, in cases in which whole life policies exist, merely accepting the cash surrender value does not take into account the additional value created by marital efforts irrespective of the cash value (just as if the policy were a term policy). Whole life policies are valuable assets in that they pay dividends and the cash value is tax deferred. Dividend rates are generally greater than bond rates, thereby making these policies more valuable than perhaps a bond portfolio. Accordingly, lawyers should not blindly accept the cash surrender value of a whole life policy to be its total value. The cash surrender value represents only one element of the bundle of economic rights. The cash surrender value effectively represents a sale of the policy at a predetermined rate based upon considerations such as projected premiums, interest and policy expenses.

Insurance policies are specifically written to protect the carrier in the event the policy is terminated or suspended prior to the company's recoupment of its initial outlay. The policy's actual account value is the amount of equity that has accumulated within the cash value portion of the policy. In contrast, the cash surrender value is simply what the policyholder will receive if the policy is terminated at an earlier date. For the first several years of a policy, the cash surrender value is dramatically less than the account value of the policy. If one party to a divorce is retaining the whole life policy, it could be a mistake to utilize the cash surrender value as the value to be distributed. This would assume the policy is only worth its immediate liquidation value, which is not necessarily its true value.

The cash surrender value does not necessarily represent even the current fair market value, nor does it take into consideration the additional value created during the marriage. The contributions toward premiums, the fact that the party retaining the policy will not have to obtain a new policy at prevailing rates, and the fact that the insured may be retaining a policy that cannot be replaced due to medical eligibility, should all be factors considered in valuing a whole life policy.

Other Considerations in the Division of Life Insurance Policies That Demonstrate Value

1035 Exchanges

Often, parties take the cash surrender value of a whole life policy and divide it as part of the division of their assets. Historically this is where the analysis of life insurance policies as a distributable asset ends. As this article points out, lawyers may be doing their clients a great disservice to end the analysis there. However, in order to actually utilize the value of a life insurance policy, whatever that value might be, parties often liquidate the cash surrender value in order to divide the value of the policy itself, or to satisfy other equitable distribution obligations. Liquidation of a cash surrender may not be the best option, since it triggers an immediate tax consequence, which, of course, diminishes the value to be distributed.

In contrast, value of the policy can be maximized to avoid such taxes by utilizing a 1035 exchange, which allows an insured to roll the cash surrender value into an annuity without triggering immediate tax consequences. If there is a gain in the life insurance policy, a 1035 exchange allows a party to defer paying income tax on the gain. By way of example, assume that $100,000 has been paid into a life insurance policy, which now has a cash surrender value of $50,000. Each party agrees to obtain new policies to insure their respective obligations. Instead of terminating the policy and receiving the cash surrender value, as is customarily done in divorce, a

party can opt to do a 1035 exchange to an annuity and purchase the new policy with other funds. The annuity will have an initial value of $50,000 and a cost basis of $100,000. No tax will be due on the $50,000 of gain up to the cost basis of $100,000.

A 1035 exchange provides a benefit even if there is a loss (*i.e.*, if the surrender value of the policy is less than the total premiums paid). Generally, such losses are not deductible. However, in a 1035 exchange the cost basis of the life insurance policy carries over to the annuity and then can be utilized to avoid paying income tax on future gains in the annuity.

Loans Against the Policy

Another option for parties to consider in dividing the cash surrender value is the ability to take a loan against the policy, which does not need to be repaid. The policy loan provides parties with flexibility insofar as no tax is triggered on a policy loan as long as the policy itself remains in force. In turn, the funds from the policy loan can be utilized to invest in alternative investments, such as an IRA. This option allows a party to fund an IRA over time, with money that is untaxed, thereby making the policy even more valuable.

Life Settlements

A newer trend, which has developed over the last several years, is what is known as a life settlement, an option that allows a policyholder to sell the life insurance policy for a value often higher than the cash surrender value. The life settlement industry grew from the viatical settlement industry. In the 1980s, the viatical settlement industry emerged from the AIDS epidemic, and enabled AIDS victims, who faced short life expectancies, to sell their life insurance policies for an amount in excess of the cash surrender value, thereby providing much-needed, immediate cash to the victim. When AIDS research progressed and victims were living longer, the viatical settlement industry declined. Thereafter, the life settlement industry emerged, focusing on insureds who are 65 and older and who are not terminally ill.

Life settlements essentially offer older individuals who no longer have minor dependents the option to sell a policy for a value likely greater than the cash surrender value. In 2001, the Viatical Settlement Models Act was released by the National Association of Insurance Commissioners to establish guidelines for the industry. In 2009, the United States Senate Special Committee on Aging conducted a study and found that, on average, life settlements yield eight times more than the cash surrender value offered by life insurance companies.[26]

When representing a qualifying older client in a divorce, life settlements offer numerous possibilities. First, a life settlement can offer a liquidation mechanism that requires little work and maximizes value. Second, a life settlement can provide a way to obtain a discernible value for a life insurance policy without the need for expensive expert valuation. Third, a life settlement can offer an option to older divorcing individuals who may decide they no longer need life insurance, insofar as they are not married and their children have reached an age where they are self-sufficient. In this case, parties may be able to derive value from something they believed had no value.

There are options available to obtain ready funds from existing life insurance policies, which should be considered in all cases where policies were obtained during the marriage. Regardless of whether there is a means to liquidate the value present in a life insurance policy, matrimonial practitioners need to be conscious of the fact that these policies may have inherent value, which could be subject to equitable distribution.

Conclusion

Historically, life insurance policies have been considered by matrimonial practitioners as either a means to secure a support obligation or as assets whose value is limited to the cash surrender value placed on them by the insurance company, which has a vested interest in minimizing that value. As this article explains, life insurance policies have value that exceeds these historical considerations. Delving deeper into these policies and evaluating these assets through the prism of the joint marital enterprise and the marital contributions made therein should lead to the recognition that life insurance policies may be valuable assets that should be subject to equitable distribution. ■

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Endnotes

1. 73 N.J. 464, 468 (1977).
2. 88 N.J. 4, 6 (1981).
3. 114 N.J. 147, 157 (1989).
4. *Compare*, *Landwehr v. Landwehr*, 111 N.J. 491 (1988), and the discussion in Skoloff & Cutler, *New Jersey Family Law Practice* (14th ed. 2010), 6.5(A) as to the potential of contracting and limiting this expansive view.
5. 91 N.J. 488, 495 (1982).
6. *See*, N.J.S.A. 2A:34-25; *Grotsky v. Grotsky*, 58 N.J. 354 (1971) (Where circumstances equitably call, court may order the maintenance of insurance to secure a support obligation); *Meerwarth v. Meerwarth*, 71 N.J. 541 (1976) (Husband required to provide life insurance for protection of wife and children); *Davis v. Davis*, 184 N.J. Super. 430 (App. Div.1982) (Requiring maintenance of life insurance or the establishment of a trust to secure support obligation).
7. *Grigsby v. Russell*, 222 U.S. 149 (1911).
8. A related issue, consistent with the premise of this note, is whether the wife should add such a projected expense to her case information statement. It is, after all, part of the marital lifestyle.
9. 168 Cal. App. 3d 1021, 214 Cal. Rptr. 634 (1985).
10. *Id*. at 1023.
11. 96 Cal. App. 3d 58, 157 Cal. Rptr. 581 (1979).
12. *In re Marriage of Gonzalez* at 1025 *citing Biltoft* at 60.
13. *Id*. at 1026 (emphasis added).
14. *Id*. at 1024 (Emphasis added).
15. *Bowen v. Bowen*, 96 N.J. 36 (1984).
16. *Id*. The valuation process in *Gonzalez* was simplified by the fact that two policies existed, insuring the life of each party, only one of which was subject to the appeal.
17. *Id*. at 1026.
18. 1191 Cap. App. 3d 319, 236 Cal. Rptr. 368 (1987).
19. 758 F. Supp. 646 (1990).
20. *Id*. at 649-650 *citing Redmond v. Redmond*, 229 Kan. 565, 629 P. 2d 647 (1979) and *Hollaway v. Selvidge*, 219 Kan. 345, 548 P.2d 835, 840 (1976). The determination in *Willoughby* was, arguably, an easier issue since the policy value had already been realized in the form of the death benefit.
21. 145 Tex. 245 (Tex. 1946).
22. 31 Kan. App. 2d 746, 74 P.3d 46 (2003).
23. *Id*. at 748.
24. Note this is a formula similar to that used in New Jersey to measure the marital contribution to retirement assets.
25. *See In re Estate of Logan*, 191 Cal. App. 3d 319, 323 (1987) ("We suspect that in more cases the cost to the parties of expert witnesses would be greater than the value of the term life insurance policy.")
26. *Wikipedia*, Life Settlements.

Work-related Childcare Expenses: A Black Hole in the Child-Support Universe

by Christopher Musulin

When calculating child support, issues frequently arise concerning both the necessity and cost of work-related childcare, as the inclusion of work-related childcare can add hundreds of dollars to the weekly child support obligation.

In fact, there should be little, if any, debate concerning these issues. The New Jersey child support guidelines specifically recognize the necessity of work-related childcare as an essential component of the income shares concept. Additionally, the underlying data used to construct the basic awards, as well as numerous learned sources, offer highly accurate standards for reasonable work-related childcare expenses for school-age children, toddlers and infants.

Why is Work-related Childcare Added to the Basic Award?

In accordance with Rule 5:6A, the child support guidelines must be used as a rebuttable presumption in all establishment and modification actions. The net cost of work-related childcare is an expense that may be added to the basic child support obligation.[1]

The New Jersey Administrative Office of the Courts contracted with Policy Studies, Inc., to fulfill certain requirements pursuant to the Family Support Act of 1988, including periodic review and updates of child support guideline protocols.[2] On March 30, 2004, Policy Studies, Inc., also known as PSI, submitted a report titled "New Jersey Economic Basis for Updated Child Support Schedules" to the Administrative Office of the Courts, containing the most recent economic data related to child-rearing costs.[3]

According to the PSI report, in the states utilizing the Betson-Rothbarth measurements of costs, questions were raised about the treatment of various expenditures related to child rearing, which included work-related childcare, the marginal cost of medical coverage, and different costs attributable to children during their teenage years. With regard to work-related childcare, the report offers the following discussion:

> The proposed New Jersey support schedule presented in this report excludes the costs of child care. Instead, in the child support calculation, the actual costs are prorated between the parents based on their relative proportions of net income and added to the basic support obligation. There are several reasons for this approach:
>
> - They represent a large variable expenditure and are not incurred by all households; usually only in households with a working custodial parent and one or more young children.
> - Where child care costs occur, they generally represent a large proportion of total child expenditures, particularly in households with children under 6 years of age.
> - Treating child care costs separately maximizes the custodial parent's marginal benefits of working. If not treated separately, the economic benefits of working are reduced substantially. One of the principles incorporated into the Income Shares model is that the method of computing a child support obligation should not be a deterrent to a participation in the work force.[4]

By excluding work-related childcare from the basic award and splitting it between the litigants, the New Jersey child support guidelines are specifically designed to minimize the economic impact of work-related childcare on the custodial parent and actively encourage participation in the productive workforce. Even if a custodial parent earns minimum wage, both the Betson-Rothbarth and PSI research and modeling assume parents will share the fixed, variable and controlled costs

related to rearing children in proportion to their incomes. The entire rationale of the income shares concept fails unless both parents maintain a source of income to share child-rearing expenses.

This clear public policy rationale weighs heavily against any argument that the custodial parent should not work because the cost of work-related childcare may exceed his or her actual net income. While there may be exceptions such as large numbers of children, a child or children with extraordinary special needs or other unusual circumstances, in most cases a custodial parent starting at minimum wage will gradually increase their income; accrue essential work-related benefits; and garner the self-esteem related to independence, achievement, and self-sufficiency. Their ability to share in child-rearing expenses will improve over time, as expenses significantly increase with the age of the child.

What is the Reasonable Cost for Work-related Childcare: Standards and Resources

Litigants often debate the reasonableness of the cost associated with work-related childcare. The issue is addressed in multiple reports by PSI, and has been the subject of numerous learned studies both in the United States and throughout the world.

The 2004 PSI report provides an analytical framework to calculate reasonable work-related childcare for school-age children, as extrapolated from the Rothbarth estimation technique.

> Since the [Consumer Expenditures Survey] itemizes child care expenditures, an adjustment can be made directly to EC/C. For example, Table I-4 at the end of this appendix shows that for two-child households in the $60,000-$75,000 income range, EC/C = 34.62 percent. Child care (CC) as a proportion of consumption for that same income range is 3.14 percent (1.57 percent x 2 children). For this income range, a revised EC/C which excludes child care costs is:
>
> Revised EC/C = 34.62 – 3.14 = 31.48 percent.[5]

The Consumer Expenditures Survey (CEX) is based on research funded by the U.S. Department of Health and Human Services, and is considered the most reliable data available estimating expenditures on children. "EC" stands for expenditures on children, and "C" stands for total family consumption expenditures.

Under the example provided above, reasonable work-related childcare for two school-age children in a family earning between $60,000 and $75,000 per year is between $1,884 and $2,355 annually. This is the assumed expense for before-school and after-school programs for children ages six through 13.

As the above measurements address work-related childcare for only school-age children, it is necessary to turn to other standards to determine reasonable full-time, work-related childcare costs for toddlers and infants in the state of New Jersey. While there are multiple studies profiling the cost of work-related childcare in the United States and throughout the world,[6] the Sept. 2009 study conducted by the New Jersey Association of Childcare Resources and Referral Agencies (NJACCRRA) is considered the benchmark for purposes of determining the actual cost of full-time work-related childcare from infancy until full-time school placement. The report is based on data gathered from 1,832 center-based programs located in 424 different municipalities in the state of New Jersey. The report contains the extraordinary finding that the average annual price of toddler and infant care is *higher* than the annual tuition at a four-year New Jersey public college.[7]

According to the NJACCRRA report, the average weekly cost for full-time center-based childcare varies from $212.25 to $420 for infants, and from $173.25 to $404.34 for toddlers up to the age of five. The highest cost in the state of New Jersey is in Hunterdon County, and the lowest cost is in Salem County. After age five, with entry into full-time school, the costs drop significantly and become more consistent with the CEX estimates described above.[8]

Additional Issues Regarding Work-related Childcare

Should the Court Consider Under-the-Table Work-related Childcare Expenses?

Arguments are frequently made that work-related childcare should only be considered if it is declared for tax purposes or paid to a licensed childcare provider. In fact, most jurisdictions treat the expense liberally, with few limitations, because of the overwhelming public policy encouraging both parents to be employed and to share in child-rearing expenses.

For example, the *Michigan Child Support Formula Manual* considers work-related childcare based upon "the established pattern of childcare" existing during cohabitation or prior to filing a petition in the court system.[9] In effect, the *status quo* existing during the viable portion of the relationship constitutes a presumption regarding the reasonableness of the expense. Many other states that employ the income shares concept utilize a similar presumption, at least at the *pendente lite* phase of the litigation.

The IRS and Work-related Childcare

Pursuant to Internal Revenue Code Section 21, a divorced or legally separated parent exercising residential custody may claim a household and dependent care credit for a child who is under the age of 13 or physically or mentally incapable of caring for him or herself irrespective of age. This persuasive authority creates an age threshold for the consideration of work-related childcare.[10] The ability of the taxpayer to claim work-related childcare can continue indefinitely with a disabled child. It should be noted the expense is reduced by any dependent care benefits paid by an employer. Many employers offer this benefit, which is excluded from gross income and is often not memorialized on a regular pay stub. Inquiry should be made through discovery regarding the existence of such benefits.

Work-related Childcare Subsidies

The state of New Jersey Department of Human Services issues subsidies for working parents with children up to the age of 13 or with special needs, who meet certain income and asset criteria.[11] The program issues vouchers, with a nominal copayment, to utilize licensed childcare centers maintaining contracts with the state of New Jersey. In modest income situations, this governmental benefit can significantly ameliorate the cost of work-related childcare. This should also be the subject of discovery.

NJRE 803(c)(6)

Another common issue relates to the level of proof required concerning work-related childcare expenses. New Jersey Rule of Evidence 803(c)(6), the business records exception to the hearsay rule, permits the introduction of invoices, registration materials and contracts for childcare services both in motion practice and at trial. The litigant can certify or testify regarding the details in the selection process; the involvement or lack of involvement of the other parent; and provide copies of canceled checks, as well as other details related to work-related childcare.

Childcare Expenses Incurred While Finding Work

Although not specifically addressed in the Court Rules, the strong public policy underlying the income shares concept supports the argument that childcare expenses incurred while searching for employment should be included in the child support guidelines calculations. Query whether a similar analysis should apply to someone in a rehabilitative situation seeking education.

The PSI report does note the difficulty inherent in distinguishing work-related childcare from childcare incurred for other purposes.[12]

Conclusion

According to data maintained by the Administrative Office of the Courts and PSI, between 15 and 20 percent of all dissolution and non-dissolution cases involve work-related childcare issues. The attendant analysis need not be cloaked in uncertainty; guidance is available. Much like the Court Rules direct courts to refer to historic earnings and labor statistics to determine appropriate income models, the CEX and the NJACCRRA report provide standards for what constitute reasonable work-related childcare expenditures. Additionally, the entire New Jersey child support guidelines system is premised upon an income shares concept that assumes work-related childcare is not a luxury, but rather a necessity.

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Endnotes

1. Work-related childcare is considered in the calculation of child support in all but five jurisdictions in the United States. More than half of the jurisdictions that consider childcare deem it a mandatory deduction, while others treat it as permissive or a basis for deviation from guidelines. Linda D. Elrod and Robert G. Spector, A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families, *Family Law Quarterly* Winter 2011 44.4 (2011): 512-13.
2. Policy Studies, Inc., based in Denver Colorado, engages in the administration and access management of public and governmental programs across America, with emphasis on child support enforcement and integrated consulting services. The company product and resource profile can be found at www.policy-studies.com.
3. This data has been subsequently updated, but the attending commentary and analysis remain valid. Jane C. Venohr and Tracy E. Griffith, *New Jersey Economic Basis for Updated Child Support Schedule*, Rep. Denver: Policy Studies, Inc., 2004.
4. Appendix I-5.
5. Appendix I-6.
6. *See, e.g.,* John Iceland and David C. Ribar, *Measuring the Impact of Child Care Expenses on Poverty*, Rep. Washington, D.C.: Population Association of America, 2001. *Parents and the High Cost of Child Care*, Rep. Child Care Aware of America, 2012. Herwig Immervoll and David Barber, *Can Parents Afford to Work? Childcare Costs, Tax-Benefit Policies and Work Incentives*, Rep. Vol. 1932. Bonn, Germany: Institute for the Study of Labor, 2006. Print. Discussion Paper Set.
7. Diane Dellano LCSW, and Theresa McCutcheon, MSW, *The High Price of Child Care: A Study Profiling the Cost of Care Within Licensed Centers in New Jersey*, Rep. Trenton, NJ: New Jersey Association of Child Care Resource and Referral Agencies, 2009.
8. See accompanying chart.
9. Michigan Child Support Formula Manual §3.06(A).
10. Of note, the Michigan Child Support Formula Manual contains a presumption that childcare is needed until Aug. 31 following the child's 12th birthday. §3.06(D).
11. www.nj.gov/humanservices/dfd/programs/child/.
12. Appendix I-3.

Average Weekly Costs for Center-based Childcare

State of New Jersey	Children 0-18 months	18 months-2.5 years old	2.5-4 years old	4-5 years old
# Municipalities Reporting	372	393	424	424
Highest Average Weekly Rate	$420.00	$333.00	$313.00	$404.34
Lowest Average Weekly Rate	$125.00	$90.00	$90.00	$75.85
Average Weekly Rate in State	$218.69	$202.71	$181.53	$177.95
Median Weekly Rate in State	$212.25	$199.00	$176.31	$173.23

Annual Costs for Center-based Child Care

	Children 0-18 months	18 months-2.5 years old	2.5-4 years old	4-5 years old
Atlantic County	$9,035.19	$8,281.08	$7,561.16	$7,312.49
Bergen County	$12,670.21	$11,589.56	$10,369.57	$10,202.86
Burlington County	$11,291.80	$10,473.84	$9,951.76	$9,313.72
Camden County	$10,042.12	$9,349.85	$8,378.77	$8,268.07
Cape May County	$8,692.67	$8,352.50	$7,267.00	$7,162.59
Cumberland County	$8,663.42	$8,325.20	$7,505.20	$7,281.25
Essex County	$8,956.25	$8,330.72	$7,877.62	$7,701.42
Gloucester County	$9,896.64	$9,409.40	$8,311.68	$8,273.72
Hudson County	$8,866.60	$8,334.27	$7,517.88	$7,381.63
Hunterdon County	$13,593.60	$12,514.96	$10,907.12	$10,730.17
Mercer County	$12,692.83	$11,755.55	$10,418.58	$10,197.89
Middlesex County	$11,598.60	$10,719.28	$9,329.84	$9,332.96
Monmouth County	$11,518.57	$10,888.13	$9,756.26	$9,618.09
Morris County	$13,593.74	$12,429.35	$10,702.37	$10,411.36
Ocean County	$10,236.36	$9,479.98	$8,660.54	$8,623.27
Passaic County	$9,901.39	$9,556.17	$8,849.74	$8,660.81
Salem County	$8,424.00	$8,353.09	$7,444.67	$7,011.33
Somerset County	$13,439.40	$12,767.56	$11,022.96	$10,515.44
Sussex County	$10,624.64	$9,790.56	$8,957.52	$8,580.52
Union County	$11,394.24	$10,186.28	$9,073.48	$8,777.08
Warren County	$10,110.36	$9,337.64	$8,515.00	$8,446.88
State of New Jersey	**$11,371.88**	**$10,540.92**	**$9,439.56**	**$9,253.40**

State v. Duprey: Say What You Mean and Mean What You Say in Domestic Violence Proceedings

by Amanda S. Trigg and Robyn Mate

In a crisis situation, a victim of domestic violence files a complaint pursuant to N.J.S.A. 2C:25-28 without the aid of counsel and without much opportunity to craft his or her sworn statement in support of the request for emergent relief. In 2012, the Appellate Division released its opinion in *State v. Duprey*,[1] a criminal matter, and changed the practice of law in civil and criminal domestic violence cases by ruling that a victim's testimony in a domestic violence action can be used by the defendant to impeach that victim's subsequent testimony in a related criminal action. Furthermore, a defendant who elects to testify will be subject to cross-examination to the same extent as the victim.

To put the importance of this ruling into context, consider the statutory framework for obtaining a temporary restraining order in New Jersey. New Jersey law provides access to forms for a summons and complaint at the court clerk's office, at the municipal courts and at municipal and state police stations.[2] Using those forms, a complainant swears to the circumstances and alleged acts of domestic violence. The clerk of the court, or other unspecified person designated by the court, must assist with completion of the necessary documents.[3] Neither the victim nor the accused defendant may assert a right to have counsel at any stage in the proceedings.[4]

In *Duprey*, the question arose of whether any testimony by either party in the domestic violence hearing may be used for cross-examination in a related criminal case and how to interpret N.J.S.A. 2C:25-29(a), which reads "testimony given by the plaintiff or defendant in the domestic violence matter shall not be used in the simultaneous or subsequent criminal proceeding against the defendant."

In *Duprey*, although the victim obtained a temporary restraining order (TRO) against Duprey on the grounds of assault and terroristic threats, she failed in her attempt to obtain a final restraining order. After trial, the trial judge dismissed the TRO and complaint. The criminal action proceeded subsequently, and at trial Duprey sought to use the transcript from the domestic violence trial to impeach the victim. In turn, the state moved for permission to use Duprey's testimony from the civil action again for impeachment if Duprey chose to testify in the criminal action. The trial judge granted both applications but the state nonetheless sought, and obtained, interlocutory review by the Appellate Division.

The Appellate Division considered both statutory interpretations and the implications of facets of the confrontation clause of the United States and New Jersey constitutions. Turning first to N.J.S.A. 2C:25-29(a), the Appellate Division noted the overall purpose of the Prevention of Domestic Violence Act is to protect victims of domestic violence and to facilitate subsequent or simultaneous criminal proceedings. The Appellate Division carefully parsed the statute and characterized N.J.S.A. 2C:25-29(a) as potentially obstructive to the confrontation clause. The broad language of the statute, if read to prohibit any use of such testimony at the criminal trial (other than the exceptions specified in the statute) "would interfere with a criminal defendant's rights under the Confrontation Clause."[5]

In so noting, the Appellate Division looked to the statements of the New Jersey Supreme Court in *State v. Guenther*[6] about the best expression of the defendant's right to confrontation through cross-examination, which should not "bow to the mechanistic application of a state's rules of evidence or procedure [that] would undermine the truth-finding function [of cross examination]."[7] The *Guenther* Court also emphasized a difference between specific and general attacks on credibility (those couched on general assumptions such as convicts being less trustworthy than general citizens) and specific attacks on credibility (such as showing the bias, prejudice, or ulterior motives of the witness).[8]

Applying those principles, the Appellate Division concluded that the trial testimony of a domestic violence complainant must be available for use by the defendant during cross-examination to impeach contradictory or

inconsistent testimony that is material to the charges against the defendant, or to show bias, prejudice, or ulterior motives on the part of the witness.[9] Such evidence need not be "the only available evidence," nor relate to "a critical issue."[10] Moreover, a trial judge shall exercise discretion in precluding lines of inquiry relating solely to "general impeachment." The "ultimate question" for the trial judge is whether exclusion serves the interests of fairness and reliability. Furthermore, if the defendant chooses to take the stand and be subject to cross-examination, he or she would be subject to use of his or her prior testimony in the domestic violence action for impeachment purposes to the same extent as the complainant. The Appellate Division's interpretation of the statute comports with the intent of the statute, as there was no reason to imply legislative intent to allow the defendant in a domestic violence action to testify falsely at a subsequent criminal trial without fear of impeachment.[11]

Ultimately, pursuant to *Duprey,* testimony taken at a domestic violence hearing may be used for impeachment purposes against the plaintiff or the defendant in a subsequent or simultaneous criminal action that changes the prior law, and should be brought to the attention of all complainants and defendants in domestic violence actions.

Practice Tips

If retained to represent either the complainant or respondent in a domestic violence action, read the entirety of the pleadings with your client. Consider amending pleadings formally. If time does not permit, elicit specific testimony during trial that clarifies or corrects any vague or incorrect statements in the summons and complaint. The risk of an adjournment to permit the other party to adequately respond to the newly presented position is far outweighed by the risk to your client if the error(s) stand uncorrected.

Technically permitted, although rarely done, the defendant may file an answer to a complaint for relief pursuant to the act.[12] This option should be reconsidered in light of the possibility of having the contents of a verified answer used against the defendant subsequently.[13]

Obtain a copy of the recording and/or transcript of the *ex parte* hearing on the complaint.[14] This testimony should have been taken under oath, and therefore can be used against the witness.

Any order for emergency relief is immediately appealable for a plenary hearing *de novo* "not on the record."[15] Never assume such an appeal was held without a record being preserved. Check whether any such hearing was recorded by the trial court and obtain any available recording or transcript. ■

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Endnotes

1. *State v. Duprey*, 427 N.J. Super. 314 (App. Div. 2012).
2. N.J.S.A. 2C:25-28(d).
3. N.J.S.A. 2C:25-28(c).
4. *Crespo v. Crespo*, 408 N.J. Super. 25, 45 (App. Div. 2009), *aff'd [o.b.,]* 201 N.J. 207 (2010); *D.N v. K.M.*, A-3021-11T3 (App. Div.)(Jan. 24, 2013).
5. *Duprey*, supra, 427 N.J. Super. at 321.
6. *State v Guenther*,181 N.J. Super. 129, 147-48 (2004).
7. *Duprey*, *supra*, 427 N.J. Super. at 322.
8. *Id*. at 323.
9. *Id*.
10. *Id*.
11. *Id*. at 325.
12. N.J.S.A. 2C:25-28(c).
13. *See e.g. H.E.S. v. J.C.S.*, 349 N.J. Super. 332 (App. Div. 2002); *J.F. v. B.K.*, 308 N.J. Super. 387, 391-92 (App. Div. 1998).
14. N.J.S.A. 2C:25-28(f).
15. N.J.S.A. 2C:25-28(h)(i); *see e.g. Vendetti v. Meltz*, 359 N.J. Super. 63 (Ch. Div. 2002).

Parental Alienation: Buzz Word or Critical Issue?

by Lizanne J. Ceconi

So how many of you are Yankees fans?" The question is posed to a classroom full of school-aged children in Northern New Jersey in mid-October, when World Series hopes are alive and expectations high. The vast majority of the young audience raises their hands in unison. "And how many of your parents are Yankees fans?" The number of raised hands barely changes.

Now let's think about our favorite cousin. Chances are your parents were close to his or her parent. Now how many of you have a relative that you can't stand? Chances are your parents didn't like them either.

Or how many family law practitioners tout and advertise that they are "Super Lawyers"? Do they really believe this, or do they simply want to create the perception?

In 2011, it is estimated attorneys spent $412 billion dollars in advertising revenue.[1] All of this is done because advertising has proven to be an effective way to manipulate perceptions. The power of suggestion has been around forever. Its impact on children in separation and divorce cases has become a specialty in the field of psychology.

This phenomenon of a child's susceptibility to suggestion and social influence from parents or other relatives is not surprising. Indeed, as one of the leading authorities on the psychology of alienated children writes, "[t]he idea that parents can change the way children think, feel and behave is the basic premise of the parental guidance industry, of many schools of psychotherapy, and of an entire branch of the science of child development."[2] Notwithstanding the global acceptance of such significant parental influence, family law practitioners and judges alike continue to struggle with the idea of one parent *alienating* their child from the other parent. It is a term that has become overused and misused by family law practitioners: parental alienation.

Family law practitioners must rise to the challenge of familiarizing themselves with the scientific data regarding parental alienation, educate their clients and judges and ensure they utilize the right experts to address the issue. Parental alienation seems to be the *diagnosis du jour* of family law custody cases, yet there is no definition or real guidance on how best to handle these matters. Practically speaking, litigants cannot afford extensive litigation, therapy, and expert costs associated with complex parental alienation cases. Courts are already overburdened and do not have the resources to take on long, protracted trials. They tend to be toxic and emotionally draining cases, with the potential for significant long-term devastation if not handled properly.

This article will attempt to address the legal implications of parental alienation by relying heavily upon developing scientific data. It will also include practical tips to help identify and avert parental alienation as it unfolds or develops. The author hopes to assist families and judges in moving these cases to a more positive place, especially considering the near impossibility of the court system being able to carve out the time needed to properly address these cases. There is no silver bullet in resolving these cases, and there is no one kind of parental alienation. However, the longer a case lasts, the more likely the alienation will persist and the more difficult it will be to reverse; early detection is key.[3]

It is also important to explain the nomenclature that will be used throughout this article, as there is a lack of consistency in the publications. The parent who has maintained a relationship with the child(ren) will be called the favored parent, aligned parent or alienating parent. The parent who no longer has a bond with the children, and is necessarily alleging parental alienation, will be called the rejected parent, disfavored parent, or alienated parent. These terms will be used interchangeably throughout this article.

The Applicability of Scientific Standards

When thinking of a custody case, one immediately invokes the "best interests of the child" standard.[4] Matters of parental alienation must be handled differently. Practitioners must not be afraid of working with the developing social science studies on the topic. The gateway to relying on such a scientific approach is New Jersey Rule of Evidence 702, which states that "if scientific, technical, or other specialized knowledge will assist

the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."[5]

This rule applies not only to jury trials but to bench trials as well, when a judge is the trier of fact.[6] The comment to N.J.R.E. 702 makes clear that "proferred expert testimony should not be rejected merely because it cannot be said that such testimony is unassailable and totally reliable, because in some areas...scientific theory of causation has not yet reached general acceptance."[7]

Furthermore, the *Frye* standard, named for *Frye v. United States*,[8] remains the standard in New Jersey in cases in which scientific evidence is to be introduced.[9] This standard affords three ways a proponent of scientific evidence can prove its general acceptance and reliability: "(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance."[10] This necessarily directs the inquiry to N.J.R.E. 803(c)(18) (learned treatises), which reads as follows:

> [t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or by judicial notice. If admitted, the statements may not be received as exhibits but may be read into evidence or, if graphics, shown to the jury.[11]

Thus, the second way to prove acceptance under *Frye*, "legal writings," is permitted even if an expert witness fails to acknowledge it is authoritative, as long as the reliability of the authority is established by other testimony or judicial notice.[12] However, even after qualifying as a learned treatise, a text may still be excluded from evidence under N.J.R.E. 403 if the danger of prejudice outweighs its probative value.

This evidence refresher course is necessary because there is no definition of parental alienation in New Jersey court case law. A LexisNexis search of New Jersey cases for the term only yields 19 cases, and none of those gives a definition of parental alienation or even factors to consider. Accordingly, practitioners must take a more scientific approach to these cases.

Sister states have also struggled to define parental alienation and identify its impact on the matrimonial arena. For example, the Court of Appeals of Arkansas has held that alienation existed when a mother refused to keep the child's father apprised of medical information, to have the child ready for visitation or to spend time with his father, and did not permit the father the first right to babysit the child when she was away.[13] In *Ryder v. Mitchell*,[14] a therapist testified that one parent's false accusation of child abuse by the other parent constituted parental alienation, but the Supreme Court of Colorado was only faced with a question of fiduciary duty.

Perhaps the most unabashed attempt at defining parental alienation is the Appellate Court of Connecticut's adoption of psychologist Ira Turkat's definition: "parental alienation syndrome occurs when one parent campaigns successfully to manipulate his or her children to despise the other parent despite the absence of legitimate reasons for the children to harbor such animosity."[15]

The Search for a Working Definition of Parental Alienation

Before definitively identifying what parental alienation *is*, it is helpful to decipher what it is *not*. First, alienated children's behavior is not justified. Justified rejection due to a parent's egregious behavior is known as estrangement. Even the most extreme estrangement situations are not comparable to alienation. The two words should not be used interchangeably. As psychologist Barbara Jo Fidler, Ph.D. and child representation expert Nicholas Bala, Esq. have written, "even abused children are likely to want to maintain a relationship with their abusive parents."[16] Second, the child's behavior is not proportionate to the rejected parent's shortcomings or mistakes. Once again, such proportionality is justified estrangement. As Fidler and Bala explain, "it is truly abusive behavior or extremely compromised parenting that differentiates alienation from a realistic estrangement."[17] Lastly, alienation is not a poor relationship that has developed over time. A child who has always had a negative relationship with a parent and rejects them accordingly is estranged, not alienated.

By process of elimination, the author finds a working definition for parental alienation: "a child's strong resistance or rejection of a parent that is disproportionate to

that parent's behavior and out of sync with the previous parent-child relationship."[18] Inherent in this definition is the idea that alienation represents a *change* in the parent-child relationship, which usually coincides with the separation, the divorce, or the decision to divorce. This definition necessarily recognizes the three contributing factors the late Richard Gardner, who is credited with first coining the term "parental alienation syndrome" in 1985, emphasized: "parental brainwashing, situational factors, and the child's own contributions."[19]

Gardner called parental alienation a "syndrome" or "disorder," a label that has become controversial among mental health professionals. Parental alienation is not included in the Fourth edition of *The Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) and, despite an intensive lobbying campaign, it will not be recognized in the updated DSM-V due out in 2013, either.[20] The inclusion was so controversial that Dr. Darrel Regier, vice chair of the DSM-V Task Force, told the Associated Press he received more mail regarding parental alienation than on any other proposed diagnosis.[21]

Perhaps the most relevant argument amidst the controversy, for purposes of this article, was the position that the proposal was driven by money-hungry custody attorneys: "it lines the pockets of both attorneys and expert witnesses by increasing the number of billable hours in a given case."[22] Opponents to parental alienation syndrome or disorder being included in the DSM-V do not believe children should be diagnosed and labeled with a mental disorder. Nevertheless, there is a recognition that alienation by a parent in child custody cases exists. From a practical standpoint, it does not matter to family law attorneys or judges whether parental alienation is recognized as a mental disorder or syndrome. Its exclusion from the DSM is merely semantics for what is known to exist in families.

Since family law attorneys have spent years perfecting the art of applying 'factors' and 'elements,' it is helpful to have such a checklist when defining parental alienation. Thus, attorneys, judges and mental health professionals should turn to the following eight primary factors that "must be identified in the child":

1. Campaign of denigration;
2. Weak, frivolous or absurd rationalizations for the deprecation;
3. Lack of ambivalence;
4. The "independent thinker" phenomenon (child claims these are his/her own, and not the alienating parent's beliefs);
5. Reflexive support of the alienating parent in the parental conflict;
6. Child's absence of guilt over cruelty to, or exploitation of, the alienated parent;
7. Presence of borrowed scenarios; and
8. Spread of rejection to extended family and friends of the alienated parent.[23]

The Spectrum of Alienation

Experts recognize that 'pure' or 'clean' cases of child alienation and realistic estrangement (those that *only* include alienating behavior on the part of the favored parent or abuse/neglect on the part of the rejected parent, respectively) are less common than the mixed or 'hybrid' cases, which will be explored later on.[24] That said, a review of the factors will help practitioners decipher how severe a case of alienation, if at all, is being dealt with.

1. **Campaign of denigration:** This attribute has been called the most "prominent" aspect of parental alienation.[25] Fidler and Bala explain that an alienated child's "tone and description of the relationship with an alienated parent is often brittle, repetitive, has an artificial, rehearsed quality, and is lacking in detail. The child's words are often adult-like."[26] Children may begin to assert their "constitutional rights" to privacy and freedom from the rejected parent.
2. **Weak, frivolous or absurd rationalizations for the deprecation:** This goes back to the disproportionate responses of children to an alienating parent's mistakes or shortcomings. "Although there may be some kernel of truth to the child's complaints and allegations about the rejected parent, the child's grossly negative views and feelings are significantly distorted and exaggerated reactions."[27] This often starts with the report that the child is 'just not comfortable' being with a parent, absent explanation. Weak rationalizations may include a child's refusal to eat a parent's food, wear certain clothes or perform homework in a parent's home because that parent traditionally did not prepare meals, buy the clothing or participate in schoolwork.
3. **Lack of ambivalence:** Children will believe the favored parent is 100 percent good while the rejected parent is 100 percent bad. Their custodial preferences are clear—they want nothing to do with the rejected parent.

4. **The "independent thinker" phenomenon (the child claims these are their own, and not the alienating parent's beliefs):** Fidler and Bala write that children's memories are so influenced that "if shown video or photographs [depicting happy times with the rejected parent] they will claim the images have been doctored or they were just pretending."[28] The child will insist the rejection is his or her own idea and will specifically report that he or she was not coached to say it.
5. **Reflexive support of the alienating parent in the parental conflict:** Fidler and Bala recognize that children may develop "an anxious and phobic-like response" as a result of their being "influenced to believe the rejected parent is unworthy and in some cases abusive."29
6. **Child's absence of guilt over cruelty to, or exploitation of, the alienated parent:** This often means the child has no gratitude for the rejected parents' contributions to their rearing, and claims to have no recollection. A truly alienated child can be "rude and disrespectful, even violent, without guilt."30
7. **Presence of borrowed scenarios:** Mental health experts are not so unrealistic as to posit that there are any perfect parents. However, "[i]n child alienation, the aligned parent puts a spin on the rejected parent's flaws, which are exaggerated and repeated. 'Legends' develop and the child is influenced to believe the rejected parent is unworthy and in some cases abusive."[31] The child may use words and terms that are identical to the favored parent's usage.
8. **Spread of rejection to extended family and friends of the alienated parent:** Warshak explains that some children even go so far as to reject the affection of a family pet they once loved, if the pet is viewed to be "aligned" with the rejected parent.[32] There are often changes in the relationships with the extended family.

A display of all or even the majority of these factors in a child represents a 'pure' severe case of parental alienation, which must be handled with extreme care. However, such cases are exceptionally rare. In a study of 55 children ranging in age from 2.5 to 18 years, 85 percent proved to be 'hybrid' cases "including some with significant components of estrangement," and only 15 percent proved to be "uncomplicated or pure cases of alienation."[33] Steven Friedlander and Marjorie Gans differentiated between cases of "alignment" (where the child has a "proclivity or affinity for a particular parent" that is "a normal development phenomenon" and "not... divorce specific"); "enmeshment" (where the "psychological boundaries between the enmeshed parent and child have not been fully and adequately established" and "the child has had developmentally inappropriate difficulty separating from the parent"); and "alienation," and noted that the majority of the cases were "hybrid cases"[34]

Possible Remedies and the Problem with Therapy

Just as there is a broad spectrum of alienation severity, there is also a broad spectrum of possible remedies. The United States Supreme Court has recognized that parents have a fundamental right to an unfettered relationship with their children.[35] New Jersey courts have also recognized that "security, peace of mind, and stability are every child's right."[36] In order to advocate for clients, family law practitioners must be extremely careful in selecting experts, as well as treating mental health professionals.

When a custodial expert is retained, he or she is bound by the provisions of the *Specialty Guidelines for Psychologists Custody/Visitation Evaluations*. The New Jersey Board of Psychological Examiners states that "allegations of acts of abuse by either parent or allegations of impairment of either parent require *specialized knowledge* and assessment skills above and beyond the general expertise required in custody evaluations."[37] Furthermore, the board's guidelines make clear that "under no circumstances should a treating psychologist agree to assume the role of evaluator...[i]f the psychologist is now or has been a therapist for any member of the family, the psychologist does not assume the role of evaluator in a custody case."[38]

It is not unusual, in a case of alienation, that the parties and children will find fault with the treating therapists and evaluators. The children may complain about the family therapist and refuse to return, claiming the therapist is on the side of the rejected parent. Courts, grasping for solutions, may seek to change the roles of therapists and evaluators while the matter is pending. In order to ensure that no one's professionalism is being challenged, adhere to the specialty guidelines.

Much has been written about the types of therapy available for children who are rejecting their parents.[39] Gardner cautioned that family therapy interventions are extremely delicate, "a therapist working with a [parental alienation] case often only has one chance to be effec-

tive."[40] Gardner found that such interventions are often "no-win" if they involve any of the following:

1. Trying to reason with the rejected child and convince him or her that the alienated parent really isn't that bad.
2. Trying to confront the rejecting child with the reality that this parent has not done anything wrong.
3. Trying to directly, or inadvertently, undermine the coalition between the child and the alienating parent by questioning or challenging the charges or beliefs expressed by the alienating parent.
4. Trying to challenge the alienating parent in a direct confrontation of power struggle.[41]

Fidler and Bala further caution that "therapy, as the primary intervention, simply does not work in severe and even in some moderate alienation cases...*therapy may even make matters worse to the extent that the alienated child and favored parent choose to dig in their heels and prove their point, thereby further entrenching their distorted views*."[42] The counter-productivity of therapy is particularly applicable to individual therapy for the children. A study of 42 children from 39 families, who were "resisting or refusing visitation during their treatment in the context of a custody or access dispute with an average duration of almost a decade," found that those "who had been forced by court orders to see a successive array of therapists of reunification counseling were, as young adults, contemptuous and blamed the court or rejected parent for putting them through this ordeal."[43] It is counterintuitive to the court system that therapy, particularly for a child, could be harmful or exacerbate the problem. Much of the scientific data supports this, and the author believes should be brought to the court's attention.

The Role of the Court

So if the court shouldn't necessarily order therapy, then what *is* the role of the court? As always, the court's primary concern is the best interests of the child: "it is the public policy of this State to assure minor children of frequent and continuing contact with *both parents* after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."[44] As the New Jersey Supreme Court stated almost 60 years ago, the court's paramount consideration is the child's safety, happiness, and physical, mental and moral welfare.[45] Welfare of the child includes many elements, and concerns more than the physical wellbeing resulting from the furnishing of adequate food, clothing and shelter. It concerns, *inter alia*, the spiritual and social welfare of the child. The desire of the child to reside with either parent has, on occasion, been overemphasized on the grounds of his or her so-called happiness. Happiness does not denote that state of mind that results from untrammeled or unchecked conduct. There should be no confusion between an unrestrained liberty or license that results in no check upon the child's conduct and the happiness that results from a well-adjusted mental outlook and genial social relationship.[46]

By this point, it should be clear that a loving relationship with *both parents* is always in the best interests of the child, absent the justified estrangement discussed earlier. However, Richard A. Warshak cautions these matters should be handled extremely carefully:

> it is important to balance careful scrutiny with openness to new ideas. Judicial responses to children who reject a parent are best governed by a multifactor individualized approach. A presumption that allows children and one parent to regulate the other parent's access to the children is unsupported by research. A custody decision based solely on the severity of alienation leaves children vulnerable to intensification efforts to poison their affections toward a parent. Concern with possible short-term distress for some children who are required to repair a damaged relationship should not blind us to the long-term trauma of doing nothing.[47]

Warshak also described what he considers to be the four options for families with severely alienated children (which, again, is rare and requires that the court determines that "a child's rejection of a parent is unwarranted and not in a child's best interests"):

1. Award or maintain custody with the favored parent with court-ordered psycho-therapy and in some cases case management.
2. Award or maintain custody with the rejected parent, in some cases with court-ordered or parent-initiated therapy.
3. Place children away from the daily care of either parent.
4. Accept the child's refusal of contact with the rejected parent.[48]

However, Warshak cautions that each option "has advantages and drawbacks and raises controversial issues regarding the proper reach of the law with respect to the rights of parents and children."[49]

Unfettered parenting time is essential in cases where parental alienation is, or may be, present. The children should have parenting time that allows them to spend uninterrupted time with the rejected parent. Often, the favored parent insists on constant contact, via telephone calls, text messages, email, or Skype. The rationale is the children are 'uncomfortable' with the rejected parent and need assurances from the favored parent. A truly alienated child is really being pressured by the favored parent and may feel the need to 'report' the rejected parent's shortcomings. Limiting contact may relieve some of the pressure and allow the rejected parent to rebuild the relationship. A court order that prohibits such contact can take the pressure off the children.

Experts agree it is imperative for the rejected parent to remain in contact with the children without the influence of the aligned parent.[50] In her study of adult children of parental alienation children, Baker found creating opportunities for the child to spend time with the targeted parent is key: "[alienated] children need an excuse to spend time with the targeted parent in order to avoid the wrath of the alienating parent."[51] However, getting a court order that forbids contact from the alienating or aligned parent during the rejected parent's time is only the tip of the iceberg.

The courts are next faced with the question of how to enforce such an order. Often, it is as simple as putting money where the mouth is. There is a line of cases dating back to 1909 that states a court may decrease child support for a custodial parent to force that parent to comply with unfettered parenting time for the noncustodial parent.[52] Baker found these sanctions or consequences can also be helpful in compelling the children to attend mandated parenting time, as children will be given "an excuse (to help the alienating parent avoid the sanctions) and can, therefore, be freed from the responsibility of appearing to choose or want this time with the targeted parent."[53]

In the most true, severe cases of parental alienation, unfettered parenting time may not be enough. Or, in some circumstances, it might be an option if the children are old enough to refuse to go. In such severe cases, a temporary or permanent change of custody might be necessary. If a parental relationship causes emotional or physical harm to the child, a court is authorized to restrict or even terminate custody.[54]

Although this might sound extreme, mental health professionals have found that "in the severest of cases which may present as such at the outset or later after various efforts to intervene have failed, custody reversal may be the least detrimental alternative for the child."[55] Another option is for the court to order "a prolonged period of residence with the parent, such as during the summer or an extended vacation...and *temporarily* restricted or suspended contact with the alienating parent."[56]

In sum, the role of the court is "educational—an authoritative figure making clear to both parents how their behavior is affecting their children. The exhortations of a judge—setting out clear expectations and consequences for failures to comply—can move many parents and children, who may also be interviewed by the judge."[57]

The Decision to Walk Away

The potential emotional and financial damage to a rejected parent is devastating. In many ways, it is akin to the loss of a child. For many, the stamina and support needed by the rejected parent cannot be sustained over years of litigation. Parents may make the Solomon-like decision that their child may be better off without them in the hopes that somewhere down the road, the relationship will rekindle, or that once the child is outside the sphere of the favored parent, efforts will be made to reunite.

Baker's study of adult children who were once affected by alienated children serves as a compelling call to action for the field of family law. Baker interviewed 40 adults between the ages of 19 and 67, all of whom felt that alienation was "a formative albeit traumatic aspect of their childhood."[58] When interviewed as adults, Baker found that remarkable percentages of her sample experienced the following:

1. Low self-esteem (65 percent)
2. Depression (70 percent)
3. Drug and alcohol problems (35 percent)
4. Lack of trust (40 percent)
5. Alienation from their own children (50 percent)
6. Divorce from their own marriages (57.5 percent)[59]

Baker also noted the following "less prominent effects of parental alienation:…problems with identity and not having a sense of belonging or roots; choosing not to have children to avoid being rejected by them;

low academic and career achievement; anger and bitterness over the time lost with the alienated parent; and problems with memory."[60] Additionally, Baker reported that "while most of the adults distinctly recalled *claiming* during childhood that they hated or feared their rejected parent and on some level did have negative feelings, they did not want that parent to walk away from them and secretly hoped someone would realize that they did not mean what they said."[61]

Warshak also focuses much of his writing on a rejected parent's choice to 'give up' on having a relationship with their child. He calls this "counterrejecting."[62] While Warshak recognizes it is natural, particularly in the early stages, for a rejected parent to avoid the children just as they avoid him or her, Warshak cautions that such counterrejecting "breaks contact...which is so crucial to resisting and reversing alienation"; "[s]tings the children who, despite their overt belligerence, at some level continue to need [the rejected parent's] love and acceptance" and; "sets [the rejected parent] up to be seen by the children... as the bad guy who caused the alienation.[63] Fidler and Bala also note that "[r]ejected parents often react with passivity and withdrawal in an effort to cope with the parental conflict that may pre-date separation...these reactions may reinforce the allegations made against them by the alienating parent and the child, including abandonment, disinterest and poor parenting."[64]

Herein lies the reason why the author believes family law attorneys should advocate not just zealously but delicately and efficiently for clients and their children. The author feels the consequences to adult children of alienation should be a call to the bench that while walking away may be the easier path for now, its long-term effects make it worth the effort to fight the fight. That practitioners must not cry alienation when it is not there, and must not seek remedies that are known to be counterproductive. And that practitioners must rely on the scientific evidence that exists. If family lawyers do, in fact, identify parental alienation in its true, severe form, the author believes it behooves them to preserve the parent-child relationship that the Constitution so patently seeks to protect.

Practical Tips

Each case of alienation is different. There is no foolproof remedy, solution, or quick fix. The experts do not all agree on the appropriate solution to the problem, but developing social science data suggests family lawyers need to handle these matters differently than an 'average' custody case.

The following are practice tips for lawyers and judges involved in cases that suggest parental alienation as defined above. These tips do not apply to true cases of estrangement based on a realistic rejection.

Practice Tips for Lawyers

Practice Tip #1: Before being quick to label a child's behavior or a familial situation as alienation, be sure to examine the history of the relationship. There must have been a *change* in the relationship in order for alienation to be present. If trying to establish alienation, provide proof the relationship was once good by supplying to the court photographs, videos, emails, text messages and cards from happier days.

Practice Tip #2: If a client raises alienation, ascertain what the children will provide as their greatest complaint about the client's parenting and deal with it head on. Are the acts complained of exaggerated? Do the acts justify the rejection? Would these acts be considered detrimental to the child if the parents were still in a healthy relationship?

Practice Tip #3: When determining whether parental alienation exists in a given case, focus not on the wrongdoing of the alleged alienating parent, but on the behavior being exhibited by the children. The analysis should include application of the eight factors discussed above. Submit certifications from individuals who have witnessed the change in behavior of the children, including family members, clergy, neighbors and friends. Attacks on a parent accused of alienating children puts the case into the he said/she said arena and loses sight of the effect this behavior has on the children.

Practice Tip #4: When consulting with clients who may be estranged from their children or in the earlier stages of alienation, advise them to do their best to maintain contact. It is important for a rejected parent to maintain ties, particularly early in the divorce process. This can be very painful for the parent, but the longer there is no contact between the rejected parent and the child, the more difficult it will be to reunify them. Also provide them with resources to better understand what is happening in their family dynamics. *Divorce Poison* by Richard A. Warshak, Ph.D. and the DVD "Welcome Back, Pluto" are some of the best primers for attorneys, judges and litigants in addressing this matter. Finally, recognize that the rejected parent is inevitably having strong

emotional difficulties dealing with the situation. Encourage them to seek professional help during the process to handle the grief and work on their parenting skills. During these times, it is nearly impossible for the rejected parent not to react poorly to the situation at hand. Poor responses will only reinforce the alienating parent's and the children's campaign against the parent.

Practice Tip #5: Early on in the matter, the practitioner should educate the court about what parental alienation is. Hire a mental health expert in parental alienation who can submit a certification to the court describing parental alienation without opining about the family in question. This expert should also educate the court about the learned treatises that are accepted in the field and provide these documents to the court. Note, however, that this expert should not later evaluate the family. Any potential conflict should be avoided.

Practice Tip #6: If the practitioner has identified what is believed to be alienation, or the beginnings of alienation, ask the court to appoint a guardian *ad litem* for the children. This will help the court stay abreast of the children's developments, especially as the case will most likely become a moving target. Some believe a lawyer would be a better guardian *ad litem* than a mental health expert, who may focus on healing the family rather than complete the task of reporting the facts for the court's benefit.

Practice Tip #7: When selecting mental health experts and treating therapists, ensure they are familiar with parental alienation and the developing social science data. These are not routine best interests custody evaluations. The *Specialty Guidelines for Psychologists Custody/Visitation Evaluations* mandate the evaluator have specialized knowledge.

Practice Tip #8: The mental health expert and the treating therapist are not one in the same. It is essential that treating psychologists are permitted to care for the clients, not evaluate them.

Practice Tip #9: Unless a child has serious mental health issues, try to avoid providing individual therapy for the child. This is absolutely counterintuitive, but most of the social science supports it. If the matter is one of alienation, the child already has distorted views of the rejected parent. The therapist may ultimately become an unwitting advocate for the child, further entrenching the alienation. Most importantly, do not allow the treating psychologist to opine on custody. Only an evaluator who has met with the entire family can provide such an opinion.

Practice Tip #10: If there are allegations of undue influence by a parent during the other's parenting time, ask the court to provide for no contact during the rejected parent's designated time. If a no contact order is entered during the client's parenting time, ask the court to provide strong sanctions for noncompliance. If granted, this could prevent an enforcement application down the road.

Practice Tip #11: Ask the judge to meet the parties and interview the children early on in the litigation. The children should know they do not make the custody decision.

Practice Tip #12: On a *pendente lite* basis, ask the court to order some form of parenting time or consistent contact between the rejected parent and the children. Try to avoid a situation where contact between the children and the rejected parent is suspended or eliminated. Requesting a change in custody early on in the litigation (despite, perhaps, a client's urgings) is often not appropriate. Courts will want to save this for the last resort after all other options have been explored. Often the 'threat' of a change in custody may, in and of itself, reinforce and further entrench the children's rejection.

Practice Tips for Judges

Practice Tip #1: Try and assess the case as early as possible to determine whether the matter could potentially be one involving elements of alienation.

Practice Tip #2: Become familiar with the current learned treatises concerning parental alienation, surrounding ones' self with experts that specialize in parental alienation, including family therapists and custody evaluators.

Practice Tip #3: Appoint a guardian *ad litem* who is familiar with the scientific data regarding parental alienation.

Practice Tip #4: Set up mechanisms for litigation funding for the family therapy, guardian *ad litem*, and mental health experts. Ordering a court-appointed evaluation by an expert in parental alienation early on in the litigation may be the best-spent money for the family. If the funds are not designated early, the favored parent may use the inability to finance litigation as an excuse to delay the matter.

Practice Tip #5: If the case appears to be one with elements or nuances of parental alienation, meet with the children in chambers. Impress upon them that the court makes the decisions not the children, and that children are better served in life with the presence of both parents.

Emphasize that the orders are expected to be obeyed, and that there will be consequences for non-compliance. Communicate to the children that failure in establishing a relationship with both parents is not an option.

Practice Tip #6: Be cautious when ordering counseling. Individual therapy for a child already carrying distorted views about the rejected parent may only worsen the situation. Therapists become advocates for their patient and indirectly make custody recommendations. Do not rely upon an individual therapist's recommendations about parenting time, even when it seems the most efficient way to address the issue.

Practice Tip #7: If alienation is suspected, be wary of allegations of abuse, complaints brought to the Division of Child Protection and Permanency (DCP&P, formerly DYFS), and concerns raised by school officials on behalf of the children. Alienated children become adept at manipulating the system.

Practice Tip #8: Most importantly, enforce orders swiftly and unequivocally. When parents and children learn the court is not enforcing its own orders, they will not respect the court or the law.

Practice Tip #9: The hardest thing a court will do is to remove children from a favored parent. Practitioners may be told the child will despair, go into deep depression, have suicidal ideations or run away. These prognostications will be made by well-meaning individuals who may not be familiar with the entire family dynamic. Removal from the favored parent should be done after a finding of parental alienation, and after all other options have been explored and failed. ■

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Endnotes

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59. *Id*. at 180-191.
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Commentary

N.J. Div. of Youth and Family Servs. v. A.L.: Prenatal Drug Ingestion as a Basis for Abuse and Neglect Under N.J.S.A. 9:6-8.21(c)(4)

by Clara S. Licata

In enacting child abuse and neglect statutes, the New Jersey Legislature intended to protect living children from harm, not the unborn. A judgment adjudicating a child as an abused and neglected child should be based on competent, reliable and admissible evidence, rather than assumptions, presumptions, and judicial notice. Scientific or medical evidence beyond the knowledge and understanding of the average fact-finder should be explained by a competent expert testifying at trial. Although such principles seem like unassailable hornbook law, they were routinely ignored in child welfare litigation. As a result, it became necessary for the New Jersey Supreme Court to restate and reaffirm these principles in *N.J. Div. of Youth and Family Servs. v. A.L.*[1]

A.L. is a seminal case focusing on statutory construction and the kind of evidence needed to establish harm, or risk of harm, to an infant born exposed to drugs ingested prenatally by the child's mother. The *A.L.* Court confirmed that N.J.S.A. 9:6-8.21 applies to a child and not to a fetus, and that the harm or risk of harm necessary to adjudicate a child abused or neglected must be based on evidence, and not on assumptions or judicial notice. While resolving the particular questions raised by the case, the Supreme Court seized the opportunity to clarify important sections of Title 9 and Title 30 relating to the ability of the Division of Child Protection and Permanency[2] to intervene in a family to protect a child from harm or risk of harm.

The division became involved with A.L. when her son's meconium tested positive for cocaine at birth. A.L.'s blood also tested positive for cocaine. The baby, A.D., exhibited no withdrawal symptoms or other signs of illness and was released from the hospital two days later. When questioned by the division caseworker, A.L. explained that she and the child's father, T.D., had picked up a friend from a bar to take him home. The friend opened a bag of cocaine in the car and when A.L grabbed it to take it away from him, it exploded in the car. A.L. denied using cocaine herself and theorized that she inhaled the substance when the bag exploded, resulting in A.D.'s prenatal exposure, an explanation the trial court found "preposterous."[3] The division substantiated A.L. for abuse and neglect, instituting a safety protection plan that required her parents to supervise her contact with A.D. and with her other child, T.L.[4]

In order to adjudicate A.D. an abused and neglected child under N.J.S.A. 9:6-8.21,[5] the division had to prove that A.D.'s "physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the parent's failure to exercise a minimum degree of care...by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof...."[6] At the fact-finding hearing, the division did not produce any witnesses, and conceded the baby did not suffer any physical harm from the prenatal exposure to cocaine. Rather, the division's case was based on risk of harm to the child "because of the positive screen by [A.L.], because of the positive screen on the child, and because of the environment [to which] the child would be going home."[7]

The division's documentary evidence consisted of its investigation summary, its screening summary, its case plan, and medical records for A.L. and A.D. One of these medical records was the pathology report showing A.L.'s positive test for cocaine upon admission to the hospital. A second toxicology report on A.D.'s meconium identified the "cocaine metabolite" "Benzoylecgonine =88 ng/g."[8] The trial court found the division had satisfied its burden by a preponderance of the evidence, noting A.L. had "abused or neglected the child [ ] in that he was exposed to a substantial risk of harm by being born with cocaine in his system."[9] A.L. appealed and, in an unpublished decision,

an Appellate Division panel affirmed the trial court's decision, concluding, "A.L.'s use of cocaine two days before A.D.'s birth created the very risk of harm that N.J.S.A. 9:6-8.21(c)(4)(b) is designed to prevent."[10] The panel also rejected A.L.'s argument that exposure of a fetus to cocaine is not a recognized harm under Title 9, without proof of harm to the child after birth, because "following his birth, A.D. was not a fetus, but was instead a living child born with a dangerous drug in his body because his mother used cocaine while pregnant with him."[11]

The Supreme Court granted A.L.'s petition for certification and granted motions to participate as *amicus curiae* from Legal Services of New Jersey and Experts and Advocates in Maternal and Fetal Health, Child Welfare, Public Health, and Drug Treatment, a group comprised of dozens of interested organizations and experts.[12]

Drug Exposure to a Fetus is Not Cognizable Under Title 9

The Court held that prenatal ingestion of cocaine, without a showing of harm or substantial risk of harm to the child after birth, cannot be the basis for a finding of abuse and neglect under N.J.S.A. 9:6-8.21(c)(4). The Court held Title 9 addresses only living children and not fetuses.[13] Thus, the division must show that a newborn, living child has been harmed, or exposed to a substantial risk of harm. The Court held the division could show a newborn has been impaired in a number of ways: by proof of withdrawal symptoms or by evidence of respiratory distress, cardiovascular or central nervous system complications; low gestational age; low birth weight; poor feeding patterns; weight loss through an extended hospital stay; lethargy; convulsions or tremors.[14] The Court reaffirmed that in the absence of actual harm, the finding of abuse and neglect must be based on proof of imminent danger and substantial risk of harm.

> Proof that a child's mother used cocaine during pregnancy would be relevant to that issue. But not every instance of drug use by a parent during pregnancy, standing alone, will substantiate a finding of abuse and neglect in light of the specific language of the statute. The proper focus is on the risk of substantial, imminent harm to the child, not on the past use of drugs alone.[15]

In concluding a fetus is not entitled to the protection of Title 9, the Court examined the statute itself, and case law in other contexts that addressed the question of whether a fetus was entitled to the protection of a particular statute or included within its scope. Examining the abuse and neglect statute, the Court held that it applies to a "child" and not to a fetus, and that the statute defines an abused or neglected child as a "child less than 18 years of age." An interpretive agency regulation defined a child as "a person from birth to his or her 18th birthday."[16] The Court further noted that the Legislature explicitly extended protection to an unborn child in N.J.S.A. 30:4C-11, authorizing the division to provide services, with the mother's consent, including "an application on behalf of an unborn child."[17] The Court concluded the explicit inclusion of unborn children in Section 11, and the absence of reference to unborn children elsewhere in Title 9 and in Title 30, was a Legislative decision entitled to respect.[18]

Turning to case law, the *A.L.* Court noted New Jersey courts have declined to extend the reach of a statute to an unborn child when the statute refers to a "person" or a "child," specifically citing the Wrongful Death Act[19] and the Domestic Violence Act.[20] Similarly, the New Jersey Supreme Court has held a physician has no common law duty to advise a patient contemplating an abortion that a fetus is an existing, living human being.[21]

Prior to the *A.L.* Court's definitive statement, there was no published opinion addressing the precise question of whether maternal prenatal ingestion of controlled dangerous substances, whether illegal or legal, could be the basis for an abuse and neglect finding in the absence of harm to the child at birth. Other published decisions have addressed the effect on a fetus of maternal conduct during pregnancy in other contexts.

In *N.J. Div. of Youth & Family Servs. v. L.V.*,[22] a mother refused to take medication during pregnancy that would have decreased her child's risk of being born HIV positive. Following birth, the baby tested negative for HIV and there was no other evidence the baby suffered any physical harm as a result of being exposed to drugs *in utero*. In that case, the division had argued for a finding of abuse and neglect, but the trial judge observed,[23] "it is the attendant suffering to the child, after birth, that a court must rely on in making a finding of abuse or neglect under those circumstances. The mother's decision to use narcotics or alcohol during her pregnancy alone is an insufficient basis for a finding of abuse and neglect."[24] The *L.V.* court held the mother's refusal to take HIV

medication alone, without proof of harm to the child at birth, did not constitute abuse and neglect by a preponderance of the evidence.

In *N.J. Div. of Youth & Family Servs. v. V.M. and B.G.*[25] the Appellate Division considered whether a pregnant woman could be found to have abused and neglected her child by refusing a caesarean section. Two members of the panel found there was sufficient additional evidence in the record to justify the adjudication of abuse and neglect against the mother, and did not reach the issue of the refusal to have the caesarian section. In a separate concurring opinion, Judge Philip Carchman found that a pregnant woman cannot be found to have abused and neglected her child by refusing a caesarian section.[26] In another context, the Appellate Division refused to sanction the incarceration, as a violation of probation, of a pregnant, drug-addicted woman to protect her fetus.[27]

Both the *L.V.* court and Judge Carchman in *V.M.-B.G.* cited *In re Guardianship of K.H.O.*,[28] a termination of parental rights case. In *K.H.O.,* the baby was born suffering from withdrawal symptoms as a result of the mother's prenatal ingestion of heroin, and required a 30-day stay in the neonatal intensive care unit. The New Jersey Supreme Court reversed the Appellate Division's determination that the mother's prenatal ingestion of heroin did not constitute harm under the four-part termination of parental rights test, but noted prenatal drug use that does not result in harm to the child after birth is not actionable under the termination of parental rights statute, N.J.S.A. 30:4C-15.1(a)(1).[29]

Thus, published decisions did not address the exact issue in this case: Whether a pregnant woman's prenatal ingestion of cocaine, without a showing of harm to the child after birth, was sufficient to constitute abuse and neglect under N.J.S.A. 9:6-8.21(c)(4). In addition to the unpublished Appellate Division decision in *A.L.*, a different panel had come to the opposite conclusion on the same kind of facts and evidence. In *N.J. Div. of Youth & Family Servs. v. J.F.*,[30] J.F. stipulated her improper use of a controlled dangerous substance during her pregnancy placed the child at risk of injury. J.F. argued on appeal that her stipulation was without a factual basis because she could not be responsible for the abuse and neglect of a fetus. The *J.F.* panel agreed, citing *L.V.*'s language concerning a woman's right to control her own body and future during pregnancy, and did not draw any distinction between a pregnant woman's refusal to take prescribed medication during pregnancy or her decision to ingest illicit substances. The *J.F.* court rendered this holding because there was no medical evidence the child suffered any injury at or following birth attributable to J.F.'s admitted drug use.[31] The panel also agreed with the *L.V.* court that the abuse and neglect statutes do not apply to a fetus, and held the judgment of abuse and neglect was not subject to a factual basis.[32]

In a third unpublished decision, *N. J. Div. of Youth and Family Servs. v. N.G.,* another appellate panel stated, in *dicta,* that maternal ingestion of cocaine alone, without manifestation of harm after birth, was not sufficient to show abuse and neglect, although there the infant suffered withdrawal and other effects.[33] Thus, the issue of whether maternal prenatal drug use resulting in a positive drug screen on the child at birth, without any other proof of harm to the child, as a basis for a finding of abuse and neglect against the mother, was ripe for consideration when the Supreme Court decided *A.L.*

Harm or Substantial Risk of Harm to the Child Must be Proven by Evidence, not Assumptions or Judicial Notice

Abuse and neglect cases are extremely fact sensitive, and their resolution turns on particularized evidence.[34] The *A.L.* Court identified the issue under consideration as whether

> A.D. as a newborn, 'ha[d] been impaired' or was 'in imminent danger of becoming impaired' as a result of his mother's failure to exercise a minimum degree of care by unreasonably inflicting harm or allowing a 'substantial risk' of harm to be inflicted... [E]vidence of actual impairment to the child will satisfy the statute, but in a case where there is no such proof, the critical focus is on evidence of imminent danger or substantial risk of harm. The statute does not cover a past risk of harm during pregnancy, which did not materialize.[35]

Noting the division had conceded that A.L.'s prenatal exposure to cocaine did not produce any ill effects on A.D., the Supreme Court turned to the division's argument that A.L. abused and neglected A.D. because she exposed him to a substantial risk of harm.

Reviewing the documentary evidence presented by the division, the Court was particularly impressed by the newborn's stool toxicology report, which noted the pres-

ence of the cocaine metabolite Benzoylecgonine in the amount of 88 ng/g. The Court stressed the medical record notation was not explained anywhere in the trial record.

> On its own, the one entry does not tell us whether the mother is an addict or used an illegal substance on a single occasion. The notation does not reveal the severity or extent of the mother's substance abuse or, most important in light of the statute, the degree of future harm posed to the child. In other words, a report noting the presence of cocaine metabolites in meconium, without more, does not establish proof of imminent danger or substantial risk of harm.[36]

In this regard, the Court cited *Black v. Seabrook Assocs., Ltd.,* where the Appellate Division held that at a retrial in a wrongful death action, expert testimony would be required to explain the significance of the presence of cocaine metabolites in the decedent's urine.[37] Discussing the need for such expert testimony, the *A.L.* Court noted the "comprehensive submission" of *amici* Experts and Advocates containing dozens of published academic studies and reports challenging the division's position that a mother's use of cocaine poses an imminent risk of harm to a newborn. Significantly, the Court stated that "None of those arguments were presented or tested at the trial level. In light of the resolution of this case, they need not—and cannot—be resolved here."[38]

As further support for its holding, the *A.L.* Court relied on *N.J. Div. of Youth and Family Servs. v. V.T.*, where the Appellate Division overturned a trial court holding that a father neglected his child based on the father's refusal to attend substance abuse treatment, and two positive drug tests for cocaine and marijuana during supervised visits.[39] The division presented no evidence of actual harm and no expert evidence the father posed a risk during visits with the child.[40] The Appellate Division reversed the finding of abuse and neglect, noting "[a]ddiction is not easy to successfully remediate; a failure to successfully defeat drug addiction does not automatically equate to child abuse or neglect...Title 9 is not intended to extend to all parents who imbibe illegal substances at any time....[N]ot all instances of drug ingestion by a parent will substantiate a finding of abuse or neglect."[41]

The *A.L.* Court then held, "Judges at the trial and appellate level cannot fill in missing information on their own or take judicial notice of harm. Instead, the fact sensitive nature of abuse and neglect cases...turns on particularized evidence." The Court went on to note that where the evidence does not demonstrate actual or imminent harm, expert testimony may be helpful, along with stipulations or other evidence.[42] The Supreme Court's reaffirmation of the need for particularized evidence in abuse and neglect cases, rather than reliance on assumptions and judicial notice, is extremely significant. It may seem elemental that assumptions and judicial notice cannot be used to prove an element of a cause of action (in this case harm or risk of harm to a child), but this is a common practice in child welfare litigation. Seasoned child welfare defense and appellate attorneys are well acquainted with cases where medical records are routinely admitted, over objection, to show harm or risk of harm without any medical testimony explaining the significance of the record and how it establishes harm or risk of harm. The *A.L.* Court's endorsement of *V.T.* cements the notion that harm or risk of harm must really be harm or risk of harm. A parent with a substance abuse problem does not automatically harm his or her child or pose a risk of harm to him or her. Title 9 requires proof by competent, material, and reliable evidence.[43]

The Division's Tools to Intervene to Assist Families and to Protect Children

Although the Supreme Court held that the division's failure to prove risk of harm to a newborn child by reason of A.L.'s prenatal cocaine exposure required reversal of the adjudication of A.D. as an abused and neglected child, the Court recognized it was appropriate for the division to become involved in the case, and that the division had the right to investigate and take such action as necessary to ensure the safety of the child.[44] During oral argument, members of the Court queried the parties extensively on what action the division could have taken to intervene in the matter, and in particular whether the division could have intervened while A.L. was still pregnant. A.D.'s law guardian maintained the position throughout the case that the division's proofs did not establish abuse or neglect, but were "better suited" for relief under N.J.S.A. 30:4C-11 and 12.[45]

Title 30 focuses on the need to provide services to at-risk children and families, and to prevent further harm to their children.[46] Under Section 11, the division can offer services to parents, including expectant parents, with their consent. Section 12 allows the division to intervene with families, without their consent, to provide

services to protect a child.[47] Significantly, the Court noted that N.J.S.A. 30:4C-11 is the only section in the child welfare statutory scheme that references unborn children. Of interest to the Court was whether Section 11 could be used to empower the division to intervene without the mother's consent to protect an unborn child. To that end, the Court asked all parties to submit supplemental briefs to address that issue. An exhaustive review of the legislative history of Sections 11 and 12 demonstrated that Section 11 allows the division to act only when the parent or guardian consents to accept services and that Section 12, which does not contain any reference to an unborn child, does allow the division to seek a court order that would require a mother to accept services and undergo treatment, without the mother's consent.[48]

The Aftermath of *A.L.*

The Supreme Court's statement that Title 9 "does not cover a past risk of harm during pregnancy, which did not materialize"[49] raises an interesting question. What happens when a pregnant woman, acknowledging her substance abuse problem, enters into an approved methadone program to treat her addiction and to protect her child from harm from withdrawal both *in utero* and after birth, and the child, at birth, is born addicted to methadone and suffers from withdrawal symptoms from that drug? Under *A.L.*, the risk of harm to the child of being born addicted to the drug for which the mother secured the methadone treatment did not materialize, and an adjudication of abuse and neglect under Title 9 by reason of the prenatal ingestion of that drug would not lie. Further, the *A.L.* Court's approval of the *V.T.* court's language that addiction is notoriously difficult to treat presumably sanctions the mother's obtaining methadone treatment to protect the child from addiction and from subsequent withdrawal from the original drug. The question then becomes whether the harm caused to the child at birth in being born addicted to methadone and the subsequent withdrawal therefrom is an actionable harm under Title 9. This issue arose in *N.J. Div. of Youth & Family Servs. v. Y.N.*[50]

In that case, the child's mother had been taking prescription opiates when she learned she was pregnant. Her physician advised her that abrupt withdrawal from those drugs could cause miscarriage. Y.N. then entered a methadone treatment program in her eighth month of pregnancy. The baby, P.C., was born testing positive for methadone and was diagnosed with NAS due to his withdrawal symptoms. The baby spent 40 days in the neonatal intensive care unit, but was released to Y.N.'s custody when Y.N. was able to supply a negative urine screen and the judge presiding on the return on the order to show cause did not find that there was a risk of harm to P.C.[51] A different judge presided over the fact-finding hearing and found that P.C. was an abused and neglected child because "[w]hen a child is born drug exposed to illicit drugs, we routinely say that's abuse and neglect."[52] The Appellate Division affirmed, finding that, "The record contains abundant and compelling evidence of the harm [P.C.] suffered during his period of withdrawal," and that the "severe withdrawal" was compelling evidence of impairment. The court rejected Y.N.'s arguments that the legal ingestion of methadone while pregnant was a protected decision under *V.M.-B.G.*

The appellate panel also relied on *State v. Tamburro*,[53] a case in which the New Jersey Supreme Court rejected a defendant's appeal of a conviction of operating a motor vehicle while under the influence of a narcotic, prescription methadone. The *Y.N.* panel found the statute merely proscribed operation of a motor vehicle while under the influence of a narcotic, without differentiating between narcotics. The panel held that, in the present case, the focus was on the harm to the child, rather than on Y.N.'s intent.[54] Y.N. has filed a petition for certification with the New Jersey Supreme Court and is awaiting that Court's decision on whether to hear the case.[55]

Under a rigorous Title 9 analysis, a newborn's impairment due to NAS as a result of his or her mother's medically approved ingestion of methadone while pregnant should not be a cognizable harm. N.J.S.A. 9:6-3.21(c)(4) requires a parent to exercise a "minimum degree of care" in supervising his or her child to avoid harm or the risk of substantial harm to the child. The New Jersey Supreme Court has defined minimum degree of care as conduct that is grossly or wantonly negligent or reckless.[56] The Court also has recognized that abuse and neglect cases are very fact specific and the application of the standard of care is not subject to a rigid formula.[57] A woman's choice to enter methadone treatment to protect her unborn child reflects a risk/benefit analysis, a medical decision concerning her own body that should be protected,[58] since under *A.L.*, the fetus is not a 'child' entitled to the protection of Title 9.[59] In addition, in the absence of any expert testimony or medical evidence that the mother was advised that the risks to the child of methadone addiction at birth outweigh the risks to the

child of addiction to and withdrawal from the underlying drug, it would appear that a trial judge could not find that the mother was grossly negligent in failing to exercise a minimum degree of care in undertaking the methadone treatment.

Conclusion

The Supreme Court's decision in *N.J. Div. of Youth and Family Servs. v. A.L.* is a comprehensive, scholarly decision that clarifies child welfare law. The Court stressed that cocaine use is illegal and did not condone its use. The Court also noted that, "This appeal is not about the morality of A.L.'s behavior while pregnant. It is about the meaning of the specific language in the abuse and neglect statute."[60]

The decision confirms that live children under the age of 18, not unborn children, are protected by Title 9. The decision also explains the type of proof needed at trial, and firmly dismisses the notion that a trial court may assume or take judicial notice an infant has been harmed by reason of his or her mother's prenatal ingestion of drugs. In this regard, trial defense attorneys should object to medical evidence that does not explain or is not supported by live expert testimony explaining the significance of levels of substances in the mother and child. A.L.'s trial counsel made all appropriate objections, preserving these issues and avoiding the need for appellate counsel to make plain error arguments on appeal.

Finally, the *A.L.* decision clarifies the methods by which the division may intervene to provide services to families with drug dependency issues to prevent harm or risk of harm to children. ■

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Endnotes

1. 213 N.J. 1 (2013).
2. The Division of Youth and Family Services (DYFS) was renamed the Division of Child Protection and Permanency. L. 2012, c. 16.
3. 213 N.J. at 10, 27.
4. *Id.* at 11.
5. N.J.S.A. 9:6-8.44 requires the court to conduct a fact-finding hearing to determine whether a child is an abused or neglected child.
6. N.J.S.A. 9:6-8.21(c)(4).
7. *A.L.*, 213 N.J. at 13.
8. *Id.* at 27.
9. *Id.* at 13 (internal quotation marks omitted).
10. *Id.* at 14 (internal quotation marks omitted).
11. *Id.* at 15 (internal quotation marks omitted).
12. *Id.*
13. *Id.* at 21-22.
14. *Id.* at 22-23.
15. *Id.*
16. *Id.* at 20 (*citing* N.J.S.A. 9:6-8.21; N.J.A.C. 10:129-13).
17. *Id.* at 20.
18. *Id.* at 21.
19. *Id.* at 21 (*citing Giardina v. Bennett,* 111 N.J. 412, 420-22 (1988) (holding that the Legislature's use of the word "person" in the Wrongful Death Act did not provide for recovery on behalf of a stillborn infant or fetus).
20. *A.L.*, 213 N.J. at 21 (*citing Croswell v. Shenouda*, 275 N.J. Super. 614, 621 (Ch. Div. 1994)).
21. *A.L.*, 213 N.J. at 21 (*citing Acuna v. Turkish,* 192 N.J. 399, 416-17, *certif. denied,* 525 U.S. 825, 128 S. Ct. 181 (2007)).
22. 382 N.J. Super. 582, 589 (Ch. Div. 2005).
23. *Id.* at 589-90 (*citing In re Guardianship of K.H.O.,* 161 N.J. 337, 349-51 (1999) (a termination of parental rights case).
24. *L.V.*, 382 N.J. Super. at 592.
25. 408 N.J. Super. 222, 225 (App. Div. 2009) (Carchman, P.J.A.D., concurring).
26. *Id.* at 241-43, 248-49.
27. *State v. Ikerd,* 369 N.J. Super. 610, 620-23 (App. Div. 2004).
28. 161 N.J. 337 (1999).
29. *Id.* at 349.
30. 2009 WL 509780 *1-2 (App. Div. 2009).
31. *Id.* at *3-4.
32. *Id.* at *4-5.
33. 2011 WL 2447733 *5 (App. Div. 2011).
34. *N.J. Div. of Youth and Family Servs. v. P.W.R.,* 205 N.J. 17, 33 (2011).
35. *A.L.*, 213 N.J. at 22.
36. *Id.* at 27-28.
37. *Id.* at 28 (citing *Black v. Seabrook Assocs., Ltd.,* 298 N.J. Super. 630, 637 (App. Div.), *certif. denied*, 149 N.J. 409 (1997)).

38. 213 N.J. at 28-29.
39. 423 N.J. Super. 320 (App. Div. 2011).
40. *Id.* at 325-27, 331-32.
41. *Id.* at 331-32.
42. *A.L.*, 213 N.J. at 28.
43. N.J.S.A. 9:6-8.46(b).
44. *A.L.*, 213 N.J. at 29.
45. *Id.* at 16.
46. N.J.S.A. 30:4C-1.1(a).
47. N.J.S.A. 30:4C-11, 12.
48. *A.L.*, 213 N.J. at 17, 19, 30-33. Unlike N.J.S.A. 9:6-8.21, N.J.S.A. 30:4C-12 does not provide for a fact-finding hearing to adjudicate abuse and neglect. Rather, the statute provides for a "summary hearing" during which the Court will determine whether the division should provide services to the family, including the transfer of legal custody of the child or children to the division and their placement outside the home. The statute further requires periodic, six-month reviews to determine whether the division's services are still necessary. *Id.*
49. *A.L.*, 213 N.J. at 22.
50. 431 N.J. Super. 74 (App. Div. 2013).
51. *Id.* at 77-79.
52. *Id.*
53. 68 N.J. 414 (1975).
54. *Id.* at 81-82; 83-84.
55. *N.J. Div. of Youth & Family Servs. v. Y.N.*, Docket No. 72,804.
56. *Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B.*, 207 N.J. 294, 297 (2011); *G.S. v. N.J. Div. of Youth & Family Servs.*, 157 N.J. 161, 177-78 (1999).
57. *A.L.*, 213 N.J. at 28, *citing P.W.R., supra,* 205 N.J. at 33.
58. *See L.V., supra*, 382 N.J. Super. at 589, sanctioning a mother's refusal while pregnant to take medication that would have reduced the chances of transmitting HIV to her unborn child.
59. *See A.L., supra*, 213 N.J. at 22.
60. *Id.* at 34.

Saul Tischler Award Notice

Every year the Family Law Section of the New Jersey State Bar Association chooses a deserving family law attorney to receive the Saul Tischler Award. Nominations for qualified recipients are to be submitted to the Tischler Award Committee, which is chaired by Lizanne J. Ceconi this year. She has requested nominations be submitted to her by Nov. 15, 2013. Any member of the Family Law Section may be nominated for the award. Nominees should meet the standards for the award, which are as follows:

1. Promotion of the family unit.
2. Contribution to the positive development of family law by publishing articles, participating in seminars and serving on committees.
3. Public service in advancing the development of family law.
4. Promoting and advancing the goals of the legal profession, including service and contributions to the Family Law Section of the New Jersey State Bar Association.
5. Membership on committees appointed by the Supreme Court of New Jersey or other committees that address family law issues.
6. Participation on early settlement panels and participation in other complimentary dispute resolution alternatives.
7. Membership, and participation, in groups that advance family law and the positive image of matrimonial lawyers.
8. Active participation in family law activities on a county and local bar association level.

Please forward your nominations by Nov. 15, 2013, to Florence Fosello, assistant to Lizanne J. Ceconi, Ceconi & Cheifetz, LLC, 25 DeForest Avenue, Suite 105, Summit, New Jersey 07901, or by email to Fosello@ccfamlaw.com.

The selection committee will make recommendations to the executive committee. The function of the executive committee will be to vote "yes" or "no" on the selection committee's nomination(s). To avoid nomination of past award recipients, please note the following list of past honorees:

1986	Retired Associate Justice Morris Pashman
1987	Lee M. Hymerling
1988	Gary N. Skoloff
1989	Richard Feinberg
1990	Frank A. Louis
1991	Hon. Eugene D. Serpentelli
1992	Barry I. Croland
1993	Laurence J. Cutler
1994	Hon. Robert W. Page
1995	Richard A. Russell
1996	John J. Trombadore
1997	David M. Wildstein
1998	John E. Finnerty
1999	Edward S. Snyder
2000	Hon. Ann R. Bartlett
2001	Alan M. Grossman
2002	John P. Paone Jr.
2003	Robert J. Durst
2004	Patricia M. Barbarito
2005	Mark Biel
2006	Lynn Fontaine Newsome
2007	Hon. Herbert S. Glickman
2008	Cary B. Cheifetz
2009	Mark H. Sobel
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2012	Bonnie Frost
2013	Lizanne J. Ceconi

New Jersey Family Law Opinions Approved for Publication

New Jersey Family Lawyer is proud to present a new, recurring column, which provides summaries of the most recent family law opinions approved for publication in the state of New Jersey. Below are summaries for those opinions approved for publication since Jan. 1, 2013.

Supreme Court of New Jersey

***DYFS v. A.L.*, 213 N.J. 1 (2013):** The Supreme Court of New Jersey reversed the Appellate Division's affirmation of a finding of abuse and neglect under Title 9, where the Division of Youth and Family Service's only accusation of abuse and/or neglect against the defendant was her alleged use of marijuana and cocaine while pregnant and the child was born unharmed by the drugs. In so doing, the Supreme Court held that the language of the abuse and neglect statute (N.J.S.A. 9:6-8.21(c)) applies only to a child, and not to a fetus. The Supreme Court further held that, in the absence of actual harm to the child, proof of a mother's drug use while pregnant does not alone substantiate a finding of abuse and neglect. Rather, the proper focus is on whether the mother's history of drug abuse poses a risk of substantial, imminent harm to the child in the future.

***Emma v. Evans*, 2013 WL 4045713 (2013):** In addressing the applicable standard when a primary custodial parent seeks to modify a child's jointly agreed-upon surname post-judgment, the Supreme Court of New Jersey held that the primary custodial parent is not entitled to a presumption that the renaming decision is in the child's best interests. Due to the importance attached to a child's name jointly given to the child at birth, a request for a name change is a major decision placing the parents on equal footing and meriting a review of the child's best interests, especially in cases where the parents share joint legal custody of the child. The parent seeking the name change must prove by a preponderance of the evidence that the name change is in the child's best interest, regardless of whether the parents were in a legally formalized relationship at the time of the child's birth. The fact-sensitive analysis may include, but is not limited to, a review of the length of time the child has used his or her given surname; identification of the child with a particular family unit; potential anxiety, embarrassment, or discomfort that may result from having a different surname from that of the custodial parent; the child's preference if the child is mature enough to express a preference; parental misconduct or neglect, such as failure to provide support or maintain contact with the child; degree of community respect, or lack thereof, associated with either paternal or maternal name; improper motivation on the part of the parent seeking the name change; whether the mother has changed or intends to change her name upon remarriage; whether the child has a strong relationship with any siblings with different names; whether the surname has important ties to family heritage or ethnic identity; and the effect of a name change on the relationship between the child and each parent.

***J.B. v. W.B.*, 2013 WL 4608646 (2013):** In a matter of first impression, the Supreme Court of New Jersey determined that redirecting a child support obligation from a parent to a special needs trust should not be considered exceptional or extraordinary if it is in the child's best interests. However, a parent seeking to modify a negotiated agreement for the support of a disabled child through the establishment of a special needs trust must present a specific plan and demonstrate how the proposed trust will benefit the disabled child in order to warrant relief. At a minimum, the trial court must have a complete understanding of the disabled child's current needs, the cost to support those needs, and any available funding resources. When a proposed plan relies on access to government benefits, it must address eligibility rules; the time span for attaining eligibility; the length of time before benefits are available once the child is eligible; and, the means of defraying current costs without compromising the child's eligibility. The plan must also designate a trustee and address the terms and conditions for disbursement of the *corpus* of the trust. Finally, the

Court held that when a disabled child is the subject of a proposed special needs trust, it is within the trial court's discretion to appoint a guardian *ad litem*.

Appellate Division

***D.N. v. K.M.*, 429 N.J. Super. 592 (App. Div. 2013):** Former girlfriend, D.N., appealed the decision of the trial court after entry of a final restraining order (FRO) against D.N. and dismissal of a cross-complaint filed against her former boyfriend, K.M. The Appellate Division upheld the decision of the trial court, finding the decision was sufficiently supported by the evidence presented. The Appellate Division expressly granted substantial deference to the trial court's findings of fact and the legal conclusions based upon those facts. In responding to D.N.'s additional argument that she was entitled to appointed counsel in defense of the domestic violence complaint, and after lengthy review of due process rights, the Appellate Division decided that there exists no requirement for appointment of counsel for indigents presenting or defending a civil domestic violence action, while recognizing the intentions of the Prevention of Domestic Violence Act as remedial rather than punitive.

***DYFS v. C.B.*, 2013 WL 2395059 (App. Div. 2013):** The Division of Youth and Family Services (DYFS) performed an emergency removal of two children, C.F. (one-and-a-half) and A.S. (six months), after their mother, C.B., called DYFS and pleaded for them to remove the children from her, as she was going to commit suicide. Two days later, DYFS commenced a Title 9 action. The trial court upheld the emergency removal and signed an order to show cause. Approximately four months later, in Jan. 2010, the trial court sustained the complaint for abuse and neglect at a fact-finding hearing, based in large part on the fact that C.B. subjected the children to harm due to habitual marijuana use and untreated mental health issues. Subsequent to the Jan. 2010 hearing, the trial court conducted several compliance review and permanency hearings, during which C.B. repeatedly tested positive for marijuana and PCP and also acted irrationally and hysterically. In Oct. 2010, the trial court approved DYFS's permanency plan seeking to terminate C.B.'s parental rights, and in Dec. 2010 DYFS dismissed the Title 9 action and instituted a guardianship proceeding. In June 2011, the trial court dismissed the guardianship proceeding and reinstated the Title 9 action, due to DYFS's change in permanency plan from termination to reunification. In Jan. 2012, after C.B. was released from a "Mommy and Me" program because the staff felt she was unstable, and after C.B. again tested positive for marijuana and PCP, the trial court approved DYFS's recommendation to change the permanency plan to termination of parental rights and adoption by a relative. The trial court found that C.B. was not employed, did not have suitable housing, and had only been compliant with DYFS services and drug tests for a short period of time. In March 2012, the trial court terminated the Title 9 action because of the pending Title 30 action. In Dec. 2012, after a trial in the Title 30 action, the trial court entered judgment terminating C.B.'s parental rights.

C.B. filed an appeal of the Jan. 2012 permanency order. The appellate panel found the appeal to be moot, as the Title 9 action was dismissed and the Title 30 action commenced and concluded. Permanency hearings, which occur in both Title 9 and Title 30 actions, determine whether reunification or an alternative plan is to be adopted. Permanency hearings are a result of federal law, which requires a "case review system" where the court reviews the status of each child periodically. Accordingly, permanency hearings are interim, and permanency orders are interlocutory. Even if the Jan. 2012 permanency order was deemed final for appeal purposes, the March 2012 order dismissed the Title 9 action, including the Jan. 2012 order. Furthermore, the Jan. 2012 order had no continuing adverse consequences to C.B. The order accomplished two things: 1) it approved DYFS's plan to file a Title 30 action, and 2) it continued the placement of the child outside of the home. DYFS was permitted to file a Title 30 action without even bringing an action under Title 9. Further, the trial court entered orders, including a final judgment, in the Title 30 action pertaining to custody that superseded the Jan. 2012 Title 9 order. C.B. had the benefit of a full trial in the Title 30 action.

***DYFS v. L.M.*, 430 N.J. Super. 428 (App. Div. 2013):** The Appellate Division reversed and remanded the trial court's termination of a mother and father's parental rights to their daughter, Sally, on the basis that DYFS failed to establish all four prongs of the "best interests of the child" standard codified in N.J.S.A. 30:4C-15.1(a). More specifically, the Appellate Division held that DYFS failed to prove, by clear and convincing evidence, that: 1) it made reasonable efforts to provide services to help the parents correct the circumstances that led to Sally's placement outside the home, and neither DYFS nor the trial court made sufficient efforts to produce the father at all Title 9 and Title 30 hearings; and 2) termination of paren-

tal rights will not do more harm than good, as Sally was removed from four foster placements in the six years since she was removed from her parents' care and exhibited a strong bond with the father.

***DYFS v. P.H.*, 430 N.J. Super. 220 (App. Div. 2013):** The Appellate Division reversed that part of a trial court decision allowing DYFS to notify a church that offered the defendant a youth pastor position of the court's finding of abuse and neglect against him as a result of sexual conduct toward his two children. In so reversing, the Appellate Division noted the unambiguous statutory language of N.J.S.A. 9:6-8.10a(b) does not include a church as an example of an entity to which DYFS may and must, upon written request, release child abuse information, as defined in N.J.S.A. 9:6-8.10a(a). In addressing DYFS's general obligation to ensure the safety of a neglected or abused child, the Appellate Division also distinguished between a situation where disclosures are more necessarily made in the midst of an ongoing investigation of child abuse, as compared to disclosures being made to prevent the possibility of future abuse against unknown victims.

***DYFS v. T.S.*, 429 N.J. Super. 202 (App. Div. 2013):** The Appellate Division determined that a finding of abuse and neglect by the father based upon noncompliance with the services of DYFS could not be supported by the record where DYFS had assumed responsibility for care and supervision of the child, C.B., after the child's birth. The appellate court reasoned that while the father did not have custody of the child but indeed filed a motion to have the child returned to him, the father did not show by purposeful conduct an intention to relinquish all parental duties and to abandon all parental claims to his child. The Appellate Division also held that it was improper for the trial court, in adjudicating the abuse and neglect claim, to apply a "clear and convincing evidence" standard of proof after informing the father that a lesser standard of "preponderance of the evidence" would be applied.

***DYFS v. Y.N.*, 431 N.J. Super. 74 (App. Div. 2013):** The Appellate Division affirmed a finding of abuse and neglect where the mother ingested methadone during pregnancy, causing the child to suffer from severe withdrawal and neonatal abstinence syndrome after his birth. In reaching its determination, the Appellate Division rejected the mother's argument that a finding of abuse or neglect could not be based upon her ingestion of methadone from a legitimate program assisting her with withdrawal issues because the child suffered actual harm, and that harm need not be intentional in order to substantiate a finding of abuse or neglect. The Appellate Division further rejected the mother's argument that a finding of abuse or neglect under the circumstances violated case law that permits a pregnant woman to make her own medical decisions, even if these decisions adversely affect the unborn child, because the mother failed to identify any case law tending to support her position.

***Gnall v. Gnall*, 2013 WL 4017288 (App. Div. 2013):** The threshold issue presented to the Appellate Division was whether the trial court erred when it declined to award permanent alimony to the plaintiff in a 15-year marriage. The parties were 42 years old when the divorce trial commenced. The plaintiff, who had a master's degree, was the primary caregiver of the three children and had not worked out of the marital home on more than a part-time basis since the third child was born in 2002. The defendant was a chief financial officer. The divorce trial commenced in 2009. The trial court imputed $65,000 income to the plaintiff, and awarded the plaintiff $18,000 per month limited duration alimony for 11 years. The trial court concluded it was not a permanent alimony case because, *inter alia*, the parties were not married long enough nor were they old enough for the defendant to be responsible to maintain the marital lifestyle for the plaintiff permanently. The plaintiff appealed the award of limited duration alimony, as well as other issues related to imputation of income to her and child support. The Appellate Division reversed the award of limited duration alimony and remanded the issue for the trial court to consider the appropriate permanent alimony award. The Appellate Division opined that it did not intend to create a bright-line rule delineating what is a short-term or long-term marriage, but declared that a 15-year marriage is not a short-term marriage. Thus, this conclusion excluded any consideration of an award of limited duration alimony for a 15-year marriage. In further support of its decision, the Appellate Division relied upon the following, among other reasons: 1) the record did not support the plaintiff would be able to resume working and earn an amount to sustain herself in a manner consistent with the marital lifestyle; and 2) the plaintiff's age alone cannot obviate permanent alimony and is but one factor a court must consider. Regarding the other issues on appeal, the Appellate Division affirmed the trial court's decision to average the parties' expenses over several years to calculate the marital

lifestyle and rejected the plaintiff's argument that the court must consider the dollar amount of expenses that were incurred immediately prior to the filing for divorce. The Appellate Division also affirmed the trial court's imputation of income to the plaintiff of $65,000 per year. However, the Appellate Division opined that was no support in the record below for the trial court's decision to immediately impute in $65,000 annual income to the plaintiff. The Appellate Division reasoned they were unaware of any authority that required a dependent spouse absent from the workforce for a significant period of time to immediately return to work *pendente lite* unless by motion or court directive. The only other issue substantively addressed by the Appellate Division was the defendant's cross-appeal regarding his life insurance obligation, which was remanded for the trial court to consider an annual reduction in the life insurance amount and to allocate the amount of the obligation for the plaintiff and the children.

***Maeker v. Ross*, 430 N.J. Super. 79 (App. Div. 2013):** Upon interlocutory review, the Appellate Division found it was error for the trial court to grant *pendente lite* support to a former girlfriend when there was no written agreement for palimony reviewed by an attorney. As an action for breach of contract accrues as of the time of breach, the amendment to the statute of frauds as then enacted applied to preclude enforcement of the alleged oral agreement. Accordingly, the action brought by the former girlfriend against the former boyfriend to enforce an alleged oral agreement to support her for life was barred by the amendment.

***Reese v. Weis*, 430 N.J. Super. 552 (App. Div. 2013):** In affirming a trial court order terminating the plaintiff former husband's alimony obligation, the Appellate Division held that a determination of whether the dependent spouse realizes an economic benefit from cohabitation must consider both the actual financial assistance stemming from the relationship, and any resulting enhancements to the dependent spouse's standard of living as compared to that experienced during the marriage. In determining that the dependent spouse at issue received an economic benefit sufficiently material enough to justify a termination of alimony, the Appellate Division affirmed the trial court's conclusion that the cohabitant not only paid for certain of the dependent spouse's direct and indirect expenses, thereby relieving her of such financial obligations, but also he provided her with lifestyle enhancements. The trial court's exercise of discretion in retroactively terminating alimony to the emancipation date of the oldest child was proper, despite difficulty in precisely quantifying the economic benefit that inured to the dependent spouse caused by her own deficient proofs, as well as flawed expert reports. The dependent spouse's laches argument was also rejected because she failed to prove she altered her position based upon an alleged belief that the plaintiff had accepted his support obligation regardless of any change in circumstances.

***Tatham v. Tatham*, 429 N.J. Super. 502 (App. Div. 2013):** In a divorce proceeding, the Appellate Division reversed a trial court decision that: the court lacked subject matter jurisdiction; the court could not exercise personal jurisdiction over the defendant; New Jersey was not a convenient forum for the resolution of disputes; and services of process was not properly effectuated. The appellate court found the plaintiff was a *bona fide* resident of New Jersey and, thus, the court possessed subject matter jurisdiction over the matter, based on her physical presence, having moved to Rumson in 2007, and her intention to make New Jersey her permanent home despite the defendant's return to Singapore in 2008. Regarding the exercise of personal jurisdiction over the defendant, the court found it reasonable and consistent with notions of due process to exercise such jurisdiction where the defendant: 1) had voluntarily entered New Jersey with the intent to reside and make a home here with his family while working in Jersey City; 2) possessed such intent while living in New Jersey for 13 months and left a mere three years prior to the commencement of the divorce proceeding; and 3) regularly sent funds to support the plaintiff and the children, and visited them here. The Appellate Division then exercised original jurisdiction in rejecting the defendant's forum *non conveniens* argument, holding it was inconvenient for both parties to litigate the matter in Australia, there exists a strong presumption favoring the choice made by a New Jersey resident who chooses a home forum, and the defendant demonstrated no hardship. Finally, the trial court's finding that the plaintiff's technical error in effectuating process without first procuring the trial court's endorsement of the process server did not merit the matter's dismissal where the trial court held that it could not reach the issue due to its determined lack of jurisdiction.

Superior Court, Chancery Division—Family Part

***B.C. v. T.G.*, 430 N.J. Super. 455 (Ch. Div. 2013):** The issue presented in this domestic violence matter is one of first impression in New Jersey—when a pregnant victim is assaulted, may a court enter an FRO that includes the victim's unborn child as an additional protected person under the Prevention of Domestic Violence Act. The parties were in a dating relationship. When the plaintiff advised the defendant that she was pregnant, the defendant told her he did not want her to have the baby. The defendant lured the plaintiff to a location where four other people dragged her from the car, threw her to the ground, and, at the defendant's direction, beat her. The defendant joined in the assault. The trial court entered an FRO that prohibited the defendant from contact with the plaintiff and members of her family. The FRO also integrated an advance protection provision that included the plaintiff's unborn child as an additional person protected from the defendant. The trial court reasoned that, in a domestic violence case where the plaintiff and the defendant have a child together, the statutory safeguards to protect the mother and child may be extended to include a safeguard for the post-birth protection of the victim's child in advance of the actual birth.

***Benjamin v. Benjamin*, 430 N.J. Super. 301 (Ch. Div. 2012):** In this relocation case, the issue presented to the trial court was whether the custodial parent who wished to relocate to another state was required to have a job secured in the new state before the court permitted relocation. The parties shared joint legal custody of their 11-year-old child. The mother was parent of primary residence and the father exercised alternate weekend parenting time. In 2012, the mother filed a post-judgment motion to relocate with the child to North Carolina with her new husband. The father opposed the move for several reasons, including, *inter alia*, the mother had not secured employment in North Carolina. The mother received a job offer in North Carolina but was unable to accept the position due to the pending litigation. The trial court held that having a guaranteed job in another state is not a mandatory precondition for relocation. However, a custodial parent's ability to provide the child with a financially stable household, which includes obtaining employment, is a relevant factor in determining whether a proposed relocation is reasonable or inimical to a child's best interests pursuant to *Baures v. Lewis*.[1] The trial court focused on several factors in its decision to allow the mother to relocate to North Carolina, which included: the high likelihood of the mother securing employment in North Carolina; members of the mother's extended family resided in North Carolina; the lower cost of living; the mother's desire for permanency (*e.g.*, purchase a home instead of renting in New Jersey); and the mother's husband's ability to provide financial consistency for the family until the mother secured employment.

Endnote

1. 167 N.J. 91, 118 (2001).