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Summary of 2008 New Jersey
Family Law Opinions and Court Rules

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ARBITRATION

Fawzy v. Fawzy, 400 N.J. Super. 567 (App. Div.), certif. granted, 196 N.J. 595 (2008). Before Judges Cuff, Lihotz, and Simonelli. Opinion by Simonelli, J.S.C. (temporarily assigned).

Issue: May parties in a matrimonial action agree to binding, non-appealable arbitration of child custody and parenting time issues?

Holding: No. The Appellate Division reversed the trial court's entry of a Judgment of Divorce which incorporated a custody arrangement reached in arbitration and remanded for a plenary hearing on custody and parenting time issues. The court held that an agreement to submit child custody and parenting time issues to binding, non-appealable arbitration violates the court's *parens patriae* obligation to protect the best interests of the child and is void as a matter of law. Although in this situation, the court notes that the defendant did not contend that the award was against the children's best interest, the court found that the agreement itself was void as a matter of law. The court has the duty of determining the best interests of the child; therefore, custody and parenting time issues cannot be subject to any agreements that restrict the court's ability to consider the best interests of the child.

Van Duren v. Rzasa-Ormes, 195 N.J. 230 (2008). Opinion Per Curiam.

Issue: Is a non-appealability clause in an arbitration agreement that forecloses judicial review of an arbitration award enforceable?

Holding: Yes. The Court affirmed the Appellate Division for the reasons expressed in the opinion by Judge Parillo in Van Duren v. Rzasa-Ormes, 394 N.J. Super. 254 (App. Div.). This case presents an issue of first impression. The appellate court held that an arbitration agreement executed before January 1, 2003 between two sophisticated business parties, each represented by counsel, in which the parties demonstrate a clear and unequivocal waiver of their rights to appellate review is enforceable. However, a complete elimination of judicial review at the initial

trial level is not 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."

BANKRUPTCY

Clark v. Pomponio, 397 N.J. Super. 630 (App. Div.), certif. denied, 195 N.J. 420 (2008). Before Judges Coburn, Grall and Chambers. Opinion by Chambers, J.A.D.

Issue: Did the trial court err in entering an order suppressing the defendant's answer with prejudice and a default judgment of divorce against the defendant, who had filed a Chapter 13 bankruptcy petition?

Holding: Yes. Pursuant to 11 U.S.C.A. §362(a), a filing of a bankruptcy petition acts as a stay of the "commencement or continuation" of a judicial proceeding against the debtor. In divorce actions, equitable distribution issues are stayed although dissolution of the marriage and custody issues are not. Once defendant filed a bankruptcy petition, the stay immediately went into effect, and this divorce case was subject to the stay. Thus, the order suppressing the defendant's answer without prejudice was void with respect to the issue of equitable distribution. Because this was void, the default judgment of divorce entered was also void under New Jersey state law, pursuant to Rule 4:23-5(a).

The effect of the stay on equitable distribution has a trickle down effect on other issues. The bankruptcy stay prevents the trial court from making a final determination on alimony claims because alimony and equitable distribution claims are interrelated. Thus, the final resolution of alimony claims must also be stayed. Attorney fees and costs must also be stayed as they are related to equitable distribution calculations. Moreover, because of the interplay between child support with the other financial issues of the case, the Appellate Division held that the trial court has the discretion to readjust the child support calculations.

The Appellate Division held as follows: the provisions of the default judgment of divorce dealing with equitable distribution, attorney fees, and costs were reversed and remanded; the defendant's claim for alimony was remanded for resolution; and the case was ordered to resume procedurally from where it stood at the time defendant filed the bankruptcy petition.

CHILD SUPPORT

Gotlib v. Gotlib, 399 N.J. Super. 295 (App. Div. 2008). Before Judges Coburn, Fuentes, and Grall. Opinion by Fuentes, J.A.D.

Issue 1: Did the custodial mother waive medical reimbursement for the children when she did not consult the noncustodial father in advance and did not provide monthly bills in contravention of the Judgment of Divorce?

Holding 1: No. A parent's obligation to pay un-reimbursed medical expenses is an essential benefit to the parties' children. As with child support, the right to receive these payments belongs to the children and is therefore not subject to waiver by a custodial parent. The non-custodial parent from whom reimbursement is sought retains the right to question the reasonableness of any individual medical expense. In deciding the reasonableness of a reimbursement request, some factors include: (1) was the treatment medically necessary; (2) was the medical treatment in response to an unforeseen emergency requiring immediate action; (3) did the treatment involve elective or cosmetic medical services, and if so, was it in the best interest of the child involved to undergo such treatment; and (4) in cases of elective or cosmetic medical treatment, was the decision economically sound, given the parties' financial resources.

Issue 2: Is the custodial mother entitled to receive college tuition contribution from the noncustodial father for the children when she did not consult the father regarding the children's choice of schools, in contravention of the Judgment of Divorce?

Holding 2: The Appellate Division reversed and remanded after the lower court held that the non-custodial father must pay 50% of the children's college tuition even though the mother failed to consult him about the choice of college or its cost. The Appellate Division acknowledged that the Legislature and the New Jersey courts have long recognized a child's need for higher education and that this need is a proper consideration in determining a parent's child support obligation. However, the trial court failed to apply N.J.S.A. 2A:34-23(a) which

codifies the Newburgh factors to be used when evaluating a claim for contribution, to wit: (1) needs of the child; (2) standard of living and economic circumstances of each parent; (3) all sources of income and assets of each parent; (4) earning ability of each parent, including educational background, training, employment skills . . . and the length of time and cost of each parent to obtain training or experience for appropriate employment; (5) need and capacity of the child for education, including higher education; (6) age and health of the child and each parent; (7) income, assets and earning ability of the child; (8) responsibility of the parents for the court-ordered support of others; (9) reasonable debts and liabilities of each child and parent; and (10) any other facts the court may deem relevant.

The Appellate Division was particularly concerned about the plaintiff's decision to seek contribution from defendant long after the educational expenses had been incurred, thereby excluding him from the decision making process of whether his children should attend private schools or whether the children should take out loans and financial aid. The Appellate Division further noted that participation by both parents is an essential factor under Gac v. Gac, 186 N.J. 535 (2006), and was expressly required by the parties' Judgment of Divorce.

Strahan v. Strahan, 402 N.J. Super. 298 (App. Div. 2008). Before Judges Parker, R. B. Coleman, and Lyons. Opinion by Parker, J.A.D.

Issue One: Did the trial court err in setting child support in this high income case by failing to (1) make specific findings of fact as to which expenses were attributable to the children and which were attributable to the custodial parent and (2) by failing to impute income to the custodial parent?

Holding One: Yes. The Appellate Division reversed and remanded for reconsideration of the child support award of $214,745 annually. The court found that the trial court had erred in failing to make specific findings of fact regarding the supplemental amount of child support it awarded in the context of a high income parent whose ability to pay is not an issue. The Court

referred to the finding in Isaacson v. Isaacson, 348 N.J. Super. 560 (App. Div.), certif. denied, 174 N.J. 364 (2002), wherein the court held that "where the parties have the financial wherewithal to provide for their children, the children are entitled to the benefit of financial advantages available to them." However, the court added that "in the context of high-income parents whose ability to pay is not an issue, 'the dominant guidelines for consideration is the *reasonable needs of the children,* which must be addressed in the standard of living of the parties." (quoting Isaacson). The court noted that the law is not offended if defendant receives an "incidental benefit"; however, "the custodial parent cannot be a primary beneficiary." The court further noted that "this is of special concern when, as here, the custodial parent has no right to alimony." The court stated that while the children are entitled to the financial advantages of being in a high income family, the custodial parent has the burden of proving the reasonableness of the expenses. The Appellate Division found that the trial court also failed to address the plaintiff's right not to spoil the children. In quoting from a Kansas case cited in Isaacson, the Court found that "no child, no matter how wealthy the parents, needs to be provided [with] more than three ponies."

The Appellate Division also found that the trial court had erred in failing to impute any income to the defendant. The court stated that when either parent is "without just cause, voluntarily underemployed or unemployed" income shall be imputed to that parent. The court noted that the children were young when the parties separated and had nannies to care for them, so there was insufficient evidence to support a finding that defendant had stayed home at plaintiff's request to care for and raise the children.

Issue Two: Did the trial court err in requiring plaintiff to maintain a $7.5 million disability insurance policy and in denying his motion for reconsideration when he advised the Court that it was impossible for him to obtain such a policy?

Holding Two: Yes. The Appellate Division found it was "illogical to require plaintiff to secure child support with a $4 million policy in the event he dies, but require $7.5 million in disability insurance if he were injured and precluded from playing football." The court stated that if plaintiff were unable to play football, he would be in the same position as any other parent who is no longer able to pursue his/her chosen career, and would be entitled to seek modification. The court held that failure to raise the issue at trial did not preclude him from now challenging the reasonableness of the requirement. Further, plaintiff's recent retirement illustrated the unreasonableness of the requirement since there was no provision to secure child support if he retired.

Issue Three: Did the trial court err in awarding counsel fees when the parties' Prenuptial Agreement stated that the parties would be responsible for their own fees?

Holding Three: Yes. The Appellate Division concluded that the trial court abused its discretion in awarding counsel fees. The language in the prenuptial agreement precluding the award of counsel fees in "both pending and upon completion of the actions" included motions for reconsideration. Furthermore, the motion for reconsideration was not brought in bad faith.

Issue Four: Was there evidence of bias to support a remand to a different judge?

Holding Four: No. The Court stated that "[b]ias cannot be inferred form adverse rulings against a party."

Ibrahim v. Aziz, 402 N.J. Super. 205 (App. Div. 2008). Before Judges Coburn, Fuentes, and Chambers. Opinion by Chambers, J.A.D.

Issue: May the court impute income to the payor at the same level he could have earned in New Jersey when he is unable to work in New Jersey through no fault of his own and he cannot earn that wage in the foreign country in which he lives?

Holding: No. Rule 5:6A allows a court to disregard the child support guidelines where good cause is shown. The Court held that because the payor was unable to obtain a Visa to work in

New Jersey and because of the the vast difference between the wages attainable in Egypt and those attainable in New Jersey, it would be "unjust and futile" to impute New Jersey wage levels to him. The Court noted that the guidelines require the court to "consider 'the reason and intent for the voluntary underemployment or unemployment'" when imputing income. Here, the payor had "a compelling reason for not working" in New Jersey. The Court also noted that courts "should consider 'what the employment status and earning capacity of [the payor] parent would have been if the family had remained intact.'" Here, the Court found that if the family had remained intact, they would have returned to Egypt. Although the plaintiff raised doubts as to the amount of income the payor claimed he was making, she did not present any proofs. The Court stated that doubts do "not provide a factual basis to impute income to defendant based on New Jersey wages;" however, the trial court may impute wages to the payor based on what he can earn in Egypt.

CUSTODY

Carrascosa v. McGuire, 520 F.3d 249 (3d Cir.), cert. denied, 129 S. Ct. 491 (2008). Before Judges Fuentes, Jordan, and O'Neill (sitting by designation). Opinion by Fuentes, Circuit Judge.

Issue: Did the District Court err in finding that the Spanish courts departed from the Hague Convention and in failing to afford comity to the decisions of the Spanish courts with respect to the custody issues of the child, whom the mother took to Spain in alleged violation of the Parenting Agreement between the mother and the father?

Holding: No. The Appellate Division affirmed the lower court's decision and concluded that the Spanish courts departed from the fundamental premise of the Hague Convention and violated principles of international comity by not applying New Jersey law to the custody issues. The Hague Convention is designed to put all participants in a custody dispute back into the positions they would have been in but for one parent's wrongful removal of the child. It is not a vehicle for determining custody rights. The Third Circuit noted that the child's habitual residence, prior to Carrascosa's removal of her to Spain, was in New Jersey. The child's removal to Spain was wrongful under Article 3 of the Convention because father's custody rights were breached by the child's removal and because the father was exercising those rights at the time of her removal. For instance, though there was a Parenting Agreement, there was no court order pertaining to custody at the time of her removal, and absent such an order, New Jersey confers equal custody rights to each parents. Furthermore, the father was exercising his custody rights because he had regular contact with the child prior to the removal.

The Third Circuit held that the Spanish court decisions regarding custody issues were improper because they applied Spanish law. Pursuant to the Hague Convention, the Spanish courts should have interpreted the father's rights of custody under New Jersey law. Thus, American courts are under no obligation to enforce the Spanish courts' judgments concerning custody.

J.A. v. A.T., 404 N.J. Super. 132 (App. Div. 2008). Before Judges Lisa, Reisner and Sapp-Peterson. Opinion by Sapp-Peterson, J.A.D.

Issue: Did the trial court err in declining to enforce the temporary custody order of the One-Member First Instance Court of Athens?

Holding: No. The defendant mother filed an application in the First Instance Court of Athens seeking temporary custody of her three children where two children lived with the father in New Jersey and one child lived with her in Greece. The Greek court conducted a hearing at which neither party appeared and entered an order granting temporary custody to the mother finding that (1) the town in which the child resided in New Jersey had minimum Greek families, (2) the New Jersey town had no Greek school thus forcing the children to attend an American school, (3) there was no one to take care of the children when the father worked, (4) the father's parents were too old to take care of the children, (5) the defendant was a capable mother, and (6) the mother's parents and sister assisted her with child care needs. The mother then filed for divorce and permanent custody of the children in the Greek court, and although a divorce was granted, no permanent custody order was issued by the Greek court. A few months later, she also filed an action in federal district court in New Jersey under the Hague Convention on the Civil Aspects of International Child Abduction.

Over a year later, the plaintiff father filed this action in New Jersey state court seeking a divorce and seeking custody of the three children. In the New Jersey state action, the defendant mother then filed a motion seeking to register and enforce the temporary custody order entered by the Greek court and seeking a declaratory order granting custody of all three children to her. Before the hearing, the parties reached an agreement with respect to custody of two of the three children, leaving the court to adjudicate custody of only the parties' youngest child who was currently residing in New Jersey.

Addressing whether the New Jersey court had jurisdiction over the matter, the Appellate Division first stated that under the Uniform Child Custody Jurisdiction and Enforcement Act, N.J.S.A. 2A:34-53 to -95, a New Jersey court has jurisdiction to make an initial custody determination if: (1) this State is the child's home state on the date of commencement of the proceeding and (2) a court of another state does not have jurisdiction under paragraph (1) and (a) the child and at least one parent have significant contacts with this state and (b) substantial evidence concerning the child's care, protection, training and personal relationships is available in this state. New Jersey had jurisdiction at the time of the filing of the complaint because the child had been residing in New Jersey for the preceding three years. However, the issue is not whether jurisdiction existed but rather whether the New Jersey court should have restrained itself in view of the prior order issued by the Greek court.

"New Jersey courts are to give full faith and credit to child custody orders issued from foreign nations except when 'the child custody law of a foreign country violates fundamental principles of human rights or does not base custody decisions on evaluation of the best interests of the child.'" (quoting N.J.S.A. 2A:34-57(c)). In awarding temporary custody to the mother, the Greek court's written decision made clear that the factors considered by the court fell woefully short of the factors that should be considered in making a custody determination as mandated by the New Jersey legislature. Additionally, the Greek court's decision did not reveal what evidence was submitted at the hearing, the reliability of the evidence and how the court evaluated the evidence. Further, no final determination of custody was ever issued by the Greek court. "The absence of a permanent custody determination by the Greek court and the absence of any record of the Greek court's consideration of the statutory factors, as outlined in N.J.S.A. 9:2-4(c), when it rendered its temporary custody decision, contravenes the public policy of this state to safeguard the interests of the children who are at the center of a custody dispute." Thus, the trial

court appropriately concluded that special equities militated against according deference to the Greek court's temporary custody determination.

DOMESTIC VIOLENCE

In re Application of E.F.G., 398 N.J. Super. 539 (App. Div. 2008). Before Judges Wefing, R.B. Coleman and Lyons. Opinion by Lyons, J.A.D.

Issue 1: Can the trial court waive the requirement of publication under Rule 4:72-3 where the party requesting it is a victim of domestic violence?

Holding 1: Yes. Rule 4:72-3 states that "[n]otice of application [for a name change] shall then be published in a newspaper of general circulation in the county of plaintiff's residence once." An application for a change of name is conducted in open court, and the records of name changes are generally available for public inspection and copying. Rule 1:1-2, however, states that "[u]nless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice."

The Appellate Division engaged in a balancing of the interests test to determine whether the applicant's waiver should be granted. The panel noted that domestic violence is a serious crime against society, that victims of domestic violence deserve the maximum protection from abuse that the law can provide, and that it is the responsibility of the courts to protect victims. The panel held that failure to waive the requirement of publication would place the applicant at grave risk in pursuing a change of name by providing the applicant's abuser with access to the publication of her application or the court records.

Issue 2: Can the trial court grant a request to seal the record on a name change application where the requesting party is a victim of domestic violence?

Holding 2: Yes. Rule 1:2-1 provides that "no record of any portion [of a proceeding conducted in open court] shall be sealed by order of the court except for good cause shown." Lederman v. Prudential Life Ins., 385 N.J. Super. 307, 316-17 (App. Div. 2006) held that what constitutes good cause is governed by a standard of reasonableness. The panel at bar held that the plaintiff had overcome the strong presumption of public access by establishing by a preponderance of the

evidence that her interest in sealing these records outweighed the presumption. The Appellate Division reversed and remanded the case back to the trial court so that it could entertain the application for a name change, dispensing with the publication requirement and sealing the record.

M.S. v. Millburn Police Dep't, ___ N.J. ___ (2008). Opinion by Justice Albin.

Issue: Does N.J.S.A. 2C:58-3(c)(8) permanently bar "all" persons who have had a weapon seized pursuant to the Prevention of Domestic Violence Act from being issued a handgun purchase permit or firearms card?

Holding: No. N.J.S.A. 2C:58-3(c)(8), a disability provision of the Gun Control Law enacted in January 2004, does not apply in all circumstances where a firearm seized pursuant to the Prevention of Domestic Violence Act of 1991 is not returned to the owner. Rather, the statute imposes a statutory bar to obtaining a gun permit only when a firearm seized in a domestic violence matter is not returned for a reason set forth in the Domestic Violence Forfeiture Statute, N.J.S.A. 2C:25-21(d)(3). After the Essex County Prosecutor's Office filed a petition in 1997 to forfeit plaintiff's handguns pursuant to the Prevention of Domestic Violence Act of 1991, plaintiff entered into a consent judgment in which he agreed to sell the firearms or otherwise surrender title to the weapons. No hearing was ever held to determine whether plaintiff committed an act that disqualified him from obtaining a firearm, nor did plaintiff admit to any disqualifying act. By entering into a consent judgment, plaintiff did not admit to a statutory basis for forfeiting his right to possess a firearms card or a firearm under the Domestic Violence Forfeiture Statute, N.J.S.A. 2C:25-21(d)(3).

N.J.S.A. 2C:58-3(c)(8), enacted in 2004, provides: "No handgun purchase permit or firearms purchaser identification card shall be issued: . . . (8) To any person whose firearm is seized pursuant to the 'Prevention of Domestic Violence Act of 1991,' and whose firearms has not been returned.'" The Legislature did not intend to prohibit the issuance of a firearms card

under N.J.S.A. 2C:58-3(c)(8) because a firearm was not returned due to circumstances beyond the control of the person requesting the firearms card. The Legislature intended to bar the issuance of a firearms card only where it is due to the fault of the plaintiff. At a forfeiture hearing in 1997, had plaintiff's firearms not been returned because plaintiff had been found guilty of a crime related to the domestic violence incident, because there was "probable cause to indict," or because the "domestic violence situation" continued after the issuance of the mutual restraining orders, then the conditions of N.J.S.A. 2C:58-3(c)(8) would have been met. It is only when a person's firearm is seized pursuant to the Prevention of Domestic Violence Act of 1991 and "has not been returned" for a reason articulated in the Domestic Violence Forfeiture State that a person is permanently barred from obtaining a firearms card.

The Prosecutor's Office can only continue to hold plaintiff's firearms card if the Prosecutor's Office can show that it would have succeeded at a forfeiture hearing in 1997. Thus, plaintiff is entitled to a hearing to determine whether, at the time he entered into the consent judgment, the Prosecutor's Office was capable of proving that he had committed an act that warranted the forfeiture of his firearms. At the hearing, the Prosecutor's Office has the opportunity to show whether plaintiff, today, is otherwise disqualified from possessing a weapon under N.J.S.A. 2C:58-3(c).

ETHICS

Brundage v. Estate of Carambio, 195 N.J. 575 (2008). Opinion by Justice Hoens.

Issue 1: Did the attorney violate the Rules of Professional Conduct by failing to disclose the existence of a trial court decision and a pending appeal, which involved the identical legal issue before the court?

Holding 1: No. Although the attorney's behavior was calculated to work an advantage for his client based on information that was uniquely his, his lack of candor with the court approached but did not exceed the bounds of acceptable behavior under the Rules of Professional Conduct. With respect to the attorney's behavior before the Family Part, the failure to disclose the existence of an unpublished trial court decision involving the same legal issue was not reasonably certain to mislead the tribunal and therefore did not violate R.P.C. 3.3(a)(5). Likewise, as to the attorney's conduct before the Appellate Division, the attorney did not violate the Rules of Professional Conduct in his brief opposing the motion for leave to appeal by failing to disclose the existence of a pending appeal involving the same legal issue. Given that leave to appeal is sparingly granted, there was nothing in the record to suggest that the motion for leave would have been granted if the Appellate Division had knowledge of the existence of a pending appeal involving the same legal issue.

Issue 2: Did the Appellate Division impose an appropriate sanction by setting aside the settlement agreement?

Holding 2: No. In deciding to set aside the agreement, the Appellate Division improperly opted to penalize the offending attorney's client rather than to impose a sanction on the attorney directly.

IMMIGRATION

Naik v. Naik, 399 N.J. Super. 390 (App. Div. 2008). Before Judges Rodriguez, Fisher, and Miniman. Opinion by Rodriguez, P.J.A.D.

Issue: Does Form I-864EZ, also known as the Affidavit of Support, create a binding contract that imposes an obligation on the sponsor of a sponsored immigrant to insure that the immigrant has available support at or above 125 percent of the federal poverty line depending on the size of the family unit?

Holding: Yes. The Affidavit of Support does create such a binding contract in New Jersey. However, the Appellate Division held that a court must consider the sponsored immigrant's own income, assets and other sources of support. Therefore, after setting spousal and child support and equitable distribution, the court should only consider Form I-864EZ support if the sponsored immigrant's sources of support fall below 125 percent of the Federal Poverty Guidelines for the family unit size. In that case the sponsor is required to pay the deficiency only. If the sponsored immigrant's support exceeds that 125 percent, then Form I-864EZ support is not mandated. Because the record did not indicate the amount of other sources of income or support available to the wife, the Appellate Division remanded for an evidentiary hearing.

PALIMONY

Connell v. Diehl, 397 N.J. Super. 477 (App. Div.), certif. denied, 195 N.J. 518 (2008). Before Judges Stern, Rodriguez, and Miniman. Opinion by Miniman, J.A.D.

Issue: Did the trial court err: (1) in ordering a palimony award since it held that plaintiff failed to meet all of the *prima facie* elements of a palimony claim; (2) in failing to enforce the settlement reached by the parties; and (3) in failing to credit defendant $126,880.31, the money paid to plaintiff prior to the trial?

Holding: No. The Appellate Division found that there was sufficient evidence for the trial judge to conclude that plaintiff and defendant were not separate economic entities because plaintiff depended on defendant for her livelihood. Defendant contended that the parties were "separate economic entities" while living together and the Court did not agree. She depended on him almost entirely and devoted whatever money she received towards the family expenses. The fact that she received child support for her son from her ex-husband does not militate against a palimony action, nor did defendant's sole ownership of rental properties that he promised would provide for their joint retirement. The Appellate Division remanded the issue whether defendant is entitled to a credit against palimony or distribution of assets regarding his claim of a down payment for plaintiff's purchase of a trailer.

Issue 2: Did the trial court err: (1) in calculating palimony based on Diehl's life expectancy rather than hers; (2) in failing to include all the usual expenditures in his calculations; (3) in failing to order a partition of the family home; and (4) in failing to divide the personal property?

Holding 2: Yes. The determination of lump-sum palimony was based on three calculations. First, the judge was required to determine the reasonable future support Diehl promised to provide. Second, the judge was required to determine the duration of the future support. Finally, the judge was required to reduce that period of annual future support to a present value lump sum.

The Appellate Division held that the trial judge erred when he used defendant's life expectancy as a measure of the lump-sum palimony award. The judge was required to use plaintiff's life expectancy. The Appellate Division held that the lump-sum must be recalculated. However, the determination of the promisee's needs in order to maintain her lifestyle is within the discretion of the trial judge. The Appellate Division found no error in the judge's discretion in using plaintiff's post-separation lifestyle as the basis for a palimony award, so long as the quantum of support was reasonably adequate and did not leave plaintiff reliant on public assistance. The Appellate Division remanded with respect to this issue, ordering the judge to make specific fact findings regarding each expense and to determine the reasonable amount of support; to use plaintiff's life expectancy in calculating a lump sum; and in calculating the lump sum, to consider the potential effects of interest, inflation, and taxes.

Regarding partition of the family home, the Appellate Division remanded and ordered the trial judge to determine if the purchase of the family home was a joint venture. If it was a joint venture, then the judge must partition. If it was not a joint venture, then the defendant cannot merely return plaintiff's $70,000 investment into remodeling, furnishing, and redecorating the home. Instead, the judge must determine the present value of $70,000 as though it had been invested in some reasonable manner, such as certificates of deposit. Alternatively, he may determine its present value based on the appreciation in the value of the family home since it was remodeled.

Bayne v. Johnson, 403 N.J. Super. 125 (App. Div. 2008). Before Judges A.A. Rodriguez, Collester and Miniman. Opinion by Collester, J.A.D.

Issue: Can palimony be awarded when the parties cohabitated and there was a promise of marriage, but the party seeking palimony was aware that the other party did not have the means to provide a lifetime of support?

Holding: No. It is not enough for there to have been a promise of marriage. The Court held that there must be a valid promise of lifetime support, and because the plaintiff knew the defendant did not have the ability to provide such support, a valid promise could not have been made. The Court also took into consideration that it was plaintiff who left the defendant, she was not abandoned as the premises in Kozlowksi and Crowe were. And stated, "there must be a showing of economic inequality and an inability by the party seeking palimony to live independently at a reasonable level of support."

Devaney v. L'Esperance, 195 N.J. 247 (2008). Opinion by Justice Wallace**.**

Issue: Is cohabitation is an indispensable element of a cause of action for palimony?

Holding: No. Although cohabitation is not an indispensable element for a cause of action of palimony, a marital-type relationship is. The Court notes that the approach used should be one that achieves "substantial justice in light of the realities of the relationship." The two indispensable elements are a promise to support and a marital-type relationship. If the plaintiff can prove that a marital-type relationship existed, the parties do not need to have cohabited for a palimony claim to stand. The trial judge may consider cohabitation or lack thereof, however, cohabitation is not a necessary element.

Even though cohabitation is not an essential element in a claim for palimony, the Court held that there was sufficient evidence for the trial court to find that the parties did not have a marital type relationship. Although, the defendant rented a condominium for plaintiff, he continued to live with his wife and the trial court correctly found that the parties had only a dating relationship.

The Court also held that there was no abuse of discretion by the trial judge in determining that neither party was entitled to counsel fees.

PRENUPTIAL AGREEMENTS

Rogers v. Gordon, __ N.J. Super. __, Docket No. A-1531-07T2 (App. Div. 2008). Before Judges Wefing, Parker, and LeWinn. Opinion by Parker, J.A.D.

Issue 1: Can a prenuptial agreement entered prior to the adoption of the Uniform Pre-Marital Agreement Act may be modified upon a showing of changed circumstances?

Holding 1: Yes. The Appellate Division held that the trial court may amend the agreement if it was executed prior to the Uniform Pre-Marital Agreement Act, so long as the defendant experienced a substantial change in circumstances from the marital standard of living, or if he would be at a subsistence standard of living. The panel cited Marschall v. Marschall, 195 N.J. Super. 16 (Ch. Div. 1984), and noted that there is a three prong test for determining enforceability: (1) there was full financial disclosure; (2) that the party sought to be bound knew and understood the terms and conditions; and (3) that the agreement be fair and not unconscionable, i.e. that it not leave a spouse a public charge or close to it, or with a lifestyle far below what was enjoyed before or during the marriage. Likewise, the Court cited D'Onofrio v. D'Onofrio, 200 N.J. Super. 361 (App. Div. 1985), noting that upon establishing a change of circumstances under Lepis a spouse may apply to the court for a modification of the agreement.

Issue 2: Can the trial judge be permitted to amend the agreement based on a prospective change of circumstances?

Holding 2: No. The defendant worked for the plaintiff as a plant supervisor. When she filed the divorce complaint, he was demoted, although his salary did not change. The trial judge found the plaintiff's testimony that the defendant would not lose his job incredible and amended the alimony provisions of the Agreement. The Appellate Division reversed that decision and stated that the defendant could only seek alimony if and when he demonstrates substantial change.

PROCEDURE

Greely v. Greely, 194 N.J. 168 (2008). Per Curiam.

Issue 1: May a plaintiff dismiss a divorce complaint by filing a stipulation of dismissal after an answer to the complaint has already been served?

Holding 1: No. If the answer to the complaint has already been served by the defendant, then pursuant to Rule 4:37-1(a), there must be a consensual dismissal between the parties "by filing a stipulation of dismissal specifying the claim or claims being dismissed, signed by all parties who have appeared in the action." In this case, there was no such consensus. The plaintiff also never filed a motion to dismiss pursuant to Rule 4:37-1(b), whereby "an action shall be dismissed at the plaintiff's instance only by leave of court and upon such terms and condition as the court deems appropriate." Thus, the plaintiff's supposed unilateral stipulation of dismissal was a legal nullity.

Issue 2: May a motion to dismiss a child custody matter on *forum non conveniens* grounds be made by any party, by the court on its own motion, or by another state's court?

Holding 2: Yes. Under the Uniform Child Custody Jurisdiction and Enforcement Act, N.J.S.A. 2A:34-53 to -95, a motion to dismiss a child custody matter on inconvenient forum grounds may be made by any party, by the court on its own motion, or by another state's court. However, a plaintiff may not seek to dismiss an action on *forum non conveniens* grounds with respect to the non-custody allegations of the plaintiff's complaint.

Nieschmidt Law Office v. Leamann, 399 N.J. Super. 125 (App. Div. 2008). Before Judges Lintner, Graves and Sabatino. Opinion by Lintner, P.J.A.D.

Issue: Did the trial court properly dismiss the law firm's complaint for unpaid legal fees for failure to give thirty-day pre-action notice under Rule 1:20A-6?

Holding: Yes. The trial court properly dismissed the law firm's complaint for unpaid legal fees for failure to give thirty-day pre-action notice under Rule 1:20A-6. A defendant's intention to defend against the complaint rather than participate in fee arbitration does not absolve a plaintiff's failure to give the required notice. To permit a plaintiff to avoid the Pre-Action Notice rule simply because a defendant opts not to participate in fee arbitration would render the rule nugatory. The Appellate Division rejected the law firm's argument that the imminent running of the six-year statute of limitations prevented the firm from filing the required pre-action notice because it was the firm who delayed in filing its complaint until the statute of limitations made it impossible to give pre-action notice within the time mandated by the rule.

Welch v. Welch, 401 N.J. Super. 438 (Ch. Div. 2008). Opinion by Guadagno, J.S.C.

Issue 1: In a post-judgment matrimonial matter, should a party be permitted to rely upon documents that were obtained as a result of a subpoena that was issued by defendant's counsel without prior court authorization and in the absence of a pending trial or plenary hearing?

Holding 1: No. "Although the rules of discovery are to be liberally construed and accorded the broadest possible latitude, discovery in family actions has, historically been far more limited than in other areas of litigation." (citation omitted). Discovery in family actions in the pre-trial stage has been expanded under the rules, but in the post-judgment motion context, parties continue to have little or no discovery absent a court order. Rule 5:5-1(a) through (c) set forth permissible discovery in the pre-trial stage. Rule 5:5-1(d) states that all other discovery is "permitted only by leave of court for good cause shown" except for production of documents, requests for admission and copies of documents referred to in the pleadings.

The issuance of a subpoena is subject to strict limitations in the pretrial stage pursuant to Rule 4:14-7. "The authority of an attorney to issue a subpoena duces tecum for purposes of discovery 'is a significant one which must be exercised in good faith and in strict adherence to the rules to eliminate potential abuses.'" (quoting Cavallaro v. Jamco Prop. Mgmt., 334 N.J.

Super. 557, 569 (App. Div. 2000)). R.P.C. 3.4(c) and R.P.C. 4.1 prohibit the egregious use of subpoena power.

Post-judgment matrimonial motions are summary in nature as demonstrated by Rule 5:5-4 and are resolved with little or no discovery. Because the subpoena in this case was issued before the motion was even filed and without a pending plenary hearing, leave of the court was required before issuing the subpoena. "[I]f parties had the right to engage in unfettered discovery every time a post-judgment motion was brought, it would convert motion practice into unwieldy mini-trials resulting in lengthy delays which Rule 5:5-4 was specifically designed to avoid." It is of little moment that the documents received pursuant to the subpoena would ultimately be admissible and of no consequence that the opposing party failed to move to quash the subpoena. As such, the documents received pursuant to the subpoena must be disregarded, and without any other evidence to support the motion for change of custody, defendant's motion was denied.

Issue 2: Should counsel fees be awarded where a party improperly issues a subpoena and has no evidence to support his motion for a change in custody without relying on documents produced in response to the improper subpoena?

Holding 2: Yes. Because defendant's counsel improperly issued a subpoena without prior court authorization and in the absence of a pending plenary hearing, defendant's counsel acted in violation of court discovery rules and in bad faith. Despite the parties' failure to address the factors of Rule 5:3-5(c), a counsel fee award is appropriate where one party acts in bad faith regardless of the relative economic position of the parties.

Issue 3: Should sanctions be imposed where a party improperly issues a subpoena?

Holding 3: No, not under the circumstances. "While discovery rules must be complied with, drastic sanctions should be imposed sparingly." Given that counsel fees were awarded and there

is no prejudice resulting from the improper issuance of the subpoena, sanctions should not be imposed.

DIVISION OF YOUTH AND FAMILY SERVICES

Division of Youth and Family Services v. D.H., 398 N.J. Super. 333 (App. Div. 2008). Before Judges Rodriguez, Fisher, and Miniman. Opinion by Rodriguez, P.J.A.D.

Issue: Is a Kinship Legal Guardianship (KLG), pursuant to the Kinship Legal Guardianship Act, N.J.S.A. 3B:12A-1 to -7, deemed to be a permanent placement option in the appropriate circumstances?

Holding: Yes. The KLG Act provides an alternative to termination of parental rights and subsequent adoption. Pursuant to N.J.S.A. 3B:12A-6(d), KLG is appropriate where the court finds, by clear and convincing evidence, that: (1) each parent is unable, unavailable, or unwilling to perform the regular and expected functions of care and support of the child; (2) the parent's inability to perform those functions is unlikely to change in the foreseeable future; (3) if DYFS is involved, DYFS exercised reasonable efforts to reunify the child with the birth parents and these reunification efforts have proven unsuccessful or unnecessary and adoption of the child is neither feasible nor likely; and (4) awarding kinship legal guardianship is in the child's best interests.

The plain language of the KLG Act indicates that the Legislature intended KLG to be an alternative permanency plan to severing parental rights. The Legislature provided that Kinship Legal Guardianship is an "alternative, permanent placement option" for the child, "without rising to the level of termination of parental rights, for caregivers in relationships where adoption is neither feasible nor likely." (Quoting N.J.S.A. 3B:12A-1). Once the caregiver becomes the KLG, the caregiver has the right to make all decisions concerning the care and custody of the child. Thus, the trial court erred in rejecting KLG as a permanent placement option.

Division of Youth and Family Services v. E.P., 196 N.J. 88 (2008). Opinion by Justice Albin.

Issue: Should the parent's parental rights should be terminated when the parent may never be fit to care for the child, but the possibility of permanent placement is unlikely and the child has an emotional and loving bond with her parent?

Holding: No. The Court determined that there was insufficient evidence in the record to support the trial court's determination with respect to the fourth factor of the best interests of the child test, namely that "termination of parental rights [would] not do more harm than good." (Quoting N.J.S.A. 30:4C-15). The unlikely possibility of permanency in the future should not outweigh a strong and supportive relationship with a natural parent.

The Court noted that the four factors of the test are not discrete, but instead provide a comprehensive standard for identifying the best interests of the child. Relying on N.J. Div. of Youth & Family Services v. G.L., 191 N.J. 596, 609 (2007), the Court emphasized that the fourth prong "serves as a fail-safe against termination even where the remaining standards have been met." The question is not whether the parent is worthy, but whether it is in the best interests of the child to terminate the parental rights. The Division must prove by clear and convincing evidence that the termination would do more good than harm. In this situation, the Division did not meet its burden.

The Court also noted that in determining the best interests of the child, in appropriate cases, the Family Part should take into account the wishes of a child over the age of ten, who has reached a level of maturity that allows the child to form and express an intelligent opinion.

Division of Youth and Family Services v. G.M., 398 N.J. Super. 21 (App. Div.), certif. granted, 195 N.J. 520 (2008). Before Judges Payne, Sapp-Peterson, and Messano. Opinion by Messano, J.A.D.

Issue: Did the trial court err in terminating the DYFS action against the mother, without ever conducting a formal custody hearing before changing the residential custody of the children from the mother who lived in New Jersey to the father who lived in Florida?

Holding: Yes. The Appellate Division held that under the doctrine of fundamental fairness the trial judge was required to conduct a formal hearing as to whether the children's continued residence with the father in Florida was in their individual best interests, and to do so before granting DYFS's request to terminate the proceedings. The doctrine of fundamental fairness which "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily," supported the requirement that a full custody hearing take place before termination of the Title Nine proceedings. While the trial judge had the authority to award the father custody of his two children while the order of protection against the mother was in effect, such a change in custody is not a "placement" pursuant to N.J.S.A. 9:6-8.54. However, because of the mother's limited financial resources, the mother's rights to see her children were significantly curtailed resulting in a near *de facto* termination of her parental rights. Thus, the proceedings held by the trial court were deficient and denied the mother basic due process rights.

Although DYFS is free to seek to terminate its involvement with a family, the court was required to consider whether it was in the best interests of the children . The Appellate Division determined that transfer of residential custody to the father who shared joint legal custody was not a "placement" under the statutory scheme, and thus did not trigger the procedural requirements in the statute or the need for continued review by the court. However, once the trial court was convinced that the children no longer needed DYFS to exercise its extraordinary statutory powers to protect their safety, the statute did not permit termination of the litigation while at the same time significantly altering the original custodial arrangements agreed to by the parties. Such a result can only be supported by the exercise of the court's inherent *parens*

patriae authority, and that, in turn, can only be justified based upon a complete adjudicative hearing on the issues surrounding the residential custody of the children.

Division of Youth and Family Services v. I.Y.A., 400 N.J. Super. 77 (App. Div. 2008). Before Judges Lintner, Graves, and Alvarez. Opinion by Graves, J.A.D.

Issue 1: Was the evidence presented at the fact-finding hearings sufficient to support the determination that the mother abused or neglected her children?

Holding 1: No. The competent, material and relevant evidence was insufficient to support the determination that the mother abused or neglected her children. In reaching its findings, the lower court improperly considered unreliable and inadmissible evidence including a psychological evaluation never produced or offered into evidence and a referral by DYFS received from the children's school principal who did not testify at the hearing. There was also insufficient evidence in the record to support the court's conclusion that both children were parentified. Although there is no universal system to determine when a child has "sacrificed his or her own needs for attention, comfort, and guidance in order to accommodate and care for the . . . needs of the parent," a finding of parentification is generally based on expert testimony or reports. Finally, although the mother was involuntarily hospitalized for four days, hospitalization alone is not sufficient to sustain a finding of abuse or neglect and there was no medical evidence to establish that the mother suffered from a mental illness that prevented her from adequately parenting her children.

Issue 2: Should the protective services litigation have been terminated after the father returned to his country of origin with the children?

Holding 2: No. The protective services litigation should not have been terminated after the father returned to his country with the children in violation of three separate court orders. The Appellate Division acknowledged the holding in N.J. Div. of Youth & Family Servs. v. R.G., 397 N.J. Super. 439, 442 (App. Div. 2008), that a permanency hearing is not required prior to

placing a child in physical custody of the nonabusive parent and dismissing the litigation. However, the Appellate Division was persuaded by the reasoning in N.J. Div. of Youth & Family Servs. v. G.M., 398 N.J. Super. 21 (App. Div. 2008), that before terminating Title 9 proceedings, "the judge needs to decide whether (1) the children's best interests were served by their continued residence with the original custodial parent, albeit with DYFS's continued obligation to provide services and to monitor the home life; or (2) whether their best interests were served by ordering a change in residential custody." In view of this holding, the Appellate Division concluded that a full evidentiary hearing was necessary to determine whether the children's best interests are served by their continued residence with their mother.

Division of Youth and Family Services v. J.C., 399 N.J. Super. 444 (Ch. Div. 2006). Opinion by Martinotti, J.S.C.

Issue: May an attorney represent a defendant in both a protective services action initiated by DYFS on behalf of the children against the defendant and in a criminal action against the defendant by the state arising out of the same facts and circumstances?

Holding: No. As a matter of public policy, the attorney must be enjoined from representing a defendant in both a protective services action initiated by DYFS on behalf of the children and in a criminal action against the defendant by the state arising out of the same facts and circumstances. Under N.J.S.A. 9:6-8.10a(a), all records of child abuse shall be kept confidential. However, the statute allows for the release of records to the attorney upon a finding by the court that such disclosure is necessary for determination of an issue before the court. This confidentiality requirement is a procedural safeguard to protect victim children from unnecessary disclosure of his/her abuse. As the defendant's criminal counsel, the attorney would ordinarily be required to demonstrate that the information in the DYFS files is "necessary for the determination of an issue before the [criminal] Court." He would then have to make a motion before the criminal court, followed by the court's *in camera* review of the requested information.

In contrast, as counsel in the protective services action, the attorney would have complete access to the entire DYFS files of the child pursuant to Rule 5:12-3. Thus, if the attorney acted as counsel for the defendant in both the DYFS and criminal matters, he would get the benefit of accessing all the information contained in the DYFS reports without having to meet the strict requirements in N.J.S.A. 9:6-8.10(a). This would circumvent the procedural and policy safeguards of protecting and ensuring the best interests of the child. Although the criminal judge could exclude certain evidence in the criminal trial, merely having the information would offer the criminal defense counsel an unfair advantage by having access to otherwise undiscoverable information. The defendant's right to counsel of her own choosing under the Sixth Amendment must be balanced against the requirements of the fair and proper administration of justice. Thus, under these circumstances, the child's right to privacy outweighs defendant's right to counsel of her choosing.

Division of Youth and Family Services v. J.L., 400 N.J. Super. 454 (App. Div. 2008). Before Judges Cuff, Lisa and Simonelli. Opinion by Lisa, J.A.D.

Issue: Does the burden of proof shift to the parents when DYFS establishes a *prima facie* case of abuse or neglect under circumstances where a child is exposed to a number of unidentified people during the period when the injuries occurred?

Holding: No. Where a child is exposed to a number of unidentified individuals over a period of time, and it is unclear as to exactly where and when the child's injuries took place, traditional *res ipsa loquitur* principles apply. Applying these principles, once DYFS establishes a *prima facie* case of abuse or neglect under N.J.S.A. 9:6-8.46a(2), the burden shifts to the parents to rebut the presumption of abuse or neglect. However, the ultimate burden of proof to show that the parents are guilty of abuse or neglect by a preponderance of the evidence remains on DYFS. In contrast, the burden shifting principle set forth in In re D.T., 229 N.J. Super. 509 (App. Div. 1988), which requires the parents to bear the burden of proving their non-culpability by a preponderance of the

evidence once DYFS establishes a *prima facie* case of abuse or neglect, only applies where "a defined number of people have access to the child at the time the abuse definitively occurred."

Division of Youth and Family Services v. M.C., ____ N.J. Super. ____ (App. Div. 2008). Before Judges Wefing, Parker, and LeWinn. Opinion by Judge LeWinn.

Issue 1: Are medical examination forms that are provided by DYFS and filled out by the doctor, after the fact, admissible pursuant to N.J.S.A. 9:6-8.46 and In re Guardianship of Cope, 106 N.J. Super. 336 (App. Div. 1969)?

Holding 1: No. These medical records were not records kept in the ordinary course of business of the hospital, N.J.R.E. 803(c)(6), instead they were documents generated by DYFS during its investigation. The Court specifically noted that the doctor did not testify at the hearing and her hospital records were not introduced into evidence. Clearly, the doctor's testimony would have been the best evidence.

Issue 2: Is a screening form prepared by DYFS workers based on statements from another person admissible pursuant to N.J.S.A. 9:6-8.46 and In re Guardianship of Cope, 106 N.J. Super. 336 (App. Div. 1969)?

Holding 2: No. N.J.R.E. 803(c)(6) requires that such records be based upon the DYFS worker's personal knowledge. In this case, the records are based on information the DYFS workers received from the doctor. Only reports that contain a DYFS worker's "'first-hand knowledge of the case' should … be treated by the courts as 'supply[ing] a reasonably high degree of reliability as to the accuracy of the facts contained therein.'" Additionally, the doctor is not an affiliated medical consultant as required by In re Guardianship of Cope. To be an affiliated consultant, DYFS must first make a referral to the professional and that referral must result in the examination report proferred at the proceeding.

Issue 3: Do the Crawford v. Washington, 541 U.S. 36 (2004), hearsay protections apply in DYFS abuse and neglect proceedings?

Holding 3: The Court did not reach this issue because it reversed the case due to the trial judge's reliance on inadmissible evidence. However, the Court did state that Crawford's protections apply to criminal cases, not civil cases.

Division of Youth and Family Services v. M.W., 398 N.J. Super. 266 (App. Div.), certif. denied, 196 N.J. 347 (2008). Before Judges Collester, Sabatino, and Lyons. Opinion by Collester, J.A.D.

Issue 1: Can parental rights of a deceased child be terminated posthumously?

Holding 1: Yes. Termination of parental rights is based on a four-prong standard codified in N.J.S.A. 30:4C-15.1(a): (1) the child's safety, health or development has been or will continue to be endangered by the parental relationship; (2) the parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm; (3) the division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the Court has considered alternatives to termination of parental rights; and (4) termination of parental rights will not do more harm than good. So long as there is clear and convincing evidence as to each element, parental rights may be terminated at any time, even after the child is deceased.

In this case, M.W.'s instability, transient lifestyle, and periods of incarceration were such that she was unable to provide a safe and nurturing environment for her children. She medically and educationally neglected, physically abused, and abandoned her children. Her noncompliance with DYFS's numerous offers of assistance and services, and her inability to recognize the harm that she caused proved that she would continue to endanger the health and safety of her children. The State also produced clear and convincing proof that the termination of parental rights would not do more harm than good because there was no parent-child bond between the children and their mother and the children associated the abuse with her.

Issue 2: Can a parent whose parental rights have been terminated receive damages for the wrongful death of a child?

Holding 2: No. New Jersey's Wrongful Death Act and the Survivor's Act does not contain an exception to the distribution mandated by the intestacy act. Parents are next in line to receive the estate of an intestate child, per N.J.S.A. 3B:5-4(b). While F.W.'s presumed intent to distribute his $1 million estate would be to give that $1 million to his brothers, New Jersey case law interprets N.J.S.A. 3B:5-4 to rule out any judicially created exception to intestacy distribution based on the wishes of the child. The one exception to the statute is the "slayer rule," which states that an intentional killer forfeits all benefits from the decedent's estate, based on the premise that wrongdoers should not profit from wrongdoing. But the slayer rule is inapplicable in this case, because it requires an intentional killing, and although M.W.'s cruelty and abandonment ultimately led to her son's death in her cousin's apartment, she did not kill her son. Although other states have barred inheritance rights of "bad parents" who have been convicted of crimes against the child such as physical abuse, sexual abuse, and endangering the child's welfare, and the Restatement of Property and the Uniform Probate Code have precluded inheritance rights of parents who have abandoned and refused to support the child, New Jersey does not follow these any of these exceptions.

The Appellate Division held that the case law indicated that in exceptional circumstances a court may apply the equitable principle that no one should be allowed to profit directly or indirectly from his own wrongdoing. The Appellate Division agreed with the trial judge that the unique and extraordinary circumstances of this case were such that the Family Court, in the exercise of its equitable powers, may terminate M.W.'s rights to inherit from F.W. The clear public policy of New Jersey is to protect and preserve the welfare of its children, and to this end, the Family Court has inherent equitable authority to fashion appropriate remedies to protect the welfare of children and advance their best interests; this includes economic interests. The

Appellate Division noted that equity, morality, and common sense dictated that physically or sexually abusive parents have no right of inheritance by intestacy. It would be cruel and inequitable to hold that M.W. retained the right to inherit $1 million from the child she burned, abused, neglected, and abandoned.

The Appellate Division then held that a constructive trust was an appropriate equitable remedy to undo an unjust result from the strict application of New Jersey statutory and case law. The Appellate Division directed that F.W.'s estate be held in a constructive trust with the direction that the funds are to be conveyed to F.W.'s brothers as proper recipients under the intestacy succession rules.

Division of Youth and Family Services v. R.G., 397 N.J. Super. 439 (App. Div. 2008) Before Judges Lisa, Lihotz, and Simonelli. Opinion by Simonelli, J.S.C. (temporarily assigned).

Issue 1: Was the defendant denied his constitutional right to due process when the fact-finding hearing and the motion for summary judgment were conducted before the defendant was represented by counsel and without the opportunity to present evidence?

Holding 1: Yes. The New Jersey Supreme Court has held that "parents charged with abuse or neglect of their children have a constitutional right to counsel." There is no evidence in the record that the defendant had any representation. The appearance of an attorney who just happened to be in the courthouse the day of the fact-finding hearing was not enough to satisfy the constitutional requirement.

Issue 2: Did the trial court err in awarding custody of the child to the out-of-state, non-custodial parent and terminating litigation without conducting a permanency hearing?

Holding 2: No. The Appellate Division held that a permanency hearing is not required prior to placing a child in the physical custody of the non-abusive parent and dismissing the litigation. The transfer of custody to a non-custodial parent is not "placement" as contemplated by N.J.S.A. 9:6-8.54(a), because the terms "relative or other suitable person" were not intended to include

non-custodial parents. Therefore, there is no need for a permanency hearing. However, because the Appellate Division also held that the defendant's due process rights were violated by the failure to appoint counsel to represent him, the Appellate Division reversed and remanded for a new hearing.

Division of Youth and Family Services v. S.S., __ N.J. Super. __ (App. Div. 2008). Before Judges Winkelstein, Fuentes and Gilroy. Opinion by Gilroy, J.A.D.

Issue: Did the trial court err in directing a change of custody back to the mother without first conducting a plenary hearing on the issue when no exigent circumstances existed?

Holding: Yes. The trial court erred in directing a change of custody back to the mother because the trial court's decision was not supported by competent evidence. Given that a custody determination impacts the relationship between a parent and a child, the trial court's decision must be supported by evidence submitted during a hearing held on the record. Such a hearing requires that documentary evidence be clearly identified and witness testimony be given under oath and subject to cross-examination. The proceeding here involved only a colloquy among the court, counsel for DYFS, the Law Guardian, the mother and an unidentified DYFS caseworker and did not exclude inadmissible hearsay. Additionally, the trial court entered the order changing custody without providing prior notice to the parties. As such, the trial court's order was vacated and the matter was remanded to the trial court to conduct a proper evidentiary hearing, allowing the parties an opportunity to call witnesses, introduce documentary evidence and otherwise establish a proper record.

Division of Youth and Family Services v. T.M., 399 N.J. Super. 453 (App. Div. 2008). Before Judges Axelrad, Payne, and Sapp-Peterson. Opinion by Sapp-Peterson, J.A.D.

Issue: Can a kinship legal guardian (KLG) remove the child from the state without a Baures hearing or the consent of the noncustodial father?

Holding: No. The KLG's underlying purpose is to formalize the status of a relative who agrees to take on responsibility for a child and can remain in place throughout the child's minority. In that status, certain parental rights and responsibilities are transferred to the caregiver, who becomes legally responsible for the care and protection of the child and providing for the child's health, education, and maintenance in the same manner as biological parents. But because KLG does not terminate parental rights, the KLG may not take action that effectively terminates a parent's visitation rights without first demonstrating to the court that the action is in the best interest of the child.

The Appellate Division accordingly held that New Jersey's removal statute does apply to parents who were never married, as was the case here. Removal thus requires the consent of both parents. Since, effectively, the KLG was the custodial parent and she did not have consent of the children's father, she must prove a good faith motive for the relocation and also that the move will not be inimical to the best interest of the child, pursuant to Baures v. Lewis, 167 N.J. 91 (2001).

RULE CHANGES

Rule 4:43-3: Setting Aside Default
This Rule requires that a party seeking vacation of default so as to reenter a case must supply either a proposed Answer or a dispositive motion, a Case Information Statement and the appropriate filing fee for an Answer or motion. If the motion to vacate is denied, the fee is returned.

Rule 4:46-1: Time for Making, Filing and Serving Motion [for summary judgment]
This Rule provides that if the decision on a motion for summary judgment or partial summary judgment (made timely, returnable at least 30 days before scheduled trial date) is not communicated to the parties at least 10 days before the scheduled trial date, an application for adjournment will be liberally granted.

Rule 4:67-2: Complaint; Order to Show Cause; Motion
The Order to Show Cause Rule has been amended merely to alert practitioners that there are new forms for the Order to Show Cause, found in Appendix XII-F through XII-H. The forms cover requests for Preliminary Injunctions and Temporary Restraints as well as the standard Order to Show Cause.

Rule 4:72-1: Complaint
(b) Change of Name for Minor Involved in a Family Action.
If the complaint is seeking a name change for a minor, the complaint must indicate whether any of the parties (including the minor) are subject to a family part action that is pending or has concluded within the last three years. If the parties are subject to a family part action, the matter shall be transferred to be heard in the family part. If no party (including the minor) has been subject to a family part action, a certification to that affect must be appended to the complaint.

TAXES

Treasury Decision 9408: The custodial parent is entitled to the dependency exemption for the child regardless of what the divorce decree or agreement states, unless the noncustodial parent attaches a signed waiver effective for that tax year. The release of claims for an exemption must be either on Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents, or a written declaration for the sole purpose of releasing the claim that conforms to the substance of Form 8332. For purposes of this decision, where one or both parents have the right to physical custody for over one-half of the calendar year and the child is under the age of majority under state law, the parent with whom the child resides longer during the calendar year is the custodial parent. The child is deemed to reside with a parent using the counting-nights rule, where each night that a child (1) sleeps at the parent's residence, whether or not the parent is present, or (2) sleeps in the company of the parent when the child does not sleep at a parent's residence, such as when the parent and child are on vacation, is a night of residence for that particular parent. Where a parent works at night, a child resides with the parent based on greater number of days, not nights.

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