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Chair's Column

And The Show Must Go On...

by Timothy F. McGoughran

New Jersey family lawyers in 2016 and 2017 should be in for some interesting times, and not because I have become chair of this great section. On May 3, 2016, the Supreme Court decided *Quinn v. Quinn*.[1] The majority opinion was written by Judge Mary Catherine Cuff, P.J.A.D. (temporarily assigned), where the Court held, "an agreement to terminate alimony upon cohabitation entered by fully informed parties, represented by independent counsel, and without any evidence of overreaching, fraud, or coercion is enforceable."[2] The Court indicated, "Under the circumstances of the record developed at trial, we hold that the trial court was required to apply the remedy of termination, as fashioned by the parties."[3]

Justice Barry Albin and Justice Jaynee LaVecchia, dissenting forcefully, noting as follows:

> The majority in this case has reached not the inevitable, but the inequitable result. The majority's adherence to *Konzelman* has led to an unjust outcome in this case. We are not bound to follow a decision whose principles are unsound and when considered reflection counsels that we should take a different, more just course. The passage of time has not dimmed the logical force of Justice O'Hern's dissent in *Konzelman*. Denying a divorced woman her right to alimony merely because she has pursued happiness and cohabits advances no legitimate interest when her economic circumstances remain unchanged. The wrong here is not made right because the anti-cohabitation clause is contained in a property settlement agreement.[4]

These are unusually harsh words in the dissent, showing a deeply divided Court. Based on recent appointments, if this issue comes before the Court again a different result is not out of the realm of possibility. A careful review of this case is in order for all family law

practitioners, with the continuing *caveat* to word your property settlement agreements carefully. This case is certain to make John Paone's top 10 cases of 2016, and provides for a turn in the law regarding cohabitation clauses in agreements.

The NJSBA Family Law Section has drafted two bills pending in the Legislature. The first bill deals with removal applications[5] and the second bill codifies college educational expenses.[6] As you know, these bills were prepared by members of the Family Law Section and approved by our section, as well as by the NJSBA Board of Trustees. We are working with the sponsors to attempt to move these bills through the Legislature and, hopefully, onto the governor's desk. Please review these bills and feel free to add any input as we move through the legislative process.

We eagerly await the report of Chief Justice Stuart Rabner's *Ad Hoc* Committee on Domestic Violence, which is presently considering policies and procedures from various perspectives. By way of background, in 2015 Chief Justice Rabner formed the Supreme Court *Ad Hoc* Committee on Domestic Violence to review concerns addressed by legislators regarding the handling of domestic violence matters. The committee included representatives from all three branches of government, including judges, prosecutors, and defense attorneys, and representatives from the Legislature, the Governor's Office, leading domestic violence advocacy groups, academics specializing in domestic violence issues and Judiciary managers with specialized knowledge in the area.

Cumberland/Gloucester/Salem Vicinage Assignment Judge Georgia Curio chaired the committee, which met regularly throughout the past year. The committee conducted an in-depth review of our current domestic violence laws and policies and its final report is being prepared. We anticipate it will be submitted to the Supreme Court within the next several months. This committee will hopefully issue some recommendations to improve the current system.

The Family Law Section continues to monitor legislation and rule changes that affect our practice.

All practitioners should be aware that the Sexual Assault Survivor Protection Act of 2015, enacted on Nov. 9, 2015, took effect on May 9, 2016. This act amends N.J.S.A. 2C:20-9 and supplements certain sections of Title 2C of the New Jersey Statutes. The act allows for an application for a temporary protective order for a victim of non-consensual sexual contact, as well as other conduct as described in the statute. The statute is for "any person" who "is not eligible" for a restraining order as a "victim of domestic violence," as defined by the provisions of N.J.S.A. 2C:25-19. These applications will be heard in the family part, so we may be seeing these applications in our practice.

As we gear up for another year, these and other issues will remain on our radar to be monitored and followed by our section. Be well.

Endnotes

1. *Quinn v. Quinn*, 2016 WL 1740662 (N.J. May 3, 2016).
2. *Quinn*, 2016 WL 1740662 at *11.
3. *Id.* at *1.
4. *Id.* at *17.
5. A-339 and companion bill S-1137.
6. A-327 and companion bill S-813.

Inside this issue

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

Editor-in-Chief's Column

Are Non-Relocation Clauses in Divorce Agreements Enforceable?

by Charles F. Vuotto Jr.

Can parties agree to provisions barring a custodial parent from relocating with his or her child out of the state? This question has just been answered by the Appellate Division in the unreported decision of *Bisbing v. Bisbing*.[1] In *Bisbing* the parties' marital settlement agreement (MSA) provided that the wife (Jaime) would have primary residential custody of their twin girls born in Nov. 2006. The court found that the primary residential custody provision was conditioned upon Jaime not relocating out of state.[2] Nine months after the divorce, Jaime called her former husband, Glenn, to notify him of her intention to marry a Utah resident and relocate to that state, notwithstanding the provision in their MSA stating "neither party shall permanently relocate with the children from the state of New Jersey without the prior written consent of the other." Glenn refused to grant permission to Jaime to relocate to Utah with the children. Eleven months after the divorce, Jaime filed a motion seeking to relocate with the children to Utah without the need for a plenary hearing.

On April 24, 2015, the trial court granted the motion allowing relocation without holding a plenary hearing on the condition that a visitation schedule be established through mediation. On July 14, 2015, after an unsuccessful mediation, and with only Jaime suggesting a parenting plan, the court issued a supplemental order establishing a parenting time and communication schedule. The trial court used most of Jaime's suggestions. Eleven days later, she and the children "left for a vacation to Utah." Three days thereafter, Jaime permanently relocated with the children to Utah.

Glenn appealed the trial court's decision. The Appellate Division reversed and remanded for a plenary hearing with the following instructions:

> We reverse and remand for a plenary hearing to determine first whether Jaime negotiated the MSA in bad faith. If so, a "best interests of the child" analysis must be conducted. Second, if bad faith is not demonstrated, the trial court must then consider whether Jaime proved a substantial unanticipated change in circumstances warranting avoidance of the agreed-upon non-relocation provision and simultaneously necessitating a *Baures*[3] analysis. If the MSA was negotiated in good faith, yet Jaime fails to satisfy her burden of proving a substantial unanticipated change in circumstances, the court must apply the same "best interests" analysis as required in the first step. Only if Glenn is unable to demonstrate that Jamie negotiated the MSA in bad faith and Jamie proves a substantial unanticipated change in circumstances occurred should she be accorded the benefit of the *Baures* analysis.[4]

Based on this decision, it appears that even if a custodial parent negotiates an MSA in bad faith, he or she can potentially avoid the anti-removal provision contained therein if that party can show that it is in the children's best interest to move. The Appellate Division then stated:

> If Jaime is unable to demonstrate an unanticipated substantial change in circumstances, even if she negotiated the MSA in good faith, the family court must apply the 'best interests' standard to determine removal. If Jaime's remarriage was anticipated, or should have been anticipated, then Glenn should be able to rely on the non-relocation provision.[5]

This language suggests that unless the changed circumstances (*i.e.*, Jaime's remarriage to a man living out of state) were contemplated, the anti-removal provision would not be enforced as Glenn had likely intended.

Although there are hurdles to overcome, a custodial parent seeking to relocate from the state with children may be able to do so notwithstanding a non-relocation clause in an agreement. The custodial parent can still enjoy the advantages of the *Baures* analysis (which favors relocation) even where the parties' agreement contains a non-relocation provision, provided the custodial parent is free of bad faith and proves a substantial unanticipated change in circumstances. Therefore, it appears that in circumstances involving agreements with language similar to the language of the MSA in *Bisbing*, the noncustodial parent cannot rely on that language as constituting an absolute bar to relocation.

The Appellate Division in *Bisbing* noted the late Justice Sidney Schreiber's concurrence in *Cooper v. Cooper,*[6] wherein he stated that "[s]ubstantial deference is to be accorded to parents' mutually-agreed-upon decisions with respect to custody and visitation," including "the parents' agreement regarding the physical situs of the children."[7] However, it does not appear that the *Bisbing* decision is in accord with these sentiments. Barring a finding of harm to the children, why didn't the court simply enforce the parties' MSA? Why did the court give benefits to the custodial parent that she had clearly bargained away?

N.J.S.A. 9:2-2 states that children of divorced parents shall not be removed from the superior court's jurisdiction "without the consent of both parents, unless the court, upon cause shown, shall otherwise order." However, the parties' MSA simply stated that, "neither party shall permanently relocate the children from the state of New Jersey without the prior written consent of the other." There was no additional language in this provision, such as the clause "unless the court, upon good cause shown, shall otherwise order." As such, shouldn't Mr. Bisbing have been able to rely on that provision as an absolute bar to his ex-wife's removal of the children from the state of New Jersey (except, of course, upon a showing of harm to the child[8])? According to the *Bisbing* decision, he could not. The very best he could hope for (with one narrow exception) was an analysis under the best interest standard rather than the more lenient *Baures* standard.

This author wonders why the wife is entitled to a plenary hearing even at the higher 'best interest' standard given that she agreed to a non-relocation term. There were no provisions to permit the court to override that term under any standard, whether it is analyzed under the best interests or *Baures* standard.

The Appellate Division also noted that if, on remand, the trial level finds the wife negotiated in good faith, without manipulative intent, the court must still consider the impact of the carefully considered non-relocation provision. Why did the appellate court phrase this as considering the "impact" of the provision? Why not enforce the term agreed to between the parties? The court cites many cases adopting the state's public policy favoring the use of consensual agreements to resolve marital controversies. What is different here? The Appellate Division states that "consensual settlement agreements are subject to the changed circumstances" doctrine.[9] However, the Appellate Division also acknowledges that the wife, in a written and voluntarily agreed-upon contract, specifically surrendered her "freedom to seek a better life" in another state while obtaining primary custody of the children, and was well aware of that agreement when she chose to remarry and move far away." If so, this author wonders why that term was not enforced.

It seems the court is acknowledging the contractual term that does not give the wife any avenue to relocate out of state with the children (without the husband's consent), while simultaneously (and seemingly contradictorily) granting a plenary hearing that potentially obviates that contractual term. The parties' MSA did state that, "in the event a job would necessitate a move, the parties agreed to discuss this together and neither will make a unilateral decision." That suggests the bar against removal had one exception in the event of a change of employment. However, that was *not* the reason the wife in *Bisbing* was moving. She was moving because she married a man who lived in Utah. The *Bisbing* Appellate Division acknowledged this fact when it stated, "remarriage, however, was not mentioned in the agreement. Perhaps testimony would reveal whether such an eventuality was considered."[10] The MSA was not ambiguous in any way. There were no missing terms. Why would the Appellate Division permit testimony (and presumably parole evidence) to interpret what appeared to be unambiguous terms of an MSA?

Therefore, it appears *Bisbing* stands for the proposition that an unambiguous non-relocation provision cannot be relied upon by a noncustodial parent, and is subject to not being enforced due to unanticipated and substantial changes in circumstance, which will trigger, at the very least, a best interest analysis (and perhaps a *Baures* analysis) to determine whether removal should be permitted. It appears the husband in *Bisbing* was only

permitted to rely on the non-relocation provision if the wife's remarriage was anticipated, or should have been anticipated. This does not seem fair. The *Bisbing* court concludes "the non-relocation provision should be enforced to the limited extent of modifying the usual, preferential treatment accorded the primary caretaker's good faith desire to relocate." Why impose that limitation? Why write that provision into the parties' MSA?

In light of the foregoing, it appears to this writer that the only conclusion one can reach is that a noncustodial parent (and his or her counsel) should be very wary of the enforceability of a non-relocation clause in a MSA. As such, a client should be advised of the potential that the clause may not be enforced (or enforced differently than contemplated). Additionally, it may be prudent to provide that client with a copy of the *Bisbing* decision and to include language in the divorce agreement that the parties have been advised of the *Bisbing* decision and expressly instruct any future court to strictly enforce the non-relocation provisions of their agreement. Such a provision should improve (but may not guarantee) the enforcement of the parties' agreement. ■

Endnotes

1. *Bisbing v. Bisbing*, 2016 N.J. Super. LEXIS 50 (App. Div. April 6, 2016).
2. From the four corners of the decision, it does not appear that the parties' MSA expressly made this statement. This appears to be a conclusion reached by the court based upon the anti-removal language contained within the MSA.
3. *Baures v. Lewis*, 167 N.J. 91, 116-18 (2001).
4. *Baures v. Lewis*, 167 N.J. 91 (2001) is the seminal case on removal of children from the state of New Jersey after a custody determination has been made. Pursuant to *Baures*' two-pronged inquiry, the moving party has the burden of proving by a preponderance of the credible evidence that "(1) there is a good faith reason for the move and (2) that the move will not be inimical to the child's best interest." *Id.* at 118. To determine whether to order removal, a court must assess "12 factors relevant to the plaintiff's burden of proving good faith and that the move will not be inimical to the children's best interest." *Id.* at 116-17. The initial burden on the movant "is not a particularly onerous one." *Id.* at 118. Once the moving party makes a *prima facie* showing, the burden shifts to the non-moving party to "produce evidence opposing the move as either not in good faith or inimical to the children's best interest." *Id.* at 119.
5. *Bisbing v. Bisbing*, 2016 N.J. Super. LEXIS 50 (App. Div. April 6, 2016).
6. 99 N.J. 42 (1984).
7. *Cooper*, *supra*, 99 N.J. at 66 (Schreiber, J., concurring).
8. *Fawzy v. Fawzy*, 199 N.J. 456 (2009).
9. *Lepis v. Lepis*, 83 N.J. 139, 148 (1980).
10. The appellate court cites to *Pacifico v. Pacifico*, 190 N.J. 258, 267 (2007) (permitting an evidentiary hearing to determine the parties' intentions when entering into a property settlement agreement).

Executive Editor's Column

College Accounts in Equitable Distribution: My Money, Your Money or the Child's Money?

by Ronald G. Lieberman

Two common methods of saving for a child's higher education expenses are transferring money to the child through the Uniform Transfers to Minors Act (UTMA) or creating an account in a qualified tuition program commonly known as a 529 plan.[1] Recent studies have shown the cost of undergraduate tuition, room and board has risen quicker and greater than the rate of inflation and, in most cases, higher than the level of growth in clients' earned or unearned income.[2] Litigants know that saving for a child's college has the utmost importance. Practitioners know that "financially capable parents should contribute to the higher education of children who are qualified students."[3] So, the question arises, "Does it matter which savings vehicle a litigant chooses to use for college costs when it comes time to address college accounts during a divorce?" The answer is an emphatic "yes."

Uniform Transfers to Minors Act/Uniform Gifts to Minors Act

A custodial account created under the UTMA and the predecessor Uniform Gifts to Minors Act (UGMA) has no contribution limit and recognizes that ownership of the account belongs to the child once the funds have been deposited into it by an individual (donor) with a custodian established to control the account for the minor.[4] The funds are not limited to being used for educational expenses, and instead merely need to be used for the benefit of the child.[5] Once deposited, the funds held in a UTMA account no longer belong to the donor, or the custodian, but to the child; once the child reaches age of majority, all UTMA property becomes available to him or her.[6] Case law makes it clear that "a custodian of an UGMA account may not use funds in the account to pay or reimburse herself either for expenditures which she makes for her own benefit or for expenditures which she is legally obligated to make from her own funds for the benefit of the minor who is the beneficiary of the custodial account."[7] So, a parent cannot use a child's estate for payment of expenses when the party was of sufficient means to pay them.

Qualified Tuition Programs/529 Plans

A 529 plan is formally a 'qualified tuition program,' and is offered by the District of Columbia and all states except Wyoming.[8] A 529 plan is quite different from UTMA accounts for many reasons.

529 plans have two forms, either a prepaid tuition plan or a college savings plan.[9] In a prepaid tuition plan, tuition credits are purchased for credit hours of future attendance at a specific educational institute.[10] In a college savings plan, contributions are made in an investment account that accumulates earnings free of federal tax, with the distributions also being free of federal tax as long as they are used to pay for educational expenses.[11] New Jersey does not tax 529 plan investment returns or distributions if they are used for "qualified higher education expenses."[12]

Qualified education expenses have been defined by the Internal Revenue Service to be "tuition and certain related expenses required for enrollment or attendance at an eligible educational institution."[13] According to the Internal Revenue Service, "student activity fees and expenses for course-related books, supplies and equipment are included in qualified education expenses only if the fees and expenses must be paid to the institution as a condition of enrollment or attendance."[14]

529 plan accounts must be used for qualified education expenses, as defined by the Internal Revenue Code, and a deduction is permitted to the contributor/account owner from his or her federal adjusted gross income for contributions he or she made to the account during the year.[15]

Beyond the tax benefits, 529 plan accounts are owned by the *contributor*, not the beneficiary, while

UTMA accounts are the irrevocable property of the beneficiary. Contributions to these 529 plan accounts are made from after-tax income so the earnings on them are tax deferred and the earnings remain tax-exempt as long as the distributions are used for the qualified education expenses.[16] Typically, 529 plan accounts can be transferred from one beneficiary to another, further demonstrating that the named beneficiary (a child) does not actually own the account.[17]

A beneficiary of the 529 plan account generally does not include the earnings distributed as income to him or her if those distributions are equal to or less than the education expenses.[18]

Important in determining the equitable distribution of the 529 is that the amounts can be rolled over from one 529 account to another, for one beneficiary or another, and the beneficiary can be changed.[19] So, whoever purchases the 529 plan is the custodian and controls the funds until there are withdrawals from it.[20] The beneficiary has no ownership rights.

There can only be one account owner per account, and the person who may benefit from the 529 account is the beneficiary.[21] 529 plan benefits may be transferred tax-free to a member of the current beneficiary's family without tax consequences.[22] Most importantly, though, as compared to a UTMA account, a 529 account remains the property of the individual who funds it.[23]

Treatment of College Savings Accounts in Divorce

A starting point for consideration of a college savings account in equitable distribution is that all property acquired during the marriage by way of a gift from a third party is not subject to equitable distribution.[24] Knowing that, and remembering that a 529 plan account remains the property of the funding party, the next logical question is whether the creation of a college savings account constitutes a gift.

The four elements of a gift are: 1) a transfer of property without the passing of consideration; 2) donative intent; 3) actual or symbolic delivery of the gift; and 4) relinquishment of ownership by the donor.[25] The differences between a UTMA account and a 529 plan account, when viewed in context of those four elements of a gift, reveal that the former is a gift to the child and, thus, exempt from equitable distribution, while the 529 plan account would not be. Those differences are best set forth in the following chart:

ELEMENT OF GIFT	UTMA ACCOUNT	529 PLAN
Transfer of Property Without Consideration	No consideration from the child to the donor	No consideration from the child to the donor
Donative Intent	The funds in the account belong to the child and go to the child upon conclusion of schooling.	The funds in the plan remain owned by the contributor and the beneficiary can be changed at any time. The funds can be transferred from one beneficiary to another.
Actual/Symbolic Delivery of the Gift	The funds (the gift) are delivered to the child upon the depositing of funds into the account.	Nothing is delivered to the child.
Relinquishment of Ownership by Donor	Once the funds are deposited into the account, the donor relinquishes ownership of them in favor of the child.	The donor does not relinquish ownership of the funds.

Assuming, for the sake of this column, that the divorcing parents have not or cannot agree on whether a college savings account is subject to equitable distribution and how to apply the funds contained in a college savings account, the court will need to resolve the issue. A judge facing the issue of how to handle the division of a college account during a divorce may likely choose among a variety of options, including: 1) deciding the account belongs to the child; 2) treating it as money to be used for the child's share of college expenses without credit to the party who funded the account regardless of which form of account it may be; 3) crediting the party making the contributions (the donor) toward his or her share of college expenses; or 4) crediting both parties equally or proportionally toward college expenses paid from the funds held in the college account.

In the case of a UTMA account, a judge should be mindful that the child, not the custodian, owns the account. Thus, an asset of the child would not be subject to equitable distribution because of the statutory requirement regarding a UTMA account that is owned by the child not the donor, and that it be used for "the benefit of the child."[26]

If there is a divorce settlement agreement in place but the issue of which party receives credit from the use of the college account is missing, a judge can add a term based upon what is reasonable under the circumstances.[27] If there are no college accounts, a judge could set aside various assets for the payment of college expenses if a 529 plan account is not actually created exercising *parens patriae* authority.[28]

The more problematic issue occurs when a court is faced with the issue of equitable distribution of a Section 529 plan account. Given that a 529 account is revocable by the donor, whereas a UTMA account is not, and the beneficiary has no ownership of a 529 account, while the beneficiary owns the UTMA account, should a judge consider the division of these two college savings mechanisms differently in the equitable distribution stage?

What About 529 Plans Specifically?

Given that a contributor owns a 529 plan account, not the beneficiary, one can argue that the account is an asset that is 'legally and beneficially' acquired during the course of the marriage subject to equitable distribution.[29] Given that the beneficiary owns the UTMA account, and not the contributor, it should not be an asset subject to equitable distribution. On that issue, this author could find no authority either supporting this view or contrasting this view; however, it would seem to logically flow that ownership survives the former but not the latter.

A judge should remain mindful that "most families in our present society necessarily regard college expenses as something to be budgeted and paid for as part of a long-term scheme involving the judicious use and application of earnings and assets before, during, and sometimes after the period of education. Education is, in effect, a capital investment."[30]

Practitioners crave predictability in the judicial process in order to provide their clients with guidance regarding the outcome of issues in dispute. In fact, *stare decisis* promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process.[31] *Stare decisis* is:

> the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.[32]

Unfortunately, there does not seem to be clear guidance on how a judge exercising his or her proper broad discretion should handle the distribution of a 529 plan account. The following seem to be the available options:

- Treat it as an asset subject to equitable distribution if it was funded from marital assets, because it remains the property of the contributor.
- Determining that the 529 plan account will be used in full in the first year and then spill over to each collegiate year, without any credit to either party, and then allocate any net remaining college expenses between the parties.
- Allocating the 529 plan account among four or five years of college expenses without a credit to either party.
- Crediting the contributor alone with the monies provided to the account if the funds were from an exempt or inherited asset not subject to equitable distribution. Of course, if a 529 plan account is funded with exempt or inherited assets, which would

not be subject to equitable distribution, the task becomes easier because those assets would not be distributable to the other parent.[33]

- Determining that the monies were actually for the 'qualified education expenses' of the beneficiary and, thus, do not provide any credit to either party for the contributions.
- Considering the monies to not be subject to equitable distribution and instead allow them to remain with the titled party without requiring them to be applied toward college expenses.

In sum, the starting point for determining how, if at all, to distribute a 529 plan account would be for the attorney to determine the source of the funds and then be guided accordingly. It would be helpful for litigants to know how a 529 plan account will be allocated so there is not a matter of 'courtroom roulette' on such an important issue. Absent such guidance, the practitioner should review the parties' prior practices on savings of monies for future, foreseeable expenditures. Until such time as guidance is received from the courts, the advocacy skills of the practitioner will make all the difference.

Endnotes

1. Section 529 of the Internal Revenue Code.
2. U.S. Department of Education, National Center for Education Statistics (2011); *Digest of Education Statistics 2010* (NCES 2011-015) Chapter 3.
3. *Newburgh v. Arrigo*, 88 N.J. 529, 544 (1982).
4. http://policy.ssa.gov/poms.nsf/lnx/0501120205.
5. *Ibid.*
6. *Id.*
7. *Cohen v. Cohen*, 258 N.J. Super. 24, 29 (App. Div. 1992).
8. www.treas.gov/press/releases/docs/529.pdf.
9. *Ibid.*
10. *Id.*
11. *Id.*
12. *Id.*
13. IRS publication 970 (2015) at p. 39.
14. *Ibid.*
15. N.J.S.A. 54A:6-25 (allows the earnings accumulating in a qualified state tuition program account to be excluded from New Jersey gross income).
16. IRS publication 970 (2015); McCullers and Stefanescu (2015), *Introduction Section 529 Plans into the U.S. Financial Accounts and Enhanced Financial Accounts* and *Finance and Economics Discussions Series Note, Washington: Board of Governors of the Federal Reserve System*, 2014-12-18.
17. *Ibid*; IRS publication 970, p. 59-60 (2015).
18. IRS publication 970, p. 60 (2015).
19. *Id.* at p. 62.
20. www.irs.gov/uac/529-plans-questions-and-answers.
21. *Ibid.*
22. Internal Revenue Service publication 970, Tax Benefits for Education, Chapter 8, p. 59-62 (2015).
23. http://www.finaid.org/savings/accountownership.phtml.
24. *Capozzoli v. Capozzoli*, 121 N.J. Super. 285, 296 (App. Div. 1972).
25. *In re Dodge*, 50 N.J. 192, 216 (1967).
26. http://policy.ssa.gov/poms.nsf/lnx/0501120205.
27. *Pacifico v. Pacifico*, 190 N.J. 258 (2007).
28. *Sauro v. Sauro*, 425 N.J. Super. 555, 573-574 (App. Div. 2012).
29. N.J.S.A. 2A:34-23(h).
30. *Enrico v. Goldsmith*, 237 N.J. Super. 572, 577 (App. Div. 1990).
31. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Luchejko v. City of Hoboken*, 207 N.J. 191 (2011).
32. *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).
33. N.J.S.A. 2A34-23(h); N.J.S.A. 2A34-23.1.

Meet the Officers:

Chair

Timothy F. McGoughran

Timothy F. McGoughran is the founding partner of the Law Office of Timothy F. McGoughran, LLC, where he works with an associate attorney and retired Superior Court Judge Eugene A. Iadanza.

He served as municipal prosecutor for Ocean Township from 2000 until 2011 and has served as municipal court judge in Ocean Township from Jan. 2012 to the present.

Since 2007, he has been a member of the NJSBA Family Law Section Executive Committee, as well as the Family Law Committee of the Monmouth Bar Association. Within the Monmouth Bar Association, McGoughran has served as co-chair of the Family Law Committee (2009-2011) and association president (2007-2008); he still serves as a trustee.

Within the NJSBA, McGoughran is a member of the Military and Veteran's Affairs Section Executive Committee and the Legal Education Committee. He serves as the NJSBA trustee for Monmouth County, for the term of 2013-2017, and has been recognized by the state bar with the Distinguished Legislative Service Award in 2010 and 2013. He also received the Family Lawyer of the Year Award in 2012 from the Monmouth Bar Association Family Law Committee.

McGoughran is a regular speaker and presenter at numerous symposiums regarding various facets of law and ethics. He graduated from the University of Pittsburgh with a B.A. in political science in 1982. He graduated from the Seton Hall University School of Law with a J.D. in 1986.

Chair-Elect

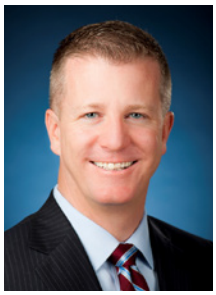
Stephanie Frangos Hagan

Stephanie Frangos Hagan is a named founding partner in the law firm of Donahue, Hagan, Klein & Weisberg, LLC, and has limited her practice exclusively to family law for more than 28 years. She is a graduate of Seton Hall Law School and received an undergraduate degree from Rutgers University. She is a frequent lecturer and panelist for NJSBA/ICLE and county bar associations on a variety of family law topics, including alimony, child support, custody, equitable distributions, domestic violence, civil unions and other important family law issues.

She serves as a blue ribbon panelist for the Essex, Union and Morris county family law early settlement programs and is a court-approved family law mediator and certified by the American Academy of Matrimonial Lawyers as a family law arbitrator. She has been a member of the Executive Committee of the NJBSA Family Law Section for more than 18 years and is currently an officer of the section. She is slated to be the chair of the NJSBA Family Law Section for the 2017-2018 term.

Hagan was formerly chair of the District Fee Arbitration Committee for Morris County, and was installed as an officer of the Morris County Bar Association and as a trustee of the Morris County Bar Foundation in Jan. 2014. She is scheduled to be installed as president of the Morris County Bar Foundation in Jan. 2017, and president of the Morris County Bar Association in Jan. 2019.

She was named as a Super Lawyer's Top 100 attorney in New Jersey in 2015 and a Super Lawyer's Top 50 Women attorney in New Jersey in 2015 and 2016.



First-Vice Chair

Michael A. Weinberg

Michael A. Weinberg is co-chair of the family law department of Archer & Greiner. As a partner in the matrimonial department, he concentrates his practice in matrimonial and family law. Weinberg is co-chair of the Camden County Bar Association Family Law Section, Executive Committee. He is a matrimonial early settlement panelist for Burlington, Camden and Gloucester counties, and has recently been named as a certified matrimonial attorney by the New Jersey Supreme Court's Board on Attorney Certification.

A master in the Thomas S. Forkin Inns of Court, Weinberg is a former chair of the Membership Committee. He has lectured for ICLE, the American Academy of Matrimonial Lawyers, American Trial Lawyers Association, and the National Business Institute, and has appeared on the television programs "Legal Lines" and "Legally Speaking." A former adjunct professor at Burlington County College, he assisted with the "Bankruptcy and Divorce" chapter in *New Jersey Family Law Practice*, 2002 and 2006 editions.

Weinberg received his B.S. from Bentley College and his J.D., *magna cum laude*, from Capital University Law School, where he was published in the *Law Review* and was a selected member of the 1993 National Moot Court Team. He was a law clerk to the Honorable Charles A. Little.

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Sheryl J. Seiden is a partner with Ceconi & Cheifetz, LLC, in Summit, where she practices family law exclusively. She is slated to be the chair of NJSBA Family Law Section for the 2019-2020 term.

Seiden graduated *magna cum laude* from New York Law School, where she served as the managing editor of the *New York Law School Law Review*. She received her B.A. in justice from the American University in Washington D.C., where she graduated *cum laude*. She is licensed to practice law in New Jersey and New York.

Seiden is a fellow of the American Academy of Matrimonial Lawyers. Prior to becoming an officer of the Family Law Section, she served as a co-chair of the Legislative Sub-Committee, and a co-chair for the Young Lawyer Family Law Sub-Committee of the Family Law Section.

She is a member of the Union County and Essex County bar associations. She has also volunteered for Partners for Women and Justice and has lectured for the Institute of Continuing Legal Education and the Union County Bar Association on family law issues, including lecturing at the Family Law Symposium. In Nov. 2014, Seiden argued for the American Academy of Matrimonial Lawyers *amicus curiae* in *Gnall v Gnall* before the Supreme Court of New Jersey.

Secretary

Ronald G. Lieberman

Ronald G. Lieberman is a partner with the firm of Cooper Levenson, PA, in Cherry Hill. He is certified by the Supreme Court of New Jersey as a matrimonial law attorney, is a fellow with the American Academy of Matrimonial Lawyers, and is certified as a board-certified family trial lawyer by the National Board of Trial Advocacy. His practice is limited to family law issues, including matrimonial law, divorce, child custody, child support, parenting time, domestic violence, and appellate work.

Admitted to practice in New Jersey, New York and Pennsylvania, Lieberman is first vice president of the Camden County Bar Association. He is co-chair of the Camden County association's Family Law Committee and past chair of the Burlington County Bar Association Family Law Committee. He is also a years-long member of the Supreme Court's Family Law Practice Committee.

A former master of the Thomas S. Forkin Family Law American Inns of Court, Lieberman has lectured on family law topics for ICLE; the New Jersey Association for Justice; Sterling Educational Services; the National Business Institute; and the New Jersey State, Burlington County and Camden County bar associations. He is executive editor of the *New Jersey Family Lawyer*, has authored articles that have appeared in the publication, and has been quoted in the *Courier Post, U.S. News and World Report, The New York Times* and on CBS 3 Philadelphia.

Lieberman received his B.A. from University of Delaware and his J.D. from New York Law School. He was law clerk to the Honorable F. Lee Forrester, P.J.F.P. (Ret.).

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Amanda S. Trigg is a partner with the law firm of Lesnevich, Marzano-Lesnevich & Trigg, LLC, in Hackensack, where she exclusively practices family law. Trigg is certified by the Supreme Court of New Jersey as a matrimonial law attorney and is president-elect of the New Jersey Chapter of the American Academy of Matrimonial Lawyers. She is also a fellow of the International Academy of Family Lawyers.

Trigg serves on the Supreme Court Family Practice Committee. She frequently moderates and lectures for the Institute for Continuing Legal Education and the New Jersey State Bar Association, and contributes toward continuing legal education presentations for the American Academy of Matrimonial Lawyers. In 2013, 2014, 2015 and 2016, *New Jersey Monthly Magazine* honored her as one of the Top 50 Women Lawyers in New Jersey. In 2015 and 2016, *New Jersey Monthly Magazine* honored her as one of the Top 100 Lawyers in New Jersey.

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

How Should Educational Expense Remission Obtained through Employment Be Allocated (If at All) in a Divorce?

by Derek M. Freed

Colleges, universities, and other educational institutions commonly provide educational expense remission for the benefit of their employees, as well as the children of their employees. For example, schools often permit the children of their employees to take classes at a reduced rate or, in certain circumstances, at no cost. Other schools pay for part of their employees' children's tuitions regardless of the schools the children attend.

As educational expense remission increases in popularity, matrimonial practitioners will likely be faced with a dispute over how to address this concept during a divorce. This article will explain educational expense/tuition remission and address arguments that can be made regarding the allocation of the remission in the context of a divorce. For example, should tuition remission benefits received through one party's employment[1] be equitably distributed between the parties? Should the remission affect child support? Should tuition remission aid both parents equally, or should it belong exclusively to the parent who obtains the benefit as part of his or her employment? Should tuition remission be categorized as a benefit that belongs to the child? These questions, as well as several others, will be discussed in this article.

Tuition Remission: The Basics

According to 26 U.S.C. §117(d)(1), "Gross income shall not include any qualified tuition reduction." 'Qualified tuition reduction' is defined to mean "the amount of any reduction in tuition provided to an employee of an organization…for the education (below the graduate level) at such organization…of (a) such employee, or (b) any person treated as an employee."[2] With certain exceptions and limitations, this section of the Internal Revenue Code essentially permits educational institutions to offer tax-free tuition remission benefits to its employees, as well as their children.[3] Furthermore, a child of an employee is only eligible for this benefit if the child qualifies as a dependent under the Internal Revenue Code.[4] Lastly, as set forth in the Internal Revenue Code, qualified tuition reduction only applies to education below the graduate level.[5]

The example given by the IRS in its *Fringe Benefit Guide* is as follows: "Carl works for ABC Community College, a division of the State University, as a physics teacher. His two children attend the State University undergraduate program at a reduced tuition. This situation meets the requirements for qualified tuition reduction and does not result in any taxable income for Carl."[6] This example illustrates that a parent who is an employee of a school may receive a substantial fringe benefit of his or her employment, which is non-taxable and which does not appear his or her W-2 or income tax return.

However, it is important to note that although the IRS references 'qualified tuition reduction' in its *Fringe Benefit Guide*, one of the most important requirements for the favorable tax treatment is that the tuition remission cannot be provided as a *quid pro quo* for services rendered.[7]

In light of the definition of qualified tuition reduction, as well as the example provided by the IRS, it is clear that there can be tremendous value to tuition remission plans.

Tuition Remission and Divorce

The real issue becomes determining *how* tuition remission factors into a divorce between the parties, if at all. There are several possibilities, which are discussed below.

Tuition Remission and Equitable Distribution

If the tuition remission benefit was received from employment obtained during the marriage, a party could contend that it constitutes "property, both real and personal, which was legally and beneficially acquired… during the marriage or civil union," and would be subject

to equitable distribution.[8] In *Reinbold v. Reinbold*,[9] the Appellate Division stated that an overview of equitable distribution indicated "that assets acquired by gainful labor during the marriage or as a reward for such labor are distributable while assets acquired after dissolution due solely to the earner's post-complaint efforts are his or her separate property."

A litigant, however, would ostensibly have difficulty prevailing on a claim that tuition remission benefits are subject to equitable distribution. A New Jersey court would more likely treat the request to equitably distribute a tuition remission benefit like it did the request to equitably distribute the value of a professional degree. In *Mahoney v. Mahoney*, the Appellate Division determined that the husband's professional degree was *not* property subject to equitable distribution.[10] The *Mahoney* court came to this conclusion for many reasons, including the "speculative" nature of the value of the degree, as well as the fact that the true "value" would be received after the end of the marriage.[11] Given the finality of the nature of equitable distribution, the New Jersey Supreme Court was concerned that, "The potential worth of the education may never be realized….The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense."[12] This same concern would seem to exist relative to a tuition remission benefit, which has a non-specific value and may be lost or revoked by the party's employer post-divorce. Additionally, the parties' children may not attend college or vocational school or the parties' children may attend a college for which the tuition remission does not apply, and the tuition remission benefits would be unused.

Tuition Remission and Child Support

If the benefit is not to be divided by way of equitable distribution (or, if it was received by one party *after* the divorce), a parent could argue that the tuition remission benefit should be considered in the context of making or modifying an award of child support. Rule 5:6A indicates that a court shall apply the child support guidelines "when an application to establish or modify child support is considered by the court." A court may modify or disregard the guidelines "only where good cause is shown."[13] The Rules of Court state, "Good cause shall consist of (a) the considerations set forth in Appendix IX-A, or the presence of other relevant factors which may make the guidelines inapplicable or subject to modification, and (b) the fact that an injustice would result from the application of the guidelines."[14]

If the tuition remission benefit belonged solely to the party who receives the benefit as a result of his or her employment, an argument could be made that the benefit constitutes a basis to deviate from the child support guidelines. This argument could be based on the concept that the benefit reflects the 'economic circumstances"' of the parent who receives it.[15] Alternatively, it may be a 'relevant' factor for the court to consider in effectuating a fair and reasonable child support award.[16]

A party may also argue that even though the tuition remission benefit is not 'income' for purposes of the Internal Revenue Service, it may constitute 'income' under the New Jersey child support guidelines. For example, the guidelines indicate, "When determining whether an income source should be included in the child support guidelines calculation, the court should consider if it would have been available to pay expenses related to the child if the family would have remained intact or would have formed and how long that source would have been available to pay those expenses."[17] Notably, 'gross income,' as defined by the guidelines, includes "the value of in-kind benefits."[18] Furthermore, the guidelines define 'in-kind income' as "The fair-market value of…benefits received in lieu of wages and in the course of employment," and indicate that they "shall be included as gross income if they reduce personal living expenses of the recipient regardless of whether they are derived from an employer, self-employment, or the operation of a business. Examples of in-kind goods, services and benefits include vehicles, automobile insurance, free housing, meals, benefits selected under a cafeteria plan, memberships, or vacations."[19]

An example of the implementation of this section of the child support guidelines is seen in the 2012 unreported decision of *Newman v. Newman*. In *Newman*, the husband was employed by a private school and provided rent-free housing with his employment.[20] The wife presented evidence that the "gross monthly rental potential" of the housing amounted to $2,900.[21] The Appellate Division affirmed the trial court's determination to increase the husband's gross income by this gross monthly rental potential, though the benefit was non-taxable in nature on the basis that it represented 'in-kind' income under the child support guidelines.[22] The increase to the husband's gross income ultimately increased his weekly child support obligation.[23]

Notwithstanding the *Newman* decision, the child support guidelines indicate that "expense reimbursements are not considered income."[24] Thus, it is likely that the court's analysis of whether this benefit impacts the calculation of child support would turn on whether the tuition remission benefit is categorized as an 'expense reimbursement' or whether it is categorized as an 'in-kind benefit.' Arguments can be crafted for both positions based on the particular plan, as well as the methodology used for implementing the benefit.

Depending on the amount of the tuition remission benefit, however, an adjustment to a child support award may not fully consider the tuition remission benefit. For example, if a tuition remission benefit amounted to a reduction in a child's tuition of $5,000 and is applied solely to the party whose employment affords the benefit, even if the parent's income is increased by $5,000 per annum, it is unclear how much of a child support adjustment the other party will actually receive. If the parties equally share physical custody of the child in question, it is highly likely there will be only a modest impact to a child support calculation if the tuition remission benefit is factored into the child support guidelines or considered in a non-guidelines award in evaluating the factors set forth in N.J.S.A. 2A:34-23(a).

If the tuition remission is categorized as a benefit to the child, an argument could be made that the benefit should be treated similarly to the derivative benefits a child receives when one parent is eligible for Social Security Disability. Pursuant to Appendix IX-A, paragraph 10.b of the child support guidelines, when determining a proper child support award, "nonmeans-tested benefits" paid to or for a dependent child that arise by reason of either parent's disability, and which have not resulted in any diminution of Social Security payments to parent, must be deducted from the basic support computation.[25]

Appendix IX-A specifically states, "Government Benefits Paid to or for Children—In some cases, government benefits may be received by or for a child based on a parent's earnings record, disability, or retirement (*e.g.*, Black Lung, Veterans Disability, Social Security). Such payments are meant to replace the lost earnings of the parent and are paid in addition to the worker's or member's benefits (*i.e.*, payments to family members do not reduce the member's benefits). A parent may also receive other non-means-tested government benefits that are meant to reduce the cost of the child such as adoption subsidies (*N.J.A.C.* 10:121-2). If non-means tested benefits are paid to or for a dependent child for whom support is being determined, the benefits must be deducted from the basic support obligation."[26]

The argument against this analogy, however, is that to be categorized as a 'qualified tuition remission' payment cannot be a *quid pro quo* for employment. As such, unlike derivative Social Security benefits, tuition remission benefits are not being provided to the child to 'replace the lost earnings of a parent.'

Tuition Remission and the Determination of the Parties' Obligations to Contribute to the Unemancipated Children's College Expenses

Potentially, the most equitable approach to addressing tuition remission would be to evaluate the tuition remission in the context of addressing the division of the child's actual tuition expense between the parties. According to *Newburgh v. Arrigo*:

> In evaluating the claim for contribution toward the cost of higher education, courts should consider all relevant factors, including (1) whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; (2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; (3) the amount of the contribution sought by the child for the cost of higher education; (4) the ability of the parent to pay that cost; (5) the relationship of the requested contribution to the kind of school or course of study sought by the child; (6) the financial resources of both parents; (7) the commitment to and aptitude of the child for the requested education; (8) the financial resources of the child, including assets owned individually or held in custodianship or trust; (9) the ability of the child to earn income during the school year or on vacation; (10) the availability of financial aid in the form of college grants and loans; (11) the child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and (12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.[27]

A tuition remission benefit would be relevant with respect to factor six ("the financial resources of both parents") and factor three ("the amount of the contribution sought by the child for the cost of higher education"). Additionally, the *Newburgh* Court indicated that "all relevant factors" should be considered, with the specifically stated factors being a non-exclusive list.[28] The New Jersey Supreme Court, in *Gac v. Gac,* confirmed that a trial court should consider "the statutory criteria of *N.J.S.A.* 2A:34–23(a) and the *Newburgh* factors, as well as any other relevant circumstances, to reach a fair and just decision whether and, if so, in what amount, a parent or parents must contribute to a child's educational expenses."[29] This confirms that a tuition remission benefit is a relevant consideration when determining the manner in which parties share a child's educational expenses.

Assuming a court determines that the tuition remission benefit is a relevant consideration, a court would next have to determine *how* to consider or apply the tuition remission benefit in the context of "evaluating the claim for contribution toward the cost of higher education."[30] For example, would the tuition remission benefit be applied prior to allocating the remaining educational expenses (if any) between the parties, or would it be applied to one party's share of the child's educational expenses?

The Discussion of Tuition Remission in Case Law

There is no decision in New Jersey that directly addresses the issue of how tuition remission benefits should be applied. In *D.G. v. K.S.*, the family part referenced tuition remission benefits in the context of resolving custodial issues. The *D.G.* court stated, "S.H. is fully committed to [the child's] educational progress. He has applied for her to attend Day School, as he is a faculty member who qualifies for a sixty percent tuition remission and financial assistance, lowering the cost to $12,000 per year or lower."[31] The *D.G.* court ultimately directed the parties to equally share the tuition, ostensibly applying the remission benefit first.[32]

While no New Jersey court has squarely addressed the issue, in *Anderson v. Aronberg* the Missouri Court of Appeals addressed the trial court's "denial of [the mother's] request that tuition remission payments made by her employer, Washington University, be credited against her obligation to pay one-half of the children's college expenses as provided in the decree."[33]

In *Anderson*, the mother's employer, Washington University [WU], provided "a non-taxable college tuition remission program which pays tuition and mandatory academic fees in the amount of one-half of WU's current tuition directly to a college or university attended by its employees' children."[34] The court found that the tuition remission program was "in existence and both parties were aware of it at the time they entered into [their] settlement agreement. However, there was no discussion of how the tuition remission payments would be treated in the event the children were able to take advantage of the program."[35] The trial court applied this benefit "off the top" of the children's college expenses, prior to dividing the remainder between the parties. The mother objected to the trial court's approach and argued that the benefit "also reduces the amount to be paid by Father and obligates her to pay somewhat more than if 'cost' was defined as the total stated tuition of the institution attended and her employer's payments were treated as a credit only toward her obligation."[36]

The Missouri court found that the laws governing child support expressly direct the trial court to consider "scholarships, grants, stipends and other cost reducing programs available to the student."[37] As such, the Missouri Court of Appeals found that the parties should pay the "actual out-of-pocket cost to the student, not the stated tuition charges. The WU tuition remission program certainly qualifies as a 'cost-reducing program' available to the children."[38]

The *Anderson* court also rejected the mother's claim that the tuition remission payments were "a fringe benefit, available solely because of her work and labor as an employee of WU, and therefore the payments are no different from a cash payment made directly from her to the school for tuition."[39] The court indicated that the tuition remission payments did not constitute income to the mother (as long as the underlying plan complied with Section 117(d) of the tax code) and as such did not constitute payment for work performed.[40]

Finally, the *Anderson* court rejected the mother's argument that the tuition remission payments were akin to a "non-custodial parent's Social Security disability benefits paid directly to the children and to the rationale supporting the collateral source doctrine applied in tort cases."[41] As such, it found "no error…to provide for the sharing of actual college expenses remaining after the application of any scholarships, grants or other cost reducing programs."[42]

In New Jersey, a party would seek to distinguish *Anderson* on the basis that the trial court (as affirmed by

the court of appeals) largely relied upon language that was present in a Missouri statute in reaching its decision. At present, there is no statute addressing the manner in which parents would divide the college expenses of their children.[43]

Anderson illustrates the differing perspectives that exist relative to the apportionment of the tuition remission benefits. One can understand the mother's basic contention, which is that the tuition remission benefit existed solely because of her employment. Thus, she felt it would be unfair for her former husband to receive any benefit from the tuition remission. The trial court and court of appeals disagreed, stressing that the parties should divide only the child's 'actual' expenses.

One could argue that the tuition remission benefit actually belongs to the child, though it is derived from the parent's employment. As set forth above, assuming the plan comports with Section 117 of the Internal Revenue Code, the benefit is non-taxable. As such, receipt of the benefit cannot be deemed 'compensation' for work performed. These facts would support a result that the tuition remission benefit would be applied before either party's contribution was determined.

However, these arguments potentially ignore the spirit of the child support guidelines, which require the court to consider in-kind benefits when resolving issues of child support. At its core, the payment of an unemancipated child's educational expenses is a form of child support. Thus, one could contend that if the in-kind benefits constitute income for a party under *Newman*, these same benefits should be applied to *only* that party's obligation to contribute to a child's educational expenses. Additionally, under the guidelines, one could argue that the parent receiving the tuition remission benefit has a greater obligation (and ability) to contribute to the child's educational expenses given that his or her obligation has been reduced.

If the employment that affords the parent the tuition remission benefit was obtained post-divorce, should that have an impact on the analysis? If the benefit belongs to the child, it would seem that the date of the attainment of the employment is irrelevant. However, if the employment was obtained post-divorce, wouldn't this serve as an additional argument that benefit should be applied to the share of the party who has the employment that provides the benefit?

N.J.S.A. 2A:34-23 indicates that "the court may make such order as to the…education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just…." Reasonableness is a subjective notion. As one can see, there are various arguments that can be made regarding the manner in which tuition remission benefits can be considered in the context of divorce litigation. The benefits can be allocated between the parties, or solely to one party. Alternatively, the benefit could be determined to belong to the child. Ultimately, after considering the legal arguments asserted, the particular facts presented by the parties will likely shape the trial court's determination of the issue. ■

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Endnotes

1. This article only addresses tuition remission benefits obtained through employment. It is acknowledged that there are other ways that tuition remission benefits may be received. For example, under the Post-9/11 G.I. Bill, children of certain parents who are on active duty service, as well as children of certain veterans may be eligible for tuition remission benefits. *See* http://www.benefits.va.gov/gibill/post911_gibill.asp.
2. 26 U.S.C. §117(d)(2).
3. A qualified tuition reduction under §117 is different from an educational assistance plan as addressed in §127 of the Internal Revenue Code. When resolving this issue in the context of matrimonial litigation, it is imperative to fully understand the nature of the benefit received. Qualified tuition reductions under Section 117 may only be offered by schools (including schools operated by churches, as well as other entities), while educational assistance plans under Section 127 may be offered by non-school employers. Also, there are caps on the non-taxable nature of Section 127 plans, while qualified tuition reductions provided for by Section 117 are not subject to a dollar limitation.

4. Whether a child is a 'dependent' is a concept that is addressed in the Internal Revenue Code. For example *see* 26 U.S.C. §152.
5. 26 U.S.C. §117(d)(1). Tuition remission may still be non-taxable for graduate school expenses under certain circumstances and with a cap.
6. *See* IRS, Fringe Benefit Guide, Publication 5137, p. 80 (2014).
7. *See Field v. C.I.R.,* 680 F.2d 510, 513 (7th Cir. 1982).
8. *See* N.J.S.A. 2A:34-23(h).
9. *Reinbold v. Reinbold*, 311 N.J. Super. 460, 469-70 (1998).
10. *Mahoney v. Mahoney*, 91 N.J. 488 (1982).
11. *Id.* at 497.
12. *Ibid.* (*citing Mahoney v. Mahoney,* 182 N.J. Super. 598 (App. Div.), *reversed by Mahoney v. Mahoney*, 91 N.J. 488 (1982).
13. *Ibid.*
14. *See* Rule 5:6A.
15. *See* N.J.S.A. 2A:34-23(a)(2), which states, "In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider…(2) Standard of living and economic circumstances of each parent.
16. *See* N.J.S.A. 2A:34-23(a)(10), which permits the court to consider "any other factors the court may deem relevant" in making an award of child support.
17. *See* Child Support Guidelines, Pressler & Verniero, *Current N.J. Court Rules*, Appendix IX-B to *R.* 5:6A (2016).
18. *Ibid.* at (v).
19. *See* Child Support Guidelines, Pressler & Verniero, *Current N.J. Court Rules*, Appendix IX-B to R. 5:6A (2016).
20. *Newman v. Newman*, 2012 WL 86959, *2 (App. Div. 2012).
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *See* Child Support Guidelines, Pressler & Verniero, *Current N.J. Court Rules*, Appendix IX-A, ¶10.b to *R.* 5:6A (2016).
26. *Ibid.*
27. *Newburgh v. Arrigo*, 88 N.J. 529, 545 (1982).
28. *Ibid.*
29. *Gac v. Gac*, 186 N.J. 535, 543 (2006).
30. *Newburgh v. Arrigo*, 88 N.J. 529, 545 (1982).
31. *D.G. v. K.S.*, 444 N.J. Super. 423, 449 (Ch. Div. 2015).
32. *Id.* at 468.
33. *Anderson v. Aronberg*, 927 S.W.2d 931, 932 (Mo. Ct. of App. 1996). The child support-related aspects of *Anderson* were superseded by changes to the operative Missouri child support statute.
34. *Id.* at 933.
35. *Ibid.*
36. *Id.* at 934.
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. *Ibid.*
41. *Id.* at 935.
42. *Ibid.*
43. S-813 and A-327 are presently pending in the New Jersey Legislature. These bills would regulate "the authority of the court to make provision for the educational expenses of an unemancipated child in certain instances."

Ethical Considerations for the Family Lawyer

by Donna K. Legband

It seems as if the practice of family law becomes more complicated and more stressful each year. In addition to communications via regular mail and telephone, family lawyers receive a constant barrage of emails and text messages from adversaries and clients. Family lawyers are practicing in a system that includes not only litigation but mediation, collaborative divorce, and arbitration. On top of all this, practitioners must keep abreast of new case law and statutes that affect their practice. Family lawyers also need to conduct their practices in accordance with the Rules of Professional Conduct and advisory opinions.

This article addresses three areas the author believes pose possible ethical challenges:

1. the retention and destruction of closed client files;
2. the statements set forth in an affidavit or certification filed with a motion to be relieved as counsel; and
3. the requirement of written retainer agreements in family matters.

The Retention and Destruction of Closed Client Files

Many family law practitioners believe they are only obligated to maintain a client's closed file for a period of seven years, and after that time has elapsed the client's file can be destroyed without any notice to the client. This principle is rooted in the Rules of Professional Conduct, specifically RPC 1.15(a), which provides, "Complete records of such account funds and other property shall be preserved for a period of seven years after the event that they record."[1]

Although it would appear that RPC 1.15(a) only requires an attorney to maintain a closed file for seven years, there are certain instances where this may not be the case, or where a lawyer will want to retain his or her file for a period in excess of seven years. In addition, attorneys should be aware of certain other considerations before destroying a former client's file.

When considering whether to destroy a former client's file, an attorney must review not only the Rules of Professional Conduct and the Rules Governing the Courts of the State of New Jersey, but also the advisory opinions rendered by the New Jersey Advisory Committee on Professional Ethics. There are two advisory committee opinions that directly address the destruction of a former client's file: Opinion 692 (from 2001)[2] and a supplement to Opinion 692 rendered a little over a year later.[3]

In Advisory Opinion 692, the Advisory Committee on Professional Ethics (hereinafter the advisory committee) held that the "portions of the file which constitute 'property of the client' must be either returned to the client, disposed of pursuant to court order or agreement with the client, or preserved and maintained for a reasonable period of time following the conclusion of the matter."[4] The advisory committee further stated that "Absent an express agreement that the file be subject to destruction at an earlier point in time, the client may assume availability of the file up to a date seven years after it has been closed, at which time it may be destroyed."[5]

It would appear that after seven years an attorney could simply destroy the client's file without any further obligation to notify or communicate with the former client. This is not the case. In the Opinion 692 supplement, the advisory committee stated, "we emphasize again that practitioners must use their judgment and apply discretion, and must consult substantive law requirements in particular practice areas to determine the appropriate retention period beyond the required seven years for files or portions of files in certain matters."[6]

Accordingly, in dissolution matters where, for example, there is a qualified domestic relations order (QDRO) addressing a defined benefit pension that will not be in pay status until a future date, a lawyer may want to retain his or her closed file until the QDRO enters in pay status. In addition, if an attorney's practice includes the preparation of prenuptial agreements, these files should be retained beyond the seven-year period, since any enforcement issues may not be raised until many years after the agreements are drafted.

If there are no issues, such as the ones set forth above, that may warrant a lawyer retaining the file, one must next address what requirements must be met in order to destroy the file. In the supplement to Advisory Opinion 692, the advisory committee held, "At the end of the seven-year retention period, a lawyer has an obligation to examine the

closed file to determine whether it contains property of the client. If a file contains such property, the lawyer should take reasonable steps to notify the former client."[7]

Both opinions attempt to provide a definition of 'client property.'[8] It is clear in both opinions that a lawyer cannot simply destroy the former client's file upon the expiration of seven years if the file contains any 'client property.' The supplement to Opinion 692 defines 'reasonable steps' in returning client property as including mailing a notice to the former client by regular or certified mail.[9]

Advisory Opinion 692 and the supplement to Opinion 692 were rendered when most firms still used postal delivery as the primary means of communicating with clients. Neither opinion addresses whether a lawyer can notify a former client via email of their intent to destroy a file. Given that many practitioners now use email as the primary means of communicating with clients, it may be time for the advisory committee to revisit this issue, and whether the use of email to notify a former client would comply with Advisory Opinion 692 and the supplement to Opinion 692.

Moreover, the aforementioned opinions make clear that the lawyer must inspect and review the contents of the former client's file prior to destroying it, to determine if there is any "client property" in the file.[10] It is only after the lawyer conducts a thorough review that the file can be discarded or destroyed. It is also important to note that Opinion 692 requires destruction of the file (if permitted) in such a manner that protects the client's confidential information.[11]

The Statements Set Forth in an Affidavit or Certification Filed with a Motion to be Relieved as Counsel

Many family lawyers have been in the position where the attorney-client relationship has deteriorated to a point where a motion to be relieved as counsel must be filed. The deterioration of the attorney-client relationship may have occurred due to various factors, such as:

1. A client's failure to communicate with counsel;
2. A client's failure to keep current on his or her counsel fee invoice, resulting in a financial burden for the attorney;
3. The client has made a material misrepresentation; or
4. The client is attempting to perpetrate a fraud or crime.

Regardless of the reason, if an attorney decides to file a motion to be relieved as counsel, the application will typically include an affidavit or certification from the attorney of record providing a basis for withdrawal from the pending matter. RPC 1.16(b) provides that a lawyer may withdraw from representing a client if "(1) withdrawal can be accomplished without material adverse effect on the interests of the client."[12]

In many instances, the affidavit submitted by counsel in support of a motion to withdraw will include facts that may affect a client negatively in the ongoing litigation. For example, affidavits that provide the following information would likely run afoul of RPC 1.16(b):

1. Damaging descriptions of the client's behavior toward the attorney and his or her office staff;
2. Examples of a client being non-responsive;
3. A statement regarding a client's failure to take reasonable legal positions; and
4. A statement that a client failed to follow the attorney's legal advice.

In addition to the above circumstances, many attorneys file a motion to be relieved as counsel when the client has violated the terms of the retainer agreement by failing to pay counsel fees.

What an attorney can do to seek the court's permission to withdraw as counsel depends on the status of the litigation and the timing of an application to withdraw as counsel. In *In re Simon*, the New Jersey Supreme Court held that an attorney cannot intentionally or unintentionally create an adversarial situation with a client that would ultimately force the court to grant an attorney's motion to be relieved as counsel.[13] This matter involved the filing of a motion to withdraw as counsel by an attorney who also filed a lawsuit against the client for unpaid legal fees.[14] *In re Simon* examines the actions of an attorney with regard to his suit for unpaid legal fees against his then-current client.

In light of *Simon*, an attorney should be careful in drafting an affidavit or certification in support of a motion to be relieved as counsel, or pursuing fees from a current client by filing an action against the client for unpaid counsel fees. An attorney should avoid creating an adversarial relationship with the client while still the attorney of record, as the court may find the attorney *intentionally* created the conflict in order to force the court to grant the motion to be relieved as counsel. In an effort to avoid such a situation (and avoid violating RPC 1.16(b) and RPC 1.7(a)(2)) an attorney's certification in support of a motion to be relieved should be diplomatic, to avoid prejudicing the client in the eyes of the court, providing the adversary with fodder in the litigation, or violating RPC 1.16(b).[15]

It may be prudent for the attorney to certify in his or

her affidavit that the basis for the request for withdrawal is "there has been a breakdown in the attorney client relationship." This language should be sufficient to permit withdrawal of the attorney from the pending litigation, and to avoid any negative inference to the client. Alternatively, counsel may wish to ask the court's permission to submit a more detailed *ex parte* certification to a judge other than the one assigned to the litigation.

It is important for judges to recognize that attorneys are prohibited by the Rules of Professional Conduct from providing specific details supporting their request to be relieved as counsel in a pending matter. In addition, given *In Re Simon*, an attorney should not file a complaint or petition to compel the payment of unpaid counsel fees prior to being relieved as the attorney of record.

The Requirement of Written Retainer Agreements in Family Matters

Most attorneys are familiar with the provisions of RPC 1.5, which delineates the factors for determining the 'reasonableness' of a fee being charged by an attorney, as these factors are addressed in affidavits filed in support of requests for the payment of counsel fees.[16] In addition to setting forth these factors, RPC 1.5(b) specifically requires that in nearly all cases the fee being charged must be provided to a client in writing.[17]

RPC 1.5(b) should be read in conjunction with New Jersey Court Rule 5:3-5(a), which requires a written retainer agreement in all family law matters.[18] Contingent fees are prohibited in family law matters, except where there is an allegation of "tortious conduct,"[19] as are non-refundable retainers.[20]

At a recent mediation training, some lawyers professed to performing mediation without written retainer agreements. Rule 5:3-5(a) specifically provides that "Except where no fee is to be charged, every agreement for legal services to be rendered in a civil family action shall be in writing signed by the attorney and the client, and an executed copy of the agreement shall be delivered to the client."[21] Although mediation can be performed by non-lawyers, when attorneys serve as mediators a strict interpretation of the RPCs and Rule 5:3-5(a) may be understood to require a written fee agreement. As such, it would be wise for any attorney who serves as a mediator to make it part of his or her practice to have a written retainer agreement in all of their mediation cases in order to insure the requirements of the RPCs and Rule 5:3-5(a) are met.

Conclusion

Attorneys who practice family law would be well advised to make sure they are familiar with the Rules of Professional Conduct to avoid any inadvertent non-compliance and the ensuing ethical problems that could arise as a result. ■

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Endnotes

1. RPC 1.15(a).
2. N.J. Advisory Comm. on Professional Ethics, No. 692, 163 N.J.L.J. 220 (Jan. 15, 2001).
3. N.J. Advisory Comm. on Professional Ethics, No. 692 Supp., 170 N.J.L.J. 343 (Oct. 28, 2002).
4. Opinion 692, 163 N.J.L.J. 220.
5. *Ibid.*
6. Opinion 692 Supp., 170 N.J.L.J. 343. Note that in criminal matters the committee held that, "absent an express agreement, a lawyer should not discard or destroy files relating to criminal matters while the client is alive."
7. *Ibid.*
8. Opinion 692, 163 N.J.L.J. 220 and Opinion 692 Supp., 170 N.J.L.J. 343. A client's 'property' is defined as original documents, photographs or things. Other types of documents could constitute property of a client depending on the nature of a particular case.
9. Opinion 692 Supp., 170 N.J.L.J. 343.
10. *Ibid.*
11. Opinion 696, 163 N.J.L.J. 220.
12. RPC 1.16(b).
13. *In re Simon*, 206 N.J. 306, 319 (2011).
14. *Id.* at 307.
15. Rule 5:3-5(d)(2).
16. RPC 1.5(a).
17. RPC 1.5(b), stating "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation."
18. RPC 1.15(a).
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*

The Sexual Assault Survivor Protection Act—An Overview and Potential Unintended Consequences

by Jennifer Weisberg Millner

On May 10, the Sexual Assault Survivor Protection Act (SASPA)[1] went into effect. SASPA allows a court to enter temporary and final protective orders for victims of non-consensual conduct.[2] This law will aid individuals who had been without protective remedies against abusers, as many situations did allow a restraining order to be entered under the Prevention of Domestic Violence Act (PDVA).[3] It had been estimated that prior New Jersey law prohibited approximately 80 percent of sexual assault survivors from applying for the protections afforded by restraining orders.[4] SASPA addresses that gap. In many ways, this new statute mirrors the remedies provided by the PDVA. This article explains the provisions of the new law, and also discusses possible unintended consequences of it.

SASPA—An Overview

The Administrative Office of the Courts is creating a new docket for cases brought under SASPA. Under the new law, only offenders who are adults can have a protective order entered against them. Similar to the procedure of the PDVA, a victim can apply for a temporary protective order on an *ex parte* basis. After an initial temporary order is entered, a final hearing is to be scheduled within 10 days.[5] In hearings under the act, the burden of proof is by preponderance of the evidence.[6]

A person who is alleging to be a victim of nonconsensual sexual conduct, sexual penetration, or lewdness, or any attempt at such conduct, and who is not eligible for a restraining order as a victim of domestic violence, as defined by the PDVA, can make an application for a protective order under SASPA.[7]

In cases involving sexual assault, there are often concurrent criminal actions, and as such, SASPA contains protections for the accused. For instance, if criminal charges have been filed, any testimony from the victim in the SASPA action cannot be used in a criminal proceeding unless it is otherwise admissible.[8]

When conducting a hearing, the court must consider the possibility of future acts when making its decision.[9] However, a court may not deny relief based on the following:

1. Failure of the victim to report the sexual assault to law enforcement
2. Intoxication of either the victim or the respondent
3. Whether the victim did not leave the premises to avoid the conduct
4. The absence of physical injury.[10]

Additionally, evidence of the alleged victim's previous sexual conduct or manner of dress at the time of the incident shall not be admitted, nor shall any reference be made to such conduct or manner of dress, except as provided in N.J.S.A. 2C:14-7 (the Rape Shield Law).[11]

If the court finds the alleged victim has proven his or her case by a preponderance of the evidence, the court shall then issue a final protective order.[12] A final protective order *must* contain the following forms of relief:

1. Prohibit the respondent from having contact with the victim; and
2. Prohibit the respondent from committing any future act of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct against the victim.[13]

The following relief *may* be granted under SASPA:

An order prohibiting a respondent from entering a residence, property, school, or place of employment of a victim or a victim's household member and requiring a respondent to stay away from any specified place frequented by an alleged victim;

1. An order forbidding contact with the alleged victim, or alleged victim's family members or employer;
2. An order prohibiting a respondent from stalking, following, threatening to harm or stalk or follow an alleged victim;
3. An order prohibiting a respondent from committing or attempting to commit an act of harassment, including cyber harassment against an alleged victim.[14]

4. As an additional protection to victims, mediation or negotiation is not allowable under SASPA regarding whether an act alleged in the application for a protective order occurred or whether an act of contempt occurred.[15]

Under SASPA, the Administrative Office of the Courts is required to establish a central registry for respondents who have been found to have committed an act constituting a sexual assault and have had a protective order entered against them.[16] It is notable that the law does not limit the central registry to final orders.

When law enforcement is called to the scene of an alleged incident of sexual assault, if the law enforcement officer finds probable cause that an act of contempt of the protective order has been committed, the suspect *must* be taken into custody.[17]

Violations of protective orders entered under the law are also addressed. SASPA provides that a respondent's violation of any protective order issued under its provisions constitutes an offense under a new subsection c. of N.J.S.A. 2C: 29-9.[18] Under subsection c., a person is guilty of a crime of the fourth degree if that person purposely or knowingly violates any provision in an order entered pursuant to the SASPA.[19]

The Potential Unintended Consequences of SASPA

SASPA undoubtedly addresses glaring deficiencies in protections afforded to victims of sexual assault. Notwithstanding that fact, the implementation of the law has the potential to have unintended negative effects on certain respondents who are ultimately exonerated after the issuance of the temporary protective order.

Sexual assault on college campuses remains a significant problem throughout the country, and New Jersey is no exception.[20] The law, in part, gives victims of sexual assault occurring on college campuses a remedy against those who have assaulted them. However, concern exists that certain respondents may be treated unfairly.

For example, while SASPA indicates that a final hearing is to be conducted within 10 days of the issuance of a temporary protective order, in this author's experience with the PVDA, which contains the same time requirement, the unfortunate reality is that a final hearing is often not concluded within that strict time frame. There is no reason to expect that a final hearing conducted under SASPA will prove more expeditious and be more likely to conclude within 10 days than those conducted under the PVDA. For matters needing more than one day to be tried, it is extremely difficult for the already overburdened courts to conduct trial over consecutive days. Also, it can be anticipated that despite the protections for respondents, if there are criminal charges pending, the respondent's criminal counsel may wish to have the criminal matter completed *prior to* a final hearing on a SASPA matter.

The adverse impact of the delay on a college student respondent could be catastrophic. For example, during this delayed time period the respondent could potentially be precluded from attending classes or being on the same campus as the alleged victim.

In situations where a student is a respondent in a matter in which a final protective order is *not* granted, there is the risk that SASPA can have devastating effects. For example, if a respondent is precluded from attending classes during the pendency of the temporary protective order, the student risks losing attendance-based financial aid or receiving a failing grade in a class that has a mandatory attendance policy. Additionally, if a student is prohibited from living on campus during the pendency of the temporary protective order, that same student may not be able to locate a place to live. This is especially the case involving students whose 'permanent' residences are many miles away from their campus. Moreover, a college student may not have the financial means to secure local temporary housing. Thus, a temporary protective order may render the student homeless and without the ability to continue with his or her studies.

An actual situation that occurred recently on a college campus is illustrative of the potential unintended consequences of SASPA. A female college student attended a party in Feb. 2016, at an off-campus bar. After having several drinks, she had sexual relations with a fellow (male) student who was a senior expecting to graduate in the spring of 2016. After engaging in this relationship, the male student arranged for a ride for the alleged victim to a friend's apartment. When the female student arrived at the friend's residence, a party was in progress. The female student then met up with a second male, and had sexual relations with him.

Several days later, the female student accused both male students of sexually assaulting her. She reported the matter to the police, as well as to the school, which conducted its own investigation. Due to the fact that there were two alleged assaulters, and many witnesses who had seen the students throughout the night, the

police investigation took several weeks to complete. Ultimately, after more than three months, the first student was found to have not assaulted the female student, while the second student was found to have assaulted the student. Had SASPA been in existence, the first student would possibly have been prohibited from attending classes and might have missed graduation, even though he was ultimately exonerated.

Conclusion

SASPA is critical to the continued steps in protecting all victims of sexual assault. Yet at the same time, it is incumbent on the courts to make sure the rights of all parties are protected, and to be cognizant of the possibility of abuse of the law. As with other newly enacted laws, it is critical to continue to evaluate and observe both the benefits and the unintended consequences it may have for alleged victims and respondents, alike. ■

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Endnotes

1. P.L. 2015, c. 147. The law was passed by the New Jersey Legislature and signed into law by Governor Christie in Nov. 2015.
2. N.J.S.A. 2C:14-14(2)(a)(1).
3. N.J.S.A. 2C:25-17 *et seq.*
4. New Jersey Coalition Against Sexual Assault press release, Nov. 9, 2015.
5. N.J.S.A. 2C:14-16(4)(a).
6. N.J.S.A. 2C:14-16(4)(a).
7. N.J.S.A. 2C:14-14(2)(a)(1).
8. N.J.S.A. 2C:14-16(4)(a).
9. N.J.S.A. 2C: 16-16(4)(a)(2).
10. N.J.S.A. 2C:14-16(4)(b).
11. N.J.S.A. 2C:14-16(4)(c).
12. N.J.S.A. 2C:14-16(4)(a).
13. N.J.S.A. 2C: 14-16(4)(e)(1) and (2).
14. N.J.S.A. 2C:14-16 (4)(f).
15. N.J.S.A. 2C:14-16(4)(d).
16. N.J.S.A. 2C:14-20(8).
17. N.J.S.A. 2C:14-17(5)(b).
18. N.J.S.A. 2C: 14-18(6)(a).
19. N.J.S.A. 2C: 29-9(c).
20. http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations.

Commentary

Advising Clients about CDR Options and Litigation—What is a Lawyer's Responsibility?

by Amy Wechsler

A lawyer's obligation to advise clients about alternatives to litigation arises in several ways. This article explores the timing and requirements for providing this advice so that clients make an informed decision about complementary dispute resolution (CDR) options, and also considers what advice lawyers should give clients about the option to litigate a family dispute.

The Court Mandate to Advise of CDR Alternatives

The New Jersey courts have mandated the filing of an affidavit (or certification) of notification of complementary dispute resolution alternatives with the first pleading in every case commenced in the Chancery Division–Family Part.[1] This affidavit must be signed by both attorney and client, stating, "that the litigant has been informed of the availability of complementary dispute resolution ("CDR") alternatives to conventional litigation, including but not limited to mediation, arbitration, and collaborative law (New Jersey Family Collaborative Law Act, N.J.S.A. 2A:23D-1 through - 18), and that the litigant has received descriptive material regarding such CDR alternatives."[2] The affidavit or certification must be in the form prescribed by the court in Appendix XXVII-A or XXVII-B of the court rules.[3] The descriptive materials come in the form of a proscribed document entitled "Divorce-Dispute Resolution Alternatives to Conventional Litigation" (the materials), which is the only form approved by the New Jersey Supreme Court for this purpose.[4]

The information provided in the materials is minimal, with only a paragraph or two about mediation and arbitration. Until the Supreme Court revises them, the materials make no mention of collaborative family law, so there is no guidance to lawyers on what they must tell clients about this option.[5]

The preliminary statement in the materials evidences the goal of presenting clients with meaningful information about available options aimed at avoiding the cost, delay, public nature, and contentiousness often associated with litigation. Thus, it stands to reason that this information should be provided early—prior to selecting litigation as an option. If it is not provided early, the advisement is perfunctory, ineffective, and presumes that litigation is the most appropriate option.[6] The court rules require only that, *by the time of filing a complaint or an answer*, parties are advised of these alternatives. Thus, the author believes the information provided in the materials on alternatives to litigation is not only insufficient to provide clients with a deep understanding of all alternatives to litigation, the requirement to provide this information arises when it has little or no significance and litigation has already been selected as the dispute resolution option.

Rule 5:4-2(h) requires both the attorney and the client to certify that they have "discussed...the complementary dispute alternatives to litigation contained in" the materials. A literal reading of Rule 5:4-2(h) suggests that the required discussion may be nothing more than asking whether the client has read and understands the materials. Presently, the discussion pertains only to mediation and arbitration, and is silent as to collaborative family law, which the materials do not yet address.

The rules of general application require more than merely providing a form to clients. In addition to recognizing CDR as a "an integral part of the judicial process," the rules specify that "attorneys have a responsibility to become familiar with" those options "and inform their clients of them."[7] Again, however, there is no specific guidance on when or in what detail attorneys should meet this responsibility.

Use of CDR Alternatives in Conjunction with Litigation

For many litigants, some CDR options remain available to them after filing a complaint. Both mediation

and arbitration can co-occur with litigation. Parties in contested family matters may be required to participate in mediation on custody issues, presumably early in the litigation, and on economic issues after appearing before the early settlement panel (ESP).[8] These court-sponsored mediation programs are post-filing and are mandatory, except in limited circumstances.

As of Sept. 1, 2015, litigants in family law cases can now elect to have their case assigned to an arbitration case management track. This option, unlike the court-sponsored mediation programs, is voluntary. Thus, the provision of information about arbitration at the point of filing a complaint or an answer may still have value to the client who may elect to take the case to arbitration at or prior to the first case management conference for a more expedient result.

Collaborative family law, however, must be completely separate from any contested court process. Litigated cases, by definition, cannot be handled in a complementary or parallel way with collaborative family law. Collaborative family law is defined as "a procedure intended to resolve the family law dispute without intervention by a tribunal."[9] The collaborative process is entirely "voluntary and may not be compelled."[10] Parties and lawyers in a collaborative case enter into a participation agreement, which must specify that if the case is filed as a litigated matter the lawyers must withdraw from further representation and the collaborative process terminates.[11] Likewise, if a case is in litigation and the parties decide they wish to proceed in a collaborative process, the complaint and any counterclaim must be withdrawn.

Informed Decision-Making

The requirement of informed consent is essential to the practice of law, and is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[12] Lawyers must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[13]

Collaborative practice, more specifically, requires parties submitting disputes to a collaborative process do so based on informed consent. This requirement exists because the process imposes a significant limit on the scope of representation the lawyer can accept; specifically, the lawyer is precluded from representing the client in contested litigation. The New Jersey Advisory Board on Attorney Ethics ruled in collaborative cases: 1) lawyers must advise clients of the risks associated with collaborative practice (*i.e.*, lack of formal discovery, potential for increased costs if the process fails and the parties go forward with litigation and new lawyers), and 2) clients must give informed consent.[14]

When considering engaging in a collaborative process, lawyers have a duty to assess whether the limited scope of representation is in the client's interests. This requires "a determination that must be made in the first instance by the lawyer, exercising sound professional judgment in assessing the needs of the client." If, based on that assessment, the lawyer concludes the collaborative process will serve the client's interests "then this limitation would be reasonable and thus consistent with RPC 1.2(c)."[15]

Informed consent is also required for arbitration, and arguably for other forms of CDR as well. The 2016 amendments to the court rules require parties in a litigated case, who elect arbitration or other alternate dispute resolution, to complete and sign a questionnaire confirming they have been advised of the risks of the process they are choosing.[16] This questionnaire relates not only to arbitration, but, by its terms, potentially to other alternate dispute resolution for litigated cases electing a CDR option.[17]

Informed Consent in Contested Litigation

Litigation is the most traditional and well-known option for resolving family law disputes, but this does not mean the process does not pose risks. When parties opt to engage in contested litigation, those risks are numerous and substantial. For example, there is risk in having a third party (*i.e.*, the trial judge) decide a family's future. There is risk in a client expecting his or her lawyer will make sure every issue, great and small, is presented in evidence to the court in a way that persuades the trier of fact to find in that client's favor. There is the risk of substantial delay due to an overburdened judicial system that can take years to schedule a trial and then months, if not years, to issue its final decision. While engaged in litigation and spending their days at the courthouse, the parties risk losing time from work, school, or caring for children. There is the risk of spending tens of thousands of dollars, decimating the family finances, and raiding accounts that were intended to be used to pay for the children's educations and the parties' retirement. There is risk in the collateral damage to family relationships as a result of contentious litigation. And there is the risk that

the final decision will be unsatisfactory (and appealed), despite all the other costs and sacrifices.

Lawyers should not presume that clients are aware of the risks associated with litigation. If lawyers are required to assess a client's interests in opting for a collaborative process, or mediation or arbitration, the author believes they should also have a responsibility, if not a duty, to assess a client's interests when choosing litigation. Filing a complaint before gathering the facts and advising the client of viable alternatives may be detrimental to the client's interests. Many clients in family law matters are highly emotional, upset, confused, angry, and frightened about their futures. Filing a complaint before making sure the client understands all of his or her options could be a failure to communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Arguably, informed consent also includes advising clients about the advantages of the various options, not only about the risks and disadvantages. If clients are to weigh one process against another, they should know how each process will potentially benefit them, as well as the risks being taken if they engage in each dispute resolution option.

The Responsibility of an Attorney to Steer a Client In or Out of Litigation vs. CDR Options

Lawyers are expected to assess a client's needs and provide meaningful information so the client can choose the most appropriate dispute resolution option. This requires knowledge and experience on the part of the lawyer. Understanding the client involves an assessment of many factors, including: the emotional state of the client; the complexity of the issues; the likelihood of difficulty getting full disclosure (either from the other side or from one's own client); the available finances to fund the process; the client's need for structure or flexibility; the need for privacy; and the client's level of knowledge/sophistication and need for advocacy and guidance.

The attorney's assessment of his or her client is not something that can be easily accomplished in an initial consultation. Still, some lawyers convince clients (or are convinced by clients) to file a complaint during the initial consultation. Lawyers can consider seeking assistance to assess a client's capacity and tolerance for litigation versus CDR alternatives. For example, further information may be gained if the client meets with a licensed mental health professional with a background in forensic work (who may also have training in mediation and in the collaborative process) for this specific purpose. The input of the mental health professional can be enormously helpful in evaluating which dispute resolution option is best for the client.

In the private practice of law, a lawyer's interest in taking the case may be "at odds with the client's interest in being served by another lawyer with different expertise."[18] The ways in which a lawyer describes the various options will affect how a client views those options. Lawyers with limited knowledge (or inaccurate knowledge) about mediation, arbitration or collaborative law may be less able to adequately inform clients of the risks and benefits of each of these processes. Lawyers who are uncomfortable with CDR options may more likely steer clients toward litigation. Lawyers who are uncomfortable with litigation may be more likely to steer clients toward CDR options. Lawyers who are highly effective as part of a team, may recommend working cooperatively or in a collaborative process. Others who are most effective in the more traditional 'lawyer-in-charge' mode may promote litigation.

While these potential conflicts may be inherent in representing clients, it is nonetheless important for lawyers to be aware of their own biases, comfort levels, strengths and weaknesses, and be honest with clients about what they can and cannot do for them. There are volumes of written materials about mediation, arbitration and collaborative law, as well as training programs offered in New Jersey and elsewhere. The author believes lawyers can and should make an effort to educate themselves in order to understand and, in turn, meaningfully discuss the options in order to assist clients in making informed choices about the course they follow in resolving their family disputes. ■

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Endnotes

1. R. 5:4-2(h).
2. *Ibid.*
3. Appendices XXVII-A and XXVII-B. R.5:4-2 pertains to "all family matters." The rules do not distinguish between dissolution and non-dissolution matters, so technically this affidavit is required in both case types.
4. "Divorce—Dispute Resolution Alternatives to Conventional Litigation" can be found at www.judiciary.state.nj.us/notices/2006/n061204.pdf. This form does not include a reference to collaborative divorce, as the Supreme Court has not yet amended it to conform with the 2016 amendments to R. 5:4-2(h). Note also that this is entitled "Divorce," which could be argued to limit its applicability.
5. Pending revision of the materials, the following language regarding collaborative law has been submitted to the Administrative Office of the Courts (AOC) for consideration, and has been added by some attorneys to the materials:

   Collaborative law is a voluntary dispute resolution process in which parties to a family dispute resolve the issues in their case without bringing contested issues to litigation. Both parties must be represented by attorneys, who are retained for the limited scope of settling the case. The parties and their attorneys enter into an agreement (called a "Participation Agreement") by which they agree to maintain confidentiality of communications and information exchanged in the collaborative process, to voluntarily disclose information that is material to the issues in their cases, and to settle their differences without bringing them to the court or other tribunal for determination. The parties may jointly retain other professionals as needed to participate in the collaborative process.

   The parties make the final decisions, so the judge does not decide any of the issues. If the process is terminated before agreement is reached, and either party seeks to address issues through litigation, both parties' attorneys, as well as any other professionals participating in the process, must withdraw from further representation in the matter.
6. Appendix XXVII-B of the Court Rules is a certification for the self-represented party to indicate he/she has read "Divorce—Dispute Resolution Alternatives to Conventional Litigation." That document currently does not include any mention or description of collaborative law. Thus, the self-represented litigant is not informed of all the options as required by R. 5:4-2(h). There is no indication elsewhere that the courts are in any other way providing this information.
7. R. 1:40-1.
8. R. 1:40-5(a) requires "screening" of custody matters to determine whether issues are genuine and substantial and, if they are, the matter must be referred to mediation. R.1:40-5(b) requires mediation following early settlement panel appearances that do not result in settlement.
9. N.J.S.A. 2A:23D-3(c).
10. N.J.S.A. 2A:23D-6.
11. N.J.S.A. 2A:23D-7(b)(6); N.J.S.A. 2A:23D-7(e).
12. RPC 1.0(e).
13. RPC 1.4(c).
14. N.J. Advisory Committee on Professional Ethics, Opinion 699, Dec. 12, 2005.
15. *Ibid.*
16. Appendix XXIX-A.
17. It does not appear that all clients heading to custody mediation, MESP mediation or otherwise must complete this questionnaire. Several of the questions relate to decisions by an arbitrator or umpire, which are not applicable in a mediation process, which is non-binding. Thus, other than arbitrations, it is not clear what types of CDR require completion of the questionnaire.
18. N.J. Advisory Committee on Professional Ethics, Opinion 699, Dec. 12, 2005.

Can Attorneys Speak to DCP&P Caseworkers?

by Allison C. Williams

Child Protective Services (CPS) investigations that arise in pending matrimonial or family law cases often create frustration for the attorneys involved in the pending matter. In New Jersey, CPS is known as the Division of Child Protection and Permanency (DCP&P or the division). The author feels the division's rules are largely unknown, and appear to shift dramatically from county to county and from family to family. The agency is given substantial deference, even when gaping holes in the investigation appear to exist. Well-established case law prohibits the trial court from simply endorsing the agency's position. Instead, the trial court must make independent findings of fact and conclusions of law.

That said, the author believes many judges appear to feel constrained to follow the division's findings. In light of this, every effort should be made at the start of an investigation to persuade the division of the client's position—either that claims of child abuse or neglect that conspicuously appear during the pendency of a contested custody or parenting time dispute are nothing more than strategic attempts to gain a leg up in litigation or, conversely, that the claims are no less legitimate because they were not unearthed until the parental relationship fractured and became the subject of contested litigation.

The first step in the process of persuasion in this context is often counsel's attempt to communicate with the DCP&P investigating worker. When counsel's attempts to communicate with the worker are rebuffed as "prohibited," the question naturally arises, "are agency personnel *really* prohibited from communicating with counsel, or are they simply choosing not to?" The purpose of this article is to answer this question in the context of the most often-cited rationale given to support a prohibition on division worker-parent attorney communication (*i.e.*, the Rules of Professional Conduct).

Division investigators may assert that attorneys are ethically prohibited from communicating with represented parties.

In court, DCP&P is represented by the Attorney General's Office. Consequently, division personnel may assert that they cannot speak with parents' attorneys without a deputy attorney general being present, since the agency is a 'represented party.' This claim may have validity, depending on the division employee with whom the attorney seeks to communicate and during which stage of the investigation the communication is initiated. In order to determine whether a division employee meets the definition of a 'represented party,' it is critical to develop an understanding of how the Rules of Professional Conduct define a scenario where an organization is the attorney's client.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by R.P.C. 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is, in fact, represented.[1] Reasonable diligence shall include, but not be limited to, a specific inquiry of the person regarding whether that person is represented by counsel.[2] Arguably, since the inception of a DCP&P investigation is not a matter in litigation, counsel may assert that representation has not yet begun. However, in 1993, the New Jersey Supreme Court convened a special committee to interpret RPC 4.2 and ultimately concluded that "…the 'matter' has been defined as a 'matter whether or not in litigation.'"[3]

The issue of whether division personnel are represented parties, thereby precluding attorney contact with them in the absence of a deputy attorney general pursuant to the Rules of Professional Conduct, turns on whether they are considered to be members of the division's litigation control group. The primary determinant of membership in a litigation control group is the person's role in determining the organization's legal position.[4]

The concept of 'litigation control group' is established in R.P.C. 1.13:

> *(a)* A lawyer employed or retained to represent an organization represents the orga-

> nization as distinct from its directors, officers, employees, members, shareholders or other constituents...however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization›s legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter....[5]

The explication of when an employee of an organization is permitted to have *ex parte* communication with attorneys for a party adverse to the organization was addressed in detail by the Appellate Division in 2001.[6] Plainly stated, if a current employee of an organization is not within the litigation control group and has not obtained other representation, *ex parte* contact is permitted consistent with R.P.C. 4.3.[7]

In 1993, the Supreme Court, when called upon to interpret that rule, elected to refer the question of which organizational employees should be accessible to opposing counsel to a special committee to "fully assess the policy implications" in varied contexts.[8] The Special Committee on R.P.C. 4.2 issued its report on March 20, 1995.[9] After the committee rendered its report, R.P.C. 1.13, 4.2 and 4.3 were amended, effective Sept. 1, 1996. The amendments reflected the recommendations made by the committee.[10]

The current rules prohibit communication only with employees who are members of the organization's litigation control group, or are represented by another lawyer in the matter.[11] This is in accord with the committee's recommendation that the prohibition against *ex parte* communication should *not* extend to employees who were only fact witnesses or involved with the subject matter of the litigation.[12] The committee explained that extending the prohibition against *ex parte* communication to employees who were only involved in the subject matter of the litigation would include too many people "whose interests are most likely not only not congruent with the organization's but also, in many cases, in conflict with it."[13] The committee determined that the bar against *ex parte* communications should *only apply in those situations where the employee is not only a fact witness, but also is significantly involved in determining the organization's legal position,* as opposed to merely supplying information.[14]

In its recommendation, the committee specifically provided that "[s]ignificant involvement requires involvement greater than merely supplying factual information regarding the matter in question."[15] Moreover, in its comment to proposed R.P.C. 1:13, the committee specifically noted that the bar "does not include persons whose actions bind the organization or are imputable to the organization or who are responsible for other aspects of organizational policy unless they meet the 'legal position' test."[16]

If the current employee is not within the litigation control group and has not obtained other representation, *ex parte* contact is permitted consistent with R.P.C. 4.2 and R.P.C. 4.3.[17] In applying these principles to counsel's communications with the division, a DCP&P investigator who conducts the division's investigation clearly does not meet the 'significant involvement' test, such that he or she could be considered a member of the litigation control group. The special committee report to the Supreme Court recommended that 'significant involvement' extend beyond mere data collection. An investigator, by legal definition, is one who examines information for purposes of making a legal inquiry.[18] Though the division investigator provides information to the agency for purposes of assessing harm, risk of harm and need for services, the investigator alone does not determine the trajectory of the DCP&P investigation or whether litigation will be pursued; this is the purview of a division supervisor who, by the division's own procedures manual, must make these determinations.[19]

The division investigator's role, as set forth in the Administrative Code, is that of fact gathering. For instance, the requirements for a DCP&P investigation specifically delegated to an investigator include, but are not limited to:

a) Interviewing the alleged child victim, in person and individually, during the investigation of a report containing any allegation;
b) Interviewing, in person and individually, the caregiver and each adult in the home, on the same day as the alleged child victim, if possible;
c) Reading and reviewing each available prior investigation relevant to the report;
d) Interviewing the reporter and every other person identified in the current report; and
e) Observing the environment where alleged abuse or neglect occurred or which poses a threat to the child.[20]

The investigator does not determine when or if the division will go to court. Once a matter has been brought to court, the investigator is typically the one who testifies to support the division's application for custody, care and supervision, or other relief.[21] By contrast, the division's litigation position is decided by the casework supervisor in consultation with a deputy attorney general. For this reason, communication by a parent's attorney with a division investigator is not ethically prohibited, although agency personnel may refuse to communicate with attorneys. If this occurs, and counsel is not able to advocate directly to the investigator, communications may still be directed to a deputy attorney general.

If neither avenue prevents an adverse finding (*i.e.*, a finding that is adverse to either the accused parent who denies the allegation of abuse or neglect, or the proponent of the abuse who refutes the agency's finding that no abuse or neglect can be confirmed), then the matter may be brought to the superior court for adjudication.

The administrative code governing child abuse and neglect investigations and decisions does not strip the superior court of jurisdiction to decide an issue pending before it regarding the same allegations.

When the division receives a referral, it must investigate and make a determination within 60 days, absent good cause shown to the office manager, who may grant 30-day incremental extensions.[22] For each allegation, the division must determine whether the allegation is "substantiated," "established," "not established," or "unfounded."[23]

The superior court, Chancery Division, has jurisdiction to adjudicate determinations that a child is an abused or neglected child.[24] Not only is this jurisdiction statutory, but it is specifically codified in the Administrative Code, which governs child abuse and neglect investigations, determinations, and appeals.[25]

Notwithstanding the jurisdiction of the superior court, the Department of Children and Families shall retain the administrative authority to:

1. Determine whether an allegation of conduct determined to be abuse or neglect by the superior court, Chancery Division, is established or substantiated;
2. Determine whether an allegation of conduct determined to not be abuse or neglect by the superior court, Chancery Division is not established or unfounded; and
3. Determine the finding for each allegation of abuse or neglect that is not adjudicated by the superior court, Chancery Division.[26]

The authority of the superior court does not end when the division makes its determination of abuse or neglect. To the contrary, while the superior court may proceed in the face of an administrative adjudication by the division,[27] the division may not upend a determination by the superior court regarding a finding of abuse or neglect.[28]

These principles apply in matters between the division and the targeted parent. The superior court may determine allegations of abuse or neglect in which the accused parent and the agency are both involved and have a full and fair opportunity to present their cases. Where a party has not had a "full and fair opportunity to litigate" the claims and issues addressed in a lawsuit, the doctrine of *res judicata* cannot be used to bar that party from litigating an issue previously decided.[29]

New Jersey courts have repeatedly held that the superior court, Chancery Division, must not abdicate its responsibility to make findings of fact and conclusions of law in favor of deferring those critical determinations of third parties.[30] To establish the need for an evidentiary hearing in a custody or parenting time dispute, a party must show that a genuine issue of material fact exists.[31] A plenary hearing is required when the submissions show there is a genuine and substantial factual dispute regarding the welfare of the children, and the trial judge determines that a plenary hearing is necessary to resolve the factual dispute.[32]

The family part must make findings on the basis of evidence presented at a hearing to prove the best interests of the child.[33] That decision-making function cannot be ceded to others.[34] In *P.T. v. M.S.*, the trial court based its *sua sponte* decision to modify a prior determination of sole legal custody and to institute immediate reunification with a parent accused of abusing a child upon an expert's opinion, without a plenary hearing.[35] The Appellate Division reversed, remanded, and reassigned the matter to a different trial court judge, premised upon the clear policy that trial courts cannot abdicate their role as fact-finders to a third party.[36]

Even in cases where the court has appointed a guardian *ad litem,* (GAL) who serves as a fiduciary on behalf of the court, the GAL's report and recommendations may never serve as a substitute for the court's exercise of its *parens patriae* obligation, nor is the court bound by the GAL's conclusion, as set forth in his or her report.[37] The same holds true when the court directs DCP&P to investigate allegations of child abuse and neglect, and DCP&P then serves in much the same role as a GAL.

This general premise also applies to investigations and determinations by DCP&P.[38] In the unpublished decision of *M.H.S. v. L.G.S.*, the trial court relied upon letter reports from DCP&P, purportedly stating that a mother's allegation of abuse or neglect by her husband of their child was "unfounded."[39] In actuality, the report did not state a position on whether the child had been abused or neglected.[40] However, the Appellate Division made clear that even if DCP&P *had* made its determination regarding the mother's claims, the division's determination is not dispositive of the matter pending before the superior court involving the same allegation:

> The Family Part misread the May 24, 2013 DCP&P report as concluding that wife's accusations were "unfounded." Neither DCP&P report contained a finding or conclusion that wife's accusations were 'unfounded' or 'unsubstantiated.' The two reports revealed that DCP&P did not investigate wife's accusations regarding incest pornography. Nothing in those reports made specific reference to the accusations, and there is no evidence that the caseworker's call to a sex crimes detective in Brooklyn resulted in further investigation or a conclusion regarding wife's allegations.
>
> *Even if the DCP&P report contained such a finding or conclusion, it is the court's responsibility to determine the facts, and that function cannot be ceded to a third party such as DCP&P.*[41]

The *M.H.S.* case relies upon the well-established principle that trial courts cannot simply accept the position of DCP&P. Of course, the finding made by the agency may be the appropriate one. However, the trial court must still conduct factual inquiry and allow disputed issues of fact to be vetted through cross examination, following which a legal determination is made.

Conclusion

As set forth in this article, various factors influence the determination of whether counsel may ethically initiate communications with a DCP&P investigator in an effort to impact the investigation. If counsel is not able to influence the process of investigation via communications with the DCP&P investigating worker, the opportunity remains for persuasion in the superior court. ■

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Endnotes

1. R.P.C. 4.2 (Communication with Person Represented by Counsel).
2. *Id.*
3. Official Comment by Supreme Court (Nov. 17, 2003).
4. *See Michaels v. Woodland*, 988 F. Supp. 468, 472 (D.N.J. 1997).
5. *See* R.P.C. 1.13(a).
6. *See Klier v. Sordoni Skanska Const. Co.*, 337 N.J. Super. 76 (App. Div. 2001).
7. *Id.* at 92.
8. *In the* Matter of Opinion 668 of the Advisory Comm. on Prof'l. Ethics, 134 N.J. 294, 303-04 (1993).
9. Rep. of Special Committee Rep. on R.P.C. 4.2, 139 N.J.L.J. 1161, 1193 (1995) (Committee Rep.)
10. *Michaels v. Woodland,* 988 F. Supp. 468, 470 (D.N.J.1997).
11. R.P.C. 4.2.
12. Committee Rep., *supra,* 139 N.J.L.J. at 1195-96.
13. *Id.* (*quoting Michaels, supra,* 988 F. Supp. at 471).
14. Committee Rep., *supra,* 139 N.J.L.J. at 1195-96.

15. *Id.* at 1195.
16. Committee Rep., *supra,* 139 N.J.L.J. at 1196; *Klier, supra,* 337 N.J. Super. at 92.
17. *Id.* R.P.C. 4.3 governs dealings with unrepresented person; Employee of Organization.
18. *Black's Law Dictionary*, online directory, http://thelawdictionary.org/letter/i/page/58/.
19. *See* Division's Field Operations Manual, §500, Abuse/Neglect Investigation Analysis, Findings and Follow-up; *see also* §501, The Review and Analysis of Facts Gathered.
20. N.J.A.C. 10:129–3.1(a) The full list of required steps in the investigation includes:
    a) Interviewing the alleged child victim in person and individually, during the investigation of a report containing any allegation;
    b) Observing each non-verbal alleged child victim, using sensitivity to avoid [further] trauma to each alleged child victim;
    c) Interviewing, in person and individually, the caregiver and each adult in the home, on the same day as the alleged child victim, if possible;
    d) In cases where a service case is currently closed but had been open within the previous two years, interviewing the prior permanency worker who is the most knowledgeable about the family, if he or she is available;
    e) Interviewing, in person and individually, each other child residing in the home of the alleged child victim, and observing each non-verbal child;
    f) Reading and reviewing each available prior investigation relevant to the report;
    g) Interviewing the reporter and each other person identified in the current report or related information as having knowledge of the incident or as having made an assessment of physical harm, including, but not limited to, the:
        i. Physician;
        ii. Medical examiner;
        iii. Coroner;
        iv. Other professional who treated the alleged child victim's current condition, other than the reporter;
        v. Assigned permanency worker;
        vi. Youth services provider;
        vii. Private agency caseworker; and
        viii. Other department representative working with the alleged child victim or his or her family;
    h) Interviewing the alleged perpetrator, in person;
    i) Completing a child abuse record information (CARI) check of each household member and each other individual regularly frequenting or living in the alleged child victim's home;
    j) Conducting a PROMIS/GAVEL check to identify a paramour's record of criminal history, when the report involves a paramour;
    k) Completing a risk assessment;
    l) Observing the environment where alleged abuse or neglect occurred or which poses a threat to the child; and
    m) Obtaining and documenting written approval by a supervisor when seeking to eliminate any requirement listed in (b)1 through 11 above.
21. *See R.* 1:6-6.
22. N.J.A.C. 10:129-7.3(a) & (b).
23. N.J.A.C. 10:129-7.3(c).
24. N.J.S.A. 9:6-1, *et seq.*
25. *See* N.J.A.C. 10:129-7.3(g).
26. N.J.A.C. 10:129-7.3(h).
27. As per N.J.A.C. 10:129-7.3(g).
28. N.J.A.C. 10:129-7.3(h)(3).
29. *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996).
30. *P.T. v. M.S.*, 325 N.J. Super. 193, 198-200 (App. Div. 1999).

31. *Segal v. Lynch*, 211 N.J. 230, 265 (2012); *Lepis v. Lepis*, 83 N.J. 139, 159 (1980); *see also Pfeiffer v. Ilson*, 318 N.J. Super. 13, 14 (App. Div. 1999) ("a plenary hearing is not necessary in every case...but rather only where a prima facie showing has been made that a genuine issue of fact exists bearing upon a critical question such as the best interests of the children...").
32. *Hand v. Hand*, 391 N.J. Super. 102, 105 (App. Div. 2007); *accord Shaw v. Shaw*, 138 N.J. Super. 436, 440 (App. Div. 1976).
33. N.J.S.A. 9:2-4(c).
34. *See*, *P.T. v. M.S.*, 325 N.J. Super. 193 (App. Div. 1999).
35. *Id.* at 198-200.
36. In *P.T.*, 325 N.J. Super. at 216, the Appellate Division held that "[t]he burden of decision-making in the face of such a conflict is one of the heaviest any judge faces. There being no litmus test for truth, we understand the temptation to place too much reliance upon experts. For a discussion of the important role of independent expert evaluation to assist the court in custody and visitation cases, *see Kinsella v. Kinsella*, 150 N.J. 276, 318–20, 328 (1997). Nevertheless, we cannot allow experts to shoulder excess responsibility or authority, nor trial judges to cede their responsibility and authority. The court must not abdicate its decision-making role to an expert. See *Matter of Guardianship of J.C.*, 129 N.J. 1, 22, (1992) (noting that expert opinion is part of a "complete and balanced presentation of all relevant and material evidence sufficient to enable [the court] to make a sound determination consistent with the child's best interest.") *Cf. In re Registrant G.B.*, 147 N.J. 62, 87 (1996) (noting that for purposes of sex offender registry, courts must take "care not to abdicate decision making responsibility to experts"); *In re D.C.*, 146 N.J. 31, 59 (1996) (noting same for purposes of involuntary commitment proceedings) (emphasis supplied).
37. *Milne v. Goldenberg*, 428 N.J. Super. 184, 202 (App. Div. 2012).
38. *M.H.S. v. L.G.S.*, 2013 WL 5417023 (App. Div. 2013).
39. *Id.*
40. *Id.*
41. *Id.* at 5, *citing Milne v. Goldenberg,* 428 N.J. Super. 184, 202 (App. Div. 2012); *Capell v. Capell*, 358 N.J. Super. 107, 108-09 (App. Div. 2003), *certif. denied*, *177 N.J.* 220 (2003); *P.T., supra*, 325 N.J. Super. at 216. (Emphasis added).