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Chair's Column

FLEC's Collaboration Making a Difference in Family Law and the Fight Against Food Insecurity in New Jersey

by Robin C. Bogan

The NJSBA Family Law Section is committed to effectuating changes in the law, assisting the judiciary, providing top quality educational programs, and giving of our time, talent and resources to our community. During the last four months, the members of our section have worked together and have made a marked difference. I am pleased to report the following efforts:

Participating as amicus curiae in *Moynihan v. Lynch*

On Nov. 30, 2021, on behalf of the New Jersey State Bar Association, I appeared before the New Jersey Supreme Court in the matter of *Moynihan v. Lynch*[1] seeking to reverse the Appellate Division's decision to invalidate a written agreement, which was signed and notarized by both parties just prior to the termination of their relationship. Also joining as *amicus* in support of reversing the Appellate Division decision was NJSBA President-elect Jeralyn Lawrence on behalf of the New Jersey Chapter of the American Academy of Matrimonial Lawyers.

In this case, Kathleen Moynihan sought to enforce the terms of a written and notarized palimony agreement. However, at trial Edward Lynch testified that although he drafted the agreement, and convinced Moynihan that having the agreement notarized would make it "legal," he never intended to be bound by the agreement. Neither party sought the required advice of counsel as required by the 2010 Amendment to the Statute of Frauds.

The Statute of Frauds requires that specific "agreements or promises ... be in writing and signed by the party to be charged therewith."[2] The Jan. 18, 2010, amendment to the Statute

of Frauds requires that palimony agreements be in writing and entered with the advice of counsel. Specifically, the amendment in subsection (h) provides that an agreement must be in writing where there is:

> A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. *For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.*[3]

The trial court in *Moynihan* enforced the written agreement as a contract although the trial court did not find that there was an oral promise for life. The Appellate Division reversed the trial court, reasoning that the agreement was exactly the type of written agreement the amendment was designed to address. As such, to comply with the statute, the agreement required attorney review. The Appellate Division found that without compliance with the amendment, the agreement was not an enforceable contract.

There were two main positions that we urged the Supreme Court to consider.

First, we argued that the Statute of Frauds, a statute designed to avoid a fraud, should not be used as a sword to perpetrate a fraud. Further, equitable defenses of promissory estoppel and partial performance must be available to defeat the 2010 Amendment to the Statute of Frauds (requiring palimony agreements to be in writing and for both parties to consult counsel for those agreements to be enforceable) when necessary to prevent a manifest injustice and where there is "clear and convincing evidence" of the elements of the equitable defense.

We argued that the longstanding precedent in New Jersey case law supports applying Section 139 of the Restatement (Second) of Contracts to recognize the equitable power to utilize promissory estoppel and partial performance to take an agreement out of the Statute of Frauds. We contended that an elevated burden of proof is a sound and reasonable way of allowing the statute to continue meeting its goal of preventing fraud, while at the same time limiting individuals from misusing the statute in circumstances that would perpetrate a fraud.

Second, we argued that to require non-married parties in a personal relationship to seek independent advice of counsel to enter into agreements for support or other consideration violates both the contracts and equal protection clauses of the United States and New Jersey Constitutions. During oral argument Justice Albin, through his questions, also suggested that the attorney requirement may also be unconstitutional under Article I of the New Jersey State Constitution providing that "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those enjoying and defending life and liberty, of acquiring, possession and protecting property, and of pursuing and obtaining safety and happiness."

While the NJSBA believes it is prudent for anyone entering into a contract or agreement to consult with independent counsel, requiring such consultation for the agreement to be valid is contrary to fundamental notions of fairness, equal application of the laws and access to justice for all persons.

I cannot emphasize enough the herculean effort undertaken from the beginning of this process through oral argument. The brief was co-authored by Brian G. Paul, Brian M. Schwartz and me. A special thank you to Brian Paul, Sheryl Seiden, Bonnie Frost, Christine Fitzgerald, Dina Mikulka, Lisa Chapland, and Sharon Balsamo who made certain that I was prepared for oral argument. I thank Jeralyn Lawrence who took this journey with me. I especially thank Brian Paul who was not only answering my emails over Thanksgiving weekend but who also spoke with me over the phone as I was driving to Trenton for the oral argument. Not surprisingly, it took a village. The oral argument can be watched on the New Jersey Supreme Court webcast page. We now await the Supreme Court's decision and written opinion.

Raising over $21,000 for the Lawyers Feeding New Jersey Initiative

On Nov. 23, 2021, instead of our traditional holiday party held in December, the Family Law Section held a "November to Remember Party" with fall food, wine and a band at the Laurita Winery in New Egypt. As part of that event, the young lawyer holiday party committee, co-chaired by Michelle Wortmann and Michelle Levin, took charge of raising money for the NJSBA "Lawyers Feeding New Jersey" campaign. The Family Law Section raised over $21,000 for this cause, which was over 50% of the total money the Lawyers Feeding NJ Campaign raised. NJSBA President Domenick Carmagnola stated, "No one should have to worry about where their next nutritious

meal is coming from, and please know that anything you can do to support this effort will make a difference."

Paris Eliades, who started this program in 2014, stated, "As we get ready for Thanksgiving and Christmas it is so important to remember that there are kids out there, kids in our schools, our neighborhoods and in our state who go to bed hungry every night." Every $1 raised provides three nutritious meals to our neighbors in need. Our Family Law Section initiative provided over 63,000 meals!

Lawyers Feeding New Jersey raises money for The Community Food Bank of New Jersey (CFBNJ). CFBNJ, a member of Feeding America®, has been delivering food, help, and hope across the state for over 45 years. CFBNJ provides 85 million meals of nutritious food annually through more than 800 community partners throughout the 15 New Jersey counties it serves, addressing hunger through workforce development initiatives, nutrition education, and connection to critical resources.[4]

We also had a food drive at the "November to Remember" event to benefit the Interfaith Food Pantry in Morris Plains. The Interfaith Food Pantry (IFP) is a community of neighbors helping neighbors committed to ending hunger and supporting self-sufficiency. It provides food, education and resources to inspire confidence and hope in the Morris County residents it serves.

A heartfelt and sincere thank you to all attorneys, sponsors and friends of the Family Law Section who contributed to this wonderful and important cause. A special recognition to Cindy Rossine and Len Rossine from Caliber Home Loans who contributed $1,000 to this effort in lieu of the holiday gifts they usually send. Lawrence Law in Watchung also contributed $1,000.

Presenting the Annual Family Law Hot Tips Seminar

On Nov. 11, 2021, the Family Law Section co-sponsored with NJICLE a virtual program moderated by Megan Murray: *Hot Tips in Family Law: What I Wish I Knew When I Was Starting Out*. Over 40 family law attorneys shared tips pertaining to motion practice, discovery, rules of evidence, dealing with adversaries, dealing with the court, trials and arbitration, alternative dispute resolution, running a law practice and collecting counsel fees. Each attorney presented for five minutes but also prepared written materials.

Attending the "Tools for Advancing Equity: Engaging in the Elimination of Bias" Program

On Oct. 12, 2021, the Family Law Executive Committee participated in the program presented by Lisa R. Burke, the Administrative Office of the Courts Diversity, Inclusion, and Community Engagement Program Coordinator. For those of you who have not yet satisfied the 2.0 diversity, inclusion and elimination of bias credits required by the amendments to *R.* 1:42 and applicable CLE Regulations, I highly recommend this engaging and thought-provoking presentation. We learned that engaging in eliminating bias requires a daily commitment and attention to the way we think, speak and make decisions. The place to start is recognizing our own implicit or unconscious bias. By attending this program, we learned that every human being has implicit biases. This workshop's goal is to expand our ability to recognize implicit bias and to provide tools for us to use to eliminate it – not only in our professional lives but also our personal lives.

Preparing for a Virtual Family Law Symposium

The Family Law Symposium will be held *virtually* on Jan. 28, 2022, from 2-5 p.m. and Jan. 29, 2022, from 9 a.m. to 5 p.m. The Friday afternoon program will be devoted to cohabitation. The panel will address litigation concerns, drafting concerns and ancillary cohabitation issues. On Saturday the topics include: The top 10 cases, intimate partner violence, Sexual Assault Survivor Protection Act (SASPA), and domestic violence updates, debating arguments attorneys fail to make, how mental illness and disability impact family law cases, imputation challenges post-COVID and in niche industries, tackling child support challenges, professionalism in family law practice and cultural awareness in family law cases.

Scheduling a Bench Bar Program for Feb. 8, 2022

During our regularly scheduled Family Law Executive Committee meeting on Feb. 8, 2022, we intend to have a discussion with members of the judiciary to explore how we can assist each other in addressing the problems that we encounter and how we can work together to solve those problems. If there are issues that you feel we should be discussing, please contact me at rcb@pbfamlaw.com or Abby Webb, the Chair of our Bench/Bar Committee at awebb@HillWallack.com.

Preparing for a Family Law Retreat in Marco Island, Florida

After a two-year hiatus, the long-awaited Family Law Section retreat has returned. Our retreat will take place from March 23 to March 27, 2022, at the J.W. Marriott in Marco Island, Florida. While the room block has been sold out, we are looking into reserving rooms at a second hotel. There are also rooms available for sponsors. If you would like to join us, please contact Melynda Johnson, Assistant Director of Meetings for the NJSBA, at mjohnson@njsba.com. Please do not wait if you are interested, as space is limited.

If there is something else that you think the Family Law Section of the New Jersey State Bar Association should be addressing, please do not hesitate to call or reach out to me or any of our Officers: Derek Freed, Megan Murray, Jeffrey Fiorello, Cheryl Connors and Ronald Lieberman.

Endnotes

1. *N.J. Super. App. Div. 2020*
2. *N.J.S.A. 25:1-5.*
3. *Id.* (emphasis added).
4. cfbnj.org

Inside this issue

Executive Editor's Column

Can You Argue Transmutation or Commingling With Retirement Assets While the *Marx v. Marx* Formula Still Exists?

By Ron Lieberman

Every family law practitioner knows that title is irrelevant to the equitable distribution of property beneficially acquired during a divorce.[1] They also know that when equitable distribution occurs in a trial setting, a judge "does not fulfill his heavy judgmental obligation by routinely or mechanistically dividing the marital assets equally."[2] After all, "[t]he word 'equitable' itself implies the weighing of the many considerations and circumstances that are presented in each case."[3] Assets that are acquired by one party due to their effort during the marriage are subject to distribution.[4] Appreciation of a premarital asset during the marriage can be distributed during the divorce regardless of whether the non-owning spouse made monetary contributions to that asset because of the "marital partnership" theory underpinning equitable distribution.[5] When it comes to the division of retirement assets, are practitioners "routinely or mechanistically" dividing them, regardless of the "many considerations and circumstances that are presented in each case?" How is such a routine distribution in keeping with the goal of equitable distribution to create a "fair and just division of marital assets"?[6] Is not a court supposed to consider if the owning party intended to gift a premarital asset to the marriage before excluding it from equitable distribution?[7]

In the distribution of a retirement asset, the courts will use a deferred distribution of the pension when no other distribution method is available whereby the numerator is the total number of years worked during the marriage and the denominator is the total number of years worked until retirement.[8] The marital coverture fraction "is the proportion of years worked during the marriage to total number of years worked."[9] The use of the marital coverture fraction permits the party in whose name the pension remains to retain the "fruits of [their] post-divorce labor."[10] That marital coverture fraction "limits a non-employee spouse's share by the term of the marriage…."[11] That fraction was created to make sure "the equitable distribution pot includes only that portion of the working spouse's labor which constitutes a 'shared enterprise.'"[12] If the asset is not subject to equitable distribution, then the increase in value is similarly excluded if that increase was due solely to passive market forces.[13]

But what if a party makes repeated, regular contributions to the retirement asset or the pension during the entire course of the marriage from income or other non-exempt funds? Why should the numerator/denominator coverture fraction theory of *Marx*[14] or *Risoldi* still control, without any thought about commingling or transmutation of that asset? The burden lies with the party claiming an immunity from equitable distribution.[15] After all, transmutation is a theory whereby "…property that once was classified as separate or non-marital can be transmuted into marital property when the spouse with title represents to the other spouse that the property will be shared."[16] When marital monies, meaning monies earned by one spouse during the marriage, are added pay period after pay period to a pension or another retirement asset, why do courts and family law practitioners default to the marital coverture period for equitable distribution? In doing so, the attorney is all but conceding the premarital component of such an asset to the titled spouse along with growth on that component.[17] "The includability of property in the marital estate does not depend on when, during the marriage, the acquisition took place. It depends solely on the nature of the interest and how it was earned."[18] Yet by defaulting to the all but predetermined outcome of the use of a marital coverture fraction, has transmutation or commingling become irrelevant for pensions and retirement assets, or are we as practitioners failing to perform advocacy on behalf of our non-owning clients? Why would we not argue that the owning spouse

intended to make a gift of the asset to the marriage, thereby causing it to lose its immunity?[19]

This situation of trying to distribute premarital portions of retirement assets is not the same as the "active/passive" dichotomy found in the line of cases discussing whether an increase in value between the complaint filing date and date of distribution was due to market forces or "the personal industry of the party controlling the asset."[20] The intent to keep a premarital portion of a retirement asset exempt from equitable distribution is not revealed merely by keeping the asset in the party's sole name. Instead, the lack of a prenuptial agreement or acknowledgment in a will regarding the exemption should heavily weigh against an intent for an exemption. If not, why do we as practitioners almost always give in and allow the titled spouse to keep 100% of the premarital portion and likely the growth on it? We should be arguing commingling and transmutation of that premarital portion of the retirement asset. After all, there can be little argument that the accumulation of pension monies or retirement dollars during the marriage was not anticipated by the parties as "expected 'future enjoyment' of the marital asset."[21]

Could it be the non-owning spouse should not share in the premarital portion of a retirement asset because they did not cause that portion to exist in the first place? That theory would seemingly ignore the concept in the law that an asset titled in one party's name which actively accrues during the marriage will be divided because the non-owning spouse's efforts to the marital partnership.[22] So what then is the argument for automatically excluding the pre-marital portion from distribution even after it has been added to during the course of the marriage with wages (i.e., marital monies)? Did not the act of adding marital monies to separate funds cause a comingling of those funds into marital property, similar to what occurred in *Ryan v. Ryan*[23]where separate funds for pain and suffering and loss of consortium were added to marital property, thereby creating a "conver[sion] of those funds into marital property"? Adding non-exempt property to otherwise exempt property may render the exempt property subject to distribution.[24] The continual adding of contributions to a retirement asset, pay period after pay period, during the course of a marriage is clearly distinguishable from the situation in *Dotsko v. Dotsko*[25] where a party received a gift, deposited the funds into a jointly titled account for 18 days, and then withdrew them into his own separate account. The continual adding of contributions cannot then be a situation where a party demonstrated an unequivocal intent to separate the otherwise exempt portion from the marital one.

This author could not locate any reported or unreported case in New Jersey that accepts, or rejects, the theory that the repeated, regular additions of contributions during a marriage to a pre-marital pension or retirement asset would cause the entirety to be subject to division. Given the clear opportunity to address "'transmutation' through the commingling of exempt and non-exempt funds," the Appellate Division in *Tannen v. Tannen*,[26] chose not to do so in general while rejecting an exemption claim when there were repeated deposits of non-exempt funds into an otherwise exempt asset.

The problem of creating all but automatic exemptions for the premarital portion of retirement assets later enhanced through marital monies during the course of the marriage is not one that can be resolved without a wholesale rewrite of the law. Such change does not happen overnight. It will be up to the practitioner to raise the question of fairness and equity under the appropriate factual circumstances. Only then will it be revealed if this marital coverture fraction is fair or merely cookie-cutter.

Endnotes

1. *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 78 (App. Div. 1974)
2. *Gibbons v. Gibbons*, 174 N.J. Super. 107, 114 (App. Div. 1980), rev'd on other grounds 86 N.J. 515 (1981).
3. *Stout v. Stout*, 155 N.J. Super. 196, 205 (App. Div. 1977).
4. *Moore v. Moore*, 114 N.J. 147, 154 (1989).
5. *Olen v. Melia*, 141 N.J. Super. 111, 113 (App. Div.), certif. den. 71 N.J. 518 (1976)(non-monetary contributions to an asset are compensable); *Rothman v. Rothman*, 65 N.J. 219, 229 (1974)(marriage is "akin to a partnership").
6. *Steneken v. Steneken*, 183 N.J. 290, 299 (2005).

7. *Ryan v. Ryan*, 283 N.J. Super. 21, 25 (Ch. Div. 1993)(if a premarital asset is commingled with with a marital asset, it could lose its immunity if the owner intended to gift that asset to the marriage.)
8. *Reinbold v. Reinbold*, 311 N.J. Super. 460, 466 (App. Div. 1998).
9. *Eisenhardt v. Eisenhardt*, 325 N.J. Super. 576, 580 (App. Div. 1999).
10. *Risoldi v. Risoldi*, 320 N.J. Super. 524, 544-45 (App. Div.), certif. den. 161 N.J. 355 (1999).
11. *Barr v. Barr*, 418 N.J. Super. 18, 35 (App. Div. 2011).
12. *Eisenhardt*, *supra*, 325 N.J. Super. at 581.
13. *Valentino v. Valentino*, 309 N.J. Super. 334, 338-39 (App. Div. 1998); *Sculler v. Sculler*, 348 N.J. Super. 374, 381 (Ch. Div. 2001).
14. *Marx v. Marx,* 265 N.J. Super. 418 (Ch. Div. 1993).
15. *Weiss v. Weiss*, 226 N.J. Super. 281, 291 (App. Div. 1988).
16. *Coney v. Coney*, 207 N.J. Super. 63, 75 (Ch. Div. 1985).
17. *Sachau v. Sachau*, 206 N.J. 1, 8 (2011).
18. *Whitfield v. Whitfield*, 222 N.J. Super. 36, 47 (App. Div. 1987).
19. *Ryan*, *supra*, 283 N.J. Super. at 25.
20. *Bednar v. Bednar*, 193 N.J. Super. 330, 333 (App. Div. 1984); *Wadlow v. Wadlow*, 200 N.J. Super. 372 (App. Div. 1985).
21. *Krupinski v. Krupinski*, 437 N.J. Super. 159, 169 (App. Div. 2014).
22 *N.J.S.A.* 2A:34-23.1(h)("the contribution by each party to the education, training or earning power of the other"); (i)("the contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker").
23. 283 N.J. Super. 21, 25 (Ch. Div. 1993)
24. *Pascarella v. Pascarella*, 165 N.J. Super. 558, 563-64 (App. Div. 1979).
25. 244 N.J. Super. 688, 675 (App. Div. 1990)
26. 416 N.J. Super. 248, 282-283 (App. Div. 2010)

Life Insurance Language for Marital Settlement Agreements

By Charles F. Vuotto, Jr., Stephen R. Urbinato, and Scott K. Schroeder

The requirement that a payor spouse maintain a life insurance policy to secure their support obligations to the payee spouse and/or child of the marriage has become a common "boiler plate" provision of almost all marital settlement agreements (hereinafter MSA or "agreement"). Ample authority exists for the implementation of such a provision.[1] However, the ease with which practitioners routinely insert this provision into countless agreements belies the actual complications and pitfalls that may arise if the life insurance provision is not appropriately constructed within the terms of the agreement. Through highlighting some of the most egregious errors commonly found in the life insurance provisions of settlement agreements, this article will demonstrate the necessity of creating properly drafted settlement provisions in the MSA to ensure that the intent of the life insurance requirement is achieved.

This article will address various components of workable life insurance clauses to be inserted into an MSA and explain some of the drafting pitfalls to avoid. For the most part, these provisions relate to life insurance to secure child support but, in many cases, may be equally applicable to life insurance to secure alimony.

The opening clause related to life insurance to secure a husband's child support obligation may read as follows. This provision can be easily revised to reflect the wife's obligation as well. For purposes herein, we shall only deal with a husband's obligation to maintain life insurance to secure child support.

> Husband shall obtain and continue to maintain, on an uninterrupted basis, individually owned life insurance upon his life in the amount of $_____ allocated equally for the benefit of _____ and _____ until their emancipation. However, the death benefit may be reduced by one-_____ upon the emancipation of a child. The death benefit may also be reduced, at the Husband's sole request, every five years by recalculating the present value of future child support and related obligations owed by the Husband (which figure must be agreed upon by the parties).[2] Husband shall designate _____ as the primary beneficiaries of the proceeds of the policy upon the provision that the proceeds shall be paid to _____ as trustee [co-trustees] of a trust that shall be administered by the trustee for the benefit of the children in accordance with the provisions set forth herein. Husband shall have the right to substitute or change his policy of insurance, so long as there is no interruption in the coverage and he maintains a death benefit equal to or greater than the amount of insurance required at the time of the substitution herein for the benefit of the children.

It is important to typically disqualify "Group" life insurance coverage as something so insecure that it cannot be considered for securing an obligation. It is also important to note how much of the death benefit relates to each child if there are multiple children. Finally, it is crucial to note when, and if, the death benefit may be reduced and when the obligation to carry insurance for a child will end. Most critically, the beneficiary is the "trustee" of the trust referred to in the MSA.

There are various reasons to provide for the insurance benefits to be held in trust by a designated trustee. First, the trust avoids having the insurance proceeds become the property of the divorced wife and thus in most cases renders the proceeds unavailable to satisfy the wife's unpaid creditors. Second, in most instances, the trust funds will also be protected against claims against the trust beneficiaries. Third, the trust will also assure that the insurance proceeds will be preserved by the trustee and readily available to the trustee for the purpose of meeting the needs of the beneficiary children. Fourth, if the husband is concerned about potential United States (or other state) estate taxes on his estate, it is also possible to use a trust to avoid or minimize potential estate taxes.[3]

In order to achieve the goal of avoiding or minimizing estate taxes, however, the trust must be created by the divorcing husband during his lifetime as an irrevocable trust which in turn will apply for, purchase and own the life insurance policy. The trust would pay for the insurance premiums using annual (or other) monetary gifts made to the trust for the purpose of paying the premiums.[4] Section 2042 of the Internal Revenue Code provides that all life insurance proceeds are includable in a decedent's estate if (1) the decedent's estate is the beneficiary; or (2) the decedent maintained "incidents of ownership" over the estate within three years of his death. Treasury Regulation 2042-1(c)(2) defines "incidents of ownership" to include "the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc." Thus, in order to avoid the inclusion of the trust in the husband's estate, the irrevocable trust must be properly constructed to ensure that the divorcing husband does not have any incidents of ownership to the policy.

Some MSAs attempt to avoid utilizing a trust by simply naming the child as the beneficiary. However, this is also problematic. Statutory law prohibits minors from being the beneficiaries of life insurance proceeds. Specifically, *N.J.S.A.* 17B:24-2(b) provides:

> Any minor not less than 15 years of age may, notwithstanding such minority, acquire ownership of and exercise every right, privilege and power with respect to or under any contract of annuity or insurance upon the life, body or health of such minor or of another person, whether or not such contract was applied for by such minor.
>
> A minor shall be deemed competent to receive and give full acquittance for any payment made by any insurer under the provisions and options of, or under a settlement agreement arising from, any contract of annuity or insurance in which a minor has acquired any interest, or is a beneficiary as follows:
>
> (1) As to a minor not less than 15 years of age—a payment or payments in aggregate not exceeding $2,000 in any one calendar year, or,
>
> (2) As to a minor not less than 18 years of age—a payment or payments in aggregate not exceeding $5,000 in any one calendar year;
>
> provided that prior to any such payment to a minor the insurer has not received at its home office written notice of the appointment of a duly qualified guardian of the property of the minor. A minor shall not be deemed competent to alienate the right to or to anticipate or commute such payment. A minor shall not by reason of his minority, be entitled to rescind, avoid or repudiate such a contract or any exercise of a right, privilege or power, or acquittance given, thereunder; except that a minor not otherwise emancipated shall not be bound by any unperformed agreement to pay, by promissory note or otherwise, any premium on any such annuity or insurance contract.[5]

If a minor child is named as a beneficiary of a life insurance policy, the proceeds will be deposited with the surrogate and will be administered either pursuant to the applicable Uniform Gifts to Minors Act (UGMA) [6] or the Uniform Trusts to Minors Act (UTMA).[7] [8]

There are two significant consequences that arise when proceeds of a life insurance policy are administered to a minor pursuant to the UGMA. First, while assets in an UGMA account are to be used solely for the minor child's benefit, if the surviving parent is not named as the custodian, this would result in their loss of control over the insurance proceeds." Second, the potentially unemancipated child will receive the assets of the UGMA at age 18, which could lead to possibly disastrous or irresponsible use of the funds depending on the significance of the assets and the maturity level of the child. The results of these two consequences could deprive the surviving parent the ability to use the funds as they choose for the child's benefit.

The consequences are just as significant for the funds in the UTMA. As with the UGMA, the surviving parent may not necessarily be named the trustee, and the funds could be released to the unemancipated child at least by their 21st birthday, which was likely not an intended result by the parents at the time of the MSA.

It is equally important to designate the beneficiary of the life insurance policy correctly. The following sample language can be used as a guide when the "trust" is created by the language of the MSA:

> The beneficiary designation on the policy

of insurance required to be maintained by Husband pursuant to this Agreement shall read: _____, trustee for the benefit of _____ under the terms of a Trust Agreement contained in a Marital Settlement Agreement dated the date that this document is fully executed.

It is also important to specify the powers of the trustee, the term (time period) of the trust, and the time and manner in which the trust will end. The following sample language can be used as a guide:

> _____ shall receive the proceeds of the life insurance as trustee and hold the funds in trust for the benefit of the children. _____, as trustee, may use so much of the trust funds, principal as well as income, even to the full extent thereof, which are needed or desirable for the proper and adequate support, health, education and maintenance of the beneficiaries of the trust. The trust shall terminate when the youngest child has attained the age of 25 years, at which time the balance of the trust funds shall be distributed equally to _____ and _____ without regard to any prior distributions to any child, free of trust; and if any of the children are not then living, the deceased child's share shall be distributed to such child's then living issue by right of representation, and if the deceased child has no then living issue, then the balance of the deceased child's share of trust funds shall be distributed to those persons who would take under the laws of the state of Husband's last domicile had he then died unmarried and without a will, free of trust. Nothing in this paragraph shall be construed to authorize any trustee to use the assets of the trust estate for such trustee's own benefit.

Many practitioners believe that, by naming the payee parent as "trustee" of the life insurance proceeds, that surviving parent will have unfettered access to the funds upon the payor's death so long as the surviving parent continues to use the funds for the benefit of the child. That belief is wrong.

Both New Jersey statute and case law prohibits a person who has a legal obligation to support a minor child from accessing that child's trust funds under most circumstances. Specifically, our Supreme Court has declared, "it has long been held that the estate of a minor should not be charged for the support and maintenance of a minor where others are responsible to do so..."[9] Consequently, a parent named as sole trustee of a child's "estate" in the form of life insurance proceeds may not be able to legally access the funds of that trust to cover an expense for the child unless that parent can demonstrate that they are financially unable to pay for the child's expense. Such a result frustrates the intent of the life insurance provision in the parties' settlement agreement, which is to secure ongoing child support to cover the expenses of the child in the event of the payor's death.

The courts of our state continue to apply the above legal principle to prohibit a financially able parent from accessing a child's estate to pay for child-related expenses. In the case of *Cohen v. Cohen,*[10] a former husband challenged his former wife's actions of reimbursing herself for their child's living expenses from an UGMA account that she had funded and created for the benefit of their child.[11] Applying the legal principle that "the estate of a minor may not be used for his support and maintenance if those who are legally responsible for the minor have sufficient funds to enable them to fulfill their responsibilities[.]", the appellate court found that the mother had wrongfully accessed the UGMA funds since she clearly had the financial ability to pay for the child's living expenses herself. This was found despite the fact that the mother had funded the UGMA account with her own funds.[12] *See also Coffey v. Coffey,13* (finding that a father breached his fiduciary duties as trustee by accessing an irrevocable trust he created for the benefit of his daughters in order to pay for his youngest daughter's college expenses); *Roberts v. Roberts,14* (father, as custodian, did not abuse his discretion in refusing to access funds in an UGMA account to pay for his child's private school tuition); *Shafer v. Shafer,15* (finding that a father misappropriated funds held in trust for his children by using the funds to "support the family lifestyle and for the general benefit of the children" when he was financially able to cover the expenses himself); *Mottle v. Haley,*[16] (affirming the trial court's refusal to credit custodial accounts against the obligation of the custodian to pay college expenses for the children); and *Katz v. Katz.17*

In order to guarantee that the payee spouse has access to the proceeds of the life insurance policy to provide for the child's expenses without having to

first prove an inability to pay the expense themselves, it is necessary to appoint another person to serve as a co-trustee alongside the payee spouse. In other words, by appointing a co-trustee who has no legal duty to support the child, the co-trustee will be able to access the funds for the purposes set forth in the trust agreement. Of course, the co-trustee selected should be one that has a positive relationship with the surviving parent, to minimize disagreements between the surviving parent and co-trustee. Unfortunately, this strategy cannot be used within an UTMA as *N.J.S.A.* 46:38A-22 limits UTMA to single custodianship.

It is also important to provide for access to the life insurance policy information by the other spouse with language such as the following:

> During the term that Husband is to maintain a life insurance policy in accordance with this Agreement, he shall not hypothecate, pledge, borrow against or encumber the life insurance policy, and shall at all times keep the premiums current and the policy in good standing. Husband shall, upon reasonable request, provide Wife with proof that such insurance has been continued in good standing. The obligation of Husband to maintain the life insurance policy and the said beneficiary designation provided above shall terminate upon the emancipation of all children (although he may reduce the death benefit as stated above) so long as all support payments are current. Husband, shall execute appropriate authorizations to be kept on file with the insurance carrier that will allow Wife to communicate directly with Husband's insurance company as provided in this subsection and to obtain only the information relating to proof that the required insurance is in effect, that all premiums are paid current, the identity of the beneficiaries (consistent with the requirements of this MSA) amount of death benefit that is currently allocated to her as beneficiary and that no liens, loans or encumbrances are against the policy. Husband shall also execute appropriate authorizations with the insurance carrier for Wife to receive duplicate mailing notices for premiums due, lapse pending and policy lapse. Additionally the Insurance Carrier issuing the policy used to secure these obligations, must be able to accommodate both the authorizations required to allow Wife to communicate with the carrier directly at any time by phone or in writing and to receive the duplicate mailing notices as described above for the policy to be considered suitable as security for these obligations. By his signature on this Agreement, Husband intends to give his authorized consent to Wife to contact directly Husband's insurance company for verification of the existence of the required insurance and beneficiary designation, and authorizes the insurance company to provide the information necessary to corroborate the satisfaction of the provisions of this Agreement (including a copy of the application for insurance).

Be wary of unworkable provisions related to access to policy information by the non-insured spouse. For example, a contingent owner does not always have policy access or receive policy correspondence unless the original policy owner has died, making them the new owner. Some carriers allow for a joint owner, but this would not necessarily allow for a limited scope of access to policy information if the insured chose to reallocate a portion of the policy to a new beneficiary. Also, as the MSA is an agreement between two individuals and not the insurance carrier, the parties cannot dictate an insurance carrier's protocol or procedures for sharing information by way of their settlement agreement.

When drafting an MSA that will include a "built in" trust, one may wish to address the requirement of the trustee to post a bond with the following language:

> The trustee of the death benefit allocated to the children referenced herein shall not be required to post a bond for his/her faithful performance as trustee and shall not be required to file a formal or judicial accounting, unless required to do so by a party in interest.

As noted above, when drafting an MSA that will include a "built in" trust, it should be made clear that its terms create an enforceable trust under New Jersey law with the following statement:

> The above terms are intended by the parties to be considered a trust under New Jersey law and all trust law shall apply, within the terms of

the trust arrangement and provisions described herein.

Lastly, it may be wise to expressly provide for the liability of the insured party's estate in the event the required insurance is not maintained as required by the agreement. Such language could be as follows:

> Should the insured party fail to maintain the life insurance required by the above provisions and die (or if for any reason the life insurance proceeds are not paid by the insurer), the amount of life insurance to be maintained upon the insured's death shall constitute a lien against his/her estate and the other party and children shall have a claim against the insured's estate for the amount of the life insurance death benefit to be maintained as of the date of his/her death as provided for herein.

The above drafting suggestions will help to make sure that the MSA operates to effectuate the intention of the parties as to life insurance to secure support obligations. ■

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Endnotes

1. *N.J.S.A.* 2A:34-23; *Grotsky v. Grotsky*, 58 *N.J.* 354 (1971); *Jacobitti v. Jacobitti*, 135 *N.J.* 571 (1994).
2. If this can be a fixed and agreed upon reduction schedule it can help to prevent post judgement costs and issues down the road.
3. The intricacies of estate taxation are beyond the scope of this article. In general, however, under current law, the United States estate tax exemption amount is $11.7 million per person (subject to inflation adjustments) until 2026 and $5.49 million (subject to inflation adjustments) from and after 2026 and there is no New Jersey estate tax. Thus, absent future changes to the law, estate tax considerations will affect only large estates.
4. In order to qualify the monetary gifts to the trust as excludable for estate and gift tax purposes, the trust must be structured to allow the beneficiaries a temporary right to remove the gifts from the trust.
5. *N.J.S.A.* 17B:24-2(b).
6. *N.J.S.A.* 46:38-13 to 46:38-41.
7. *N.J.S.A.* 46:38A-52.
8. The UGMA was repealed, effective July 2007, and replaced by the UTMA. Under the UGMA, the funds belong to the child when the child reaches age 18. Under the UTMA, the funds belong to the child when the child reaches the age of 21, unless the trust expressly directs that the custodianship be terminated at an earlier stated age after the minor attains the age of 18.
9. *In re Application of Conda*, 104 *N.J.* 163, 170 (1986) (citations omitted).
10. 258 *N.J. Super.* 24 (App. Div. 1992)
11. *Id.* at 26-28.
12. *Id.* at 30-31.
13. 286 *N.J. Super.* 42 (App. Div. 1995)
14. 388 *N.J. Super.* 442 (Ch. Div. 2006)
15. 2005 *WL* 3454677 (N.J. Super. A.D.)
16. 2008 *WL* 238505 (N.J. Super. A.D.)
17. 310 *N.J. Super.* 25 (App. Div. 1998)

Bankruptcy and Divorce: The Complexities of Collecting Counsel Fees (or any Judgment) through Wage Execution

By Jenny Berse and Samuel J. Berse

Editors' Note: This is the third and final article of a series discussing the intersection of bankruptcy law and collections with financial awards in family court. Part I ran in the February 2020 edition of New Jersey Family Lawyer. *Part II ran in the March 2020 edition of* New Jersey Family Lawyer.

To briefly recap, in Part I of this article series, *Bankruptcy and Divorce: Exceptions to Dischargeability*, we explained that debtor-spouses (or ex-spouses) cannot file bankruptcy to avoid their Family Part ordered financial obligations.[1] In Part II, *Bankruptcy and Divorce: Getting Counsel Fees Added to Probation Arrears*, we discussed how counsel fees awarded in the Family Part can be added to a debtor's probation account arrears and, therefore, be collected by and through the family court's probation division. This article starts simple, and then explores at an extremely high level the nuances that arise in the traditional means of collecting a counsel fee award, or any judgment, through wage execution outside of the probation division.

The most important first step is obtaining a judgment. In the context of counsel fee orders, the writers' preferred method is to have the Family Part order a self-effectuating judgment providing that if the full payment is not made within a certain timeframe, "any amount outstanding shall be reduced to a judgment." This language is sufficient for Judgment Processing Services in Trenton to record the judgment; a practitioner need not submit a subsequent certification or other submission to the Family Part. Thus, a Family Part order containing this language becomes a self-effectuating judgment. As a practice tip, a practitioner then simply sends a cover letter seeking entry of the judgment, a copy of the order, and the $35 docketing fee directly to: Judgment Processing Services Superior Court Clerk's Office, P.O. Box 971, Trenton, New Jersey, 08625. It is truly that simple to successfully docket a judgment, make it part of the public record, and obtain what is commonly referred to as a "Judgment Number" or "J Number." However, collecting on such a judgment is sometimes much more complicated, and that is the focus of this article.

Basic information on "How to Enforce and Collect a Judgment" is available through NJCourts.gov.[2] Notably, "[y]ou cannot, however, collect your judgment from the debtor's welfare benefits, Social Security, SSI, veterans' benefits or unemployment benefits."[3] As set forth therein, for wage execution, "[i]f the debtor works in New Jersey and earns more than $217.50 per week, you can ask the court for an order directing the debtor's employer to deduct a set amount from his or her paycheck until you are paid in full."[4] Further:

> To request a wage execution, you must send a Notice of Application for Wage Execution to the debtor and his/her employer by regular and certified mail. A sample Notice is posted on the Judiciary's Web site. A copy of the application and a proof of service must be filed, along with a $50 fee, with the Civil Division Manager's office in the county where the case was heard. Both the original docket number of the case and the "J" or "DJ" docket number must appear on your application. If the debtor objects to the wage execution, before or after it is issued, the court will schedule a hearing. If there is no objection or if the judge disallows the objection, the court will issue an Order for Wage Execution. Once you receive the signed order, you must prepare a Writ of Wage Execution. The Writ of Wage Execution is a document that gives the sheriff the authority to collect the money owed to you from the debtor's wages. A

> sample Writ of Wage Execution is on the Judiciary's Web site. You should then forward the Writ of Wage Execution and the appropriate sheriff's service fee to the sheriff of the county where the debtor's employer is located. You should contact the sheriff's office in advance to determine the amount of their fee.[5]

Now, getting to the heart of this article, the issue presented is surprisingly complex and, like our previous two articles in this series, the analysis involves the intersection of state law and federal law. Having a valid and enforceable judgment against a debtor with executable wages is not necessarily sufficient to institute collections. This article explains the basis for this uncertainty and how to overcome it whenever possible.

The process of collecting on a civil judgment through wage execution is far different from that of a family court probation division wage garnishment, and there are two main takeaways. First, the limits for probation division wage garnishment are much higher than civil wage execution.[6] In short, if a debtor is garnished for the maximum amount permitted by a probation wage garnishment, they cannot simultaneously have their wages executed in any amount for the payment of any civil judgment. Second, a debtor subject to probation wage garnishment that is for an amount less than the applicable civil wage execution thresholds can still be subject to civil wage execution up to the statutory thresholds. The New Jersey Courts have several forms and packets setting forth the calculations to ascertain the applicable amount of a wage execution but, crucially, none address or discuss the interplay of more than one simultaneous execution and/or garnishment.[7]

To explain the statutory framework, note that for probation division wage garnishment, "[t]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed . . . 50 per centum of such individual's disposable earnings for that week."[8] However, for civil judgments, "[u]nder the federal Consumer Credit Protection Act, the amount of wages that exceed 25% of net wages or 30 times the federal minimum wage, whichever is less, may be garnished."[9] Federal minimum wage is $7.25 per hour, and 30 times $7.25 is $217.50; thus, under Federal law, a debtor with net weekly earnings above $290 can be garnished for 25% of their net wages.[10] The New Jersey Court defines "net pay" as "the part of someone's income left after payment of taxes and other obligations; such as federal income tax, state taxes, city and local taxes, Social Security and Medicare taxes, health insurance, disability, etc."[11] It is also worth noting that civil wage execution must be for weekly amounts above $48.[12]

Crucially, under controlling New Jersey law, there is an additional limitation that a wage execution of no more than 10% of a debtor's income can occur if their wages are below 250% of the poverty level:

> In no case shall the amount specified in an execution issued out of any court against the wages, debts, earnings, salary, income from trust funds or profits due and owing, or which may hereafter become due and owing to a judgment debtor, exceed 10%, unless the income of such debtor shall exceed 250% of the poverty level for an individual taking into account the size of the individual's family, in which case the court out of which the execution shall issue may order a larger percentage.[13]

Further, in the context of other types of garnishments, "the State may seek a wage execution of up to 25% of the debtor's gross earnings, provided that after the execution the debtor's income will not be less than 250% of the poverty level for an individual taking into account the size of the individual's family."[14]

Here are two examples to illustrate the above concepts:

> Example A – If Debtor A has gross earnings of $600 and net earnings of $500 per week and no other dependents or spouse, Debtor A's maximum civil wage execution is $60 per week (10% of gross earnings). If Debtor A pays $75 per week in child support through probation wage garnishment, Debtor A cannot be subject to a civil wage execution in any amount since Debtor A's child support wage garnishment exceeds the statutory limits of civil wage execution.
>
> Example B – If Debtor B has gross earnings of $2,500 and net earnings of $2,000 per week and a spouse and two other dependents, Debtor B can be subject to a wage execution in the amount of $250 per week (10% of gross earnings) or "a larger percentage" pursuant to

N.J.S.A. 2A:17-56(a). If Debtor B also pays $150 per week in alimony per previous order through probation wage garnishment, Debtor B can be subject to a civil wage execution in the amount of $100 per week representing the difference between the maximum amount of Debtor B's wages that can be subject to civil wage execution and the amount of alimony being garnished through probation. Note that in any argument for "a larger percentage" pursuant to *N.J.S.A.* 2A:17-56(a), the maximum amount for a civil wage execution is 25% of net pay, which in this example is $500 per week. Subtracting the $150 per week alimony payment leaves a maximum civil wage execution of $350 per week.

Seemingly complicating matters is the 45-year-old Appellate Division precedential opinion *Household Finance Corp. v. Clevenger* wherein the panel stated:

> *N.J.S.A.* 2A:17-52 provides that "*Only one execution against the wages, debts, earnings, salary, income from trust funds or profits of such judgment debtor shall be satisfied at one time*," and when more than one execution is issued 'pursuant to . . . this article [Article 7]" against the debtor "they shall be satisfied in the order of priority in which such executions are presented to the person or persons from whom such wages . . . are due and owing[.]" This section further provides, as a result of an amendment made by L. 1969, c. 292, § 2, that an execution derived from an order for support of a wife or children shall take precedence if served on the same day as the wage execution, even if [p]resented later in the day. Moreover, the statutory scheme is to limit an order to pay and a wage execution to 10% of the debtor's wages, unless the wages exceed $ 7,500 a year, in which case the court may order a larger percentage. Identical limitations are found in *N.J.S.A.* 2A:17-56 and *N.J.S.A.* 2A:17-57, by virtue of the amendment to both sections made in 1970 by the same enactment. L. 1970, c. 287.[15]

As the panel continued, "[t]he provision relating to an execution to satisfy a support order, the imposition of limits on the portion of wages that may be taken from a debtor and the provision that only one wage execution shall be satisfied at one time express a singular legislative intent."[16] However, the Court then clarified, stating that intent merely "*prohibits satisfaction of two executions at one time in excess of the prescribed statutory limits*."[17]

In sum, multiple garnishments and/or wage executions are permitted up to the applicable statutory limits, and practitioners should use the forms available through the New Jersey Courts website for assistance in determining the amount of a debtor's wages that may be subject to a civil wage execution.[18] The legal analysis presented above addresses issues not currently reflected in any official New Jersey Court forms and further sets forth what the authors believe should happen if a debtor is already subject to probation division wage garnishment for child support, alimony, or even arrears-only payments.

However, seeking a civil wage execution from a debtor who is already being garnished through probation may be met with hostility from a court tasked with ordering the wage execution or the debtor's employer. A contributing factor is that the Notice of Application for Wage Execution form specifically states, "[i]n no event shall more than 10% of gross salary be withheld *and only one execution against your wages shall be satisfied at a time*."[19] However, the authors posit that a strict reading of this language is misplaced in two respects. First, pursuant to the case law and New Jersey and federal statute, if a probation wage garnishment does not exceed the limits for a civil wage execution, then both may occur simultaneously.[20] Second, a debtor may be garnished above 10% of gross salary if their income exceeds "250% of the poverty level for an individual taking into account the size of the individual's family."[21] Thus, in each case, practitioners must perform an analysis and create the appropriate argument regarding the permissible amount of a civil wage execution that may attach concurrently with a probation division wage garnishment. ■

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Endnotes

1. The most recent iteration of *Bisbing v. Bisbing* confirmed that a Family Part order for counsel fees is non-dischargeable as a domestic support obligation in the nature of support. *Bisbing v. Bisbing*, 468 N.J. Super. 112 (App. Div. 2021).
2. How to Enforce and Collect a Judgment, njcourts.gov/forms/11383_ht_enforce_jdgmnt.pdf (last visited Nov. 5, 2021).
3. *Id.*
4. *Id.*
5. *Id.*; How to Ask the Court to Order a Wage Execution in a Special Civil Part Case, njcourts.gov/forms/10548_wage_exec.pdf (last visited Nov. 5, 2021).
6. 15 U.S.C.§ 1673(a)-(b); N.J.S.A. 2A:17-56.9. *See also* Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title III (CCPA), dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs30.pdf ("The amount of pay subject to garnishment is based on an employee's 'disposable earnings,' which is the amount of earnings left after legally required deductions are made." Further, "Title III also limits the amount of earnings that may be garnished pursuant to court orders for child support or alimony. The garnishment law allows up to 50% of a worker's disposable earnings to be garnished for these purposes if the worker is supporting another spouse or child, or up to 60% if the worker is not. An additional 5% may be garnished for support payments more than l2 weeks in arrears.") (last visited Nov. 5, 2021).
7. *See* How to Object to a Wage Garnishment at p. 8, njcourts.gov/forms/12322_obj_wage_garnish.pdf (last visited Nov. 5, 2021).
8. 15 U.S.C.§ 1673(b)(2)(A)-(B); N.J.S.A. 2A:17-56.9.
9. *Synchrony Bank v. Daniels*, 464 N.J. Super. 384, 387-88 (Ch. Div. Nov. 12, 2019) (citing 15 U.S.C. § 1673(a)).
10. 15 U.S.C. § 1673(a).
11. How to Object to a Wage Garnishment, p. 3, njcourts.gov/forms/12322_obj_wage_garnish.pdf (last visited Nov. 5, 2021).

15 U.S.C.§ 1673(b)(2)(A) - (B); N.J.S.A. 2A:17-56.9

12. N.J.S.A. 2A:17-50.
13. N.J.S.A. 2A:17-56(a) (note that no reference to this statutory provision appears in any of the aforementioned New Jersey Court forms).
14. N.J.S.A. 2A:17-56(b). *See also* U.S. FEDERAL POVERTY GUIDELINES USED TO DETERMINE FINANCIAL ELIGIBILITY FOR CERTAIN FEDERAL PROGRAMS, available at aspe.hhs.gov/poverty-guidelines, (providing that federal poverty guidelines for a family of two is currently $17,420; 250% of which is $43,550) (last visited Nov. 5, 2021).
15. *Household Finance Corp. v. Clevenger*, 141 N.J. Super. 53, 57-58 (App. Div. 1976) (emphasis added).
16. *Id.* at 58.
17. *Id.* (emphasis added).
18. *See id.*, *see also, supra*, notes 2, 5, and 7.
19. How to Ask the Court to Order a Wage Execution in a Special Civil Part Case, *supra* (emphasis added). Moreover, the priority of liens is determined by the "first in time, first in right" rule. *Sagi v. Sagi*, 386 N.J. Super. 517, 525 (App. Div. 2006); *see also Les Realty Corp. v. Hogan*, 314 N.J. Super. 203, 206 (Ch. Div. 1998) (holding that the "first in time, first in right" rule applied to give priority to a mortgage that was recorded before a child support judgment was docketed).
20. *Household Finance Corp.*, 141 N.J. Super. at 58; *see also* Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title III (CCPA), *supra* (discussing an example where "the existing garnishment for child support means . . . that no additional garnishment for the defaulted consumer debt may be made because the amount already garnished is more than the amount (25%) that may be generally garnished" implying that a lesser child support award opens the door for concurrent civil wage execution).
21. N.J.S.A. 2A:17-56(a).

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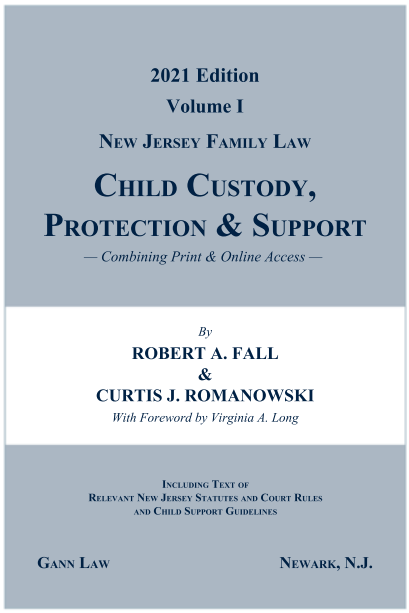

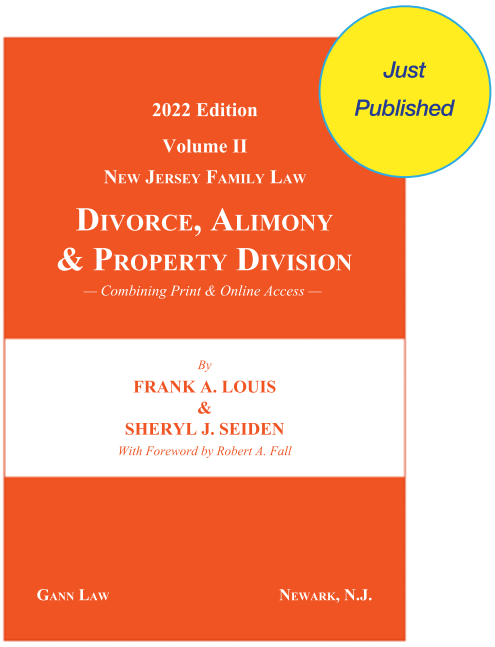

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Friends Without Benefits: Alimony Termination Pursuant to N.J.S.A. 2A:34-23n

By Bruce Evan Chase

When the current alimony statute was first adopted in 2014,[1] this author read and re-read the statutory provisions regarding suspension or termination of alimony in the event of the payee spouse's cohabitation. Many practitioners opined that the "new" statute simply codified the common law regarding cohabitation and the factors the court had to apply in determining whether the alleged "cohabitation" was sufficient to terminate or suspend the payment of further alimony. Others, including this author, opined that the "new" statute focused more on the "status" of living together as distinguished from the various roles, responsibilities, relationships and inter-relationships between the former spouse and their new cohabitant. However, recent case law suggests that this author's early interpretation of the statute was likely misguided.

It is helpful to understand that the term "cohabitation" as used in the statute is a term of art; rather than saying that cohabitation "is" or cohabitation "means," the statute states:

> Cohabitation *involves* a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.[2] [Emphasis added.]

Cohabitation under the statute requires proof of what this author calls "cohabitation plus" because living together is only one of the many factors relied upon in determining whether there is a sufficient relationship to warrant a termination of the alimony obligation.[3] The revised statute makes it clear that cohabitation does not require that the payee and their significant other actually live together in the same residence.[4]

As both Bench and Bar have become more familiar with the "new" statute and applying it to the often-unique facts and circumstances of our cases, certain "norms" have been commonly accepted:

- You may not conduct post-judgment discovery of any kind absent a specific court order.5
- A *prima facie* showing of cohabitation is necessary to secure an order permitting discovery.6

Living together is not essential to a finding that a spouse is cohabiting.[7]

The *Landau*[8] opinion presents a so-called catch 22 for the practitioner. With a prohibition against post-judgment discovery absent an order permitting it, how does the payor secure proofs sufficient to make a *prima facie* showing? This is particularly difficult because most, if not all, of the information and documentation that might exist to help "prove" cohabitation is private to the payee and the cohabitant and within their sole control.

This author believes that in most cases, the cohabitation is obvious, with the payee physically living with someone, the cohabitation sufficiently open and notorious so that one need not conduct any discovery or retain a private investigator to make a *prima facie* showing.

Query: Is the act of an open and notorious cohabitation i.e., the payee and their cohabitant living together, in and of itself, sufficient to make a *prima facie* showing so as to allow discovery of the issue? And, if the mere fact of cohabitation is sufficient to allow discovery, will the permitted discovery be broad enough to secure sufficient information to develop facts applicable to the factors in the statute? Can one pursue discovery from the cohabitant? Can one require the cohabitant to appear for a deposition or produce bank records? What if the cohabitant fails to respond to or appear for a properly notice deposition?

Considering the "definition" of cohabitation in the statute, proofs may include such facts and circumstances as consideration of the significant other transporting the payee ex-spouse's children, attending the children's activities, vacationing together — with or without children, and whether the significant other's children and/or family are integrated with the ex-spouse's children.

Proofs necessary to "prove" cohabitation, if available

at all, may also come from the payor's children. Can a practitioner rely upon this information in a client's certification seeking discovery or termination/suspension of support? Per New Jersey Court Rule 1:6-6, such information would be hearsay and practitioners are cautioned against submitting certifications from children. So, what does a practitioner do when it is only the children who have direct information relative to cohabitation?

A child is permitted to be called as witnesses and to testify assuming they are competent.[9] Does this then permit the use of affidavits executed by a child? If so, will the motion judge accept the affidavit and consider it, or will the submitting attorney be criticized for its submission?

Other statutory factors include:

- "Intertwined finances such as joint bank accounts …"[10] and "sharing of joint responsibility for living expenses."[11] However, as set forth above, how does the payor secure that information in a proper and legal manner? What if the payee responds to the application to terminate or suspend alimony and admits that the cohabitant is contributing toward mutual living expenses, but absent that contribution they would be unable to meet their reasonable living expenses? Absent such an admission and the right to pursue discovery, what does a practitioner do?
- Recognition of the relationship in the couple's social and family circle is yet another statutory factor the court "shall" consider.[12] Referring to the unrelated cohabitant as a significant other, exclusive partner, or other endearing term together with other indices of a long-term, significant, committed relationship, are typically alleged. Generally, how do the payee and cohabitant hold themselves out to others? Again, this information would typically come to the payor as hearsay, if at all.
- Sharing household chores is a statutory factor[13] but again, absent unusual facts and circumstances, such circumstances would not be within the payor's knowledge, unless through hearsay through a third party, possibly the children.
- Whether the payee spouse is actually living with the alleged cohabitant, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship are other statutory factors.[14] Living together is not essential to a finding of sufficient cohabitation to terminate or suspend alimony.[15]

While answers to many of these questions are likely unavailable, the moving papers must be as detailed as possible, with facts and circumstances that the payor has actually observed (or what the private detective has observed and commemorated in a certified, written report so it can be filed as a "Certification" pursuant to Rule 1:6-6).

If one must refer to hearsay material, identify it as such. On occasion, practitioners have relied upon or received papers from colleagues that include introductory language like, "upon information and belief" or "while my attorney advises me that it is hearsay" or "while my attorney advises me that the court is loath to permit certifications of children and/or minors" and, "without prompting, my son/my daughter told me _____." The strategy for the filing party must be to include all facts and circumstances of which they have knowledge, including perhaps some non-evidential, hearsay material, to explain the need to conduct discovery.

It is only the rare case in which the court may find that a sufficient case has been made to terminate, suspend, or modify the alimony being paid upon proofs by way of Certification. Given the unique factual underpinnings of any cohabitation claim, it would be a rare situation that a court would terminate, suspend or modify an alimony obligation absent a plenary hearing. Given the fact that the payor has no access to discovery, it would seem reasonable to expect that proofs sufficient to support a finding that the payee is actually living with someone, that is, actually cohabiting, should in most cases, be sufficient for making a *prima facie* case so as to support the issuance of a post-judgment discovery order. But what about the situation in which the payee admits cohabitation but denies any "intimate relationship"? Friends without benefits!

I now focus upon the use of the term "intimate personal relationship," which can be found twice in the statute.[16]

Webster's Dictionary defines "intimate" as, "1. the state of being intimate: familiarity; 2. something of a personal or private nature."

Does the "new statute" countenance a payee's choice to live with an unrelated adult, maintain separate finances, maintain separate bedrooms, share certain living expenses, not engage in intimacy with each other, while avoiding a finding of cohabitation? In this author's opinion, the answer is yes and in fairness to the payee, the answer should be a resounding "yes."

In the unreported Appellate decision of *Gille v. Gille*,[17] the former husband retained a private detective to surveil his former wife. During a 90-day period, the detective made observations over 29 days. On 13 of those 29 randomly chosen days, the wife's boyfriend was present overnight. He was seen retrieving mail, assisting one of the parties' children shoveling snow and entering the home when the ex-wife was not present. The trial court noted that by the time the motion was heard, the ex-husband had not "updated" the detective's report. The trial court found that there were no "intertwined finances" or "shared living expenses," and that neither the ex-wife nor the boyfriend held themselves out as "boyfriend or girlfriend." The trial court noted that the instances of the boyfriend engaging in activities around the ex-wife's home were "very limited" and were instances of "chivalry," not the performance of household chores on a continuous basis." The detective's report, according to the trial court, established a dating relationship, "but nothing more." The trial court made such findings in determining whether a *prima facie* case had been made without testimony, only by reviewing the detective's report and certifications. The Appellate Division nonetheless accorded "substantial deference" to the trial court's findings of fact and affirmed the decision finding that no cohabitation had been proven.[18]

This author recently litigated a matter in which the payor moved to terminate alimony premised upon the ex-wife/payee's cohabitation with an unrelated male/cohabitant. Interestingly, the payee readily admitted that she and the cohabitant shared a home owned by her father. She had known the cohabitant since high school; they dated once when she was 16, some 21 years ago; she considered him a "friend" and he attended the parties' wedding. The payee certified that the cohabitant was only a platonic friend, and that there was absolutely no intimacy.

Prior to the admitted "cohabitation," the payee had been occupying the entire four-bedroom, two-bath home together with the parties' daughter who was 9 years old. The cohabitant had recently moved to New Jersey from Florida and had secured sole residential custody of his two children, ages 10 and 7. He needed an affordable, safe residence. The payee's parents knew the cohabitant through their daughter for 20 years.

The payee asked her father if he would consider renting "half" the house to the cohabitant. Because the parents knew the cohabitant, that he was raising his children, and were convinced he and the payee only had a platonic relationship, they agreed to rent him "half" the house. The written lease delineated which two bedrooms he and his children would occupy, for which they had exclusive use. The one kitchen would be shared.

Confronted with this set of these facts and circumstances, the trial court granted the ex-husband/payor limited discovery of the payee, her parents, and the cohabitant. Perhaps surprisingly, the non-parties complied with all discovery requests.

The evidence showed that the cohabitant paid rent every month to the father; there were no shared finances between the payee and the cohabitant. The cohabitant denied any intimate relationship with the payee. The parents both certified that they would never have rented "half" of the house to the cohabitant had they believed any type of romantic relationship existed. The payee and the cohabitant admitted that they occasionally shared travel responsibilities for the other's child/children and they occasionally "picked up" food for the other that was kept in the "common" refrigerator. The payee and cohabitant occasionally shared a meal with each other, and their children and they occasionally attended activities as a "foursome."

Following discovery, the application was heard by way of oral argument. The court found that there was no cohabitation of the type that might result in a termination, modification, or suspension of alimony. In this author's opinion, the lack of an "intimate" relationship—"friends without benefits"—was the most important factor the court relied upon in denying the payor's motion.

It is this author's opinion that the statute was not intended to prohibit a dependent ex-spouse from having a platonic, non-intimate relationship with someone of the same or different sex in order to share expenses, assume some limited responsibilities like assisting with transporting children, and even having meals together, in order to continue receiving needed alimony. This seems only fair and reasonable since the payor has unrestricted rights to live with anyone they may choose, to have an intimate or platonic relationship, to share responsibilities, to share economic responsibilities or benefits, and equal protection of the law requires nothing less. For a former spouse receiving alimony, however, assertion of the right to have an intimate versus a platonic relationship, reside with someone, and share mutual responsibilities, carries with it legal implications.

In 2019, the Appellate Division, in the case of *Landau v. Landau*,[19] addressed the quantum of evidence necessary to make a *prima facie* showing as a prerequisite for

an order permitting post-judgment discovery.

In *Landau*, the parties' marital settlement agreement (MSA) provided the right to seek review and modification of the husband's limited duration alimony obligation in the event of cohabitation as that term was defined under then-current case and statutory law.[20] The parties were divorced *after* adoption of the 2014 alimony statute.[21]

The trial court deferred a ruling on the merits of the motion to terminate but found that Mr. Landau had made a sufficient showing to entitle him to limited discovery for any evidence that might establish a *prima facie* case of cohabitation. Ms. Landau appealed.

On appeal, the court reversed the order of the trial court. The court acknowledged the difficulty in collecting sufficient evidence to make a *prima facie* case of cohabitation, particularly when there are active efforts to conceal the cohabiting relationship.[22] However, the court ruled that difficulties in finding evidence to make a *prima facie* case did not warrant permitting invasion of a party's privacy through discovery.[23] The court instead held that a party seeking modification was first required to establish a *prima facie* case of cohabitation before that party would be entitled to discovery of further evidence to prove cohabitation.[24] But what must one present to make that *prima facie* case?

More recently, the opposite result was reached by the Appellate Division in *Goethals v. Goethals*.[25]

After 15 years of marriage and having two children together, the Goethals were divorced in 2016. Mr. Goethals agreed to pay alimony of $8,066 per month and additional alimony based upon a percentage of his bonus and additional compensation such as restricted stock units and stock options. The settlement agreement stated that neither party could maintain their marital standard of living but agreed to be bound by its terms. The settlement agreement also provided that Ms. Goethals' "cohabitation in a mutually supportive, intimate, personal relationship shall be considered a change of circumstances warranting a review of alimony."[26] Ms. Goethals assumed "an affirmative obligation to advise [Defendant] of said cohabitation."[27]

The procedural history of the *Goethals* case reveals that Mr. Goethals first moved to modify his alimony obligation premised upon his ex-wife's cohabitation in response to what is referred to as her "third enforcement motion" filed in May 2017.[28] The decision recites that Ms. Goethals "partially prevailed" in her first two such motions.[29]

In his supporting certification, Mr. Goethals alleged that his ex-wife and the alleged cohabitant, "A.G.," had been involved in an exclusive, enduring and committed relationship for three years, having begun that relationship before the finalization of the divorce.[30] Mr. Goethals further alleged that his ex-wife and A.G. had become engaged to be married.[31] Mr. Goethals also relied upon Instagram and Facebook activity and observations and a surveillance report by a private detective.[32] Mr. Goethals alleged that "at a bare minimum," Ms. Goethals and A.G. "are engaged, spent consistent/regular overnights together from August 1, 2014, through the present," that they "moved together to a home in Basking Ridge, that they performed regular household chores together, dined together with their respective families, attended parties, [barbecues], and gatherings of friends/family, performed [CrossFit] training/competitions together and held themselves out to the public, family and friends as a couple."[33]

In reply, Ms. Goethals acknowledged her engagement to A.G. as of April 1, 2017, but denied any intertwined finances, denied sharing household chores, denied making any enforceable promises to support each other and denied that she was living with A.G. She admitted visiting A.G. at his home in Virginia "mainly on weekends."[34] She denied that A.G.'s belongings were ever in the PODS container when she moved her belongings to her new home.[35] Finally, she denied being in a relationship akin to the supportive, intimate, and personal or marriage-like relationship that would warrant review of Mr. Goethals' alimony obligation.[36]

On Aug. 1, 2017, the trial court judge denied both parties' motions.[37] As to Mr. Goethals' motion to terminate based upon his ex-wife's cohabitation, "applying governing case law and applicable statutory factors found in N.J.S.A. 2A:34-23(n)" the judge held that Mr. Goethals "had fallen short … in making a *prima facie* case of cohabitation to shift the burden to plaintiff."[38] The judge explained that while Ms. Goethals and A.G. were "engaged, Plaintiff's relationship with [A.G.] is the romantic relationship characterized by regular meetings, participation in mutually appreciated activities, and some overnight stays," all of which according to the judge, were insufficient to establish cohabitation "considering the absence of economic impact."[39] Specifically, the judge found that Mr. Goethals had failed to produce any evidence of intertwined finances such as joint bank accounts and other joint holdings or liabilities and failed to produce any evidence of joint responsibility for living expenses.[40] The judge added that "[e]ating out,

vacationing and visits to Ms. Goethals' shore house do not suggest that plaintiff or [A.G.] are paying each other's living expenses."[41]

The trial court noted that Mr. Goethals' surveillance report revealed that A.G. spent approximately 18 overnights at Ms. Goethals' home between Sept. 5, 2016, and April 1, 2017, and that the Goethals' two children had "stayed with A.G. at his Virginia property" for three days in April of 2017.[42] The surveillance report also noted that A.G. was observed clearing snow from Ms. Goethals' car, "re-stacking items in the recycling/garage pile at the end of [the plaintiff's] driveway."[43] The report included observations of a "POD[s] container, with A.G.'s belongings" in Ms. Goethals' driveway.[44]

The Court found no evidence of "sharing of household chores" or caring "for each other's children."[45] The court rejected the notion that 28 family Facebook pictures over some two years which either Ms. Goethals or A.G. "liked or commented on" constituted "recognition of the relationship in the couple's social and family circle," or "of a relationship tantamount to marriage."[46]

Mr. Goethals moved for reconsideration arguing that under the terms of the MSA, there was no requirement that there be economic impact or intertwined finances when determining cohabitation.[47] He further argued that based upon the Court's own findings, he had made the requisite showing of changed circumstances as defined in their agreement. The Court denied Mr. Goethals' motion.[48]

Eleven months after his motion for reconsideration was denied, Mr. Goethals filed another motion to once again review his alimony obligation alleging changed circumstances premised upon "cohabitation and/or Plaintiff's substantial increase in income."[49] Mr. Goethals again argued that proof of intertwined finances was not necessary to establish cohabitation based upon the specific cohabitation terms of the MSA.[50] In support of this motion, Mr. Goethals provided photos of Ms. Goethals and the parties' children attending events with A.G. and his family, with "their new family dog," and the integrated family "cooking in Ms. Goethals' kitchen."[51] Mr. Goethals asserted that the parties' son regularly referred to A.G. as his "step-dad" and that both children had a bedroom at A.G.'s summer home.[52] While arguing that intertwined finances were not necessary, Mr. Goethals argued that it was "readily apparent" that both Ms. Goethals and A.G. were "economically benefitting from same."[53]

On Sept. 14, 2018, a different judge denied Mr. Goethals' motion to terminate alimony based upon cohabitation which he described as the defendant's "third bite at the apple."[54] The motion judge found no reason to disturb a "well-reasoned decision" and that there had been no "change of circumstances since the date of the prior orders."[55] The Court held that Mrs. Goethals' relationship with A.G. was not "mutually supportive" as included in the definition of cohabitation in the parties' MSA.[56]

The Appellate Division ultimately reversed the trial court and remanded for further proceedings including discovery and a plenary hearing.[57]

The disparate result between *Landau* and *Goethals* highlights the inconsistent manner by which courts apply cohabitation law and the assessment of what constitutes a sufficient *prima facie* case to warrant discovery.

In *Goethals*, the Appellate Division held that when applying the section of the statute that addresses cohabitation, a court cannot necessarily find the absence of cohabitation solely on grounds that the couple in question does not live together on a full-time basis.[58] In so holding, the Appellate Division specifically found that the trial court, "by dismissing the substantial evidence amassed by defendant, and requiring that there be specific evidence of intertwined and the couple living together on a full-time basis to establish *prima facie* evidence of changed circumstances, the judge misapprehended the express provision of the MSA and the factors enumerated in N.J.S.A. 2A:34-23(n)."[59]

While each case is fact specific, practitioners and litigants ultimately need a better understanding and expectation of what is required to overcome the initial step in the cohabitation process.

The Appellate Division clarified the requirements to make a *prima facie* cohabitation case in the June 2021 decision of *Temple v. Temple*.[60] In *Temple*, Jeffrey Temple moved to terminate his alimony obligation, alleging that his ex-wife Cynthia was cohabiting or had re-married William Boozan, with whom she had a relationship for some 14 years.[61]

Among the "facts and circumstances" Jeffrey presented in his moving papers:

A. Two years after their divorce, he regularly saw Mr. Boozan's car when picking up the children at the former marital home for his weekend parenting time;[62]

B. In various social media posts, Mr. Boozan referred to Cynthia as his "wife," eight of which are noted in the opinion as having been posted between 2012-2018;[63]

C. Several of Mr. Boozan's social media posts revealed

that he and Cynthia had traveled and extensively participated in social/family events;[64]

D. Cynthia and Mr. Boozan had spent a considerable amount of time at Mr. Boozan's home in Spring Lake, New Jersey, as verified by pictures Cynthia had posted in every year since Mr. Boozan purchased the home in 2016;[65]

E. In a publication issued by a Catholic church located in Spring Lake, in a Mother's Day message board, Cynthia was referred to as "Cynthia Temple Boozan;"[66]

F. Cynthia sold her New Jersey home in 2017 and purchased an apartment in New York City, and Mr. Boozan sold his Spring Lake home in 2020. Continuing to work in Long Island, Jeffrey suggested that Mr. Boozan was able to substantially reduce his commuting time by cohabiting with Cynthia in her New York apartment;[67]

G. Jeffrey's private detective observed Cynthia living in Mr. Boozan's Spring Lake home from April to June 2020;[68]

H. Photos showed Cynthia using the Spring Lake home garage access keypad, bringing groceries into the home and retrieving mail.[69]

Cynthia attempted to refute or explain all the information Jeffrey presented.[70] She acknowledged that she and Mr. Boozan were in "good friends" but denied that they were cohabiting or married.[71]

The Court also considered;

A. Financial records produced by Cynthia and Mr. Boozan reflected transactions between them in early 2020;[72]

B. Upon filing Jeffrey's motion, his attorney sent notice to Cynthia and Mr. Boozan to preserve all relevant documents and information. Nevertheless, they both "scrubbed" their social media accounts and deleted many of the posts Jeffrey had produced and relied upon.[73]

C. While denying she was cohabiting with Mr. Boozan but admitting that they were "good friends," Cynthia claimed she was "sheltering" in his home from April to May 2021 due to COVID and out of concern for "race riots" in New York.[74]

The trial court denied Jeffrey's motion.[75] He appealed and among other issues raised, he claimed that based upon the facts and circumstances he presented, he was entitled to discovery and an evidentiary hearing.[76] The Appellate Division reversed, found that Jeffrey had presented a *prima facie* case of cohabitation, and was entitled to discovery and an evidentiary hearing.[77]

The Appellate Division found that the trial court had "mistakenly weighed" the competing certifications and had "accepted as true, Cynthia's explanation..."[78] The Court went even further by saying that the "opposite approach should have been taken."[79] Jeffrey was entitled to an assumption that his allegations were true and the benefit of all reasonable inferences to be drawn from the evidence he had marshaled.[80]

As to Cynthia's efforts to deny cohabitation and refuse Jeffrey's allegations, the Court noted that while there may be "non-cohabitation explanations" for all that Jeffrey presented, the Court noted that the "only question for the judge" was whether Jeffrey presented enough to entitle him to discovery and an evidentiary hearing.[81]

Noting that what constitutes a *prima facie* case of cohabitation has not been "precisely defined" since enactment of the statute, the Court rejected the notion that evidence favorable to the moving party must be presented on all six statutory factors in N.J.S.A. 2A:34-23(n).[82] Rather, the Court held that whether a *prima facie* case has been made "focuses more on the essential meaning of cohabitation."[83] The Court also referenced the seventh statutory factor, "all other relevant evidence."[84] That omnibus factor in the Court's view, demonstrates "the statute does not contain the alpha and omega of what ultimately persuades a court that a support spouse is cohabiting."[85]

The Court expressed "wonder" whether a movant like Jeffrey could ever make a *prima facie* case if they had to provide evidence on all six specific factors.[86]"

The Court stated, "Judges must be cognizant that most relevant cohabitation information is not readily available to the party alleging the other party is cohabiting.[87] The Court compared the situation to that of a party defending against a summary judgment motion filed prior to the completion of discovery, when "crucial facts are within the sole knowledge of the other party."[88] In those situations, summary judgment is improper.[89] While cautioning against a "fishing expedition" on a weak claim, the Court noted again that moving parties like Jeffrey do not have access to much of the relevant cohabitation evidence.[90]

As did this author, the Court noted that evidence of "intertwined finances" between the former spouse and another is typically confidential and not available.[91] "Demonstrating that a former spouse and a paramour are 'sharing' or bearing 'joint responsibility' for their living

expenses" is not likely" to be obtained "without a right to compulsory discovery."[92]

What then must a payor spouse prove to make a *prima facie* case? The Court held, "It is enough that the movant present evidence from which a trier of fact could conclude the supported spouse and another are in a 'mutually supportive, intimate relationship' in which they have 'undertaken duties and privileges that are commonly associated with marriage or civil union.'"[93]

In summary, cohabitation cases are extremely fact sensitive. Counsel is well-advised to make certain that all available evidence is collected and considered *before* filing an application. When making an application to terminate or suspend alimony premised upon cohabitation, make certain to focus upon the statutory elements necessary to make a *prima facie* showing of cohabitation and do not ignore the seventh stator factor, that is, "all other relevant evidence." That "omnibus" factor allows a practitioner to be creative in the moving papers and the proofs to be supplied. Include every fact and circumstance that supports a claim of cohabitation premised upon the statutory factors. Do not forget to conduct online searches of public information relating to the ex-spouse and their significant other including postings on Facebook, Instagram and other social networking sites. Finally, in the notice of motion, make a specific request that the court make a finding that a *prima facie* case has been proven sufficient to warrant discovery and make certain that to seek a broad range of available discovery techniques. ■

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Endnotes

1. The 2014 amendments to N.J.S.A. 2A:34-23 added subsection (n) regarding alimony and cohabitation.
2. N.J.S.A. 2A:34-23(n).
3. *Ibid.*
4. *Ibid.*
5. *Welch v. Welch*, 401 N.J. Super 438, 446 (Ch. Div. 2008).
6. *Landau v. Landau*, 461 N.J. Super 107 (App. Div. 2019).
7. N.J.S.A. 2A:34-23(n).
8 *Landau v. Landau*, 461 N.J. Super 107 (App. Div. 2019).
9. New Jersey Rule of Evidence 601.
10. N.J.S.A. 2A:34-23(n)(1).
11. N.J.S.A. 2A:34-23(n)(2).
12. N.J.S.A. 2A:34-23(n)(3).
13. N.J.S.A. 2A:34-23(n)(5).
14. N.J.S.A. 2A:34-23(n).
15. *Ibid.*
16. N.J.S.A. 2A:34-23(n) 1st par. and (4).
17. *Gille v. Gille*, A-1853-15T4, 2018 WL 333486 (N.J. Super. Ct. App. Div. January 9, 2018).
18. *Ibid.*
19. *Landau v. Landau,* 461 N.J. Super 107 (App. Div. 2019).
20. *Id.* at 109.
21. *Ibid.*
22. *Id.* at 118.
23. *Ibid.*
24. *Id.* at 118-19.
25. *Goethals v. Goethals*, 2020 N.J. Super. Unpub. LEXIS 32 (N.J. Super Ct. App Div. January 7, 2020).
26. *Id.* at 4.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Id.* at 6.
31. *Id.* at 5.
32. *Ibid.*
33. *Id.* at 5-6.
34. *Id.* at 6-7.
35. *Id.* at 7.
36. *Ibid.*
37. *Ibid.*
38. *Id.* at 9.
39. Ibid.
40. *Id.* at 8.
41. *Ibid.*
42. *Id.* at 6.
43. *Ibid.*
44. *Id.* at 6.
45. *Id.* at 9.
46. *Ibid.*
47. *Id.* at 10.

48. *Ibid.*
49. *Id.* at 11.
50. *Ibid.*
51. *Id.* at 12.
52. *Ibid.*
53. *Ibid.*
54. *Id.* at 16.
55. *Ibid.*
56. *Id.* at 17.
57. *Id.* at 25-27, 29.
58. *Id.* at 22.
59. *Id.* at 25.
60. *Temple v. Temple*, 2021 N.J. Super. LEXIS 88 (N.J. Super Ct. App Div. June 17, 2021).
61. *Id.* at 2.
62. *Id.* at 8
63. *Id.* at 9-10.
64. *Id.* at 10-11.
65. *Id.* at 12.
66. *Ibid.*
67. *Id.* at 12-13
68. *Id.* at 13.
69. *Ibid.*
70. *Id.* at 14.
71. *Ibid.*
72. *Id.* at 13.
73. *Id.* at 14.
74. *Ibid.*
75. *Id.* at 3.
76. *Id.* at 2.
77. *Ibid.*
78. *Id.* at 3.
79. *Id.* at 3-4.
80. *Id.* at 4.
81. *Id.* at 14.
82. *Id.* at 4.
83. *Ibid.*
84. *Id.* at 6.
85. *Ibid.*
86. *Ibid.*
87. *Ibid.*
88. *Id.* at 15.
89. *Ibid.*
90. *Ibid.*
91. *Id.* at 6.
92. *Ibid.*
93. *Id.* at 7.

When One Bite of the Apple is Not Enough: Making Sure Your Client Gets Her Piece of the Pie

By Lynn B. Norcia

What happens when a judgment of divorce is entered but the division of marital assets was not addressed in the initial judgment? May a party reopen the matter and get the proverbial second bite of the apple? In general, the entire controversy doctrine is a rule which generally requires parties to bring all claims in the same case, so as to avoid fragmented litigation. However, in at least one well-reasoned opinion, Judge Lawrence Jones found that under certain circumstances, the equities of a case can favor re-opening of a divorce for the limited purpose of addressing previously unaddressed equitable distribution.[1] Does the fact that the first Judgment of Divorce was entered in a state other than New Jersey change this outcome? The answer is the scope of the foreign state's authority, or lack thereof, to order the distribution of marital assets, is a factor which is relevant to the New Jersey court's decision whether to permit a claim to be raised in New Jersey litigation.

In the course of representing a client who sought help in a custody dispute, I discovered she had some untapped equitable distribution of which she was not aware. Kim needed help with a custody dispute between her and her ex-husband, Fritz, regarding their 11-year-old son Jason.[2] The parties had separated in 2011, and Kim and Jason moved to North Carolina with the informal consent of Fritz. Two years after the separation, Kim filed her complaint for divorce *pro se* in North Carolina. Her only prayers for relief were that she be granted a "Judgment of Absolute Divorce," and that she be permitted to resume her maiden name. She did not seek alimony or equitable distribution for her six-year marriage. Fritz did not file a responsive pleading and did not otherwise submit to the jurisdiction of the North Carolina court. The court entered a barebones Judgment of Divorce in October 2013, without addressing custody of Jason, (other than to note that he was living with Kim), and without any reference to marital assets.

Kim contacted me in June 2019 because, after a history of sharing physical custody of Jason without any specific custody agreement or parenting plan in place, Fritz was refusing to return Jason to her in North Carolina for the summer and upcoming school year.[3] Without any order in place, Jason had been spending school years in North Carolina and summers and school breaks in New Jersey with his father.[4] We filed to certify the North Carolina Judgment of Divorce and filed a complaint to establish an FM docket in New Jersey.[5] As a result of cross motions of the parties, the court set a hearing date for the matter to resolve the physical custody issue going forward. With limited financial resources, our client did not have the financial ability to pursue a full custody hearing with its attendant litigation costs. Kim felt she had almost no leverage for negotiation with Fritz since he knew she did not have the means to hire her own expert or even share the cost of a joint expert, and the judge had decided not to disturb what had become the status quo at the time, leaving Jason in New Jersey pending a full custody hearing.

In preparation for the custody hearing, we realized the North Carolina court had never addressed the issue of equitable distribution. When questioned, Kim simply told us there were no marital assets. She did not realize that, as a police officer, Fritz had a pension which was a "marital asset" and something to which she could assert a claim. She was completely unaware that she was entitled to a portion of Fritz's police pension. Fritz was already in paid status, having been approved for a disability pension. We calculated the monthly payout to be modest, but more importantly, we realized her ability to assert a claim for a portion of Fritz's much-revered pension would give her some leverage in the custody and parenting time negotiations.[6] We decided to explore whether she could amend her complaint to raise the issue in New Jersey under the current FM docket, a full six years after the divorce had been granted. We were surprised to find there was no obvious answer to this question, and no recent published case law addressing the issue. Had Kim already expended her "one bite" of the proverbial apple? Would the entire controversy doctrine prevent us from pursuing a claim for

equitable distribution at this late date?[7]

Not surprisingly, guidance to the answer was found in one of the numerous opinions written by Judge Jones, although the relevant opinion was unreported.[8] In *Puerta v. Puerta*,[9] an unpublished 2016 Ocean County Family Part case, the court was faced with the question of whether a party could bring a post-judgment claim for equitable distribution of a marital asset or whether the entire controversy doctrine precluded the action. In *Puerta*, the parties had spent most of their married life in New Jersey but had jointly purchased property in North Carolina. The plaintiff filed for divorce in New Jersey, and the defendant husband, who was living in the marital property in North Carolina, failed to enter a responsive pleading. Accordingly, the court granted the plaintiff an uncontested final judgment of divorce. Unfortunately, the plaintiff naively relied on the defendant's verbal representation that, together, they would sell the North Carolina property and divide the proceeds equally. After waiting approximately a year and a half for her ex-husband to take any action to sell the real estate, the plaintiff sought a court order in New Jersey re-opening the divorce proceedings to address the equitable distribution of the parties' real estate. The defendant opposed the application by asserting that the divorce was over, and since the plaintiff had not expressly requested a judgment of equitable distribution in the prior proceedings, she had forfeited her right to share in the value of the North Carolina property. The *Puerto* court framed the issue presented as: "whether the court may re-open this previously concluded, uncontested divorce proceeding to now address equitable distribution of marital property."[10]

Judge Jones concluded that under the facts presented, and based on principles of equity and fairness, the plaintiff's petition to reopen the matter could proceed. In so doing, the court distinguished the 1973 Chancery Division decision in *Sibilia v. Sibilia*,[11] which essentially held: "when a judgment of divorce is entered without addressing equitable distribution, such omission may result in the loss of any equitable distribution claims."[12] Judge Jones observed that the *Sibilia* decision was issued very shortly after the effective date of New Jersey's equitable distribution statute,[13] and did not provide "significant factual detail" of the circumstances which gave rise to the controversy.[14] Moreover, the decision had no major history of interpretation in subsequent case law, nor did it address certain additional equitable principles and factors which were present in *Puerto*. Therefore, the court found the *Sibilia* decision did not bar it from considering, "as a matter of fundamental fairness, plaintiff's post-judgment application for equitable distribution of the parties' real property on its substantive merits."[15]

Relaxation of the Entire Controversy Doctrine and Rule 4:30A

Judge Jones concluded that the heart of the issue before the court was the "entire controversy doctrine," and its applicability to "plaintiff's request for a re-opening of previously uncontested divorce litigation to address a previously unlitigated and substantively unadjudicated issue of equitable distribution."[16] The court noted Rule 4:30A sets forth the entire controversy doctrine and furthers the goal that claims and matters arising among related parties should be adjudicated together rather than in separate, successive, or fragmented litigation.[17] It had already been established in a 1996 New Jersey Supreme Court case that the entire controversy doctrine is applicable to family court actions.[18] The *Puerta* court noted the doctrine is an equitable one "whose application is left to judicial discretion based on the factual circumstances of an individual case."[19] Judge Jones concluded "a court of equity may in appropriate circumstances consider the substance of a matter, notwithstanding the competing policy considerations behind the entire controversy doctrine."[20]

The *Puerta* court determined it had the authority to relax Rule 4:30A, in order to achieve fairness and equity. Judge Jones relied upon Rule 1:1-2 (rules may be relaxed to prevent injustice) and Rule 4:50-1(f) (motion for relief from judgment may be made at any time in "exceptional circumstances") as the basis for relaxing the preclusions directed by the entire controversy rule. Relying in part on the general principle of law that "equity abhors forfeiture,"[21] the court held, "[a] denial of a party's ability to pursue equitable distribution may, in some cases, be essentially tantamount to forfeiture of that party's legitimate interest in a major asset of the marriage."[22]

Avoiding the Potential of Forfeiting Equitable Distribution

Having established that the entire controversy doctrine did not automatically preclude a party from asserting a claim for post-judgment equitable distribution, and that, in general, the court has the authority to relax the rules in order to achieve fairness and equity, the court expounded upon the social importance of equitable distribution. Judge Jones observed that the New Jersey

Legislature had considered the issue of equitable distribution to be "significant enough to warrant the implementation of an entire multi-part statute, N.J.S.A. 2A:34-23.1."[23] He noted further the distribution of marital property through equitable distribution is an acknowledgment of the concept "that marriage is a shared enterprise, a joint undertaking that is in many ways akin to a partnership."[24]

The court compared the facts in *Puerta* to those presented in the 2013 Chancery Division decision in *Clementi v. Clementi*.[25] In *Clementi*, the plaintiff-wife obtained a default judgment against the defendant-husband. The parties' major marital asset was their marital home. After the defendant defaulted, the plaintiff filed a notice of final judgment, seeking sole ownership of the home. The court in *Clementi* declined to substantively grant the plaintiff's request simply by virtue of the defendant's default itself. Rather, the court held the plaintiff had an affirmative obligation to demonstrate why it would be fair and equitable to grant her request for the entire equity in the parties' home, to the exclusion of the other party.[26] Judge Jones concluded, "*Clementi* supports the appropriateness of effectuating equitable distribution of the former marital home through judicial analysis under the totality of the circumstances, rather than by limiting such analysis to the single issue of whether one party to the marriage failed to appear in the divorce litigation."[27]

The *Clementi* court's analysis was helpful to both the court's analysis in *Puerta* as well as the facts presented by my own case involving Kim and Fritz. There was one important distinction, however, which Judge Jones appropriately noted. "Unlike *Clementi* ... the potential forfeiture in this case would ironically arise not in favor of the plaintiff who actually appeared in the litigation, but rather *in favor of a defaulting defendant* who, after service of process, failed to appear and substantively participate in the divorce itself… The defaulting defendant would essentially walk away with the entire equity in the property by simply failing to actively participate in the divorce proceedings."[28] Certainly, such a result flies in the face equitable considerations.

Balancing the Entire Controversy Doctrine Against the Goals and Equitable Distribution

After setting the stage by summarizing the facts and analyzing the relevant law and equitable principles applicable to the matter before the court, Judge Jones articulated the competing policy considerations in the following manner:

> [T]he purpose and goal of the entire controversy doctrine must be balanced against the purpose and goal of fairness relative to equitable distribution, particularly where there has never at any time been (1) any previous substantive judicial analysis of same, (2) any formal request by either party for such an analysis at an earlier date, or (3) any waiver and release of equitable distribution claims in a settlement agreement.[29]

The court warned that a party may not unilaterally and intentionally bifurcate their own case by purposefully not raising equitable distribution with the plan to come back to court after the fact. Moreover, "intentional bifurcation in family actions is generally prohibited except in rare cases."[30] Judge Jones was very clear in stating, a litigant's "premeditated plan to effectuate a self-created bifurcation, without requisite pre-approval and authorization by the court, *would be fundamentally inappropriate*."[31] But in *Puerta*, as well as in the case of Kim and Fritz, there had been no "premeditated" plan to bifurcate the case. Rather, in both cases, the litigants had filed for divorce without the benefit of counsel and were now experiencing the consequences of their pennywise ways.

In *Puerta*, the court determined: "As a matter of fairness, and without in any way undermining the continued viability of the entire controversy doctrine, a family court may logically consider various equitable factors… in determining...whether to re-open prior uncontested divorce proceedings for the limited purpose of effectuating equitable distribution of a previously unaddressed major marital asset."[32] Judge Jones laid out a cogent, detailed discussion of at least eight equitable factors which should be considered when making this determination, without limitation to the possibility of others. Those factors are:

> A) Why did the applicant not address equitable distribution in the underlying divorce litigation (i.e., mistake, excusable neglect, fraud by other party, etc.)?
>
> B) Would the applicant have likely had a significant entitlement to equitable distribution of the asset at issue, i.e., a meritorious claim of substance and a reasonable likelihood of success on the merits, had either party filed a request for equitable distribution in the divorce litigation?
>
> C) Did the applicant expressly waive a claim

for equitable distribution in a prior settlement agreement or divorce proceedings?

D) How much time has passed since the entry of the judgment, and if significant time has in fact passed since the judgment of divorce, why did the applicant not bring the application to re-open the proceedings at an earlier date?

E) Have the parties' circumstances since the entry of the judgment of divorce significantly changed to such a degree that reopening the issue of equitable distribution would cause unreasonable hardship to the other party, or substantially prejudice his or her position to the point where no equitable adjustments could reasonably accommodate such changes?

F) Would the failure to address equitable distribution cause a forfeiture of a significant entitlement to share in a marital asset, and unjust enrichment of the other party, leading to an inequitable or unconscionable result under the factual circumstances of the case?

G) Does the parties' failure to previously address equitable distribution result in ongoing ambiguity and clouding of rights and obligations relative to assets or debts?

H) Are there any other relevant equitable consideration to consider under the particular factual circumstances of the case?[33]

Not surprisingly, upon the review of the eight factors in light of the facts in the case, the court in *Puerta* found, "equity and fairness supports the re-opening of this case under Rule 4:50-1(f) to effectuate post-judgment equitable distribution of the parties' real estate."[34] The court illustrated how a different conclusion could result in a blatantly unfair outcome. The court gave an example how an unscrupulous litigant could manipulate litigation to take unfair advantage of a spouse if the rules were inflexible:

> If …the rules are interpreted so as to create an automatic and permanent forfeiture of a defendant's right to share in the property if he or she does not raise the issue of equitable distribution in the divorce itself, then in a case where the marital home…is only in the plaintiff's name, all plaintiff would have to do to obtain the entire house by forfeiture is simply *not* raise the issue of equitable distribution of the property in the divorce proceedings. By not requesting such relief in the complaint, and by not filing a notice of final judgment, a plaintiff could improperly do a simple end run around the terms and spirit of both Rule 5:5-10 and *Clementi* by first obtaining an uncontested divorce, and then utilizing the entire controversy doctrine to legally block defendant from ever raising the issue post-judgment, or collecting his or her equitable ownership share of the property.[35]

The *Puerta* court concluded: "In the present case, the potential inequity becomes even more glaring because the defendant, who defaulted in the divorce proceeding, would end up with the entire equity in the marital property without ever even asking for same."[36] In Kim and Fritz's case, Fritz had also defaulted in the divorce proceeding and he would be the party who would avoid the distribution of an asset which he was undoubtedly aware was subject to division with Kim.

One question which we contemplated, in light of the facts of our case, was whether the result would have been different if Kim had included a petition for equitable distribution of marital assets before the North Carolina court but the court had declined to address the claim. We concluded that, if anything, it may have strengthened the argument that she be permitted to raise the claim in a New Jersey action. The 1975 Appellate Division decision in *Woliner v. Woliner,* which was also relied upon by Judge Jones in *Puerta*, had held a party could successfully make a post-judgment application for equitable distribution when a party had previously obtained a judgment of divorce in a foreign state, which "expressly avoid[ed] any adjudication with respect to property rights."[37] The *Woliner* court demonstrated the unfairness of adopting a contrary conclusion with a simple example also relied upon by Judge Jones in *Puerta*.

> A husband of wealth, for example, by the simple expedient of obtaining a foreign divorce on a bona fide change of domicile… could deprive the wife of a long-continuing marriage, a New Jersey domiciliary, of her right to a division of the marital estate. Her ineligibility would persist even should the husband eventually return to New Jersey at some point in the future. The irrationality of this possibility persuades us

that the Legislature never intended this result.[38]

The issue of preclusion based on the entire controversy doctrine was not raised in *Woliner*. The central issue was simply whether an out-of-state divorce judgment could serve as the basis for an equitable division of marital property.[39]

Therefore, we concluded that the fact Kim had not raised the equitable distribution claim in North Carolina had no detrimental impact on her ability to subsequently raise the claim in New Jersey. In fact, further research revealed that *if* Kim had raised the issue with the North Carolina court, the court would not have had jurisdiction to address the claim since Fritz had never submitted to the jurisdiction of North Carolina. North Carolina could not distribute property which was not within its state without having personal jurisdiction over the defendant.[40] Conversely, had Fritz submitted a responsive pleading to Kim's complaint in North Carolina, North Carolina could have ruled on issues regarding equitable distribution because it would have had personal jurisdiction of both parties.[41]

Lessons Learned

So, what became of Kim and Fritz and their custody dispute? The dispute was resolved in mediation and a consent order was entered establishing a reasonable shared parenting schedule between the parties. However, by asserting a legal basis to pursue a claim against Fritz's police pension, Kim's bargaining power in mediation was clearly strengthened. Kim ultimately decided to waive her interest in Fritz's pension in consideration for other expenses which might have been her responsibility, therefore, the court never ruled on the equitable distribution issue. More importantly, after years of dealing with Fritz's controlling and emotionally abusive behavior, it finally gave our client some power of her own to get a piece of the pie that was rightfully hers. ■

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Endnotes

1. *Puerta v. Puerta*, 2016 WL 7035169 (Ch. Div. 2016).
2. All names are fictitious to protect the identity of the parties.
3. Kim had reluctantly consented to allowing Jason to stay in New Jersey for the 2018-2019 school year based upon Fritz's "promise" he would return Jason when the school year was finished, i.e. in June 2019.
4. The first issue to be considered was whether North Carolina or New Jersey had jurisdiction over the custody dispute. The divorce had been entered in North Carolina, but Jason had been residing with his father in New Jersey for over a year. The North Carolina Judgment of Divorce did not address custody of Justin other than to note he had been residing with his mother Kim in North Carolina. In the absence of a specific custody order in North Carolina or elsewhere under the UCJEAA New Jersey had become Jason's "home state," and any petition for relief had to be filed in New Jersey.
5. Bruce Pitman, Esq., of Starr, Gern, Davison & Rubin, was co-counsel on this matter.
6. Fritz's motivation to become the parent of primary residence was driven in large part by his desire to be relieved of child support. He had played a limited role in Jason's life despite Kim's efforts to engage him.
7. Kim had never affirmatively waived any claim to equitable distribution and it had not been mentioned in the Judgment of Divorce.
8. The opinion clearly seems to meet the standards delineated in R. 1:36-2(d) regarding "Guidelines for Publication" of trial court opinions, under a number of factors, including but not limited to the fact that it "constitutes a significant and nonduplicative contribution to legal literature by providing an historical review of the law, or describing legislative history, or containing a collection of cases that should be of substantial aid to the bench and bar."
9. 2016 WL 7035169.
10. *Puerta*, *supra*, at 3.
11. 123 N.J. Super. 211 (Ch. Div. 1973).
12. *Puerta*, *supra*; citing *Sibilia*, *ibid*, at 212.

13. N.J.S.A. 2A:34-23(h).
14. *Puerta*, *supra*, at 4.
15. *Id.*
16. *Id.*
17. *Kent Motor Cars, Inc. v. Reynolds and Reynolds*, Co., 207 N.J. 428, 443 (2011).
18. *Puerta*, *supra;* citing *Brennan v. Orban*, 145 N.J. 282, 290 (1996); *Oliver v. Ambrose*, 152 N.J. 383, 394 (1990).
19. *Id.* at 5; citing *Brennan*, *supra*, 145 N.J. at 290.
20. *Id.*
21. *Id.*; citing *Dunkin' Donuts of America, Inc., v. Middletown Donut Corp.*, 100 N.J. 166, 182 (1985); *McQueen v. Brown and Cook*, 342 N.J. Super. 120, 130 (App. Div. 2001).
22. *Id.*
23. *Id.* at 6.
24. *Id.* at 7; citing *Rothman v. Rothman*, 65 N.J. 219, 229 (1974).
25. 434 N.J. Super. 529, 538 (Ch. Div. 2013).
26. *Clementi*, *supra*, 434 N.J. Super. at 538.
27. *Puerta*, *supra*, at 8.
28. *Id.* at 7 (emphasis in original). The result of a defaulting party reaping the benefits of their lack of participation in a proceeding is a factor which is relied upon in other cases addressing similar issues. See *Woliner v. Woliner*, 132 N.J. Super. 216 (App. Div. 1975); *Slodowski v. Slodowski*, 156 N.J. Super. 376 (Ch. Div. 1978)
29. *Id.* at 8.
30. *Id.*; citing *Frankel v. Frankel*, 274 N.J. Super. 585, 591 (App. Div. 1994).
31. *Id.* (emphasis added).
32. *Id.*
33. *Id.* at 8-9.
34. *Id.* at 9. Rule 4:50-1 addresses relief from judgment and subsection (f) provides that relief may be granted by the court for "any other reason justifying relief from the operation of the judgment or order."
35. *Id.* at 12 (emphasis in original).
36. *Id.*
37. *Woliner v. Woliner*, 132 N.J. Super. 216, 221 (App. Div. 1975) aff'd o.b. 68 N.J. 324 (1975).
38. *Id.* at 224.
39. *Id.* at 221.
40. See *Slodowskiv. Slodowski*, 156 N.J. Super. 376, 380-81 (Ch. Div. 1978) (a distribution of real property in New Jersey directed by a court of another state as an incident of an otherwise valid divorce was not entitled to full faith and credit because the foreign court did not have jurisdiction over the real estate or over the person of the defendant).
41. *Higginbotham v. Higginbotham*, 92 N.J. Super. 18, 35-36 (App. Div. 1966) (where the court of another state had personal jurisdiction over both spouses, the court concluded that a provision of the divorce decree affecting title to real estate in New Jersey was entitled to full faith and credit).

Domestic Violence Hearings Should Not be Conducted Through Zoom

By Thomas J. Hurley and Hon. Charles M. Rand (Ret.)

"This disease makes us more cruel to one another than we are to dogs." — Samuel Pepys[1]

As soon as Zoom[2] was incorporated into our judicial system, lawyers began to advertise that they were the best Zoom domestic violence attorneys available. This capitalization on the changes in our domestic violence courtrooms initiated by the COVID-19 crisis is problematic. It is the opinion of these writers that domestic violence hearings should not occur through Zoom. They should only occur in person and in open Court, with both the plaintiff and the defendant present in front of the judge at the domestic violence hearing.

This article will explore why it is imperative that no attorneys try matters in contested domestic violence proceedings virtually.

Legislative Background of the Prevention of Domestic Violence Act

New Jersey's Prevention of Domestic Violence Act (PDVA) begins substantively at N.J.S.A. 2C:25-18 with legislative findings:

> The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.[3]

With this as the preamble to our statute, it is surprising that the Administrative Office of the Court has not "carved out" domestic violence hearings as an exception to the mandate to move court matters forward by virtual appearance during the COVID-19 crisis. If a domestic violence proceeding requires its own set of standards and controls under the statute, only in an open courtroom can justice be appropriately and fairly meted out. A seasoned attorney, however, understands and knows that the PDVA is often used as both a sword and shield. Attorneys practicing for a few years understand that the PDVA can be used unscrupulously as a tool to gain control of a home, children, and economics. We believe that only in an open courtroom can a judge discern those subtle dynamics that often hinge on the credibility of the parties.

The Zoom process does not provide an attorney the ability to confront the plaintiff and the defendant in the same manner as they would in a courtroom. Through Zoom, the inflection of voices, the mannerism of hands, the manner in which people hold themselves, and their dress are placed in the shadows. Only through the crucible of the in-person courtroom appearance can a judge properly determine when someone is lying or telling the truth.

The ability to determine truth and credibility through the Zoom process is problematic. In recognition of the significant role the trial judge plays in issues of credibility, our Supreme Court wrote:

> When the credibility of witnesses is an important factor, Trial Courts conclusions must be given great weight. …the Trial Court is better positioned to evaluate witness credibility, qualifications, and the weight to be accorded to her testimony.[4]

In addition, during the course of an in-person domestic violence trial there is opportunity for consultation with a client while the other party testifies. There is note taking, whispering, and, of course, the judge watches both the plaintiff and the defendant throughout the proceedings. Decades ago, in the courtroom of a venerable retired Appellate Judge, this author learned that a judge watches the parties from the beginning to the end of the proceedings – and oftentimes even whilst other cases are being tried. When a plaintiff goes from laughing as they enter the court room to "crying on cue" during their testimony, a judge can ascertain more about the litigant than perhaps from the words they might say. These "in the present" and often nonverbal cues are lost in Zoom.

The Zoom process aborts and distorts communication between the attorney and the client, not only in a positive manner but also in a negative one. Today, in every attorney's office the attorney can text, email, or be in the same room as their client while the client is on a Zoom hearing. They can send messages to the client, even as the client is testifying, as to how to answer and what to answer. This new dynamic diminishes the ability for a judge to determine objectively the truthfulness of the mindset and veracity of the witness.

Multiple times during the course of this author's career, a witness testifying in person would go onto the stand with notes. These notes were then requested for inspection and the Judge granted that request. These notes often lead to a positive result for the client who was not testifying. Use of Zoom for contested domestic violence hearings effectively eliminates that process. Notes will exist off-screen and off-record, and we believe that scripted and often unseen prompting will occur.

How evidence is presented is skewed by the Zoom technology. Reviewing text messages and emails will be impossible. Visual proofs of prior injuries, proffered via 8" x 11" glossies in person, will present far less effectively through Zoom. Many true victims will lose the impact of what their physical harm or problem might have been.

Calling police officers as witnesses through the Zoom process will be much less impactful than when the police officers appear and testify in person at a domestic violence hearing. Police officers are busy, and these authors believe upsetting their life and work routine by calling upon them to appear remotely will be troubling to the process when they are "Zoomed" in.

There are technical difficulties with Zoom. Batteries run out. People who find that the process is not going their way will "disconnect" mysteriously from the process. Worse – the "Hollywood Squares" nature of the Zoom technology does not allow and will not allow an attorney to watch all individuals during the case. Much is learned by watching a plaintiff or a defendant during an in-person domestic violence case when they are not testifying. Much is learned by the way they whisper to a child or a friend that they have brought into the court room. These dynamics are not present or observable during domestic violence hearings via Zoom.

Moreover, many domestic violence cases are resolved by consent in the Courthouse in the time surrounding in-person appearances. This occurs in far fewer instances with the use of Zoom technology. When people are faced with having to go into the crucible of the courtroom they sometimes get "cold feet" or they realize they are about to be cross-examined and found to be not as credible as they were when they filed or received the complaint. Settling cases in the Zoom environment is close to an impossibility. In addition, judges are loathe to conference domestic violence cases.

We cannot forget that the possible results of a domestic violence hearing are not simply the entry of a final restraining order. The judge has substantial power in domestic violence cases. N.J.S.A 2C:25-29 outlines over four pages what a judge can order after a finding of domestic violence. For example, the judge can take away the right of a convicted defendant to purchase, own, or possess a firearm. In this instance, a defendant's constitutional rights are affected. A judge can also grant exclusive possession of a residence or household to the plaintiff regardless of whether the residence is jointly or solely owned by the parties.

Most importantly, the judge in a domestic violence hearing can make determinations regarding parenting time. As stated in N.J.S.A. 2C:25-29(b):

> The [final restraining] order shall protect the safety and well-being of the plaintiff and minor children and shall specify the place and frequency of parenting time. Parenting time arrangements shall not compromise any other remedy provided by the Court by requiring or encouraging contact between the plaintiff and defendant. Orders for parenting time may include a designation of a place of parenting time away from the plaintiff, the participation of a third party, or supervised parenting time.[5]

Practically speaking, the rights of a defendant after conviction are always compromised. That individual can never be on an "even footing" when it comes to parenting for the future. That individual could, in point of fact, be subject to an investigation or evaluation by the appropriate agency to assess the risk of harm to the child prior to any parenting time order. This is a very serious result and one that should not be subject to a process which has been described in a recent *New York Times* editorial as follows:

> The problem is that the way the video images are digitally encoded and decoded, altered and adjusted, patched and synthesized introduces all kinds of artifacts: blocking, freezing, blurring, jerkiness and out-of-sync audio. These disruptions, some below our conscious awareness, confound perception and scramble subtle social cues. Our brains strain to fill in the gaps and make sense of the disorder, which makes us feel vaguely disturbed, uneasy and tired without quite knowing why.[6]

All counsel in handling a domestic violence case where either the plaintiff or the defendant has minor children place the litigant at grave risk as to their parenting rights. Indeed, Presiding Judge Michael Patrick King, writing for the Appellate Division, held that "[t]he Prevention of Domestic Violence Act presumes an award of temporary custody in favor of a prevailing party in domestic violence proceeding proceedings."[7] Thus, in a domestic violence hearing conducted via Zoom, a parent's constitutional rights relating to their children could be unduly compromised where issues of credibility are not properly ascertainable due to the limitations of virtual appearance technology.

In addition, monetary compensation and financial awards are frequently ordered in domestic violence cases. Compensatory losses under the PDVA are defined to include, but not be limited to:

> … [l]oss of earnings or other support, including child or spousal support, out-of-pocket losses for injuries sustained, cost of repair or replacement of real or personal property damaged or destroyed or taken by the defendant, cost of counseling for the victim, moving or other travel expenses, reasonable attorney's fees, court costs, and compensation for pain and suffering. Where appropriate, punitive damages may be awarded in addition to compensatory damages.[8]

Ordinarily, concerns regarding minor children eclipse the monetary and financial results in a domestic violence proceeding. Nonetheless, financial awards have an impact on how all the affected litigants live. The equity of those financial results should not be compromised by a system that was described in the *New York Times* as follows:

> Video chats have also been shown to inhibit trust because we can't look one another in the eye. Depending on the camera angle, people may appear to be looking up or down or to the side. Viewers may then perceive them as uninterested, shifty, haughty, servile or guilty. For this reason, law scholars and criminal justice activists have questioned the fairness of remote depositions, hearings and trials.[9]

There are 19 separate provisions outlining relief available under our Domestic Violence Statute.[10] Pursuant to one of those 19 provisions, the Court can order that a defendant undergo a psychiatric evaluation.[11] It is difficult, if not impossible, to believe that a Court has the ability to discern with any degree of certainty whether an individual needs or requires psychiatric help after watching them on a Zoom hearing, with its inherent limitations, for a short period of time. Such an assessment could take months or years under ordinary circumstances in person. On a Zoom hearing, an individual could appear "well" (when they are, in fact, not stable) or could appear extraordinarily poorly (when they are, in fact, not unstable) on the video. A domestic violence hearing held through the imperfect lens of Zoom, therefore, may result in misguided and disproportionate orders with potentially dramatic and unjust results.

All trial attorneys are familiar with the concept of *voir dire* (from the French for "to see, to say"). This phrase denotes the examination which counsel or the Court may make of one presented as a witness where competency or interest is at risk. As the Appellate Division has stated, "[o]ur Courts must be vigilant to ensure that parties' procedural rights are maintained."[12] These authors question how our Courts' vigilance can possibly remain uncompromised if *voir dire* occurs through the imperfect prism of Zoom technology.

Domestic violence hearings place other rights particularly at risk. Indeed, at the commencement of each domestic violence hearing, judges instruct litigants that the process could result in a negative impact upon their immigration status, their ability to hold licenses, their future as teachers or daycare center owners – even their ability to practice in law enforcement. Moreover, a resulting Final Restraining Order is a final decision with far-reaching implications. It cannot be cured as other things can be cured.

An unpublished matrimonial decision issued on Jan. 23, 2020, by a Presiding Judge of the Appellate Division is distinguishable from the domestic violence proceedings currently under discussion. In *Pathri*, the plaintiff filed suit and, voluntarily, moved back to India.[13] Judge Fisher quoted Gilbert and Sullivan in the preamble of his decision, noting that "the rules have not quite caught up to the technological revolution." The litigant in that case could not return to the United States. Judge Fisher wrote:

> Our court rules do not provide for testimony by way of contemporaneous video transmission, but they don't prevent it either. In fact, trial testimony may be presented in a number of ways that do not require the [witness's] physical presence… The rules, however, provide no other guidance about when testimony by contemporaneous video transmission may occur. In considering the propriety of telephonic testimony at a post-conviction relief hearing, the Supreme Court acknowledged that the rules "do not expressly require [live, in-person testimony]" while also finding that the rules do not "directly prohibit remote testimony by telephone.[14]

Judge Fisher noted that there was a two-part test that would allow telephonic testimony only in "special situations in which there is either exigency or consent and in which the witness' identity and credentials are known quantities."[15] Judge Fisher then outlined that in an application for remote testimony, judges should consider the following:

- the witness's importance to the proceeding;
- the severity of the factual dispute to which the witness will testify;
- whether the fact-finder is a judge or a jury;
- the cost of requiring the witness's physical appearance in court versus the cost of transmitting the witness's testimony in some other form;
  the delay in the disposition;
- Foreseeability of the circumstance that called for the application to testify by contemporaneous video transmission.[16]

Significantly, in a footnote to his *Pathri* opinion, Judge Fisher stated that the Court "intend[s] that our holding should have no impact on criminal proceedings due to the Sixth Amendment's application."[17]

We propose that, certainly, domestic violence proceedings cannot in any way be looked at as other than a criminal proceeding given the resulting impacts of the findings in a domestic violence hearing, as we have discussed above.

Therefore, no domestic violence case should be tried by Zoom and that the only cases that should involve appearances via Zoom are dismissals by consent. We are all sensitive to one another's nuanced facial expressions. The human expressions of emotion are an intricate array of muscle contractions, tears, and the sounds that we emit. Those telling and insightful expressions of our emotions disappear in the pixelated videos and are smoothed over or delayed to preserve bandwidth.

Attorneys use physical objects in the courtroom to demonstrate the seriousness of the harmful actions of perpetrators of domestic violence. Cell phones are smashed, and screens are cracked. In the courtroom, attorneys can confront the defendant with these objects. The judge can examine broken plates, splintered stairway spindles, knives, and even guns. The damage and threatening scope of physical evidence is lost through Zoom technology. Taken from another angle, a defendant's bloody shirt or broken glasses are far less probative when seen through a computer screen. In this way, a defendant's argument may be compromised because the jurist cannot examine the physical proof that they may, in fact, be the victim.

Thus, it is our belief that domestic violence trials by Zoom have no place in our judicial system and should not occur. The sanctity of the courtroom with a live judge in a robe, in person, is lost through the limitations of the Zoom process, and in-person domestic violence trials must be preserved in the interests of justice. ■

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Endnotes

1. Samuel Pepys (February 23, 1633 – May 26, 1703) was an English diarist and naval administrator, recording his observations from the last pandemic of the bubonic plague from 1665 to 1666. Incidentally, N.J.S.A. 2C:25-29 (b)(19) provides the judge may make "[a]n order directing the possession of any animal owned, possessed, leased, kept, or held by either party or a minor child residing in the household. Where a person has abused or threatened to abuse such animal, there shall be a presumption that possession of the animal shall be awarded to the non-abusive party." Thus, the judge in a domestic violence proceeding has the authority to take a dog from a defendant.
2. The authors use the term "Zoom" throughout this article to describe a virtual audio/visual courtroom environment. However, the reader is guided to include all other products of a virtual courtroom nature, such as Microsoft Teams.
3. N.J.S.A. 2C:25-18.
4. *In re: Guardianship of DMH*, 161 N.J. 365, 382 (1999).
5. N.J.S.A. 2C:25-29(b)(3).
6. Kate Murphy, *New York Times*, *Why Zoom is Terrible*, nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html (last visited Nov. 5, 2021).
7. *Mann v. Mann*, 270 N.J. Super 269; *See also Grover v. Terlaje*, 379 N.J. Super 400, 407 (App. Div. 2005).
8. N.J.S.A. 2C:25-29(b)(4).
9. Kate Murphy, *New York Times*, *Why Zoom is Terrible*, *supra*.
10. N.J.S.A. 2C:25-29(b).
11. N.J.S.A. 2C:25-29(b)(18).
12. *N.B. v. S.K.*, 435 N.J. Super. 298, 308 (App. Div. 2014).
13. *Pathri v. Kakarlamath*, 462 N.J. Super. 208 (App. Div. 2020).
14. *Id.* at 212-13.
15. *Id.* at 213-14 (quoting *Aqua Marine Products, Inc. v. Pathe Computer Control Systems Corp.*, 229 N.J. Super. 264, 274-75 (App. Div. 1988)).
16. *Pathri* at 216.
17. *Id.*, footnote 4.

Navigating the Use of Social Media by Family Law Attorneys and Our Clients

By Amanda S. Trigg and Jacqueline N. Larsen

Social media continuously changes how we communicate, receive news and connect with others in our personal and professional lives. Social media functions as a platform to connect with family, friends, clients, former clients or other lawyers. However, these casual conversations of emojis, videos, photographs, comments and text become critical in a legal proceeding and can create potential headaches for both litigants and attorneys. Inevitably, relevant, discoverable evidence lies within the social media accounts of at least one person involved in a litigation.

Two ethics opinions[1] broadly define social media to include "any electronic platform through which people may communicate or interact in a public, semi-private, or private way." This includes blogs, public and private chat rooms, listservs, other online locations, social networks, and websites. The opinion specifies, but does not limit its ruling to, Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo, and Lawyers.com because all users of social media can share information, messages, email, instant messages, photographs, video, voice, or videoconferencing content. Whether you are posting for your own law practice or reviewing a client's content, examine both the substance and the privacy of all of that content.

Who Views What? Privacy Settings Work

Using social media to publicize your legal skills and services has never been easier or more dangerous. As a social media user, be conscious of what you post, your tone, and who sees your content. On any day, your social media posts let others interpret your life as they choose, not always as you intend. Like all marketing, it requires thoughtful planning and knowledge of the rules that govern professional advertising.

Wherever attorneys communicate with the public, other attorneys, or clients online, users may have the ability to limit who may see their posted content and who may post content to their pages, and our ethical rules apply. American Bar Association Model Rule 1.1 (Competence) addresses our professional obligation to keep abreast of changes in our practice as part of our obligation to maintain the requisite knowledge and skills to competently practice law. In 2012 the ABA published Comment [8] to Model Rule 1.1, to add the language "…including the benefits and risks associated with relevant technology…" *(emphasis added)*. While lawyers do not need to be experts, they must understand the basic features of technology commonly used in legal practice.[2] Learn about, use and update your privacy settings on all social media accounts to avoid inadvertent social media violations.

One easy step allows you to control who sees your posts: Only accept "friend" and "follower" requests from people you know. This security setting protects your content from being available to the entire public. Additionally, you can and should use the feature which requires you to review and approve any endorsement or comment that someone else wants to post on your social media profile, especially if you do not frequently check your accounts.

Think Before You Post: Use of Social Media for Marketing Legal Services

On social media, we portray the best version of ourselves. We love posting pictures of that great vacation, that shiny new car, posting honors or accolades like "Super Lawyers" or "Best Lawyers in America," or touting that big courtroom victory. But think twice before posting. The information we promote about our practices on both personal and professional social media accounts must be completely accurate. Any misleading content, let alone deceptive identification of the lawyer, firm or your qualifications, violates the Rules of Professional Conduct which prohibit false or misleading communication about a lawyer's services.[3]

In May 2016, the New Jersey Supreme Court Committee on Attorney Advertising issued a Notice to the Bar which was supposed to serve as a "reminder" regarding advertising awards, honors or accolades. Again, in May 2021, the New Jersey Supreme Court Committee on Attorney Advertising issued a Notice to the Bar after

reviewing numerous law firms' advertising pages (which included email signature blocks), setting forth guidelines reminding attorneys about the required two-step process for posting about awards, honors, and accolades that compare a lawyer's services to other lawyer's services:

A. Lawyers are first responsible for making sure the organization made an "adequate and individualized inquiry into the professional fitness of the lawyer."[4] The inquiry should not rely solely on a survey of lawyer's voting or calling in for one another. Be especially mindful of awards, and honors, and accolades that are received based on payment. The committee stated, "[fa]ctors such as payment of money for issuance of the award; membership in the organization that will issue the award; and a level of participation on the organization's Internet website render such awards suspect."[5] The inquiry must comport with R.P.C. 7.1(a)(3)(ii), which provides that the comparison be substantiated.

B. If the award or honor passes the first step a lawyer still must provide the following information/language "*in proximity* to the reference to the award, honor, or accolade," which cannot be provided by reference to another page or in tiny print: (i) a description of the methodology on which the award is based;[6] (ii) name of the comparing organization (the committee notes that the organization is often different from the award); and (iii) the statement "No aspect of this advertisement has been approved by the Supreme Court of New Jersey."[7] The notice provides an example of how an award or honor should be cited no matter where it is posted.

Before you share on LinkedIn or Facebook that you received an award, make sure the required additional information about the award is present. Improper use of honors or accolades such as "Super Lawyers," "Best Lawyers in America," "Rising Star," or "Super Lawyer" violates the Ethic Rules and may lead to disciplinary action.

We must monitor and control the content posted by independent sites, as well as our own social media accounts. Although this is not a new concept, new directories seem to pop up constantly and it can be difficult to monitor what is being posted. The duty to monitor what other people say about you can be onerous, since we do not control what others post. If you find listings that describe a law firm as "the most" or "the best" or otherwise better than any other firm, beware of violations of R.P.C. 7.1 for allowing communication which forms unjustified expectations.

Occasionally, one of your cases might generate interest from the media or you might have the urge to share your success on social media. Before you post "great day in court on a difficult custody case," make sure you look to the various Rules of Professional Conduct which govern these communications. Just as you would pause before accepting a call from a reporter, before you "tweet," remember that attorneys should not advertise or communicate about an active or closed case without the client's consent because R.P.C. 1.6, a fundamental tenet of the attorney/client relationship, requires lawyers to refrain from revealing information relating to the representation of a client unless the client gives informed consent.[8] Also, pursuant to Model Rules 1.6, 3.5 (impartiality and decorum of the tribunal) and 3.6 (trial publicity), lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a different provision of the Model Rules.

As use of social media by lawyers and clients continues to grow, we must continue to understand the ethical challenges associated with them. In December 2020, the New Jersey Advisory Committee on Professional Ethics issued Opinion 738 to clarify whether attorneys may publicly respond to online criticism without violating Rules of Professional Conduct 1.6 and 1.18.[9] Pursuant to Rule 1.6 (confidentiality of information) and 1.18 (prospective client) lawyers may not reveal information relating to representation or information obtained in a consultation without the client's consent, even if no attorney-client relationship continues. A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution the advisory committee suggested language it deemed an appropriate response to negative online criticism (which was originally suggested in a recent Pennsylvania advisory opinion): "I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."[10] With this new directive, social media platforms present particular difficulties because we may not know what is being posted and we might not have independent ability to correct inappropriate posts, even if the authors intended only praise. We also bear responsibility for what others say about us, including our associates and staff.[11]

As a rule of thumb, it is better not to respond to

reviews even if the review is untruthful. Responding to an online negative review (or any review) can lead to trouble for lawyers. Recently, an attorney in Oregon received a public reprimand, but could have been subjected to a 30-day suspension, after revealing a client's criminal record and full name in response to a negative online review.[12] The attorney's previous client posted online on several different websites critiquing the amount of legal fees he had paid versus the results obtained. In addition, the client wrote that the attorney was a "horrible attorney," a "very crooked attorney," and "…I mean how bad of a lawyer do you have to be to lose something that can't be lost?"[13] In response, the attorney responded with the client's full name and criminal history. It is important to note that the client did not reveal in his review that he had been convicted of theft and burglary, only the attorney did. The Oregon Supreme Court noted that by revealing the client's first and last name and criminal history, the knowledge would be available not only to those reading the reviews but to anyone that searched the client's name.[14] Responding to online reviews is a big and growing issue as more attorneys turn to the internet for advertising and more potential clients turn to the internet for reviews.

Attorneys should be particularly careful when responding to comments on social media, making sure the comment does not divulge confidential client information or later indicate the establishment of an attorney-client relationship.[15] On Facebook or Twitter, where individuals can share content worldwide, make sure the information is general and does not contain legal advice. An attorney should take particular care when responding to individual questions on social media because the public comment or tweet could establish an attorney-client relationship, which would be done without a conflict check, and may be viewed by others and contain confidential or privileged information. Remember, people can take the things they see and read online out of context and make their own assumptions. Everything you post is subject to the reader's interpretation.[16] Avoid posting information that could be interpreted as legal advice on a public platform.

Tweeting and Friending: Social Media Activity for Clients

When clients use social media, especially during a divorce, custody case, or support action, there are some urgent, timely changes they may have the right to make to protect themselves and others in their family. Diligent and zealous representation may require lawyers to review a client's social media postings, and/or proactively advise clients about how their social media can be used by them, or against them. Simply put, emails, texts, tweets and posts can be used in Court.

Have your client identify all accounts and advise changing all of the passwords, even if they believe their passwords are secret, secure and cannot be guessed. Passwords can be stored on, or across, devices and we want our clients to have the privacy that they believe exists.

Encourage your client to be honest with you about what they have posted on social media. Where applicable, an attorney should advise the client of the potential effect of the client's conduct on a child custody dispute including poorly timed or inadvisable new content on social media.[17] Have your client go through the posts, as far back as you think is appropriate, to check whether they find material that might be useful or potentially damaging in their case. What you do not know can only hurt your client's case.

Lawyers may not, however, give any advice to direct or even suggest that social media content be destroyed. Aside from whether such an instruction would reflect a lack of competency and understanding of how social media providers store and archive data,[18] the advice also violates ethical obligations. RPC 3.4 applies to situations where a lawyer advises a client to delete or alter social media content. One Virginia attorney who advised a client to "clean up" his Facebook page and suggested that some images be removed found himself suspended for five years and facing a $722,000 award of costs and fees against the client and the attorney.[19]

Carefully present your instructions to clients about their past and future social media activity. Clients may want to take a break from social media during their litigation but make sure your client knows how to deactivate but not delete the account.[20] The District of New Jersey granted a spoliation sanction against a plaintiff whose Facebook account was automatically deleted after fourteen days of deactivation of their account.[21] Evidence on social media platforms is subject to the same duty to preserve as other types of electronically stored information. If they do not want to take a break then clients should use each platform's security settings to restrict and control what other people can post on their timeline or account. Everything your client has posted or continues to post can become evidence in their case.

No True Privacy Online: Social Media in the Discovery Process

By now, most attorneys realize that they may not seek to obtain private social media by any pretext, such as seeking to "friend" a witness or by having their agents request access to information that is protected by privacy settings, whether the targeted social media user is represented by counsel or not.[22] How much social media information is discoverable? Attorneys and parties involved in litigation are increasingly looking to social media for potential evidence and attorneys or parties may view the public portion of a person's social media profile.

As a result of the Stored Communications Act,[23] social media service providers are precluded from disclosing stored electronic communications absent any consent from the social media user or other specified situations.[24] A civil subpoena in a family law action will not vitiate the protection provided by the Stored Communications Act. In *Facebook Inc. v. City of S.F.*,[25] the defendants charged with homicide issued broad subpoenas seeking public and private communications, including any deleted posts or messages, from the social media accounts of the homicide victim and a prosecution witness.[26] After the appellate court directed the trial court to quash the subpoenas, the California Supreme Court partially reversed and remanded, in a two-part holding:

1. The appellate court correctly held the subpoenas unenforceable concerning communications addressed to specific persons, or which were and remained configured by the registered user to be restricted; but
2. The Stored Communication Act does not bar disclosure of communications configured to be public, which remained so configured at the time the subpoenas were issued. The Supreme Court would permit disclosure on the grounds that public communications fall under the "lawful consent" exception to the restrictions of the Stored Communications Act, and therefore must be disclosed by a provider pursuant to a valid state subpoena. [27]

The use of a subpoena to obtain information from a non-party social media provider presents certain challenges; therefore, seeking discovery from the social media user, rather than the provider, might be more productive.[28]

The appellate courts in New York addressed social media issues by allowing access. In *Vasquez-Santos v. Mathew*,[29] a former professional basketball player sought damages arising out of an automobile accident. One defendant sought to compel access by a third-party data mining company to the plaintiff's devices, email accounts, and social media accounts, seeking photographs and other evidence of plaintiff engaging in physical activities. The trial court denied the application but the Appellate Division unanimously reversed to permit the discovery. *Vasquez-Santos* represented a trend toward increased access to social media discovery, by permitting a third-party data mining company access to uncover items on the plaintiff's private social media accounts. More generally, the opinion's tone presents social media discovery as customary.

Attorneys should not overlook social media evidence when an individual's willingness to share their life on social media creates another source of evidence. Attorneys should engage in informal discovery by conducting a simple Google search of the person. If a social media user fails to set privacy controls, content may be available to the public. Attorneys should also update the "document" definition in interrogatories to include social media content including profiles, postings, videos, messages, and chats. Be careful that the requests are not too broad, add time frames, and tailor the request so that the information sought will be relevant and likely to lead to admissible evidence. New Jersey Court Rule 4.10(2)(g) limits the use of discovery to issues that will not delay, harass or create an undue burden on the parties.

Conclusion

The rise in the use of social media and technology has made the practice of law both more efficient and more dangerous. It is important to remember that the essence of the legal profession is confidentiality. Attorneys should understand the use of social media platforms, the privacy settings and the utilization of such information. Before you click to post that next status update or tweet, make sure you review the Rules of Professional Conduct. ■

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Endnotes

1. Washington D.C. Bar Association, Ethics Opinion 370, "Social Media I: Marketing and Personal Use," and Ethics Opinion 371, "Social Media II: Use of Social Media in Providing Legal Services," both dated March 18, 2019.
2. RPC 7.1 permits comparative advertising provided that: (1) the name of the comparing organization is stated; (2) the basis for the comparison can be substantiated; and (3) the communication includes the following disclaimer, in a readily discernible manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey." See also, New Jersey Committee on Attorney Advertising, Notice to the Bar, May 4, 2016.
3. RPC 7.1
4. Supreme Court Committee on Attorney Advertising Reminder: Advertising Awards, Honors and Accolades That Compare A Lawyer's Services to Other Lawyer's Services, Notice to the Bar, issued on May 5, 2021.
5. *Id*.
6. Supreme Court Committee on Attorney Advertising Reminder: Advertising Awards, Honors and Accolades That Compare A Lawyer's Services to Other Lawyer's Services, Notice to the Bar, indicates that a description of the methodology can be provided in the advertising itself or by reference to another "convenient, publicly available" cite.
7. *Id*.
8. RPC 1.6; See also American Academy of Matrimonial Lawyers, Bounds of Advocacy 2.9 ("An attorney should not communicate with the media about an active case under most circumstances. An attorney should not communicate with the media about a case, a client or a former client without the client's prior knowledge and consent, except in exigent circumstances when client consent is not obtainable").
9. American Bar Association, Advisory Committee on Professional Ethics, Formal Opinion 738 (2020).
10. Pennsylvania Bar Association Formal Opinion 2014-200 (2014) retrieved from American Bar Association, Advisory Committee on Professional Ethics, Formal Opinion 738 (2020).
11. RPC 5.1, 5.2, 5.3, 8.4.
12. Debra Cassens Weiss. *Lawyer gets reprimand for responding to negative online review with embarrassing client information,* ABA Journal, July 21, 2021.
13. *Id*.
14. *Id*.
15. RPC 1.6 and 1.18.
16. Recently in California, the Commission on Judicial Performance reprimanded a judge who joined a Facebook group titled "Recall George Cascón." The judge added several of his family members to the group, posted comments and liked numerous posts. In addition, the judge maintained a public Twitter account. The commission determined both social media accounts, available to the public, reflected the appearance of bias in violation of the Judicial Code of Ethics. Commission on Judicial Performance, Decision and Order, September 14, 2021. cjp.ca.gov/wp-content/uploads/sites/40/2021/09/OGara_PR_DO_9-14-2021.pdf .
17. American Academy of Matrimonial Lawyers Bounds of Advocacy 5.2.
18. See e.g. *Crowe v. Marquette Transportation Co. Gulf-Inland, LL*, No. 14-1130 (E.D. La. Jan. 20, 2015) (deactivated Facebook account could be retrieved and the court compelled defendant's consent/cooperation for any subpoenas the defendant wished to issue directly to Facebook).
19. *Allied Concrete Co. v. Lester*, 285 Va. 295, 736 S.E.2d 699 (Va. 2013).
20. Both Facebook and Twitter have tools designed to preserve social media content (Download Your Timeline or Twitter Archive).
21. *Gatto v. United Air Lines, Inc.* 2013 WL 1285285 (D.N.J. 2013).
22. Consider the practical implications of Model Rule 3.4, 4.1-4.4, and 8.4 (misconduct). See also *Robertelli v. N.J. Office of Attorney Ethics*, 224 N.J. 470 (2016) (The plaintiff changed his Facebook settings and made his profile private, the defense attorneys instructed their paralegal to add plaintiff as a "friend" on Facebook).
23. 18 U.S.C. § 2701 et seq.
24. *Ehling v. Monmouth Ocean Hosp. Serv.*, 961 F. Supp. 2d 659 (D.N.J. 2013) (Court held that Facebook posts that are configured to be private are by definition not accessible to the general public and thus fall under the Stored Communication Act).

25. Petitioners include Facebook, Inc., Instagram, LLC, and Twitter, Inc.
26. *Facebook Inc. v. City of S.F.*, 417 P.3d 725 (Cal. 2018). Petition for certiorari denied on May 18, 2020.
27. 18 U.S.C. §2702(b)(3).
28. Facebook will not respond to subpoenas seeking user content. facebook.com/help/133221086752707/
29. *Vasquez-Santos v. Mathew,* 168 A.D. 3d 587 (N.Y. App. Div. 2019).