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Summary of 2006 New Jersey Family Law Published Opinions, Court Rules and Statutes

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ALIMONY

Larbig v. Larbig, 384 N.J. Super. 17 (App. Div. 2006) Before Judges Parker, C.S. Fisher and Yannotti. By Judge Fisher, J.A.D. **Issue 1**: Whether the trial court erred by denying payor's request to modify his alimony and child support obligation made only twenty months after divorce. **Holding 1**: The denial of the request to modify the alimony and child support obligation of defendant was affirmed, despite the existence of factual disputes regarding the condition of his business and ability to pay. It was not an abuse of discretion to decline to order a plenary hearing based on the short passage of time between the entry of the judgment of divorce and modification request. The trial judge correctly concluded that the defendant failed to demonstrate that a change in circumstances was "anything other than temporary". **Issue 2**: If a payor seeks modification of an equitable distribution payout, what is the standard of review? **Holding 2**: The Court affirmed the decision of the trial judge to refuse to characterize the defendant's equitable distribution payout as additional alimony. The promise to pay $2,600 per month for five years represented the agreement reached by the parties for the equitable division of their marital assets. Despite a single contradictory sentence in which the payments were likened to support, they were properly recognized as an equitable distribution provision based on: (1) their placement within the portion of the agreement that provides for the exchange of assets; (2) the unambiguous language that constituted the bulk of the description; and (3) clear intent of the parties to characterize the payments as part of equitable distribution. The payments were not subject to modification based upon changed

circumstances but bound to the standard set forth in R. 4:50 and therefore the defendant's motion did not provide an adequate basis for relief.

Palmieri v. Palmieri, 388 N.J. Super. 562 (App. Div. 2006). Before Judges Coburn, R. B. Coleman and Gilroy. By Judge R.B. Coleman, J.A.D. **Issue**: Whether the trial court properly terminated husband's alimony obligation based upon wife's cohabitation with another man, where the settlement agreement provided that alimony would terminate if the wife resides with any unrelated person regardless of the financial agreement. **Holding**: The Appellate Division reversed and remanded for the trial court to determine, after a plenary hearing, the nature of wife's relationship with the man. The husband had proof that she was living with a man and the wife denied it. The court noted that the enforcement of the termination provision could lead to an absurd result. For example, if the payee lived with an ailing relative or the payee was taken care of by a nurse.

Platt v. Platt, 384 N.J. Super. 418 (App. Div. 2006). Before Judges Coburn, Lisa and S.L. Reisner. By Judge Lisa, J.A.D. **Issue 1**: Is it permissible for a trial court to average five years of a parties' income for the purposes of equitable distribution and alimony where the party is self-employed and his income was significantly reduced after the divorce complaint was filed? **Holding 1:** Yes. The trial judge reasonably averaged imputed income to husband who controlled the parties' business and was responsible for determining his own annual compensation. The averaging of income over five years by the trial judge to determine income for the purposes of calculating alimony and equitable distribution was based on fluctuations in the husband's income, which included a dramatic reduction two years after the filing of the divorce complaint. Thus, the basis for the trial judge's ruling was equitable under the circumstances and not the result of finding that the husband was voluntarily underemployed which would have required requisite findings of fact. **Issue 2**: If counsel for a party has ex parte communication with a court appointed expert, should the wrongdoer pay a greater portion of the expert's fees? **Holding 2**: Yes. The court held that the wrongdoer should pay $5,000 of the $8,000 of fees due to the court expert. Back to Top

ANNULMENT/VOID MARRIAGES

Attor v. Attor, 384 N.J. Super. 154 (App. Div. 2006). Before Judges Parrillo, Holston, Jr. and Gilroy. By Judge Holston, Jr., J.A.D. **Issue**: May a party invoke a Fifth Amendment privilege on cross-examination after testifying on the same issues in support of a Counterclaim for Divorce where the privilege is intended to protect the party from prosecution in an immigration proceeding? **Holding**: No. The trial judge erred in permitting defendant to assert her Fifth Amendment privilege against self-incrimination after she voluntarily testified on the same issues in support of her counterclaim for divorce. Defendant had effectively waived the privilege. Failure to permit cross-examination on the issues deprived plaintiff of his right to demonstrate her lack of credibility and to prove his cause of action for Annulment. Furthermore, the privilege is only applicable where there is a "real and appreciable" basis to fear prosecution. Here, the deportation proceedings feared by the witness were civil, not criminal, in nature and therefore, her testimony as to possible falsification of immigration documents was not a sufficient basis to allow her to invoke her Fifth Amendment privilege.

In the Matter of the Estate of Santolino, 384 N.J. Super. 567 (Ch. Div. 2005). By Judge Lyons, J.S.C. **Issue 1**: Whether a court may annul a marriage after the death of one of the parties based on impotency when the claim is brought by a party in interest, i.e. a third party with standing. **Holding 1**: No. An action for annulment on the basis of impotency must be brought by a party to the marriage and only when both parties are alive. The court observed that the language of N.J.S.A. 2A:34-1(c) makes a marriage voidable only at the election of the party to the marriage who did not know of the other's condition at the time of the marriage. **Issue 2**: Whether a court may annul a marriage after the death of one of the parties based on lack of consent or fraud when the claim is brought by a third party in interest. **Holding 2**: Yes. N.J.S.A. 2A:34-1(d) provides that an annulment may be granted when a party is unable to give consent to marriage; there is a lack of mutual assent; the marriage was based on duress on one of the parties; or there was fraud as to the essentials of the marriage. A lack of capacity to consent renders a marriage void, and "allows the court to render a posthumous judgment of nullity with regard to the marriage at issue because a void marriage is deemed not to have been a marriage at

all." **Issue 3**: Whether a court has general equity jurisdiction to annul a marriage on a claim brought by a third party who has standing after the death of one the parties to the marriage. **Holding 3**: Yes. A court of equity has "inherent jurisdiction" to annul fraudulent contracts, including the contract of marriage.

Yaghoubinejad v. Haghighi, 384 N.J. Super. 339 (App. Div. 2006). Before Judges Cuff, Parrillo and Gilroy. By Judge Cuff, P.J.A.D. **Issue**: Whether a marriage performed in accordance with the Islam religion but without the parties having obtained a marriage license is void. **Holding**: Yes. N.J.S.A. 37:1-10, passed in 1939, abolished common law marriage and established two prerequisites for a valid marriage: (1) the issuance of a marriage license pursuant to N.J.S.A. 37:1-2; and (2) the performance of the marriage before a person, religious society, institution or organization authorized by N.J.S.A. 37:1-13 to solemnize marriages. Failure to comply with both of these requirements renders the marriage "absolutely void." Accordingly, the Appellate Division reversed the ruling of the trial judge that the absence of a marriage license was a deficiency that was cured by subsequent "Validating Acts." Back to Top

CHILD SUPPORT

Diehl v. Diehl, 2006 WL 3740793 (N.J. Super. A.D.) Before Judges Skillman, Lisa and Grall. By Judge Grall, J.A.D. **Issue**: Is it equitable to provide a party with a credit for child support during a period of disability where their obligation had already been reduced? **Holding**: No. It is neither equitable nor consistent with the child support guidelines to provide a credit to a party who has had their child support obligation reduced to a level commensurate with their ability to pay. Child support guidelines and R. 4:6A allow for a credit for that benefit. Calculation of credit, if any, to plaintiff was difficult in this case because his child support obligations changed three times during the period he was obligated to pay child support. The trial judge incorrectly credited plaintiff for the time in which he was disabled and had his child support obligation reduced to reflect the SSD benefits paid to his daughter. When SSD benefits, considered in calculating child support, are paid to a child, a good cause showing is necessary in order to justify any further credit. See also R. 5:6A. The case was reversed in part, affirmed in part and defendant was given credit for counsel fees, SSD benefits paid for his daughter and proceeds given to plaintiff from defendant's civil lawsuit.

Dolce v. Dolce, 383 N.J. Super. 11 (App. Div. 2006) Before Judges Linter, Parrillo and Holston, Jr. By Judge Parrillo, J.A.D. **Issue**: Can a party declare their child emancipated based at age 18, where the child is not attending school, despite a provision in the property settlement agreement setting emancipation at an older age? **Holding**: No. Emancipation of a child is a fact-sensitive analysis that does not occur by operation of law. The emancipation of the parties' child by the trial court because he was no longer in school and reached the age of 18 was contrary to the terms of the Final Judgment of Divorce which included an agreement that child support would continue, inter alia, until age 23. Reaching the age of 18 is only a threshold proof for emancipation that can be voluntarily extended by agreement. Because the husband was seeking to modify his child support obligation, the Court was required to be guided by the best interests of the children. Here, such an agreement existed and could not be dissolved without the requisite showing of a change in circumstances. Furthermore, the Court acknowledged that the parties agreement to extend the emancipation age of the child was a significant consideration in enforcing their agreement.

Forrestall v. Forrestall, 389 N.J. Super. 1 (App. Div. 2006). Before Judges Linter, S.L. Reisner and Seltzer. By Judge Seltzer, J.A.D. **Issue 1**: Is it error for an employer's contributions to defendant's 401(k) plan and income generated by the plan to be included in defendant's income for purposes of child support? **Holding 1**: Yes. In order for an asset to be properly considered as income for the purposes of calculating child support, it must be accessible within the meaning of the Child Support Guidelines. Appendix IX-B to R.5:6 (including retirement and profit sharing plans to sources of income considerable for a determination of child support) instructs that any such funds must be "available to pay expenses related to the child if the family would have remained intact." Although the monies in the defendant husband's plan were accessible, they were subject to substantial penalties and taxes for their early withdrawal. The trial judge correctly found that the funds available from the 401(k) were not "income" because they would not likely be accessed under ordinary circumstances had the family remained intact. The Court further emphasized that such treatment only applied to funds which

a party did not personally invest into their retirement plan, as well as the accrual of income which may not be withdrawn without penalty. “We emphasize that there is no claim that the funds received by defendant and voluntarily contributed to his retirement plan are insulated from consideration as income on which his support obligation is based…Once the funds are placed into the account, however, they do not produce income to which defendant has ordinary access. The children of an intact family would not expect to benefit from either the employer’s contribution or the accretion to the retirement fund…” **Issue 2**: Is it proper to calculate and incorporate a bonus which was declared in one year but not received until another year for a parties child support obligation? **Holding 2**: No. “There is no authority for, or logic in, utilizing a bonus declared, but not received, in 2004 to compute child support for the period commencing May 1, 2005. Rather, the income received in 2005, including the bonus, would be used to compute support for the period commencing May 1, 2006.” The trial judge did not err in his refusal to treat the husband’s bonus as income for calculating the upcoming year’s support solely because it appeared on his tax return.

Gac v. Gac, 186 N.J. 535 (2006). By Justice Wallace. **Issue**: Does an estranged parent have an obligation to contribute to the college loans of a child in addition to child support? **Holding**: No. Under the unique circumstances presented, it would not be equitable for an estranged father to be required to contribute to the college loans of his daughter because of the lateness of the request for contribution, as well as the absence of any downward modification of child support paid during the period of attendance. The Court reaffirmed the standard annunciated in Newburgh v. Arrigo, 88 N.J. 529 (1982), and concluded that a balancing of the twelve enumerated factors under that case to the “unusual circumstances presented” warranted a finding that the non-custodial parent should not be liable for the college loans. In reaching its decision the Court clarified that an inquiry under Newburgh requires consideration of all twelve factors, articulating that no one factor is a threshold concept. The Court noted that the request for contributions to college loans was not only made after graduation, but in response to the father’s application to emancipate the child. The fact that no prior request for contributions to college costs were made prior to the accrual of the debt, as well as the absence of an application for a downward modification in the child support obligation during the time the child attended college, were applicable considerations for the Court in determining whether an obligation was owed to the child.

Gifford v. Benjamin, 383 N.J. Super. 516 (App. Div. 2006) Before Judges Axelrad, Skillman and Levy. By Judge Levy, J.A.D. **Issue**: Can federal Supplemental Security Income benefits (SSI) received by a child be deducted from child support obligations? **Holding**: No. SSI benefits are means-tested which means they are based on the financial status of the recipient, the purpose of which is to provide a minimal income supplement to allow for adequate support. The decision of the trial court to use the benefits received by the child as an offset to cancel the child support obligation was reversed because the Child Support Guidelines specifically exclude SSI benefits (and similar means-tested benefits) from the class of government benefits permissibly deducted from child support. This result was found to be consistent with the Instructions of the Child Support Guidelines and existing case law, which had been misapplied by the trial judge. The Court distinguished the facts of the case from those in Burns v. Edwards, 367 N.J. Super. 29 (App.Div. 2004) and Herd v. Herd, 307 N.J. Super. 501 (App.Div. 1998), by noting that the means-tested nature of SSI benefits requires they not be treated as income for the purposes of child support, regardless of the recipient. While that proposition is observed by the holding in Burns, where the SSI benefits received by the non-custodial parent were not considered as income in determining his support obligation, the facts of the instant case cannot result in the same favorable treatment of the benefits for the non-custodial parent because the child was the recipient. Herd is also distinguishable because in that case, non-means tested benefits were involved (you do not consider the income or resources of the recipient and these benefits are properly included in calculating support).

J.R. v. L.R., 386 N.J. Super. 475 (App. Div. 2006) Before Judges Coburn, Collester and Lisa. By Judge Collester, J.A.D. **Issue**: Whether the doctrine of equitable estoppel can be invoked to circumvent the child support obligation of a biological father who was unaware of his daughter’s existence for nine and one-half years. **Holding**: “[I]t is settled law that the natural parent is the primary source for the support of a child, and the duty cannot be switched to a stepparent absent exceptional circumstances.” The Court observed equitable estoppel as the vehicle by which the right of a child to support is protected in such exceptional circumstances, and limited to situations where interference with the child’s support from the natural parent gives rise to an

obligation in the stepparent. The Court found no such interference and affirmed the trial judge's ruling that established the child support obligation of the biological father. Here, the court found that the psychological father was responsible for one-half of the calculated child support and the biological father responsible for the other one-half. The interests of equity were served by safeguarding the right of a child in need of support. The Court set support at an amount that considered the natural father's ability to pay before allocating the difference to the non-biological parent.

J.S. v. L.S., 2006 WL 3681668 (N.J. Super. A.D.) Before Judges Coburn, Coleman and Gilroy. By Judge Coleman, J.A.D. **Issue 1**: Can equitable distribution provisions of a Property Settlement Agreement be revisited when it is later determined a party is not the biological father of the child born during the marriage? **Holding 1**: No. Paternity is not one of the sixteen factors included for consideration in equitable distribution under N.J.S.A. 2A:34-23.1. Although the record reflects that "certain" or "various issues" would be reconsidered in the event that paternity could not be established, the trial judge reasonably concluded that such a finding could only affect the child-related provisions of the parties' agreement. The language contained on the record was ambiguous and did not specify which provisions would be revisited should paternity subsequently become an issue. **Issue 2**: Is a party entitled to reimbursement of child support payments when it is determined they are not the biological parent of the child? **Holding 2**: No. Because the child at issue was born during the marriage between the parties, defendant was presumed to be the biological father who was responsible for contributing for support pursuant to N.J.S.A. 9:17-53(c). The defendant was believed to be the biological father at the time his pendente lite support obligation was established, and thus owed a duty of support directly to his child (because the obligation of child support flows directly to the child and not between parents as recognized under Pascale v. Pascale, 140 N.J. 583 (1995)). Defendant was not entitled to a reimbursement because the plaintiff was not unjustly enriched as custodial parent when she accepted the support payments since the true identity of the child's father was not yet known and no other support had been provided. The Court also took issue with the fact that defendant's attorney failed to reserve the right, in the Property Settlement Agreement, to make revisions to alimony, equitable distribution or other property issues what would change as a result of the paternity test results. The defendant was left with the sole remedy of suing the biological father for reimbursement of the child-related expenses he paid. The child should not be permitted to suffer and having the mother repay the expenses would cause such a result.

Lozner v. Lozner, 388 N.J. Super. 471 (App. Div. 2006). Before Judges Lefelt, Parrillo and Sapp-Peterson. Opinion by Judge Lefelt, P.J.A.D. **Issue**: Can a party's substantial student loan debt constitute a factor that requires the alteration of a guidelines-based child support award? **Holding**: Possibly. The Appellate Division held that significant student loan debt may be considered by the trial court in determining whether the alteration of a guidelines-based child support award is warranted. In doing so, "the trial court should consider the effect on the family of any particular deduction" and may utilize the factors set forth in N.J.S.A. 2A:34-23(a). The court is cognizant of the fact that a credit should be given for a substantial loan debt provided the party can show that they "reasonably and necessarily" acquired the loan for the educational purposes of improving their earning capacity.

Pryce v. Scharff, 384 N.J. Super. 197 (App. Div. 2006) Before Judges Collester, Lisa and S.L. Reisner. By Judge Reisner, J.A.D. **Issue**: Is the Probate Division required to collect post-judgment interest on overdue child support being paid through Probation? **Holding**: Yes. As the contracted entity to collect child support pursuant to federal mandate, the Probation Division is also required to collect post-judgment interest on support orders that accrue pursuant to R. 5:7-5(g). The Court noted that federal law requires states to efficiently collect child support as a condition of receiving federal funding. Citing 42 U.S.C.A. Sec. 654a(e)(4)(A), the court noted that this law requires that the states monitor and track "support owed under the other and other amounts…. including arrearages, interest or late payment penalties and fees". N.J.S.A. 2A:17-56 is intended to implement the federal requirements regarding collection of child support. New Jersey Court Rules also permit for calculation of post-judgment interest (R. 4:42-11). The Appellate Division recognized the inherent limitations in the ability of the Probation Division to calculate and collect interest on child support orders because it is only able to do so after assets have been located upon which an execution can be made. However, when a party calculates interest accrued on child support arrears on their own behalf, they are entitled to an order from the trial court directing probation to collect same.

Tretola v. Tretola, 389 N.J. Super. 15 (App. Div. 2006). Before Judges Coburn, Axelrad and Coleman. By Judge Axelrad, J.A.D. **Issue**: Should a trial court require discovery and a plenary hearing regarding the emancipation of a child when the provisions of the Property Settlement Agreement entered into by the parents contains conflicting requirements for emancipation? **Holding**: Yes. The trial judge failed to recognize the existence of a material factual dispute in adjudicating plaintiff's request to emancipate his son without requiring further documentation and holding a plenary hearing. Under the facts presented, there were conflicting provisions for emancipation since the parties' child was both enrolled full time in pursuit of his college degree while employed full time. The Property Settlement Agreement was not sufficiently clear regarding emancipation requirements to allow the trial judge to conclude that the child should be emancipated solely on the basis of the certification submitted. "The need for discovery and analysis of the evidence in a further proceeding is underscored in a case such as this where the parties' PSA does not specifically address plaintiff's monetary obligation under the circumstances where his son is both employed and attending college full time. The Family Part judge was directed to schedule a plenary hearing to consider the child's college plans, expenses, incomes, savings, contributions toward household and individual expenses, and to evaluate the financial status of the parties. Citing Dolce, the court further noted that in determining emancipation, the court must engage in a "critical evaluation of the prevailing circumstances including the child's need(s), interests, and independent resources, the family's reasonable expectations, and the parties' financial ability, among other things." Back to Top

CONSTITUTIONAL LAW

Lewis v. Harris, 188 N.J. 415 (2006) By Justice Albin. **Issue 1:** Is there a fundamental right to marriage for persons of the same sex under the liberties guaranteed by Article I, Paragraph I of the New Jersey Constitution? **Holding 1:** No. In discerning whether same-sex marriage is a substantive right that is fundamental, the Court examined "whether the right of a person to marry someone of the same sex is so deeply rooted in the tradition and collective conscience" of the people of New Jersey so as to make it an "absolute right". The analysis of a fundamental right under Article I, Paragraph I mirrors the two-tiered inquiry of the Fourteenth Amendment's substantive due process analysis. "First, the asserted fundamental liberty interest must be clearly identified. See Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 138 L. Ed.2d 772, 788 (1997). Second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State." Citing King v. S. Jersey Nat'l Bank, 66 N.J. 161, 178 (1974). "In this case, the liberty interest at stake is not some undifferentiated, abstract right to marriage, but rather the right of people of the same sex to marry. Thus, we are concerned only with the question of whether the right to same-sex marriage is deeply rooted in this State's history and its people's collective conscience." The consideration by the Court in this regard focused on the statutes governing the rights of heterosexual and same-sex couples. New Jersey's civil marriage statutes (N.J.S.A. 37:1-1 to 37:2-41) explicitly use gender-specific language to limit marriage to heterosexual couples. Furthermore, the Domestic Partnership Act, which sought to close the gap in the disparate treatment of same-sex couples, unambiguously provides that marriage is exclusive to heterosexuals. The Court professed the above legislation as the intent of the people, and emphasized its reluctance to circumvent the democratic process. "[W]e must be careful not to impose our personal value system on eight-and-one-half million people, thus bypassing the democratic process as the primary means of effecting social change in this State." Thus, the Court concluded that "[d]espite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right." **Issue 2:** Does the Equal Protection guarantee of Article I, Paragraph I of the New Jersey Constitution require that same-sex couples be afforded the same legal benefits and privileges available to married heterosexual couples? **Holding 2:** Yes. Under New Jersey law, a statute may not impermissibly distinguish between its citizens. The plaintiffs claimed that the State's marriage laws relegate same-sex couples to second-class citizens because they deprive them of the privileges that flow from traditional marriages. To analyze whether a law permissibly distinguishes between citizens, the Court must determine if the distinction drawn by the legislation bears a substantial relationship to a legitimate government purpose. Citing Caviglia v. Tours of Am., 178 N.J. 355 (1987). Therefore, the inquiry undertaken by the Court

in examining New Jersey's marriage laws is whether the differences in the rights afforded between heterosexual and same-sex couples is substantially related to a legitimate interest on the part of the New Jersey legislature. The specific standard applied in equal protection claims involves a balancing test of three factors: The nature of the right at stake; the extent to which the complained of legislation restricts that right; and the benefit to the public in the restriction. In examining the nature of the right at stake, the Court focused on the development of gay and lesbian rights in the State. "Over the last three decades, through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation." The Court acknowledged the progressive approach taken by New Jersey in protecting gay and lesbian rights, specifically noting the passage of the Domestic Partnership Act in 2004 to bridge the gap that existed in the rights enjoyed between committed heterosexual and same-sex couples. The Court articulated the nature of the right at stake and intent of the legislature to "provide committed same-sex couples with a strong interest in equality of treatment relative to comparable heterosexual couples." The Court next inquired as to the extent to which New Jersey marriage laws restrict the rights of same-sex couples by comparing the current status of the laws governing marriage to the Domestic Partnership Act. "The Domestic Partnership Act, notably, does not provide to committed same-sex couples the family law protections available to married couples." The Court cited, inter alia, the ability to change a surname without court petition, property ownership as tenants by the entirety, exemptions for realty transfers between spouses, and back wages payable to the survivors of a deceased spouse to highlight the continued disparate treatment given to same-sex couples, concluding that the Domestic Partnership Act has failed to close the gap of inequality in the treatment to same-sex couples under the law. The Court next considered the benefit to the public in the restrictions placed on same-sex couples by the marriage laws of New Jersey. The Court found no acceptable or tangible benefit to the people of New Jersey that is secured by denying gay and lesbian couples the same set of rights enjoyed by heterosexual partners. However, the Court did note the express disadvantages experienced by children of same-sex couples who are unable to secure (among other things) health care, insurance, and tuition assistance benefits as a result of their parent's lifestyle. "There is no rational basis for, on the one hand, giving gays and lesbians full civil rights in their status as individuals, and, on the other, giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships." Accordingly, the Court concluded that "under the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." **Issue 3:** If the Equal Protection guarantee of Article I, Paragraph I does require reciprocal rights to same-sex couples, is the title of marriage also required? **Holding 3:** No. The Court determined that its holding (that same-sex partners are entitled to the full set of rights enjoyed by heterosexual couples) changed the ability to assert a right to the title of marriage under equal protection, because the "claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples." In deferring to the judgment of the legislature to provide an appropriate title to the union of same-sex partners, the Court declined to "presume that a difference in name alone is of constitutional magnitude."

Pasqua v. Council, 186 N.J. 127 (2006). By Justice Albin. **Issue:** Whether the right to counsel attaches to ability-to-pay hearings in which indigent parents are subject to incarceration for non-compliance with child support obligations. **Holding:** The Fourteenth Amendment Due Process Clause and Article I, Paragraph I of the New Jersey State Constitution mandate the appointment of counsel to indigent parents confronted with incarceration at child support enforcement hearings. The Court observed the principle that the fundamental right to counsel is not dependent on defining a proceeding as civil or criminal, but guided by the standard of whether a potential loss of liberty exists. In affirming the trial court and reversing the Appellate Division holding that the rights of indigent parents are sufficiently protected by the observance of fact-finding procedures by judges, the Court cited the "high risk of an erroneous determination and wrongful incarceration". Ultimately, the procedures and intricacies of an enforcement proceeding, coupled with the potential loss of liberty, were not offset by any public interest in denying the fundamental right to counsel. Back to Top

EQUITABLE DISTRIBUTION

Barr v. Barr, 418 N.J. Super. 18 (App. Div. 2011). Before Judges Axelrad, R.B. Coleman, and Lihotz. Opinion by Lihotz. **Issue**: Should a spouse share in the substantial increase in the value of the other party's military pension that had not vested at the time of the divorce and where the increase resulted from substantial post-complaint contributions and promotions? **Holding**: Maybe. The parties' Property Settlement Agreement ("PSA") in this matter provided that "wife will receive 50% of Husband's pension benefits attributable to his 11 years in the military service only. Such benefits are to be distributed when Husband commences receiving same." The trial court awarded plaintiff 50% of the marital value of the pension that was arrived at by applying a standard formula with a "coverture fraction." The Appellate Division ordered a plenary hearing to determine whether the parties intended the PSA to limit plaintiff's interest to the marital value accumulated during his eleven years of active service as a Captain in the military during the marriage rather than his post-judgment service in the reserves where he was promoted to the rank of Major. The Court concluded that "there are some extraordinary pension increases that may be attributable to post-dissolution efforts of the employee-spouse, and not dependent on the prior joint efforts of the parties during the marriage. In such instances, these sums must be excluded from equitable distribution and the application of the coverture fraction may be insufficient to accomplish this purpose." The burden falls on the pensioner-spouse to establish, with calculable precision, what portion of the increase in the pension's value should be immune from equitable distribution.

Sachau v. Sachau, 206 N.J. 1 (2011). Per Curiam. **Issue:** Did the lower court err in failing to utilize the fair market value of the parties' former marital home in 2007 to determine a spouse's equity where the Final Judgment of Divorce directed that the home be sold upon a triggering event that occurred 22 years earlier in 1984? **Holding:** Yes. The parties' Final Judgment of Divorce directed that the marital home be sold upon their youngest child turning eighteen (18) and graduating from high school on November 28, 1984. Neither party pursued the sale of the home until plaintiff filed a motion to secure his interest in the property twenty-two (22) years later. The lower courts erred by utilizing the property's value as of the triggering event in 1984 rather than its current value at the time of the sale in determining the plaintiff's interest. The husband's interest must be calculated based upon the current value of the home at the time of the sale. The Court distinguished this holding from its prior decision in Pacifico v. Pacifico, 190 N.J. 258 (2007), where the triggering event took place at the same time of the actual sale of the property. Here, there was a gap of more than two decades and the Final Judgment of Divorce was silent regarding the value if the home was not sold at the time of the triggering event. Absent an agreement to the contrary, plaintiff's interest should be determined based upon current value. Back to Top

FEES GRANTED TO SELF-REPRESENTED PARENTING COORDINATOR

Segal v. Lynch, 417 N.J. Super. 627 (App. Div. 2011), certif. granted, 207 N.J. 190 (2011). Before Judges Baxter, Koblitz and Newman. Opinion by Newman. **Issue 1:** Can a parenting coordinator (PC), representing herself, seek fees to defend 20 grievances filed by a litigant? **Holding 1:** Yes. The fees sought were not counsel fees, but fees owed based on the contract between the parent coordinator and the parties for her hourly services related to the time it took for her to respond to the twenty (20) grievances filed by the litigant. Assuming such obligation was not addressed in the contract, the parent coordinator may not have recovered such expenses. **Issue 2:** Does an award of fees to a PC have a chilling effect on a parties desire to file a grievance? **Holding 2:** No. There was a contractual basis for same. Parties to an agreement have a right to rely upon and enforce all of the terms contained therein. In addition, the PC program would be ineffective if a PC was not compensated for time expended in response to a grievance. **Issue 3:** Did the judge err by deciding the grievance dispute without a plenary hearing? **Holding 3:** No. It is in the court's discretion to decide the grievance without a plenary hearing since there were no material facts in dispute. Moreover, the PC guidelines do not require a plenary hearing. Back to Top

GRANDPARENTS RIGHTS

Tortorice v. Vanartsdalen, 422 N.J. Super. 242 (App. Div. 2011). Before Judges Parrillo, Yannotti and Espinosa. Opinion by Espinosa **Issue:** In a visitation dispute between maternal and paternal grandparents can the maternal grandparents (the psychological parents) claim that they have the autonomy of a parent as

provided in Moriarty v. Bradt, 177 N.J. 84, 101 (2003)? **Holding:** No. The grandparents are in parity with each other. Although the maternal grandparents are psychological parents, the court will apply a best interest analysis as opposed to the Moriarty standard that requires the moving party to prove that harm will come to the child unless visitation rights are granted. Back to Top

MEDIATION/ENFORCEMENT OF AGREEMENT

N.H. v. H.H., 418 N.J. Super. 262 (App. Div. 2011). Before Judges Axelrad, Coleman, and J.N. Harris. Opinion by Harris. **Issue 1:** Was it a conflict of interest under R.1:40-4(f) for the mediator to attempt to facilitate a reconciliation between the parties and thereafter mediate the dispute? **Holding 1:** No. Rule 1:40-4(f) was not applicable where the mediation was privately initiated without judicial supervision and Fawzy and Johnson procedural requirements were met. **Issue 2:** Was it error for the court to enforce an MSA that provided that a joint psychological expert's opinions as to custody and parenting time would be binding on the parties? **Holding 2:** No. The MSA provided specific procedures that satisfied the Fawzy requirements. **Issue 3:** Was it error for the court to enforce a mediated MSA without a hearing where plaintiff claimed: (a) there was inadequate disclosure, (b) she did not understand the impact of waiving pretrial discovery; (c) that the MSA wasn't fair or reasonable and (d) that there was no formal valuation of the marital estate? **Holding 3:** No. Public policy favors enforcement of agreements. You do not need full and broad discovery for an agreement to be fair. Here, wife voluntarily executed the agreement and agreed to limit the scope of discovery to a streamlined valuation which is allowable under Lerner v. Laufer, 359 N.J. Super. 201 (App. Div.) certif. denied 177 N.J. 223 (2003). Wife received 3.3 million in cash, $726,000 in clothing and jewelry, artwork, furniture and substantial alimony as well an initial award of alimony of $8,000 per month and a percentage of husband's bonus for 24 months and thereafter $10,000 per month in alimony. The settlement was fair and equitable under the laws of family litigation even though the court acknowledged that it didn't review the limited analysis of the forensic accountant.

Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, LLC, 421 N.J. Super. 445 (App. Div. 2011). Before Judges Cuff, Simonelli and Fasciale. Opinion by Cuff, P.J.A.D. **Issue 1:** Will the Court enforce an oral settlement reached during a Rule 1:40-4 mediation if the agreement was not reduced in writing for three days after the mediation session? **Holding 1:** Yes. Although an agreement reached in mediation must be in writing to be enforceable pursuant to Rule 1:40-4(i), the terms may be prepared shortly thereafter. **Issue 2:** If mediation is confidential pursuant to N.J.S.A. 2A:23C-5 and Rule 1:40-4(d), can an oral settlement be enforced? **Holding 2:** Yes. The statute and rule is inapplicable because both parties waived it. The party seeking to enforce the agreement and the mediator filed a certification with the court to enforce the agreement and the opposing party never claimed that the agreement was confidential. Back to Top

PARENTAL RIGHTS: RIGHT TO RECEIVE COLLEGE RECORDS

Van Brunt v. Van Brunt, 419 N.J. Super. 327 (Ch. Div. 2010) (approved for publication Apr. 15, 2011). Opinion by L.R. Jones, J.S.C. **Issue 1:** Does a court order requiring an unemancipated college student to produce proof of college attendance, course credits and grades to his/her parents as a condition for ongoing child support and college contribution violate the student's right to privacy under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C.A. §§1232 (g); 34 C.F.R. § 99.31? **Holding 1:** No. While FERPA prevents parents from obtaining documentation directly from institutions of higher education without the child's authorization, the act does not preclude an unemancipated child from providing a supporting parent with verifying documentation of attendance at said institution. A student cannot seek support and educational funds and simultaneously prevent the payor from verifying whether the child is emancipated. **Issue 2:** When a non-custodial parent pays court-ordered child support and/or college costs for an unemancipated college student, is the responsibility to provide that parent with ongoing proof of college attendance/credits/grades that of (a) the student, (b) the custodial parent, or (c) both? **Holding 2:** It is both the student and the custodial parent's responsibility to obtain the necessary documentation from the school and forward it to the non-custodial parent. In the event that this is not possible, the custodial parent must notify the non-custodial parent, therefore allowing the payor to file a motion for emancipation. Back to Top

PARENTAL RIGHTS: ARTIFICIAL INSEMINATION/IN VITRO FERTILIZATION

E.E. v. O.M.G.R., 420 N.J. Super. 283 (Ch. Div. 2011). Opinion by Sandson. **Issue:** Can two parties enter into a private contract regarding a self-administered "artificial insemination" procedure where one party contracts with another to terminate their parental rights without a licensed physician? **Holding:** No. While the Court realized that the plaintiff and the defendant would normally be allowed to enter such a contract under N.J.S.A. 9:17-44(b), the parties failed to abide by the statute in which the donor must utilize a "licensed physician" in the transaction. The court noted that it was not expressing an opinion as to the termination of parental rights in the future.

In re Parentage of a Child by T.J.S., 419 N.J. Super. 46 (App. Div.), certif. granted, 207 N.J. 228 (2011). Before Judges Parrillo, Yanotti and Skillman. Opinion by Parrillo. **Issue 1:** Under the Parentage Act, N.J.S.A. 9:17-38 to -59, can a married infertile woman be a legal parent where she consents to a gestational carrier giving birth to a child where the sperm of her husband and the egg of an anonymous donor were fertilized in vitro? **Holding 1:** No. The wife has no biological or gestational connection to the child. The wife may assert her rights through adoption. **Issue 2:** Is it a violation of equal protection, if infertile men are presumed to be fathers when their wives give birth but a wife is not presumed to be the mother when her husband is a sperm donor and there is an anonymous egg donor? **Holding 2:** No. Under the Parentage Act, maternity is not established by consent or intent. There was no violation of equal protection because there was no substantial need to achieve a governmental objective. Here, there was no likelihood that the wife was biologically related to the child. There are actual biological differences that justify the distinction. In vitro fertilization is the procedure where the egg and sperm are fertilized outside of a woman's body and then implanted into a woman's uterus for gestation. Back to Top

REMOVAL

McKinley v. Naters, 419 N.J. Super. 205 (Ch. Div. 2010) (approved for publication Apr. 13, 2011). Opinion by L.R. Jones, J.S.C. **Issue 1:** Should the court grant a contested application for a temporary removal of a 14 year old child to Florida for a 2 week summer vacation prior to a formal relocation hearing? **Holding 1:** Yes. The court ruled in this case that this does not violate the anti-removal considerations of N.J.S.A. 9:2-2. Furthermore, the court held that the child, whose preference is relevant, should be able to spend 2 of 4 weeks of vacation in Florida to allow the child to experience each proposed residence.

Morgan v. Morgan, 205 N.J. 50 (2011) Opinion by Justice Long. **Issue 1:** Was it error for the court to conclude, in a removal action under Baures v. Lewis, 167 N.J. 91 (2001), that the movant's reason for the move was "invalid" as opposed to the good faith standard of prong one? **Holding 1:** Yes. The standard is good faith and was met by Wife's desire to move to Massachusetts to be with her fiancé, her extended family and the children and to be a "stay at home" mom if she remarried. **Issue 2:** Was it error for the court to determine, in an *in limine* motion without a plenary hearing, that there was not a *de facto* shared custody arrangement warranting a "best interest" test rather than a hearing under Baures to determine if harm would come to the children? **Holding 2:** No. Although Husband claimed that his *de facto* parenting time was more than the 5/14ths overnight and dinner once/week provided in the MSA, the court ruled as a matter of law that the time and responsibility arrangement did not support a shared custody arrangement. "It is the nature of the interaction and not their number [of overnights] that tells the tale". Therefore, the burden of proof was on the party seeking to relocate to prove that harm would not come to the child. **Issue 3:** If there is a 4 year delay between the trial judge's opinion related to removal, should there be a new hearing on the Baures factors? **Holding 3:** Yes. The passage of time has caused changed circumstances that require that the entire record be supplemented and all Baures factors must be addressed anew. Back to Top

SIBLING VISITATION

J.M.S. v. J.W., 420 N.J. Super. 242 (App. Div. 2011). Before Judges Rodríguez, Miniman, and Lewinn. Opinion by Lewinn. **Issue:** Does the Adoption Act (N.J.S.A. 9:3-38 to 9:3-56) preclude grandparents from

pursuing grandparent visitation under N.J.S.A. 9:2-7.1 after the child is adopted by a relative of a biological parent? **Holding:** No. Plaintiff-grandparents had the right to pursue grandparent visitation under N.J.S.A. 9:2-7.1. The trial court improperly relied on In re Adoption of a Child by W.P. where the grandparents were barred from pursuing visitation after the child was adopted by a "non-relative". The Appellate Division distinguished the within matter from In re Adoption of a Child by W.P. and permitted the plaintiff-grandparents to pursue grandparent visitation because (a) the child was adopted by relatives of the biological mother; (b) plaintiff-grandparents served as the child's temporary foster parents for almost two years prior to the adoption; (c) the adoptive relatives permitted plaintiff-grandparents visitation for two years following the adoption before terminating same for personal reasons. Back to Top

STATUTORY INTERPRETATION - STATUTE OF FRAUDS FOR PALIMONY

Botis v. Kudrick 421 N.J. Super. 107 (App. Div. 2011). Before Judges Rodríguez, Grall, and LeWinn. Opinion by LeWinn. **Issue 1:** Where a complaint for palimony was filed prior to the enactment of N.J.S.A. 25:1-5 (requiring that palimony agreements must be in writing and signed by the parties in order to be enforceable), should the statute be prospective or retroactive for a pending or "pipeline" case? **Holding:** The statute should be applied prospectively. A statute will be given retroactive effect only "(1) where the Legislature has declared such an intent, either explicitly or implicitly, (2) when an amendment is curative, or (3) 'when the expectations of the parties so warrant.'" In this case, none of these elements were present and therefore the decisional law that predated the statute was applicable where a case was pending prior to the enactment of the statute. **Issue 2:** Is partial performance a defense to the statute? **Holding 2:** By way of dicta, the court stated that it was not error for the court to observe that the claimant may have a defense to the Statute of Frauds if there was partial performance. Back to Top

TORT OF INVASION OF PRIVACY

Villanova v. Innovative Investigations, Inc., 420 N.J. Super. 353 (App. Div. 2011). Before Judges Lisa, Savatino and Alvarez. Opinion by Lisa, P.J.A.D. **Issue**: Does the placement of a global positioning system ("GPS") device in a person's vehicle without his or her knowledge constitute the tort of invasion of privacy? **Holding**: No. In the absence of evidence that the person drove the vehicle into a private or secluded location that was out of public view and in which the individual had a legitimate expectation of privacy, the placement of a GPS device in a person's vehicle without his or her knowledge does not constitute the tort of invasion of privacy. A person traveling in an automobile on a public street has no reasonable expectation of privacy. There was nothing in the record to establish that the GPS device ever tracked the plaintiff in a private or secluded location. Back to Top

TRUSTS

Tannen v. Tannen, N.J., 2011 N.J. LEXIS 1267 (2011). Per Curiam. **Issue 1:** Where wife was the beneficiary of an irrevocable discretionary trust (which generated $124,000 per year in income and historically paid real estate taxes on the marital home, one-half housekeeper fees and improvements to the home) and trustee had sole discretion to provide for her health, education and welfare, can the court name the trust as a third party and compel the trustee to make support payments to wife which will increase wife's cash flow and reduce husband's alimony and child support obligations? **Holding 1:** No. The Supreme Court affirmed substantially for the reasons expressed by the Appellate Division as follows: Income from the trust should not be imputed to wife because the trustee had complete discretion. However, if Restatement (Third) of Trusts §50 was applied, wife would have an enforceable right to trust income for support despite the broad discretion of the trustee. Restatement (Third) has not been adopted by any reported decision in New Jersey and, if adopted, would operate to change the law in this State. It was error for the trust to be named as a party. All records and evidence could have been obtained by subpoena. On remand, the trial judge was directed to consider the historical expenses that the trust paid, such as real estate taxes, home improvements and wife's rent free use of the marital home owned by the trust. Otherwise, wife would receive a windfall and the result would be

inequitable to the husband. **Issue 2:** Did wife have a fiduciary obligation to husband to seek income from the trust, which would have impact on husband's alimony and child support obligations? **Holding 2:** No. Although public policy requires divorcing spouses to be fair with each other (not to dissipate assets or intentionally reduce income, etc.), there is no precedent that a party to a divorce proceeding has a fiduciary duty "to act primarily for another's benefit." **Issue 3:** In determining lifestyle, should an expert review at least three years of financial records? **Holding 3:** No. It depends on circumstances and shouldn't be mechanical. Weishaus v. Weishaus, 360 N.J. Super. 281, 291 (App. Div. 2003). Back to Top

DIVISION OF YOUTH AND FAMILY SERVICES ("DYFS")

N.J. Div. of Youth and Family Servs. v. A.R., 419 N.J. Super. 538 (App. Div. 2011). Before Judges Cuff, Fisher, and Sapp Peterson. Opinion by Fisher. **Issue:** Is it abuse and neglect of a child pursuant to N.J.S.A. 9:6-8.21(c) if 10 a month old child is placed on a bed without rails and falls off the bed onto a hot radiator? **Holding:** Yes. This was not simple negligence. A parent must exercise a minimum degree of care. The defendant exercised conduct that was grossly or wantonly negligent, likely or probably to result in injury.

N.J. Div. of Youth and Family Servs. v. D.P., 422 N.J. Super. 583 (App. Div. 2011). Before Judges Cuff, Lihotz and St. John. Opinion by Lihotz. **Issue:** Can foster parents (resource parents) who claimed they were psychological parents to a child placed in their care for almost two years intervene in a best interest hearing for permanent placement of the child? **Holding:** No. The foster parents have no independent right to intervene. The foster parents have the right to make statements to the court. However, they cannot cross examine witnesses, engage experts, demand discovery or appear in the action. The "psychological parent" doctrine of U.C. v. M.J.B. 163 N.J. 200 (2000) does not apply to foster parents.

N.J. Div. of Youth and Family Servs. v. H.P., 2011 N.J. Super. Lexis 193 (App. Div. 2011). Before Judges Carelman, Fisher and Baxter. Opinion by Fisher. **Issue 1:** Should findings of abuse and neglect under Title 9 be set aside because defendant was not instructed as to his right to counsel or the right to adjourn his case to retain counsel or to have counsel appointed? **Holding 1:** Yes. The right to counsel in a Title 9 proceeding has constitutional dimensions. Adjournments should be granted to obtain counsel or pro bono counsel. By way of dicta, the court stated that a fact finding role is not satisfied by a summary of testimony followed by a parroting of the Statute without credibility findings or how and why the ultimate conclusion was drawn. Since the judge may be committed to his opinion as to the facts, on remand another judge shall be assigned.

N.J. Div. of Youth and Family Servs. v. I.S., 422 N.J. Super. 52 (App. Div. 2011), aff'd & clarified, 423 N.J. Super. 124 (App. Div. 2011). Before Judges Cuff, Sapp, Peterson and Fasciale. Opinion by Sapp-Peterson. **Issue:** Where there is no finding of abuse and neglect under Title 9 but the children cannot be properly cared for due to their emotional problems, can DYFS enter an order for supervision, care and custody under Title 9 and Title 30? **Holding:** Yes. The court conducted a Title 9 and Title 30 proceeding simultaneously. Defendant had notice of the proceeding and due process requirements were met. The court concluded under Title 30 that the parents could not care for or meet the needs of the children by clear and convincing evidence. Under Title 9, children are immediately safeguarded due to a sense of urgency and the burden of persuasion is preponderance of the evidence. Under Title 30, the court determines if it is in the child's best interest to preserve the family unit with health and permanent safety being major concerns. The burden of persuasion is preponderance of the evidence unless there is an action for termination of parental rights which requires clear and convincing evidence to succeed.

N.J. Div. of Youth and Family Servs. v. J.C., 2011 N.J. Super. Lexis 191 (App. Div. 2011). Before Judges Lihotz, Waugh and St. John. Opinion by Lihotz. **Issue:** Is an appeal from a Title 30 proceeding moot when the parent voluntarily consents to a surrender of parental rights? **Holding:** Yes. An issue is moot when a decision sought can have no practical effect on the controversy. The decision also clarifies the "parallel but not congruent track of Title 9 and Title 30."

N.J. Div. of Youth and Family Servs. v. K.L.W., 419 N.J. Super. 568 (App. Div. 2011). Before Judges Rodriguez, Grall, and Miniman. Opinion by Grall. **Issue:** Did the Division fail to comply with N.J.S.A. 30:4C-

12.1 by not initiating a search for relatives who may be able to provide care for a child placed in their custody? **Holding:** Yes. The Division has a statutory obligation to search for relatives who may be able to provide care for the child placed in their custody because prior to terminating parental rights kinship legal guardianship is an alternative.

N.J. Div. of Youth & Family Servs. v. M.D., 417 N.J. Super. 583 (App. Div. 2011). Before Judges Carchman, Messano and Waugh. Opinion by Messano, J.A.D. **Issue**: When a defendant stipulates to a finding of abuse and/or neglect at a fact-finding hearing, what information must counsel provide to defendant to insure he or she has made a knowing and voluntary waiver of his or her rights, and what are the obligations of the Judge in accepting a stipulation of a finding of abuse/and or neglect? **Holding**: Given the significant rights a defendant waives by entering into a stipulation to a finding of abuse and/or neglect, defense counsel and Family Part judges must make specific inquiries of the defendant on the record before the Judge accepts a stipulation. Defense counsel, at a minimum, has an obligation to clearly and unequivocally advise the defendant that he or she would be deemed to have committed child abuse and/or neglect due to admission of certain facts. Defense counsel should also advise the defendant of the consequences of a finding of abuse and/or neglect. The Judge must explicitly inform the defendant of the following: (1) defendant is waiving his or her right to a hearing at which DYFS must prove abuse or neglect by a preponderance of the evidence; (2) at such a hearing, the Judge would determine what documentary evidence and testimony would be admitted and defendant would have the right to challenge the evidence and cross-examine the witnesses; (3) if the Judge accepts the stipulated facts and concludes they demonstrate abuse and/or neglect, the Judge will enter an order finding that defendant abused and/or neglected the child; and (4) as a result of that order, DYFS may seek termination of parental rights or continue the removal of the child and/or provide services; and (5) defendant's name shall remain on the Central Registry of confirmed perpetrators and is waiving any ability, either through the administrative process or through the court proceedings, to challenge the inclusion of his or her name on the registry.

N.J. Div. of Youth and Family Servs. v. P.W.R., 205 N.J. 17 (2011). Opinion by Justice Lavecchia. **Issue 1:** Was there abuse and neglect of a 16 year old child under Title Nine, N.J.S.A. 9:6-8.21 to 8.73 due to the following: the child was slapped in the face; the home was inadequately heated; the child was not taken to a pediatrician for two years; and the parent limited contact with the child's grandfather? **Holding 1:** No. An occasional slap in the face as discipline of teenager, with no bruising or marks does not constitute excessive corporal punishment under the statute. The lack of heat alone did not constitute neglect. There was no evidence that the child's health was impaired because she did not see a pediatrician for two (2) years. A child is not emotionally impaired by not visiting a grandparent unless there is evidence that harm will ensue. The grandparent did not file an application for visitation or claim that the child would face harm as a result of the lack of contact. **Issue 2:** Can uncorroborated previous statements of a child relating to abuse be the sole basis for a finding of abuse or neglect? **Holding 2:** No. A child's hearsay statements may be admissible into evidence, but cannot be the sole basis of a finding of abuse or neglect.

N.J. Div. of Youth and Family Servs. v. R.D., 207 N.J. 88 (2011). Opinion by Justice Rivera-Soto. **Issue:** Can determinations made in the adjudication of an abuse or neglect proceeding under Title Nine, N.J.S.A. 9:6-8.21 to -8.73, be given collateral estoppel effect in a later guardianship/termination proceeding under Title Thirty, N.J.S.A. 30:4C-11 to -15.4? **Holding:** No. The purpose of Title Nine is to immediately protect children from further injury. The purpose of the Title Thirty is to terminate parental rights. The court ruled that unless the parties are given advance notice that the Title Nine proceedings are to be conducted under the higher, clear and convincing evidence standard constitutionally required for Title Thirty proceedings and appropriate accommodations are made for the fundamentally different natures of these disparate proceedings, Title Nine determinations cannot be given collateral effect in any subsequent and related Title Thirty proceedings. The Court must also make clear to the parties that the determination may have preclusive impact in the termination proceeding under title Thirty.

N.J. Div. of Youth and Family Servs. v. T.B., 207 N.J. 294 (2011). Opinion by Justice Long. **Issue:** Whether a finding of neglect was properly entered against a mother who left her four year old child unsupervised for two hours under the mistaken belief that his grandmother was home with the child. **Holding:** No. The Court held

that the mother did not fail "to exercise a minimum degree of care" under N.J.S.A. § 9:6-8.21(c)(4)(b) because her conduct did not rise to the level of gross negligence or recklessness. The mother and child in this matter live with the grandparents who routinely care for the child. On the night of the underlying incident, the mother put the child to sleep for the evening before she left the home to have dinner with a friend. The mother believed that the grandmother was home to care for the child as her car was in the driveway. The grandmother, however, had made an impromptu decision to travel with her husband to New York. The neighbors contacted the police who in turn called DYFS when the child woke up to find out that he was home alone. The Court determined that under these circumstances the mother was merely "negligent" and ordered that DYFS remove her name from the New Jersey Child Abuse Registry.

N.J. Div. of Youth and Family Servs. v. T.I., 423 N.J. Super. 127 (App. Div. 2011). Before Judges Yannotti, Espinosa and Kennedy. Opinion by Espinosa. **Issue:** Can a court grant kinship legal guardianship (KLG) to a paternal grandparent who unequivocally asserted a desire to adopt the child? **Holding:** No. Pursuant to N.J.S.A. 3B:12A-1 et seq. KLG shall not be granted if adoption of a child is feasible or likely. Therefore, the trial court's decision to terminate parental rights is affirmed.

N.J. Div. of Youth and Family Servs. v. V.T., 2011 N.J. Super Lexis 221 (App. Div.). Before Judges Fuentes, Graves and Koblitz. Opinion by Koblitz. **Issue:** Under Title 9, was a father guilty of abuse and neglect where he failed to comply with a drug treatment program and tested positive for cocaine and marijuana? **Holding:** No. A failure to overcome a drug addiction doesn't *ipso facto* equate to abuse and neglect as a matter of law. DYFS needs to prove by expert testimony that the father's impairment posed a risk to the child. Back to Top

STATUTES

N.J.S.A. 37:1-5 Immediate Marriage if arrested upon criminal charge This statute was repealed.

N.J.S.A. 37:2-5 Right of husband and wife to contract with or sue each other This statute was repealed.

N.J.S.A. 37:2-10 Married woman's liability for debts contracted before or after marriage This statute was repealed.

N.J.S.A. 37:2-12 Property owed at time of marriage and property acquired thereafter This statute was repealed.

N.J.S.A. 37:2-23 Married woman legally separated from husband; power to convey, mortgage, lease or devise real property This statute was repealed.

N.J.S.A. 37:2-24 Husband legally separated from wife; power to convey, mortgage, lease or devise real property This statute was repealed. Back to Top

RULE CHANGES

Rule 1:40-12 Mediators and Arbitrators in Court-Annexed Programs This rule clarified that continuing education shall include instruction in ethical issues associated with mediation practice.

Rule 4:101-1 Abstracts to Be Entered This rule was amended to replace the reference to Automated Child Support Enforcement System (ACSES) with the more generic New Jersey automated child support system.

Rules 5:1-4, 5:2-1, 5:3-5, 5:4-2, 5:5-1, 5:5-2, 5:5-3, 5:5-6, 5:5-9, 5:6-7, 5:7-1, 5:7-3, 5:7-7, 5:7-8, 5:7-9, 5:8B, 5:9-1 These rules were amended to include references to domestic partnerships and civil unions where needed.

Rule 5:3-7 Additional Remedies on Violation of Orders Relating to Parenting Time, Alimony, Support or Domestic Violence Restraining Orders Paragraph (c) was added to provide for enforcement of relief under domestic violence restraining orders not subject to criminal contempt complaints.

Rule 5:4-4 Service of Process in Family Part Summary Actions; Initial Complaints and Applications for Post-Dispositional Relief This rule was amended to eliminate formal motion practice in summary matters. Summary matters include all non-dissolution initial complaints as well as applications for post-dispositional relief, applications for post-dispositional relief under the Prevention of Domestic Violence Act, and all kinship legal guardianship actions. The rule further provides that the Court may in its discretion or upon application by a party expand discovery, enter case management orders or conduct a plenary hearing on any matter. The rule also adds diligent inquiry requirements for summary actions and clarifies the requirements for vacating default orders.

Rule 5:6-6 Probation-Initiated Status Review of Support Orders This rule was amended to clarify that Probation may present to the court for status review any case being enforced by Probation. The court may modify, suspend or terminate a support order, close a Probation case, or take any action that the Court deems appropriate and just. However, the rule makes clear that status review hearings are not a substitute for motions or applications for post-dispositional relief initiated by the parties.

Rule 5:7-1 Venue This rule added that in a termination of a domestic partnership where both parties are non-residents, venue shall be laid in the county in which the Certificate of Domestic Partnership is filed.

Rule 5:7-2 Application Pendente Lite This rule was amended to conform its language to Rule 1:10 with respect to enforcing litigant's rights.

Rule 5:7-4 Alimony and Child Support Payments This rule was amended to ensure that enforcement of child support orders shall presumptively be in the county in which the child support order is first established unless the court orders the case transferred for cause. The rule also replaces references to ACSES with the more generic New Jersey automated child support system. The rule also added that electronic signatures are acceptable.

Rule 5:7A Domestic Violence: Restraining Orders This rule was amended to provide that electronic temporary restraining orders may be transmitted electronically without need for a duplicate written order.

Rule 5:8-2 Direction for Periodic Reports This rule replaces references to the probation office with Family Division. It also provides for the filing of custody decrees of another state in accordance with the procedures promulgated by the Administrative Office of the Courts.

Rule 5:8-4 Filing of Report This rule replaces references to the probation officer with Family Division personnel.

Rule 5:10-2 Caption of Complaint; Waiver of Filing Fees This rule added that each complaint shall address only one adoptee. However, supporting documentation for a sibling group may be submitted as one set of documents. The rule further provides that the filing fee for additional children may be waived at the discretion of the Surrogate upon a showing of financial hardship.

Rule 5:10-3 Contents of Complaint This rule amends the requirements for domestic agency adoptions and private agency adoptions. The rule also adds a requirement to attach an affirmation by the plaintiff to the complaint.

Rule 5:10-4 Surrogate Action This rule was amended to add a requirement that the Surrogate review the complaint to ensure that it meets the requirements of Rule 5:10-3 and that venue is properly laid. It also requires the Surrogate to conduct a party look-up in the Judiciary case management system and to provide the entire adoption file to the court for review at least five business days before the first proceeding.

Rule 5:10-5 Post-Complaint Submissions This rule was added to require that certain documents not filed with a complaint must be provided to the court at least 10 days in advance of a preliminary hearing and final hearing.

Rule 5:10-6 Indian Child Welfare Act This rule was added to require the court to determine whether there is reason to believe that the child or either biological parent may be a member of a federally recognized Indian tribe and if so, requires investigation and notification.

Rule 5:10-7 Judicial Surrender of Parental Rights This rule was added to allow for a biological or legal parent to surrender his or her parental rights before the Court.

Rule 5:10-8 Preliminary Hearing This rule (formerly Rule 5:10-5) was modified to require the medical histories of the biological parents to be submitted and retained in the court's file. It also was amended to require the approved agency to provide a background checklist and certification on a form prescribed by the Administrative Director of the Courts.

Rules 5:10-9, 5:10-10, 5:10-11 These rules were re-designated and the term natural parents was amended to biological or legal parents.

Rule 5:10-12 Judgment of Adoption; Procedures for Closing and Sealing Adoption Records This rule (formerly Rule 5:10-9) was amended to require a separate Judgment of Adoption for each adoptee. It also was modified to require the clerk to provide certified copies of the Judgment to the plaintiff's attorney and the clerk of the Superior Court and to require that the records be filed under seal by the clerk. It was amended to require the Surrogate to submit the report of adoption to the Bureau of Vital Statistics and Registration.

Rule 5:10-13 Requests to Unseal Adoption Cases; Procedure This rule was added to provide uniform procedures for unsealing adoption cases.

Rule 5:10-14 Domestic Adoptions and Readoptions of Foreign Citizens This rule was added to provide standard procedures for adoptions and re-adoptions of foreign citizens.

Rule 5:10-15 Adoptions of United States Citizens by Residents of Foreign Countries That Are Signatories to the Hague Adoption Convention This rule was added to provide standard procedures for adoptions of United States citizens who will be adopted by residents of foreign countries that are signatories to the Hague Adoption Convention.

Rule 5:10-16 Adoptions of United States Citizens by Residents of Foreign Countries That Are Not Signatories to the Hague Adoption Convention This rule was added to provide that adoptions by residents of foreign countries that are not signatories to the Hague Adoption Convention shall conform to domestic adoption rules.

Rule 5:10A Adoption of a Child or An Adult; Use of Automated System; Name Checks This rule was added to provide that adoptions be recorded using the Judiciary's case management system. It also requires that name checks be done through the Judiciary's case management system.

Rule 5:11 Action for Adoption of Adult This rule was amended to require an affidavit of verification and non-collusion be attached to every complaint for adoption and to require that a certification by any non-adopting spouse, civil union or domestic partner consenting to the adoption.

Appendix V. Family Part Case Information Statement The CIS was amended to include civil unions and domestic partnerships. Back to Top

If you have a question or wish to discuss this topic with one of our family lawyers, please give Joe a call at (**732) 352-9871**.

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