

WILENTZ, GOLDMAN & SPITZER

2007 FAMILY LAW DEPARTMENT CASE

DIGEST

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ADOPTION

In re P.B. and S.B. for the Adoption of L.C., 392 N.J. Super. 190 (Ch. Div. 2006) . Opinion by Judge Mendez, P.J.F.P.

Issue: Whether an adult adoption may be granted when the statutorily-required minimum age requirement between the petitioning parties is not satisfied?

Holding: Maybe. Although the New Jersey statute governing adult adoption, N.J.S.A. 2A:22-1 to -3, requires a ten-year age difference between the adoptee and adopting parents, a court may waive the requirement if the adoption is in the best interest of the adoptee. (Citing N.J.S.A. 2A:22-2). The trial court interpreted the legislative intent of the minimum age difference requirement “as a method of ensuring at least a semblance of a parent-child relationship.” In considering under what circumstances this requirement could be waived under the statute, the court further opined that “it logically follows that, if this age difference cannot be met, the court must examine whether the parties’ purpose is to legally solidify their already-existing parent-child relationship.” However, the court did not find such an intent under petitioners’ application, holding “[it] saw no evidence of a parent-child relationship between the parties, and the parties never characterized their relationship as such. The parties testified that they did not seek the adoption to establish inheritance rights or to address issues of perpetual care, but to solidify their emotional connection as a family.”

In re Adoption of a Child by Nathan S., 396 N.J. Super. 378 (Ch. Div. 2006). Opinion by Judge Ellen L. Koblitz, P.J.F.P.

Issue: Whether a grandfather may adopt his granddaughter to co-parent with his daughter, thereby terminating the parental rights of the biological father?

Holding: A grandfather cannot become a co-parent with his daughter by adopting his granddaughter when the biological father is alive. The Legislature did not intend to allow two

persons outside of a marriage or partnership to adopt children together. To allow a grandfather to become a co-parent with his daughter would contravene New Jersey public policy against incest. Moreover, grandparents have legal rights and protections such as kinship legal guardianship, grandparent visitation rights, and the ability to adopt grandchildren over a biological parent's objection when both parents' rights have been terminated. Additionally, unlike stepparents and same-sex partners who have none of the legal protections grandparents have, grandparents have standing to petition a court for visitation and leave property through intestacy. These rights compel the conclusion that the law should not be expanded to include this type of adoption.

ALIMONY

Calbi v. Calbi, 396 N.J. Super. 532 (App. Div. 2007). Before Judges Stern, Collester and Sabatino. By Judge Collester, J.A.D.

Issue: Whether a change of circumstances resulting from the wrongful death of a child caused by the alcoholic alimony recipient, terminates or reduces the alimony obligation? In this case, the fifteen year old child died as a result of a severe trauma caused by the mother kicking him in the head and neck area.

Holding: No. The Appellate Division initially discussed Mani v. Mani, 183 N.J. 70 (2005), and case law related to its holding that marital fault is irrelevant to alimony except in two narrow instances: where fault has affected the economic life of the parties, and cases where the fault “so violates societal norms that continuing the economic bonds between the parties would confound notions of simple justice.” Although expressing sympathy for the father, the panel held that the facts in Calbi did not satisfy the standard for non-economic egregious circumstances under Mani based upon the following: the child’s wrongful death was not premeditated or intended; the fact that the prosecutor recommended a lesser sentence indicated that the prosecutor was satisfied that there was insufficient proof of an evil intent by the parent to kill the child; the parent was an alcoholic and under the influence of alcohol at the time of the child’s death; the child’s death resulted from a rare injury that was unforeseeable and unanticipated; and that while the record was void of information regarding the guilty parent’s feeling, it is probable that she will be haunted by memories and guilt forever. The Appellate Division noted that nothing in its decision precluded the legislature from amending the alimony statute to include a per se rule that a former spouse’s act of taking the life of one of the parties’ children disqualifies the guilty spouse from receiving alimony.

J.P. v. Div. of Med. Assistance & Health Servs., 392 N.J. Super. 295 (App. Div. 2007). Before Judges S.L. Reisner, Seltzer and King. Opinion by Judge S.L. Reisner, J.A.D.

Issue: Whether alimony constitutes income received by a Medicaid recipient, where the alimony is paid to a special needs trust created pursuant to a Family Part order during the divorce proceedings?

Holding: No. The special needs trust in this case was a legitimate Medicaid planning vehicle and falls within the protection of Federal and State Medicaid laws. As such, the State Medicaid program was unable to reduce its contribution to the recipient's nursing home costs by the amount of alimony her ex-husband paid to the special needs trust.

The Appellate Division based its decision on its interpretation of the Federal Medicaid Statute, as well as a letter from the Federal Health Care Financing Administration ("HCFA"), the agency charged with interpreting the Medicaid Statute. The HCFA letter provided that "income placed in that trust is not counted as income to the individual for Medicaid eligibility purposes." The Appellate Division recognized that it must defer to interpretive letters from the HCFA. Under Federal Medicaid law "assets," which include both income and resources and are required to be paid directly to the special needs trust by court order, never pass through the disabled person's hands and therefore are not considered available to her. Thus, in line with the Legislature's intent, the special needs trust may be used to shelter income and resources, including alimony and equitable distribution placed in the trust pursuant to court order, so that the disabled person may continue to receive Medicaid benefits at the appropriate level.

ARBITRATION

Hogoboom v. Hogoboom, 393 N.J. Super. 509 (App. Div. 2007). Before Judges Wefing, C.S. Fisher and Messano. Opinion by Judge Wefing, P.J.A.D.

Issue: Whether the parties can appeal a trial court’s confirmation of an arbitration award made pursuant to an agreement that permitted such an appeal, when the parties are raising issues not raised at the trial level?

Holding: No. While the parties permissibly enlarged the scope of appellate review under N.J.S.A. 2A:23B-4(c) in their Property Settlement Agreement, they were not permitted to appeal a post-judgment arbitration award terminating alimony because they had not raised their objections at the trial court level, as required.

The appellate court noted that the record “[contained] no indication that the trial court made any findings with respect to these awards.” The provision in the Property Settlement Agreement did not enable the parties to “create an avenue of direct appeal to [the Appellate Division].” Parties must initially seek review of arbitration awards in the trial court which must then employ the standard of review that the parties contractually agreed upon. However, “consent of the parties does not create appellate jurisdiction.”

Morel v. State Farm Ins. Co., 396 N.J. Super. 472 (App. Div. 2007). Before Judges Coburn, Grall and Chambers. Opinion by Judge Donald S. Coburn, P.J.A.D.

Issue: Whether the plaintiff had a right to appeal from a trial judge’s order confirming the arbitration pursuant to the New Jersey Alternative Procedure for Dispute Resolution Act (APDRA)?

Holding: In general, the plaintiff has *no* right to appeal from a trial judge’s order confirming the arbitration award under N.J.S.A. 2A:23A-18 unless one of the exceptions applies. The exceptions allowing an appeal include a child support order, an award of attorneys fees, or under

circumstances “where public policy would require appellate court review” deemed necessary for the appellate court to carry out its “supervisory function over the courts.” (citing Mt. Hope Dev. Assoc. v. Mt. Hope Waterpower, 154 N.J. 141, 152 (1998)). In this case, because the judge failed to apply the relevant statutory standards for review of an arbitrator’s decision, the appellate court’s supervisory function requires review and reversal and remand for application of the statutory standards.

CHILD SUPPORT

Campbell v. Campbell, 391 N.J. Super. 157 (App. Div. 2007). Before Judges Stern, A.A. Rodriguez and Collester. Opinion by A.A. Rodriguez, P.J.A.D.

Issue: Whether the trial court properly denied the obligor's motion to vacate a foreign support order that had previously been registered over obligor's objections at a registration hearing?

Holding: Yes. The Australian child support order was properly registered at a hearing in August of 2004, at which time the obligor (ex-husband) had an opportunity to argue against the registration of the order. Subsequently, in January of 2006 the ex-husband moved to vacate the order of support. The trial court's compliance with procedural mandates supported the denial of the appellant ex-husband's motion to vacate under various provisions of the Uniform Interstate Family Support Act. The Court found that in compliance with N.J.S.A. 2A:4-30.109, the ex-husband was provided with an opportunity to contest the validity of the registration and have it vacated. "The judge found that ex-husband participated at the hearing [scheduled to register the foreign judgment], 'entering his objections to registration and arguing that he was entitled to abatement of arrears due to unemployment. The court ruled against [ex-husband] on both issues'". The Appellate Court held that the "motion to vacate the registration was properly denied since the issues were previously raised and dismissed at the registration hearing". Consequently, pursuant to N.J.S.A. 2A:4-30.110(c), the trial court confirmed the registration of the Australian judgment because "a confirmation of a registered order...precludes further contest of the order with respect to any matter that could have been asserted at the time of registration."

Crespo v. Crespo, 395 N.J. Super. 190 (App. Div. 2007). Before Judges R.B. Coleman and Gilroy. Per Curiam.

Issue: Whether the trial court erred in denying defendant’s motion to suspend payment on his child support arrears where defendant is disabled and his only income is his monthly Supplemental Security Income (SSI) disability payment?

Holding: Yes. Burns v. Burns, 367 N.J. Super. 29 (App. Div. 2004) held that “a non-custodial parent is relieved from child support obligations where he or she ‘is totally disabled’ and ‘indisputably indigent, surviving solely on SSI benefits directed at providing him [or her] with the legislatively-established minimum level of subsistence.’” The rationale applies not only to those situation where the court is calculating a support award, but to the obligation to repay a child support obligation that has become due. Collection on arrears must be suspended until such time as the payor has the ability to pay arrears from income or assets, actual or imputed, other than SSI.

Giordano v. Giordano, 389 N.J. Super. 391 (App. Div. 2007). Before Judges Wefing, C.S. Fisher and Messano. Opinion by C.S. Fisher.

Issue: Whether federal law, once triggered, preempts state law or otherwise prohibits a state court from compelling payment of child support arrearages at a rate greater than that imposed by a federal court?

Holding: No. In examining the congressional intent of the Child Support Recovery Act, 18 U.S. at C.A. §228, the Appellate Division determined “that its scope is not so ‘pervasive’ as to generate an inference that the states were left no room to act in this field.” In addition, the Appellate Division determined the legislative history sufficient to support the well-established principle that “authority over domestic relations matters, including the entry and enforcement of child support orders,” is reserved to the states.

In enacting the Child Support Recovery Act, “Congress did not intend to supplant state law in enacting the Child Support Recovery Act.” Rather, “a state court’s imposition of even

more onerous terms or additional obligations on a delinquent parent and imposed by a federal court is not something likely to interfere with and certainly would not constitute an obstacle to a federal court's collection efforts, but would merely add to the burden of repayment justifiably imposed upon those delinquent parents who have attempted to frustrate collection efforts by moving across state lines.”

Lissner v. Marburger, 394 N.J. Super. 393 (Ch. Div. 2007). Opinion by Judge Ostrer, J.S.C.

Issue: Whether an application for modification of child support should be treated the same as an application for modification of alimony when an obligor seeks a reduction because of his voluntary retirement prior to age 65?

Holding: The court set a new standard to determine whether child support should be reduced upon an obligor's voluntary retirement incorporating the factors set forth in Deegan v. Deegan, 254 N.J. Super. 350 (App. Div. 1992) and Silvan v. Silvan, 267 N.J. Super. 578 (App. Div. 1993), where the courts evaluated the same issue with respect to alimony. In evaluating an application for a reduction in child support due to voluntary early retirement, the court must determine whether the benefits to the voluntarily retiring parent substantially outweigh the disadvantages to the child. The factors to be considered include: (1) the benefits to the retiring parent, based on his or her age, health, timing, finances, assets, reasons for retiring, and whether the parent can control the disbursement of retirement payments to enable him or her to maintain support for the child despite retirement; (2) the impact on the child of reduced support, based on his or her needs, age, health, assets, and standard of living to which he or she was accustomed, and any proffered advantages to the child from the parent's retirement; (3) the fairness of the decision, based on the obligor's motivation, good faith, and voluntariness of the retirement; and (4) any other factors. Applying those factors, the court determined that the plaintiff failed to meet his burden and therefore was not entitled to a reduction in child support.

Marshak v. Weser, 390 N.J. Super. 387 (App. Div. 2007). Before Judges Lintner, S.L. Reisner and Seltzer. Opinion by Judge S.L. Reisner, J.A.D.

Issue: Whether a New Jersey court may compel a parent to pay for the college expenses of a child even though the state in which the support order was originally entered does not provide for such a responsibility?

Holding: No. The trial court erred by entering an order that obligated the defendant father to pay for his son's college expenses because under the Uniform Interstate Family Support Act (UIFSA) the state in which child support originated (Pennsylvania) did not provide for such relief. In reaching that conclusion, the court relied on N.J.S.A. 2A:4-30.114(c), which prevents a New Jersey court from modifying "any aspect of a child support order that may not be modified under the law of the issuing state," and N.J.S.A. 2A:4-30.107(a), which requires a New Jersey court to defer to the child support order of a foreign jurisdiction and observed that "[t]he law of the issuing state governs the nature, extent, amount, and duration" of child support. Further support for the court's decision was found in the 2001 amendments to the Model Act and the comments thereto, which clarify that modifications to impose college tuition payments are not permissible where the law of the issuing state would not provide such support. Because Pennsylvania law does not require a parent to pay college expenses, the legislative intent and language of New Jersey's UIFSA statute compel the conclusion that "our courts cannot modify the Pennsylvania child support order to provide a longer duration than Pennsylvania law would allow."

The Appellate Division distinguished the instant facts from those of Phillip v. Stahl, 344 N.J. Super. 262 (App. Div. 2001), rev'd on dissent, 172 N.J. 293 (2002), in which the Supreme Court reversed "substantially" for the reasons expressed in the dissent. The court concluded that the dissent's acknowledgment of the need for a plenary hearing to determine whether college

expenses should be paid had the court otherwise had subject matter and personal jurisdiction was merely dicta. Indeed, Philipp did not answer nor even address the issue of duration of support as raised in this case. Therefore, New Jersey's UIFSA statute and the 2001 amendments to the Model Act confirm that the courts of New Jersey could not modify the Pennsylvania support order to extend the duration of child support for the payment of college expenses.

In re Rogiers, 396 N.J. Super. 317 (App. Div. 2007). Before Judges Skillman, Winkelstein and Yannotti. Opinion by Judge Winkelstein, J.A.D.

Issue 1: Does a biological father, who does not contribute to a child's support during her lifetime, qualify as a parent under the intestacy laws?

Holding 1: Yes. It is not necessary that a parent support a child in order to inherit from the child under the intestacy laws. Thus, a biological father qualifies as a parent under the intestacy laws and is entitled to inherit from that child regardless of whether he or she contributed to the child's support during the child's lifetime. The child's intestate estate passes to the surviving parents in equal shares under N.J.S.A. 3B:5-4b.

Issue 2: Is a supporting, custodial parent entitled to retroactive support from the child's other parent upon the child's death?

Holding 2: While a child support obligation often does not survive the death of a child, there may be circumstances when child support may be awarded retroactively based upon equitable principles, even where no claim for child support had previously been made. In this case, however, the parent had opportunities to request child support during the child's lifetime and that supporting parent was able to care for the child's needs through the use of special needs trust fund established for the child as a result of a medical malpractice claim. Since it appeared that the funds in the child's special needs trust fund were more than sufficient to meet all expenses of the child during her lifetime, and the custodial parent had never requested child support from the

other parent during the child's lifetime, there were no equitable reasons why retroactive, post-death support obligation should be imposed.

Issue 3: Whether a supporting parent's claim for reimbursement of expenditures incurred for the deceased child's support, some of which appeared to have been incurred after the supporting parent removed the child from the jurisdiction of New Jersey in opposition to a court order restraining such removal, could be resolved without a plenary hearing?

Holding 3: No. The parent's claims for reimbursement could not be evaluated without discovery and possibly a plenary hearing. Questions remained as to whether portions of the claimed expenses had been paid by the trustee; whether the custodial parent had left New Jersey prior in willful violation of a court order or before learning the order had been signed; and the trustee had not yet submitted a final counting. Until those questions were answered, which might require a plenary hearing, those issues could not be resolved.

R.A.C. v. P.J.S., Jr., 192 N.J. 81 (2007). By Justice Albin, writing for a unanimous Court.

Issue: Whether the Parentage Act's statute of repose, N.J.S.A. 9:17-45b, can be equitably tolled to allow the filing of a child-support-reimbursement complaint against the biological father eight years after the repose period had elapsed?

Holding: No. The New Jersey Parentage Act establishes a twenty-three year statute of repose during which time a child-support-reimbursement complaint must be filed. The statute of repose commences on the date of the child's birth, and equitable tolling is not applicable to it. Thus, even though plaintiff only learned of the deception one year before filing his action, because the action was instituted more than 23 years after the birth of child, it was barred under the Act.

CONSTITUTIONAL LAW

U.S. v. Kukafka, 478 F.3d 531 (3d Cir. 2007). Before Circuit Judges Van Antwerpen and Fuentes and District Judge Padova. Opinion by Judge Fuentes, C.J.

Issue 1: Whether the Child Support Recovery Act of 1992, as amended by the Deadbeat Parents Punishment Act of 1998, exceeds Congress's power under the Commerce Clause?

Holding 1: No. The Deadbeat Parents Punishment Act (the "Act"), 18 U.S.C.A. § 228(a), CITE, makes it a crime to willfully fail to pay a child support obligation to a child in another state. In United States v. Parker, 108 F.3d 28 (3d Cir. 1997), the Act was found to be a constitutional exercise of Congress's power because, although failure to pay child support may be a local activity, it is part of a national economic and interstate economic problem that "falls within the scope of congressional authority under the Commerce Clause." The constitutionality of the Act was not affected by the Supreme Court ruling in United States v. Morrison, 529 U.S. 598 (2000), which held that Congress could not regulate non-economic conduct "based solely on that conduct's aggregate effect on interstate commerce." The Court held that the Act clearly regulates an activity that substantially impacts interstate commerce for the following three reasons: (1) the activity regulated under the Act is commercial or economic in nature; (2) the Act contains an explicit jurisdictional element that limits its reach to interstate transactions; and (3) the Act was passed after express legislative findings about the effect of unpaid child support on interstate commerce. Furthermore, the Court held that the Act, by criminalizing an individual's willful failure to pay child support, the Act encourages the payment of interstate debts and discourages the willful frustration of interstate commerce, which is "a valid exercise of congressional power under the Commerce Clause."

Issue 2: Whether an ecclesiastical divorce provision within a divorce decree violates the Free Exercise Clause of the First Amendment, thereby invalidating the entirety of the divorce decree

and meriting a dismissal of an indictment based upon a failure to pay child support under the Act?

Holding 2: No. Regardless of the constitutionality of the ecclesiastical divorce provision, the indictment was based upon a violation of appellant’s support obligations, which was “wholly unrelated to and separate from” any obligation to pay for an ecclesiastical divorce. The Court held that in order to “sustain a conviction, the Act does not require a federal court to ensure the validity of each aspect of the underlying court order containing the support obligation” because such a requirement would provide “an avenue for re-litigating substantive issues of state family law.”

Issue 3: Whether the jury instruction pertaining to the willfulness element of the Act improperly stated the government’s burden of proof?

Holding 3: No. The District Court’s jury instruction pertaining to the willfulness element of the Act was proper. Under the Act, “ability to pay” is not an element, but rather the “inability to pay” provides a defense to liability for support obligations. The Court held that the following appellant’s presentation of his inability to pay and lack of willfulness, the District Court properly instructed the jury that it could not find willfulness on the appellant’s behalf unless it had determined that appellant had the ability to pay the support obligation.

Quarto v. Adams, 395 N.J. Super. 502 (App. Div. 2007). Before Judges Stern, A.A. Rodriguez, and Sabatino. Opinion by Judge Jack M. Sabatino, J.A.D.

Issue: Whether the Division of Taxation is compelled to permit a same-sex couple, married in another jurisdiction before the effective date of New Jersey’s Civil Union Act of February 19, 2007, to file a joint New Jersey gross income tax return for 2006?

Holding: The Division of Taxation is not required to treat the 2006 income of a same-sex couple who were married in another jurisdiction in 2003 as joint income. The Division may allow for a

reasonable transition period to conform to the constitutional and statutory principles espoused in Lewis v. Harris, 188 N.J. 415 (2006), and the Civil Union Act, N.J.S.A. 37:1-28 to -36. This case does not offend constitutional rights, but rather involves only a short-term transitional issue of implementation. Moreover, the Division's denial of the couple's request comports with the law that requires a couple to have been married in the year that their income was earned in order to qualify for joint filing status.

CUSTODY

Griffith v. Tressel, 394 N.J. Super. 128 (App. Div. 2007). Before Judges Skillman, Holston, Jr. and Grall. Opinion by Grall, J.A.D.

Issue 1: Did the trial court err in determining that New Jersey had “exclusive, continuing jurisdiction” over custody under the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”)?

Holding: No. In 2001, mother relocated to Maryland with the parties’ daughter, pursuant to a PSA incorporated into the parties’ Final Judgment of Divorce entered April 24, 2001. The PSA awarded the parties joint legal custody and designated mother the primary custodian, with father enjoying parenting time with the child in New Jersey every other weekend, on holidays, and for two weeks during the summer. Post-judgment motion practice ensued in both New Jersey and Maryland. On August 9, 2005, father filed an application in New Jersey for a transfer of custody. Mother responded with a cross-motion asserting that Maryland, where the child had resided with her since 2001, was the more appropriate forum. The trial court denied mother’s cross-motion and scheduled a plenary hearing on father’s application to change custody. Mother appealed.

The Appellate Division thoroughly discussed the legislative history and intent of the UCCJEA, adopted by New Jersey under N.J.S.A. 2A:34-53 to 95. The Appellate Division clarified that so long as there is either a “significant connection” to, or “substantial evidence” in New Jersey, “exclusive, continuing jurisdiction” is retained by the state. The Appellate Division affirmed the trial court’s decision, finding that New Jersey retained continuing jurisdiction based upon the “significant connection” to the state. In finding the requisite “significant connection” to the state, the Griffith Appellate Division considered the following: the parties shared joint legal custody; the child returned to New Jersey for parenting time every other weekend, holidays, and two weeks of the summer; both parties sought relief in New Jersey courts via post-judgment

motion practice; the parties and child attended counseling in New Jersey; and the child abuse alleged by mother allegedly occurred in New Jersey.

Issue 2: Did the trial court err in denying mother's motion asserting that Maryland was the more appropriate forum under N.J.S.A. 2A:34-71?

Holding: Yes. The focus of an inquiry concerning a more appropriate forum is whether the court of another State is in a better position to make the custody determination, taking into consideration the relative circumstances of the parties. The Court held that New Jersey should decline jurisdiction in favor of Maryland. In reaching its conclusion, the Appellate Division focused on the following factors: the child and plaintiff had resided in Maryland for the past four years and the child was only seven years of age; the child had been evaluated by speech and educational therapists in Maryland; the child had been seeing a psychologist in Maryland who had been involved in the custody litigation; the child had alleged abuse to her mother, grandmother and psychologist, who were all residents of Maryland; the Maryland court was familiar with the litigants, issues and had issued protective orders in the case; supervisors for parenting time were located in Maryland; the Maryland court was in a better position to protect the child; and essentially all witnesses were in Maryland. Based on these findings, the Court determined that New Jersey should decline to exercise its jurisdiction since Maryland was a more appropriate forum for the litigation.

Hand v. Hand, 391 N.J. Super. 102 (App. Div. 2007). Before Judges Kestin, Graves and Lihotz. Opinion by Graves, J.A.D.

Issue: Did the trial court err in denying a movant's motion for a change in custody in the absence of a plenary hearing based on the court's determination that the movant failed to meet her prima facie burden of establishing that there was a genuine factual dispute concerning the welfare of the children?

Holding: No. The Appellate Division determined that the trial judge did not err in holding that plaintiff, as the moving party, failed to establish a prima facie case that a genuine factual dispute existed regarding the welfare of the parties' children. The plaintiff's claims that the father was a neglectful alcoholic who may have physically abused the children were completely unsubstantiated. The "trial court correctly concluded there was no need for a plenary hearing because plaintiff failed to establish a prima facie case that circumstances subsequent to the divorce judgment were adversely affecting the welfare of the children." After carefully reviewing the submissions in light of the applicable law, the trial court correctly concluded that there was no evidentiary basis to warrant a plenary hearing.

Innes v. Carrascosa, 391 N.J. Super. 453 (App. Div. 2007) Before Judges Stern, Collester and Lyons. Opinion by Judge Lyons, J.T.C.

Issue 1: Whether New Jersey was bound by a Spanish court's determination of custody resulting from the Spanish court's adjudication of a Hague application wherein it determined that there had been no wrongful removal of a child from New Jersey to Spain?

Holding 1: No. The Hague Convention does not permit a court who hears a Hague application to decide the issue of custody. "A review of the Convention and related laws reveals that it only determines the habitual residence of the child, not the right to custody. Thus, as the forum hearing the Hague application, it was not within the province of the Spanish court to determine issues of custody, but rather the child's habitual residence." The Spanish court was not authorized to adjudicate the issue of custody because it was only able to properly determine the habitual residence of the child. The Hague Convention is not a vehicle by which legal custody rights are settled, but rather a mechanism for determining whether a child has been illegally removed or retained in a foreign country. The Hague Convention is designed to secure the safe return of the child to their country of habitual residence. Once it is determined under the Hague

Convention that a particular country is a child's habitual residence and the child should be returned there, a custody determination is left to the law of the state to which the child is returned. Any decision for enforcement, or modification of the custody dispute or decree is left to the appropriate judicial or administrative agency of the child's home state. Accordingly, the Spanish erred when it proceeded to decide issues of custody despite its recognition of New Jersey as the child's habitual residence. Moreover, the Spanish court failed to apply the law of the child's habitual residence, New Jersey, when reaching its conclusion that the child had not been wrongfully removed from New Jersey to Spain.

Issue 2: Did the doctrine of res judicata prohibit the New Jersey court from determining the issue of custody in a situation where the Spanish court had already ruled on the issue?

Holding 2: No. Despite the fact that plaintiff and defendant were both parties to the custody application before the Spanish court, the Court determined the doctrine of res judicata could not be invoked to bar the litigation of custody in New Jersey. The court held that since Spain was without jurisdiction to determine the issue of custody, any custody determination by the Spanish court should have no bearing on the New Jersey court. "Because neither proper jurisdiction was had nor a final determination made by the Spanish courts on the issue of custody, res judicata does not apply."

Issue 3: Whether principles of international comity required New Jersey to recognize the Spanish court's determination that a wrongful removal of the child had not occurred?

Holding 3: No. The Court held that comity could not be afforded to the Spanish court's decision because New Jersey law was deliberately disregarded by the Spanish court, which applied its own standards in interpreting the effect of the parent agreement breached by the defendant when she absconded with the parties' child to Spain. Contrary to the Hague Convention, Spanish constitutional and procedural law were applied instead of New Jersey Law.

“Comity also cannot be afforded to the decision of the Spanish court because the decisions contravene the public policy of New Jersey with regard to parental rights”.

Issue 4: Whether the New Jersey trial court’s decision to restrict a party’s ability to introduce evidence was an infringement of her constitutional rights?

Holding 4: No. The party seeking to retain the child in Spain was not entitled to the admission of all evidence she wanted to present because she failed to comply with the Rules of Court. The party was in default because she only filed “a limited notice of appearance”. Therefore it was not a violation of her constitutional rights to limit her ability to introduce evidence because she was in default pursuant to Rule 5:4-3 governing responsive pleadings. In addition, the party also defaulted by purposely failing to participate in court ordered custody evaluations.

Issue 5: Whether it was an abuse of discretion by the trial court and violation of due process rights to impose a \$148,000 lien against the New Jersey real estate holdings of the party seeking to retain the child in Spain?

Holding 5: No. The Appellate Division acknowledged the ability of the trial judge to impose economic sanctions on a party who has violated an order respecting custody pursuant to Rule 5:3-7A.

Issue 6: Whether the trial court abused its discretion and violated the Fifth Amendment rights of the party seeking to retain the child in Spain when it denied her request to stay the sanction portion of the trial pending the outcome of a criminal investigation against her?

Holding 6: No. There is no absolute rule in New Jersey by which civil matters must be suspended as a matter of right pending the disposition of criminal proceedings relating to the same subject matter. “[C]onsidering the age of the case and the continuing harm being suffered by [plaintiff], the court was under no obligation to grant her stay on the issue of sanctions [while plaintiff’s] criminal proceeding was pending”.

MacKinnon v. MacKinnon, 191 N.J. 240 (2007). Opinion by Chief Justice Zazalli.

Issue: Whether the standard for removal of a child outside of New Jersey, established in Baures v. Lewis, 167 N.J. 91 (2001), applies when a custodial parent seeks to relocate the child to a foreign country?

Holding: Yes. In assessing the standard established in Baures v. Lewis, 167 N.J. 91 (2001), for the out of state relocation of a child, the Court acknowledged that “[t]he interstate and international removal contexts involve the same interests.” Custodial parents have the right to “self-determination,” while non-custodial parents have the fundamental right to a continued relationship with their child. However, it is the best interests of the child that is the central concern of courts adjudicating relocation applications. “The same ‘ultimate issue’ is at the heart of international removal. The interests remain the same and, therefore, the Baures test appropriately balances the concerns implicated in either situation.” Because the Baures factors can accommodate the distinctions between interstate and international removal applications, the standard is appropriately flexible enough to accommodate international removal applications, including those which involve a foreign country that is not a signatory to the Hague Convention.

The Court cautioned that international removal is more complex than interstate removal, and, therefore, the trial court should apply the Baures factors expansively to adapt to international circumstances.

Uherek v. Sathe, 391 N.J. Super. 164 (App. Div. 2007). Before Judges Wefing, C.S. Fisher and Yannotti. Opinion by Judge C.S. Fisher, J.A.D.

Issue: Whether Rule 5:8-6 requires the transcript of an in camera review with a child to be turned over where a custody dispute does not exist?

Holding: No. “As the full context of the rule reveals, a parent’s right to a transcript of a child’s interview presupposes and is wholly dependent upon there being a pending custody dispute”

because disclosure of such information would enable a litigant to “invade the child’s private communications and ought not to be permitted absent [same]”. In the instant case, the parent requested the transcript four years after the interview and resolution of the custody issue, and was seeking disclosure to confirm his suspicions that his former wife had succeeded in alienating his daughter from him.

DOMESTIC VIOLENCE

D.V. v. A.H., 394 N.J. Super. 388 (Ch. Div. 2007). Opinion by Judge Blaney, J.S.C.

Issue: Whether an act of domestic violence committed by a biological parent against the legal custodian of his child is within the jurisdiction of the court under the Prevention of Domestic Violence Act of 1991?

Holding: Yes. Pursuant to N.J.S.A. 2C:25-19(d), “Domestic violence also includes any person, regardless of age, who has been subjected to violence by a person with whom the victim has a child in common”. Due to the fact that plaintiff was the legal and physical custodian of defendant’s child, with whom he had parenting-time rights, the parties relationship was properly characterized as having “a child in common”. Despite the fact that “[t]he term ‘child in common’ is not specifically defined in N.J.S.A. 2C:25-19(d)”, the trial court concluded the defendant’s acts fell within the statutory scheme because it found that the intent of the Legislature was to protect victims of violence that occurred within family type relationships.

Frazier v. Northern State Prison, Dept. of Corrections, 392 N.J. Super. 514 (App. Div. 2007).

Before Judges Skillman, Holston, Jr. and Grall. By Skillman, P.J.A.D.

Issue: Whether a simple assault under N.J.S.A. 2C:12-1a(3) constitutes a misdemeanor crime of domestic violence, thus barring possession of a firearm under the Lautenberg Amendment to the federal Gun Control Act?

Holding: No. The Administrative Law Judge (“ALJ”) and the Merit System Board erred in concluding that appellant, a senior corrections officer, was prohibited from carrying a firearm under the Lautenberg Amendment following his conviction for simple assault. According to 27 C.F.R. § 478.11, a “misdemeanor crime of domestic violence” is defined as an offense which: (1) is a misdemeanor, including offenses that are punishable only by a fine; (2) has, as an element,

the use or attempted use of physical force or the threatened use of a deadly weapon; and (3) was committed by a person similarly situated to a spouse, parent, or guardian of the victim. The Appellate Division held that the decision of the ALJ and the Merit System Board faltered upon examination of the second criterion of the misdemeanor of domestic violence definition. Specifically, appellant had to have been convicted of an offense that had, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon. Under N.J.S.A. 2C:12-1a(3), a person is guilty of simple assault if he “attempts by physical menace to put another in fear of imminent serious bodily injury.” This type of assault may be committed without the actual or attempted use of physical force. Therefore, appellant’s simple assault conviction did not meet the second criterion as established by administrative regulation for identification of a misdemeanor crime of domestic violence.

McGowan v. O’Rourke, 391 N.J. Super. 502 (App. Div. 2007). Before Judges A.A. Rodriguez, Collester and Lyons. Opinion by Judge Lyons, J.S.C. (temporarily assigned).

Issue 1: Does the single act of sending provocative photographs to a family member constitute harassment sufficient to sustain the entry of a final restraining order?

Holding 1: Yes. “The act of mailing graphic pornographic pictures to a third-party and implying that they may be sent to the victim’s workplace and her son is egregious.” The Appellate Division confirmed the trial court’s entry of the final restraining order when it considered the act in question against the landscape of the parties’ history. Despite the absence of a prior history of domestic violence, the trial court properly recognized that the evidence of an act of harassment occurred.

Issue 2: What is the appropriate standard for awarding attorney’s fees under the Prevention of Domestic Violence Act (Act), N.J.S.A. 2C:25-17 to -35?

Holding 2: Because attorney’s fees are expressly included in the Act as compensatory damages, the considerations which apply to an award of counsel fees in a matrimonial action are inapplicable. A court may exercise its discretion in awarding counsel fees if the fees are a direct result of the domestic violence and are reasonable under the factors in Rule 4:42-9(b). Based on this standard, the Appellate Division concluded that the trial court did not abuse its discretion in awarding fees.

Signorile v. City of Pert Amboy, 2007 U.S. Dist. LEXIS 85715. By Judge Pisano, U.S.D.J.

Issue 1: Did the police violate husband’s constitutional rights by charging him with simple assault against his wife, after she recanted a prior statement alleging that plaintiff hit her?

Holding: No. The police filed the complaint against husband in accordance with the State of New Jersey’s Domestic Violence Manual (“the Manual”) and the New Jersey Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17. Evidence of the wife’s injuries were visible, the police initiated an investigation, and the wife’s statement to the investigating officers substantiated that her visible injuries were caused by the husband. Simultaneous with the investigation, spurred by the wife reporting the abuse to her friend’s husband, the wife’s co-workers reported the abuse to the police as well, initiating an independent investigation and report. Although the wife subsequently traveled to police headquarters with husband’s brother to recant her prior statements, and amend same to provide that “she fell in her bathroom”, the police concluded that the wife was not credible and filed a complaint against husband for simple assault.

State v. Brown, 394 N.J. Super. 492 (App. Div. 2007). Judges Stern, A.A. Rodriguez and Sabatino. Opinion by Judge Stern, P.J.A.D.

Issue: Whether a criminal indictment in a domestic violence matter may be dismissed pursuant to the doctrine of collateral estoppel due to the Family Part’s finding in the domestic violence proceedings that the victim had failed to prove an act of domestic violence by a preponderance of the evidence?

Holding: No. The legislative policy embodied in the Prevention of Domestic Violence Act and the Victims’ Rights Amendment to our Constitution, N.J. Const., art. I, ¶ 22 do not permit fundamental fairness to preclude the State from prosecuting a defendant indicted for a charge that formed the basis of an unsuccessful domestic violence complaint. In so holding, the Appellate Division highlighted various portions of the Act that emphasize that a complaint under the Act and a criminal proceeding arising from the same underlying conduct are separate and distinct. The Appellate Division further held that the assistance provided to an alleged victim under the Act by the Prosecutor’s Office does not satisfy the fifth element of collateral estoppel, “privity between the parties”.

Burella v. City of Philadelphia, 501 F.3d 134 (3d Cir. 2007). Before Judges Ambro, Fuentes and Smith. Opinion by Judge Fuentes, Circuit Judge.

Issue 1: Whether the police officers had a constitutional obligation under the due process clause to protect the wife from the abuse of her husband, who was a ten-year veteran of the Philadelphia Police Department, after numerous reports of abuse and violation of restraining orders or whether the police officers had qualified immunity?

Holding 1: The police officers did not have a constitutional obligation to protect a wife from the abuse of her husband. In deciding whether a defendant is entitled to qualified immunity, a court must determine “if defendant’s conduct violated a constitutional or statutory right, and if so, whether the right allegedly violated was ‘clearly established’ at the time of the violation.” The wife had no cognizable claim that the officers’ failure to enforce the orders of protection violated

her substantive due process rights or procedural due process rights. Because she had no constitutional entitlement for the arrest of her husband, the officers were entitled to qualified immunity under 42 U.S.C. § 1983 given that the first prong of the qualified immunity test was not satisfied.

Issue 2: Whether the police officers' failure to make an arrest to prevent the abuse of the wife after numerous reports of abuse and the issuance of restraining orders constituted a state-created danger?

Holding 2: The officers' failure to act did not give rise to a claim of a state-created danger. The claim of a state-created danger could not succeed because alleging that the officers' failure to act caused harm does not satisfy the doctrine, which requires state authority to be affirmatively employed in a manner that injures a citizen.

Issue 3: Whether the wife had a cognizable federal equal protection claim where police officers failed to make an arrest of the abusive husband or whether the police officers had qualified immunity?

Holding 3: The police officers were entitled to qualified immunity as the wife had no cognizable claim under the equal protection clause. A plaintiff alleging an equal protection violation based on the unequal treatment of domestic violence victims must show "that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom." Without evidence from which a reasonable jury could find an unlawful custom or infer a discriminatory motive (such as statistical evidence or individual arrest records), the equal protection claim must fail.

M.S. v. Millburn Police Dep't, 395 N.J. Super. 638 (App. Div. 2007). Before Judges Stern, A.A. Rodriguez and Sabatino. Opinion by Judge A.A. Rodriguez, J.A.D.

Issue: Whether the issuance of a final restraining order, which is later vacated by agreement, prohibits the return of a firearms purchaser identification (“FPI”) card pursuant to N.J.S.A. 2C:58-3(c)(8)?

Holding: Yes. N.J.S.A. 2C:58-3(c)(8) provides that an FPI card must not be issued “[t]o any person whose firearm is seized pursuant to the ‘Prevention of Domestic Violence Act of 1991’ . . . and whose firearm has not been returned.” This prohibition survives even if the restraining order is later vacated. Additionally, this statute applies even if it was not in effect at the time of the judgment requiring the forfeiture of firearms (i.e., before January 4, 2004) because the Legislature intended the statute to apply to a future application for an FPI, and by inference, return of a seized FPI.

DIVISION OF YOUTH AND FAMILY SERVICES

Division of Youth and Family Services v. B.H., 391 N.J. Super. 322 (App. Div. 2007). Before Judges A.A. Rodriguez, Sabatino and Lyons. Opinion by Lyons, J.T.C.

Issue 1: Whether or not the children’s biological mother, B.H., was denied effective assistance of counsel in DYFS proceedings that resulted in the transfer of custody to the children’s biological father because her counsel failed to introduce physical and testimonial evidence in support of her position?

Holding: No. The Appellate Division determined that the right to custody of one’s child is a fundamental constitutional right which merits the due process right to the effective assistance of counsel.

The Appellate Division adopted the test for the effective assistance of counsel as developed in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court held that “[t]he benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a fair result.” Strickland set forth a two-part standard a defendant must show to satisfy a claim of ineffective assistance of counsel: 1) that counsel’s performance was deficient with errors so serious that counsel was not providing the representation guaranteed by the Sixth Amendment; and 2) that counsel’s deficient performance prejudiced the defense to the extent that the defendant was denied a fair trial and reliable result.

In B.H., the Appellate Division held that the conduct by B.H.’s counsel was reasonable and that her claim for ineffective assistance of counsel must fail. Under the first prong in Strickland, there was no indication that the counsel for B.H. exercised anything but reasonable professional judgment in making strategic decisions and comprehensive arguments on her behalf.

There was nothing in the record indicating that counsel failed to consider placing additional witnesses on the stand or that said testimony would have influenced the trial court's decision. The Appellate Division further held that B.H. failed to satisfy the second prong under Strickland as there was no indication that she was denied the right to a fair trial or that the trial court reached an unfair result.

Division of Youth and Family Services v. F.H., 389 N.J. Super. 576 (App. Div. 2007) Before Judges Cuff, Fuentes and Baxter. By Judge Fuentes, J.A.D.

Issue: Whether the trial court's termination of defendants' parental rights as to their middle son, but not their eldest and youngest child, was proven by clear and convincing evidence under the four prongs of N.J.S.A. 30:4C-15.1a?

Holding: Yes. The trial court's findings of fact, pertaining to the middle child, were substantiated by sufficient circumstantial evidence that he had suffered serious injuries while in his parents' custody, thus creating legal grounds to warrant the termination of parental rights with respect to the middle child. However, there was insufficient evidence to support a termination of parental rights as to the eldest and youngest children based solely on the possibility that the neglect or abuse of the middle child might, in the future, result in the neglect or abuse of the other children.

The Appellate Division reviewed each of the four prongs to be considered in the best interests evaluation under N.J.S.A. 30:4C-15.1a. Following a remand to the trial court for further evidence concerning the possibility of a Kinship Legal Guardianship placement, the appellate court found that DYFS met its burden of proof under the first prong to show by clear and convincing evidence that the parents posed a danger to the child because the injuries the middle child sustained were not the result of a medical condition or caused by a sibling.

The Appellate Division also determined that DYFS met its burden of proof under the second prong by establishing by a preponderance of the evidence that neither parent was willing to acknowledge any responsibility for the injuries the child sustained while in their custody or to accept the parental role of providing a safe environment for their child in the future.

Under the third factor, the Appellate Division held that DYFS met its burden to show they had made reasonable efforts to help the parents remedy the situation, including investigating whether the paternal uncle could be a viable caretaker for the middle child.

The Appellate Division then held that while DYFS did not satisfy the fourth factor by showing that separating the children from their foster children would cause serious harm to them, DYFS did establish clear and convincing evidence as to three of the four factors for terminating the parental rights as to the middle child. Therefore, the Appellate Division held that allowing him to return to the family home “would cause greater harm than allowing him to remain in DYFS custody pending a more suitable and permanent foster care placement.”

Notwithstanding the case made by DYFS for terminating parental rights as to the middle child, the court held there was insufficient evidence to conclude there was a high probability of future harm to the other two children such that a termination as to them was warranted. The court expressed its hope that sibling visitation would occur, but noted that this issue that has not yet been addressed in case law.

The court also rejected the parents’ arguments that placing a Muslim child in a Christian family would serve to undermine the cultural and religious heritage of that child to be raised as a Muslim. While finding this to be a “laudatory” goal, the court felt “it cannot not guide the decision to remove or not to remove; to terminate or not to terminate; or to pass over an otherwise suitable foster placement.”

Division of Youth and Family Services v. G.L., 191 N.J. 596 (2007). Per Curiam.

Issue: Whether the Division of Youth and Family Services met its burden to satisfy by clear and convincing evidence the four prongs of the statute authorizing the termination of the mother's parental rights based on her failure to eliminate harm to the child posed by the child's father?

Holding: No. In this case, the Court revisited the issue it recently addressed in Division of Youth and Family Services v. M.M., 189 N.J. 261 (2007). However, in G.L. the court found no basis under the statute to terminate the mother's parental rights. Here, the biological father had shaken an older son, who eventually died of his injuries. The father was convicted of endangering the welfare of a child and sentenced to nine years in prison. The evidence showed that the child died from Shaken Baby Syndrome, although the mother placed the blame on the father's failure to call 911.

When a second child was born, DYFS restricted the father's contact with the child to supervised visitation and directed the mother to obtain psychological counseling. . While the mother agreed and did comply with these restrictions, she insisted that the father did not shake the dead infant, but merely failed to call for help. DYFS, fearing that the mother would not sufficiently protect the child, placed the newborn in foster care and filed a complaint for guardianship and for termination of the mother's parental rights. The trial court terminated the mother's parental rights based upon its determination that the mother's unwillingness or inability to sever ties with the father posed a serious risk to the child. In addition, the court relied on the fourth prong of the statute – that the termination would not do more harm than good. In light of the early separation of mother and child, the bond between them was weak, while, it had grown stronger with the foster parents as the case progressed.

The Appellate Division affirmed, deferring to the trial court's findings. The Supreme Court granted certification, and reversed, holding that DYFS failed to satisfy the four prong test under N.J.S.A. 30:4C-15.1a. In particular, the Court found that the mother had complied with all requirements placed on her by DYFS and that, the mere fact that she wished to maintain a

relationship with the father did not form a basis for termination so long as she does not live with the father or permit him unsupervised visits with the child. In addition, the court chided DYFS for removing the child from the mother at such an early age that bonding was not permitted to occur.

Division of Youth and Family Services v. M.M., 189 N.J. 261 (2007) By Justice Zazzali.

Issue: Whether the trial court erred in terminating the parental rights of a father with respect to his child based upon his inability to correct the danger to the child created by the child's birth mother?

Holding: No. In this unique situation where the father was not found "unfit" to parent, the termination of the father's rights was proper on his inability to stabilize the danger created by the mother. The court based its decision upon the child's best-interests under N.J.S.A. 30:4C-15.1(a). DYFS proved all four prongs as required under the statute, to wit: 1) parental rights may be terminated when the child's health and safety are endangered by the parental relationship; 2) the parent is unwilling or unable to eliminate the harm facing the child; 3) DYFS has made reasonable efforts to help the parents correct the situation; and 4) termination will not do more harm than good. The dissent argued that the father's parental rights should not have been terminated as the child was bonded to him and the father had presented a viable daycare plan for the child while he was at work.

Here, the child was placed in foster care 16 days after his birth as the mother, a mentally-challenged alcoholic, failed to be a viable caretaker. The trial court's termination of the mother's parental rights was not challenged on appeal. However, the father argued that DYFS did not meet their burden to terminate *his* parental rights, but was merely doing so because he was cohabiting with the child's mother.

The Supreme Court affirmed the trial court's determination that the father failed to provide for the son's special needs in overcoming various muscular and neurological disorders and that the father also failed to mitigate the effects of the harmful environment caused by the birth mother. Conversely, under the care of the foster parents, the son flourished and formed strong emotional bonds with his foster parents. The Court overruled the Appellate Division's holding that the father's parental rights should be reinstated on the grounds that "one parent cannot be held responsible for the shortcomings of the other." While the father is employed, independent, affectionate and poses no actual threat to his son, the Court cited the psychological experts findings that the positive relationship between the father and son would not compensate for the significant loss the son would experience if he were to be separated from his foster parents. The Court refused to consider a daycare plan submitted by the father more than a year after his parental rights were terminated by the trial court. The Court also noted that its decision was premised upon the foster parents' willingness to allow continued visitation by the father.

Division of Youth and Family Services v. S.F., 392 N.J. Super. 201 (App. Div. 2007). Before Judges Cuff, Fuentes and Baxter. Opinion by Judge Baxter, J.T.C. (temporarily assigned).

Issue: Whether the trial court's order granting Kinship Legal Guardianship ("KLG"), pursuant to N.J.S.A. 3B:12A-6c, to the paternal grandparents was proper?

Holding: Yes. The Appellate Division concluded that the trial court properly considered all four prongs of the KLG application made by DYFS, pursuant to N.J.S.A. 3B:12A-6c, and deferred to the trial court's thorough grasp of the facts and keen appreciation of their significance.

The first prong was satisfied as the trial court's decision was amply supported by its record finding that the mother's addiction to drugs was an ongoing and severe condition, marked with abuse before, during and after her pregnancies, as well as numerous relapses. The mother

was not interested in maintaining a consistent presence in her children's lives, based on her lack of effort to see her sons or attend her scheduled parenting time sessions.

The second prong was satisfied by the well-documented history of defendant's drug abuse and inability to overcome same or become more involved in her children's lives. These actions provided ample support for the trial judge's conclusion that her condition and inability to parent her sons would not change in the foreseeable future.

DYFS satisfied the third prong by making substantial efforts to effectuate reunification and to provide services to help defendant function effectively as a parent. These services included providing substance abuse counseling and services as well as examining the propriety of alternative options such as adoption.

The fourth prong was satisfied as the Appellate Division agreed with the trial court that the children's placement with their paternal grandparents, who are dedicated and loving, was in their best interests. The paternal grandparents provided stability and "were particularly attuned to the older son's need for specialized care and treatment due to his autism," as opposed to the mother who denied the existence of the son's condition. However, as the foster parents were unwilling to adopt the children, the Appellate Division affirmed that KLG was appropriate. In this arrangement, the Guardian must provide for the child's health, education and maintenance until the child becomes emancipated while the child's parents must continue to pay child support and have the right to visitation, as KLG does not terminate parental rights.

Division of Youth and Family Services v. B.R., 192 N.J. 301 (2007). Opinion by Justice Long.

Issue 1: What is the appropriate standard to evaluate claims of ineffective assistance of counsel in termination of parental rights cases?

Holding 1: Because personal liberty is at stake in a termination case, the test for ineffective assistance of counsel in the criminal context should be applied to termination cases as well. To

establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the following two prongs must be satisfied: “(1) counsel’s performance must be deficient -- i.e., it must fall outside the broad range of professionally acceptable performance; and (2) counsel’s deficient performance must prejudice the defense -- i.e., there must be a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” This standard should be applied because the right to counsel in termination cases is based on statutory and constitutional grounds.

Issue 2: When must a claim of ineffective assistance of counsel in a termination of parental rights proceeding be raised?

Holding 2: Claims of ineffective assistance of counsel in termination cases must be raised on direct appeal. A direct appeal is likely to be faster than a post-judgment motion or a *habeas* proceeding, thereby advancing the interest of the child by reaching finality of the termination issue sooner.

Issue 3: What is the appropriate procedure if the ineffective assistance of counsel claim cannot be decided based on the appeal record alone?

Holding 3: The appellate panel should remand the case to the trial judge for an accelerated hearing to be completed in no more than fourteen days with an oral decision on the record promptly following the hearing. The parties then are permitted to exchange appellate briefs simultaneously within seven days. The Appellate Division must then decide the issue as expeditiously as possible. The Court referred the matter to the Committee on Family Practice for recommendations on the codification of this scheme.

EQUITABLE DISTRIBUTION

Addesa v. Addesa, 392 N.J. Super. 58 (App. Div. 2007). Before Judges Stern, Collester and Messano. By Judge Stern, P.J.A.D.

Issue 1: Whether the trial court erred in compelling the testimony of the mediator and in ordering discovery of the mediator’s file in order to evaluate if there was a basis for disturbing the property settlement agreement?

Holding 1: Yes, it was improper to require the testimony of the mediator and to order discovery of the mediator’s file. Under the mediation agreement, which expressly provided that neither the mediator nor his records would be subject to subpoena. Following State v. Williams, 184 N.J. 432 (2005), this court held that “private negotiations must remain confidential or they will have no beneficial impact.” The court noted that the issue presented in this case pre-dated the enactment of New Jersey’s Uniform Mediation Act of 2004 (N.J.S.A. 2A:23C-1 to -13), which would have prevented the mediator from offering evidence of a mediation communication.

Issue 2: Was it improper to hold a plenary hearing to assess the fairness/conscionability of the agreement?

Holding 2: No. The trial court’s order for an evidentiary hearing was proper as the motion papers and certifications of the parties to set aside the PSA were sufficient to warrant the evidentiary hearing as to the wife’s knowledge and receipt of financial information during the mediation and the unconscionability of the PSA. Moreover, the pertinent documents contained in the mediator’s file had been identified in the motion papers and the husband’s certification, and thus, were already properly before the trial judge.

Issue 3: Whether the findings of the judge presiding over the plenary hearing as to the unconscionability of the property settlement agreement were based upon the findings of the prior judge, which were made without the benefit of a hearing?

Holding 3: Yes. The judge presiding over the hearing independently and properly concluded that the property settlement agreement was unconscionable. While the agreement asserted that the intention of the parties was to divide the marital estate on a 50-50 basis, this was not achieved because the husband's business assets were grossly miscalculated due to misrepresentations made by the husband. The judge's findings of fact and conclusions of law on the unconscionability of the property settlement agreement were drawn from a review of the totality of the circumstances.

Issue 4: Must a court find fraud has been committed in order to find an agreement unconscionable?

Holding 4: No. Fraud and unconscionability have been recognized as two separate and independent bases for setting aside property settlement agreements. The definition of unconscionable is "shockingly unfair or unjust" and makes no mention of any finding of fraud.

Genovese v. Genovese, 392 N.J. Super. 215 (App. Div. 2007). Before Judges Kestin, Graves and Lihotz. By Judge Lihotz, J.T.C. (temporarily assigned).

Issue: Whether the trial court erred by holding that the coverture period ended, for purposes of determining equitable distribution of husband's pension, on the date he filed his first divorce petition in another state?

Holding: No. The trial court properly found the marriage end-date to be the date the initial complaint for divorce was filed by the husband in 1994 and not the date of the subsequent complaint for divorce, filed almost ten years later following the reversal of the initial judgment of divorce. The Appellate Division noted that the "practical rule" set forth in Painter v. Painter, 65 N.J. 196 (1974) for determining property distribution is that a marriage end-date is the date the complaint for divorce was filed with the court. In Portner v. Portner, 93 N.J. 215 (1983), the Court held that for purposes of the equitable distribution of marital assets, a marriage is deemed

to end on the day a valid complaint for divorce is filed that commences a proceeding culminating in the entry of a final judgment of divorce. However, blind application in this case of that rule would be unfair where the facts provided incontrovertible evidence of the irretrievable breakdown of the marriage since one party remarried after the New York divorce trial resulting in a judgment of divorce, although it was later vacated.

Larrison v. Larrison, 392 N.J. Super. 1 (App. Div. 2007). Before Judges Cuff, Fuentes and Baxter. Opinion by Judge Fuentes, J.A.D.

Issue 1: Whether the trial court erred by not exempting any portion of a disability pension from equitable distribution that included benefits intended to compensate for the disability?

Holding 1: Yes. The holding of the trial court was reversed and remanded because it failed to conduct the necessary analysis as to what portion of the pension represented retirement benefits which could be shared under an equitable distribution scheme, and what portion of the pension was immune from distribution because it was intended to compensate the pensioner for economic loss as a result of his disability. The Court found that defendant's benefits were intended in part to substitute for lost wages because his ability to receive such payments is expressly conditioned on being disabled. The trial court must conduct an analysis, with the assistance of expert opinion, to determine the appropriate amount subject to equitable distribution.

Issue 2: Whether the trial court erred in ordering defendant to maintain life insurance to protect plaintiff's equitably acquired share of the pension benefits?

Holding 2: Yes. The trial court erred in ordering defendant to maintain life insurance to protect plaintiff's share of the pension benefits because his pension plan did not provide for survivor benefits to an ex-spouse, and thus, plaintiff's benefits cease upon defendant's death.

Issue 3: Should the trial court have imputed income to the plaintiff in light of the fact that the children were now school age allowing for the potential of part-time employment by the plaintiff?

Holding 3: Yes. The Appellate Division remanded the issue of plaintiff's earning capacity for the trial court to determine whether income should be imputed to her given that the trial court failed to consider whether plaintiff was capable of assuming some employment responsibility now that the children had reached school age.

Sternesky v. Salcie-Sternesky, 396 N.J. Super. 290 (App. Div. 2007). Before Judges Coburn, Fuentes and Grall. Opinion by Judge Jane Grall, J.A.D.

Issue 1: What portion, if any, of an accidental disability retirement allowance awarded by the Board of Trustees of the Police and Fire Retirement System is subject to equitable distribution?

Holding 1: A component of the accidental disability retirement allowance is subject to equitable distribution. The portion of the allowance that is attributable to years of service during the marriage for a retirement benefit is subject to equitable distribution, while the portion that is attributable to compensation for the disability is not. In the absence of specific evidence or guidance from the Legislature or PFRS as to a precise segregation of these components, a court should use a formula to determine the portion subject to equitable distribution. When the employee is not yet eligible for ordinary retirement, the court should calculate the ordinary retirement allowance at fifty percent of the employee's final salary. The disability allowance is the excess amount over the fifty percent for ordinary retirement income. After calculating this amount, the court must identify the portion of the allowance that is attributable to service during the marriage. This amount is computed by multiplying the ordinary retirement allowance by a fraction, with a numerator equivalent to service during the marriage and a denominator equivalent to service required for an ordinary retirement allowance.

Issue 2: Did the trial court err in fixing the amount of child support?

Holding 2: Because imputation of income is in the sound discretion of the trial court, the decision to impute income of \$25,000, which was less than suggested by the expert, was not an abuse of discretion. The consideration of inadmissible evidence contained in plaintiff's personnel file did not have an impact on the outcome of the trial. Finally, because the trial court did not employ consistent numbers in calculating child support, the matter was remanded for further proceedings.

GRANDPARENT VISITATION

Rente v. Rente, 390 N.J. Super. 487 (App. Div. 2007). Before Judges Coburn, Axelrad and Gilroy. Opinion by Judge Axelrad, J.T.C. (temporarily assigned).

Issue: Whether the trial court erred in granting the grandparents visitation under New Jersey's Grandparent Visitation Statute (GVS), N.J.S.A. 9:2-7.1, in light of the mother's objections to visitation and the existing visitation schedule?

Holding: The trial court erred in granting the grandparents visitation as they had failed to satisfy the burdens under Moriarty v. Bradt, 177 N.J. 84 (2003), which requires a showing that substantial harm will come to a child unless visitation occurs. The only state interest that may overcome the presumption in favor of a parent's decision to deny grandparent visitation is "the avoidance of harm to the child." Only after the potential for harm has been shown and the presumption has been overcome, may the court order a visitation schedule that is in the best interests of the child based on the statutory factors. The trial court failed to analyze the facts under this rubric. Further, the trial court erroneously relied on a court-appointed expert's net opinion that found that the grandparents provided the most stable environment for the child without giving the mother an opportunity to retain her own expert or even cross-examine the expert. Thus, the trial court improperly applied a best interests test and therefore the grandparents were not entitled to visitation.

PALIMONY

Devaney v. L’Esperance, 391 N.J. Super. 448 (App. Div. 2007). Before Judges Wefing, Parker and Messano. Per Curiam.

Issue: Is cohabitation an essential element to a cause of action for palimony?

Holding: Yes. “Requiring cohabitation as an element of a palimony action [provides] a measure of advanced notice and warning, to both parties to a relationship, and to the respective family members that legal and financial consequences may result from that relationship.” (Quoting Levine v. Konvitz, 383 N.J. Super. 1, 10-11 (App. Div.), certif. denied, 186 N.J. 607 (2006)). The trial court properly denied plaintiff’s application, which sought to circumvent the cohabitation requirement by asserting the parties had established a marital relationship by attempting to have a child together. “Without such a bright-line requirement, the concept of ‘marital-type’ relationship is unacceptably vulnerable to duplicitous manipulation.” (Quoting Levine, 383 N.J. Super. at 10-11).

Carino v. O’Malley, 2007 WL 951953 (D.N.J. Mar. 28, 2007). Opinion by Judge Katherine S. Hayden, U.S.D.J.

Issue 1: Does a person have a cognizable claim for palimony when the parties never cohabited in the traditional sense?

Holding 1: Yes. Despite the Appellate Division’s proclamation that cohabitation is an absolute prerequisite to a palimony claim, the district court was not persuaded that the highest court of New Jersey (New Jersey Supreme Court) would establish such a “bright-line” rule. A bright-line rule would not comport with the equitable principles giving rise to judicial recognition of palimony. Moreover, the three justifications for a bright-line rule -- “eliminating the danger of duplicitous manipulation, protecting the interests of innocent spouses and children, and providing a physical manifestation of the nature of the relationship” -- did not apply to the facts

of the case given that both parties were alive and able to present evidence regarding the character of their relationship. Thus, the district court concluded that the New Jersey Supreme Court would hold that cohabitation is an important, but not an indispensable factor that must be considered in ascertaining whether a marital-type relationship existed sufficient to support a palimony claim.

Issue 2: Which state's law should control to resolve the contract claims and the tort claims?

Holding 2: New Jersey law should control the contract claims because there is no conflict of laws between New York and Pennsylvania on those issues. The choice of law issue arose because the events giving rise to plaintiff's claims occurred in New Jersey, New York and Pennsylvania and because plaintiff lived in New York and defendant lived in Pennsylvania at the time of the complaint. With respect to the claims of intentional torts and negligent infliction of emotional distress, New Jersey law should control over New York and Pennsylvania law because New Jersey has the greatest interest in having its statute of limitations applied. Because New Jersey tolls the statute of limitations for intentional torts when there is evidence of Battered Woman's Syndrome, New Jersey has the greatest interest in having its two-year statute of limitations period applied as the Legislature has taken the position that victims of domestic violence be assured the maximum protection from abuse that the law can provide.

MISCELLANEOUS

Brundage v. Estate of Carambio, 394 N.J. Super. 292 (App. Div. 2007), certif. granted, 192 N.J. 597 (2007). Before Judges Winkelstein, Fuentes and Baxter. Opinion by Fuentes, J.A.D.

Issue: Whether an attorney, in the context of opposing a motion for leave to appeal, had a duty to disclose a pending appeal in which he was counsel of record, when the pending appeal involved the identical legal issue the appellate tribunal was being asked to consider in the motion for leave to appeal?

Holding: Yes. Under R.P.C. 3.3(a)(5), the attorney had an affirmative duty to inform the appellate panel considering the motion for leave to appeal of a pending appeal involving a material issue that was substantially similar or related to a material issue raised in the motion for leave to appeal in which the lawyer was involved. The attorney violated his duty as he was aware of the existence of such an appeal and failed to inform the appellate panel of its existence.

Hesson v. Hesson, 392 N.J. Super. 94 (Ch. Div. 2007). Opinion by Judge Rauh, J.S.C.

Issue: Whether a litigant's request for a name change in a divorce complaint survives the death of the other spouse prior to the entry of a final judgment of divorce?

Holding: Yes. Here, the husband died subsequent to the filing of the complaint, the entry of default and the filing of the notice of equitable distribution, but prior to the entry of a final judgment of divorce. The trial court determined that the "notice requirements" under N.J.S.A. 2A:52-1 which are intended to avoid potential fraud and provide some measure of protection to third parties, added little or nothing to the proceeding. Due to the fact that the relief sought in this case would have been granted but for the death of one of the parties, coupled with the fact that no third parties were implicated, the court concluded that it was able to properly consider and grant the wife's request for a name change.

In re Shinn, 394 N.J. Super. 55 (App. Div. 2007). Before Judges Parker, C.S Fisher and Yannotti. Opinion by C.S. Fisher, J.A.D.

Issue 1: Whether the trial court properly held that plaintiff’s premarital waiver, in a prenuptial agreement, of an elective share to the estate of her late husband was unenforceable by N.J.S.A. 3B:8-10 and N.J.S.A. 37:2-38?

Holding: Yes. Following a nine-day trial, the trial court held that the premarital agreement was unenforceable as plaintiff executed the premarital agreement without any understanding of defendant’s assets, income or financial obligations. The complete lack of financial disclosure, and the circumstances surrounding the execution of the agreement, made the agreement unenforceable under N.J.S.A. 3B:8-10 and N.J.S.A. 37:2-38.

Issue 2: Whether the trial court erred by invoking the doctrine of equitable estoppel to enforce plaintiff’s premarital waiver of an elective share to the estate of her late husband where, under the circumstances, her waiver was unenforceable by N.J.S.A. 3B:8-10 and N.J.S.A. 37:2-38?

Holding: Yes. The review of the trial court’s determination that the doctrine of equitable estoppel could apply to enforce an agreement that was otherwise statutorily unenforceable is not entitled to any special deference. The Appellate Division cited the longstanding principle that “equity must follow the law”, and that equity must never “become an instrument of injustice”, before reversing the trial court’s decision in holding, “By applying the doctrine of equitable estoppel, the trial judge mistakenly allowed [defendant’s] estate to take advantage of [defendant’s] inequitable wresting from [plaintiff] her waiver of an elective share-conduct that, under the circumstances, was hostile to the will of the Legislature.”

Sheppard v. Sheppard (In re: Notice of Removal), 481 F. Supp. 2d 345 (2007). Opinion by Judge Irenas, S.U.S.D.J.

Issue: Whether the United States District Court for the District of New Jersey has subject matter jurisdiction, pursuant to 28 U.S.C. § 1441, following the filing of a Notice of Removal (from state to federal court) by a non-party seeking to remove a divorce action from the New Jersey Superior Court, Chancery Division, Family Part?

Holding: No. The Court held that it did not have subject matter jurisdiction over a New Jersey State divorce action pursuant to 28 U.S.C. § 1441, the removal statute, when the Notice of Removal was filed by a non-party to the divorce action. The non-party, an insurance carrier, purporting to be an “additional defendant” to the divorce case, asserted that subject matter jurisdiction in the federal district court was founded upon ERISA, 29 U.S.C. § 1132(a)(1)(B). The court disagreed, concluding that the case must be remanded to the New Jersey Superior Court for lack of subject matter jurisdiction because the removal statute, which must be strictly construed, limits the right of removal to defendants in the action. The court distinguished the holding of Ward v. Congress Constr. Co., 99 F. 598 (7th Cir. 1900), in which the removal of a state court action by a non-party was held to be proper. That decision was distinguishable because the non-party in Ward was found to be an omitted and necessary defendant, it was based on a previous and outdated version of the statute, and the statute was liberally construed before the United States Supreme Court made clear that the removal statute should be strictly construed.

Moreover, by issuing a remand, the Court set out to serve the interests of federalism. Since matrimonial issues have traditionally fallen within the realm of the state courts, the State’s interest in this action outweighed the federal question presented by the ERISA issue. Finally, the Court issued a remand in an effort to preserve judicial resources. While deciding the issues regarding the divorce, the state court ought to simultaneously and efficiently decide the ERISA issue.

Johnson v. Johnson, 390 N.J. Super. 269 (App. Div. 2007). Before Judges Cuff, Fuentes and Baxter. Opinion by Judge Cuff, P.J.A.D.

Issue 1: Whether the trial judge erred in finding that the court-appointed expert's fees were reasonable based solely on conflicting certifications without conducting a hearing?

Holding 1: Yes. The trial judge erred by resolving credibility issues on conflicting certifications based on his prior dealings with the expert. Because defendant challenged not only the reasonableness of the fee but also the occurrence of certain events including a discussion of the nature, scope, and costs of services, the dispute could not be resolved on conflicting certifications. A hearing is necessary to make credibility findings as to the receipt of the bill for the expert's services and the reasonableness of the fees.

Issue 2: Whether the trial judge's previous credibility findings required a remand to a different trial judge?

Holding 2: Yes. The matter must be remanded to a different judge because the trial judge resolved factual disputes against defendant without a hearing and expressed his belief in the credibility of the expert.

Issue 3: In an action to recover expert fees by a court-appointed forensic accountant, is the attorney for the expert entitled to counsel fees pursuant to Rule 4:42-9(a)(1) and Rule 5:3-5(c)?

Holding 3: No. While Rule 4:42-9(a)(1) provides for fee allowances in family actions, Rule 5:3-5(c) limits the award of fees to "any party to the action." Because a court-appointed expert is not a party to the action and is not retained by the parties, it is inappropriate to shift counsel fees when the court-appointed professional seeks payment of his fees.

Pacifico v. Pacifico, 190 N.J. 258 (2007). Opinion by Justice Long.

Issue: Whether the instruction of the Appellate Division to the trial court to apply the doctrine of “contra proferentem” in interpreting a provision in a property settlement agreement was proper?

Holding: No. The doctrine of “contra proferentem”, whereby a court adopts a meaning of an ambiguous contract term that is most favorable to the non-drafting party, should not have been applied to determine the parties’ intent in valuing the marital home for purposes of exercising the wife’s right of first refusal. First, the Appellate Division incorrectly found that the property settlement agreement was solely drafted by the husband’s counsel. As is typical in the negotiation of matrimonial settlement agreements, while the husband’s counsel drafted the initial version of the agreement, the wife’s counsel drafted the second version and both counsel participated in the editing and development of the agreement to reach the final version. Second, the prerequisite to implementing the doctrine of contra proferentem, unequal bargaining power, did not exist between the parties.

The Court reversed and remanded the matter to the trial court to evaluate “what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the ‘expressed general purpose.’” On remand, the Court declared that “where the sale of a marital asset is to abide a future event, for example the coming of age of a child, and no alternative is provided, current market value as of the time of the triggering event is presumed,” and thus, the wife had the burden of proof to show that the house should be valued at the time of the divorce. Ultimately, the Court suggested that precise drafting of matrimonial settlement agreements should be the polestar in every matrimonial action, “otherwise... the parties will continue to struggle over the underlying grievances of the marriage, long after the ink on the judgment of divorce has dried.”

State v. McAllister, 394 N.J. Super. 571 (App. Div. 2007). Judges Skillman, Lisa and Grall. Opinion by Skillman, P.J.A.D.

Issue: Whether a conviction for the first degree offense of endangering the welfare of a child by the production of pornography proscribed by N.J.S.A. 2C:24-4b(3), which requires the State to show that the defendant was a “parent, guardian or other person legally charged with the care or custody of the child,” can be based on evidence that the defendant was a live-in boyfriend of the victim’s mother who had a de facto parental relationship with the victim?

Holding: No. The Appellate Division held that only a person assigned responsibility for a child’s care or custody by a court or public agency may be found to be “legally charged” with the child’s care or custody. The term, “person legally charged with the care or custody of a child,” must be strictly construed to apply only to a person who has been assigned responsibility for a child’s care or custody by a court or public agency under N.J.S.A. 30:4C-26(a), N.J.S.A. 30:4C-26.4, or another statute and not merely a de facto status.

M.F. v. Dep’t of Human Servs., 395 N.J. Super. 18 (App. Div. 2007). Before Judges Lintner, S.L. Reiner, and C.L. Miniman. Opinion by Judge Christin L. Miniman, J.A.D.

Issue: Whether an individual caring for a minor child is eligible for benefits under Temporary Assistance for Needy Families (TANF) and Work First New Jersey program (WFNJ) when that individual has no blood or legal relationship to the child?

Holding: No. The Division of Family Development properly denied benefits under the Temporary Assistance for Needy Families (TANF) benefit component of the Work First New Jersey program (WFNJ) to an individual who was caring for a child after the death of the child’s mother but who had no blood or legal relationship with the child. To receive benefits under the WFNJ program, the statute requires that a person be legally or blood-related to the child or be the child’s legal guardian. N.J.S.A. 44:10-57. Legal guardian is defined under the act and the

regulations as “a person who exercises continuing control over the person or property, or both, of a child, including any specific right of control over an aspect of the child’s upbringing, pursuant to a court order.” Ibid.; N.J.A.C. 10:90-2.7(a)(3)(i)(2)(iv). The policy to establish and maintain “successful family life and childhood development” does not require a broad interpretation of the term “legally related.” Moreover, a kinship legal guardianship provides an avenue for an individual to establish a legal guardianship to become eligible for benefits, which incorporates the concept of psychological parent recognized by the Supreme Court in V.C. v. M.J.B., 163 N.J. 200, 230, cert. denied, 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed. 2d 243 (2000). Because the administrative decision was not arbitrary, capricious or unreasonable, the denial of WFNJ/TANF benefits was proper.

J.H. v. Mercer County Youth Detention, 396 N.J. Super. 1 (App. Div. 2007). Before Judges Stern, Lisa and Holston, Jr. Opinion by Judge Holston, Jr., J.A.D.

Issue 1: Whether the County Detention Center constitutes a “person standing in loco parentis within the household” within the meaning of the Child Sexual Abuse Act?

Holding 1: Yes. The Detention Center falls within the definition of a “person standing in loco parentis within the household” under the Child Sexual Abuse Act (CSAA) such that it could be held liable for sexual abuse if it is proven to have knowingly permitted or acquiesced in sexual abuse committed by its employee. A county, as a municipal corporation, is a corporation included within the definition of person contained in N.J.S.A. 1:1-2 and thus constitutes a “person” under the CSAA. The Detention Center stands “in loco parentis” to plaintiff because the Detention Center operates in the traditional role of a guardian toward its ward, as an instrumentality of the Code of Juvenile Justice, views its role vis-à-vis the juveniles as acting “in loco parentis” thus creating a temporary relationship. Finally, the Detention Center is a

household in light of the services statutorily required to be provided to the juveniles as well as the stated services which the Detention Center acknowledges it provides on its website.

Issue 2: Whether the New Jersey Tort Claims Act bars the plaintiff's causes of action against the County defendants under the CSAA and under the common-law torts of negligence and intentional infliction of emotional distress?

Holding 2: No. The Tort Claims Act (TCA) does not bar the plaintiff's cause of action against the County defendants under the CSAA for compensatory and punitive damages. Given that the CSAA is more specific than the TCA with regard to the welfare of children and was enacted after the TCA, the CSAA was intended to supercede TCA immunity to the County defendants. Thus, the passive abuser liability provision of the CSAA entitling plaintiff to compensatory damages applied to the County defendants, as modern principles of vicarious liability would apply to the actions of Detention Center supervisors who violated the Center's non-delegable duty to protect the juveniles from sexual abuse at the hands of employees under their supervision. Punitive damages under the CSAA were also available because such damages advance the public policy behind the CSAA, namely the vulnerability of the juveniles and the Detention Center's non-delegable duty to protect them from victimization. In contrast, the TCA bars the plaintiff's common-law claims due to plaintiff's failure to meet the threshold medical expense of the TCA.

State v. Froland, ___ N.J. ___ (2007). Opinion by Justice Long.

Issue: Whether a stepmother who removes her stepchildren from the state with the consent of their father (her husband), but without the consent of their mother, is guilty of non-consent kidnapping under N.J.S.A. 2C:13-1.

Holding: No. "Although subject to a charge of kidnapping by 'force, threat or deception' under N.J.S.A. 2C:13-1(d), and to a charge of interference with custody under N.J.S.A. 2C:13-4(a), a

party who acts with the permission of a parent is not guilty of non-consent kidnapping.” A removal of a child under N.J.S.A. 2C:13-1 is “unlawful” in only two instances, namely if the removal is effectuated by “force, threat or deception” or without the “consent of a parent, guardian or other person responsible for general supervision of [the child’s] welfare.” The Court determined that the term parent in the kidnapping statute must be given its ordinary meaning, which is defined as a biological father or mother or a father or mother related by adoption. The term parent does not encompass the particulars of a judicial order. Thus, the father had the power to give the stepmother consent to remove the children, and without any evidence of force, threat or deception, the stepmother’s conviction for kidnapping could not be upheld.

A parent (or a stepparent with a parent’s consent) who takes a child , depriving the child’s other parent of custody or parenting time, can be convicted of the crime of interference with custody rather than kidnapping. The interference with custody statute and the kidnapping statute were designed to address distinct conduct. This interpretation is supported by the legislative history of both statutes. The Court concluded that the legislative history revealed that “the Legislature clearly intended to carve out of the kidnapping statute noncustodial parents who seek to obtain more favorable custodial control over their children without the use of threat, force or violence.” Thus, unlike the kidnapping statute, the interference with custody statute was intended to focus on the rights of the child’s other parent, who is the victim of the interference crime.

Garrett v. Matisa, 394 N.J. Super. 468 (Ch. Div. 2007). Opinion by Judge Ostrer, J.S.C.

Issue: What effort must an attorney make to satisfy the duty to notify a client of the intention to withdraw as counsel when the client has moved without disclosing a new phone number or address?

Holding: A moving attorney must certify, consistent with Rule 4:4-5(c)(2), that (1) he has made diligent efforts to locate his client, and (2) he has been unable to locate and actually serve the client with notice. Once the attorney makes such a showing through submission of a certification, the motion to withdraw may be served by publication and the attorney should take any other steps that may reasonably result in notice. In the absence of such a showing, the motion will be denied without prejudice. It is well settled in New Jersey that an attorney who wants to withdraw from representation of a client must notify the client in advance and advise them of the grounds for withdrawal.

Van Duren v. Rzasa-Ormes, 394 N.J. Super. 254 (App. Div.), certif. granted, 192 N.J. 595 (2007). Before Judges Leflet, Parrillo and Sapp-Peterson. Opinion by Judge Parrillo, J.A.D.

Issue: Whether a non-appealability clause in an arbitration agreement that forecloses judicial review of an arbitration award is enforceable.

Holding: Yes. A case presenting an issue of first impression, involving an arbitration agreement executed before January 1, 2003, between two sophisticated business parties, each represented by counsel, which precluded judicial review of an arbitration award beyond the trial court level, was found to be enforceable. Parties to an arbitration agreement may waive their right to appellate review if their intention to do so is clear and unequivocal. However, a complete elimination of judicial review at the initial trial level would not be enforceable because it would be contrary to public policy and to the appropriate level and scope of review of arbitration awards as set forth in N.J.S.A. 2A:24-8. There is a “fundamental difference between a non-appealability clause applied to a trial court’s review, which effectively eliminates judicial oversight entirely of an arbitrator’s award and a non-appealability clause applied only to an appellate court’s review of the trial court’s judgment confirming or vacating an arbitrator’s award.”

All Modes Transport, Inc. v. Hecksteden, 389 N.J. Super. 462 (App. Div. 2006). Before Judges Skillman, Lisa and Grall. Opinion by Judge Skillman, P.J.A.D.

Issue 1: Whether the trial court erred by warning defendant during his cross-examination that continuation of his testimony could result in the court referring the matter to the appropriate prosecuting authority and suggesting that defendants give further consideration to settlement?

Holding 1: Yes. The trial court erred in interrupting defendant during his cross-examination to warn him that continuation of his testimony could result in the referring the matter to the appropriate prosecuting authority. The trial court told counsel that if the testimony and documents to be revealed on cross-examination revealed material transgressions (beyond the tax fraud already revealed during cross-examination), the court would be required to write a letter pursuant to Sheridan v. Sheridan, 247 N.J. Super. 552 (Ch. Div. 1990). The trial court suggested that the parties attempt to settle the matter if the testimony and documents would reveal such transgressions. The parties settled the matter and defendant moved to vacate the settlement.

A trial court has no obligation to warn a defendant, or even a potential witness who is not represented by counsel, that his testimony may be self-incriminating and no obligation to warn of a potential Sheridan issue. Here, it was defendant's counsel's responsibility to warn him of the Sheridan issue. The trial court's statements in this case "had to have exerted substantial pressure upon [defendant] to settle the case in order to avoid criminal prosecution," regardless of whether the court intended to exert such pressure. Thus, the trial court erred in interrupting defendant's cross-examination to warn him of the Sheridan issue.

Issue 2: Whether the trial court erred in ruling that defendant would be entitled to vacate the settlement only if he could show that he did not understand the facts relevant to his exposure to prosecution for tax fraud?

Holding 2: Yes. The trial court erred in ruling that defendants would be entitled to vacate the settlement only if he could show that he did not understand the facts relevant to his exposure to prosecution for tax fraud. The determination of whether the settlement was coerced does not turn on the court's purpose in issuing the warning but rather its effect on defendants' decision to settle. The issue should have been whether defendant entered into the settlement under duress because he feared that a continuation of the trial would result in the court referring his testimony to the appropriate prosecuting authority. Accordingly, the denial of defendant's motion to vacate was reversed and remanded to the trial court for reconsideration of the issue of voluntariness in settlement.

ENACTED LEGISLATION

Irreconcilable Differences: N.J.S.A. 2A:34-2 was amended to include irreconcilable differences as a cause of action for divorce, where there was a breakdown of the marriage for a period of six months and which make it appear that the marriage should be dissolved and that there is no reasonable prospect of reconciliation.

New Jersey Task Force on Child Abuse and Neglect: N.J.S.A. 9:6-8.75 was amended to expand the goals of the New Jersey Task Force on Child Abuse and Neglect to study and develop recommendations regarding the most effective means of improving the quality and scope of child protective and preventative services in order to: (1) optimize coordination of child abuse-related services and investigation; (2) promote the safety of children at risk of abuse or neglect; (3) ensure a timely determination with regard to reports of alleged child abuse; (4) educate the public about the problems of, and coordinate activities relating to, child abuse and neglect; (5) develop a Statewide plan to prevent child abuse and neglect and mechanisms to facilitate child abuse and neglect prevention strategies in coordination with the Division of Prevention and Community Partnerships; (6) mobilize citizens and community agencies in a proactive effort to prevent and treat child abuse and neglect; and (7) foster cooperative working relationships between State and local agencies responsible for providing services to victims of child abuse and neglect and their families.

Creation of Civil Unions N.J.S.A. 37:1-28, et. seq., effective February 19, 2007: In light of the New Jersey State Supreme Court's ruling in Lewis v. Harris, 188 N.J. 415 (2006), this statute provides the gay and lesbian community within New Jersey with the required statutory rights of marriage through the form of Civil Unions. Under this legislation, a same-sex couple over the age of 18 can enter into a Civil Union that will provide them with "all of the same benefits, protections and responsibilities under law, whether they derive from statute or administrative or

court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.”

PENDING LEGISLATION

A1197: Provides that children under care, custody or supervision of DYFS may not be home-schooled.

A2008: Permits a child who moves out of a school district due to a family crisis to remain enrolled in that district until the end of the school year

A2187: Revises various sections of the Parentage Act and proposes new provisions concerning paternity, to be known as the “New Jersey Parentage Act of 2006”.

A2252: Establishes “Matthew’s Law Limiting the Use of Restraints” pertaining to care and treatment of developmentally disabled persons.

A4335: Authorizes the Department of Youth and Family Services to review prospective resource family parents' child abuse record information from other states, and provides these parents with right to be heard at certain hearings.

A4489: Directs the Division on Women to conduct an audit of the coordination of community responses to domestic violence.

A4533: Provides that committing a sex act with a minor constitutes sexual assault against the minor under certain circumstances.

A4358: Revises procedures for suspension or revocation of licenses for overdue child support.

A4557: Prohibits permanent change of child custody during period of active military duty; provides that absence due to active military duty, by itself, is not sufficient to justify modification of a child custody or visitation order.

A4565: Permits parent of stillborn child to request certificate of birth resulting in stillbirth directly from State registrar.

S1523: Requires school districts to notify the Department of Youth and Family Services of certain pupil absences.

S2857: Requires employees of adoption agencies specializing in foreign adoption to undergo criminal history record background and child abuse record information checks.

S3051: Amends stalking law to broaden protections for victims.

NEW JERSEY RULES OF COURT¹

R. 1:6-3(b) (Cross-Motions). Although the Rule was intended to be amended to eliminate the requirement that relief requested in a cross motion relate to the relief requested in the initial application filed by the other party in Family Part matters, a drafting error resulted in the rule still requiring litigants to file separate applications, obtain adjournments and prevented them from raising issues which the Court found not germane to the original motion.

R. 4:43-2 (Final Judgment by Default). It is now clear that the Family Part is exempt from this Rule which requires having to file a motion to enter default. The Supreme Court previously suspended the application of this Rule to Family Part matters.

R. 5:1-2 (Domestic Partnership/Civil Unions). This new Rule makes clear that Domestic Partnership Act matters and matters relating to civil unions are cognizable in the Family Part.

R. 5:3-4 (Right to Counsel). This new Rule makes it clear that attorneys are not to be assigned to represent indigent obligors in child support enforcement matters.

R. 5:4-2(g) (Confidential Litigant Information Sheet). The Confidential Litigant Information Sheet must now to be signed and certified by the client.

R. 5:5-2(c) (Case Information Statement). The amendment to the Rule requires litigants to amend their Case Information Statements (“CIS”) “in all cases” to inform the Court of any “material changes” in their income, expenses, assets or liabilities. Prior to the amendment, litigants were under “a continuing duty to inform the court of any changes in the information supplied on the Case Information Statement.” This Rule change arose out of the unreported Appellate Court opinion, in Kravchenko v. Kravchenko.

R. 5:5-4(c) (Time for Service and Filing). The Family Part motion cycle is now consolidated for all pre-judgment and post-judgment matters and the new schedule runs on a 24-15-8 day cycle.

¹ The Wilentz, Goldman & Spitzer Matrimonial Department would like to thank John P. Paone, Jr., Esq., of Paone & Zaleski, as his article “New Rule Changes Relevant to the Practice of Family Law” served as a guide in organizing this section of the Digest.

Previously pre-judgment motions were heard on a 16-8-4 day cycle and most post-judgment motions were heard on a 29-15-8 day cycle.

R. 5:5-4(c) (Copies). This Rule was further amended to provided that two (2) copies of papers are now required to be served to adversaries with respect to motions, cross motions and reply certifications.

R. 5:5-10 (Default; Notice for Equitable Distribution). This is the new Rule number regarding default and Notice for Equitable Distribution which was previously codified under R. 5:5-2(e).

Appendix IX-A(17) (Adjustments for the age of children). The Appendix was clarified to provide that the 14.6% upward adjustment for children 12 or older receiving an initial child support award under the guidelines is also to be applied in subsequent adjustments.

Appendix IX-F (Schedule of Child Support Awards). The Schedule was modified to reduce the child support guideline limit from \$4,420.00 per week net available income to \$3,600.00 per week. The Supreme Court Family Practice Committee noted that the increase from the prior limit of \$2,900.00 to \$4,420.00 per week was “so high as to adversely affect the Judge’s ability to fashion child support at these unique income levels.” At \$3,600.00 per week however, still 95% of New Jersey families will fall within the new guidelines. The Committee has reserved until the next rules cycle reviewing the “economic principles of the child support guidelines” which has provided a reduction in child support awards from the schedule in effect prior to September 1, 2006.