

WILENTZ, GOLDMAN &
SPITZER

2006 FAMILY LAW DEPARTMENT
CASE DIGEST

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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 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 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 the court expert.

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.”

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 not 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 in tact." 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 announced 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 (and similar means-tested benefits) 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."

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 rights 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.

CUSTODY

Barblock v. Barblock, 383 N.J. Super. 114 (App. Div. 2006) Before Judges Skillman, Axelrad and Sabatino. By Judge Sabatino, J.S.C. (temporarily assigned).

Issue: Whether the trial court erred by granting plaintiff-mother's application to remove the parties' two minor children to Buffalo, New York in the absence of a plenary hearing?

Holding: No. The trial court did not err in granting the mother's removal application in the absence of a plenary hearing since the trial judge heard extensive oral argument on the motion, considered all of the written submissions of the parties, and appropriately determined that the two-prong test set forth in Baures v. Lewis, 167 N.J. 91 (2001), was satisfied. A plenary hearing is not required for all contested removal cases. Since the father failed to raise any genuine issues of material fact, it was not necessary for the trial court to conduct a plenary hearing.

In re Application of Adan, 437 F. 3d 381 (Ct. App. 2006) Before Restini, Chief Judge, and Alito, then Circuit Judge, now United States Supreme Court Justice, and Ambro, Circuit Judge. By Judge Ambro.

Issue: Whether the trial court erred by granting a father's petition to have his daughter returned to Argentina pursuant to the Hague Convention, in a situation where the mother claimed she had fled to the United States with the parties' daughter due to the father's abuse?

Holding: Yes, the trial court erred. Although Argentina was properly determined to be the child's country of habitual residence, it failed to properly consider whether the father

had custody rights pursuant to Argentine law, and failed to properly consider the mother's assertions that returning the child to Argentina would pose grave risk to the child due to the father's abuse. On remand, the trial court must conduct further fact finding with regard to whether the father had custody rights pursuant to Argentine law. If the trial court does conclude that the father had such custody rights, the trial court must then make detailed findings of fact concerning whether the child's return posed grave risk to the child by considering the totality of the circumstances, rather than isolating each particular incident of abuse.

Shea v. Shea, 384 N.J. Super. 266 (Ch. Div. 2005) By Judge Millard, J.S.C.

Issue: Whether a removal application made three months after the settlement of the Final Judgment of Divorce is entitled to a 'best interests' standard of review rather than a

Baures v. Lewis, 167 N.J. 91 (2001), standard of review?

Holding: Yes. In situations where a party seeks removal of a child shortly after the settlement of the Final Judgment of Divorce, the moving party must make an initial prima facie showing that the two-prong test of Baures has been satisfied. However, the opposing party is entitled to establish that the moving party manipulated the Baures removal procedures by filing the removal action immediately after the entry of the Final Judgment of divorce. If proven, fundamental fairness would require that the removal application be determined pursuant to the best interests of the child custody standard, in lieu of the less stringent Baures criteria. The trial court noted, "To rule otherwise could potentially encourage disingenuous settlements, encourage a party to use the Baures line of cases as a sword, or alternatively compel a cautious party to exhaustively litigate custody when not truly necessary."

O'Donnell v. Singleton, 384 N.J. Super. 141 (App. Div. 2006) Before Judges Kestin, R.B. Coleman and Seltzer. By Judge Seltzer, J.S.C. (temporarily assigned).

Issue: Whether the trial court erred by ordering that a custodial parent equally share the driving responsibilities to effectuate parenting time for a non-custodial parent who had voluntarily moved eighty miles away?

Holding: No. The Appellate Division held that there was no abuse of discretion as the trial court's order provided a reasonable resolution of the transportation issue. The Appellate Division emphasized the Family Part's special expertise to resolve the many disputes that arise in family matters.

Karkkainen v. Kovalchuk, 445 F. 3d 280 (Ct. App. 2006) Before Judges Rendell and Smith, Circuit Judges, and Irenas, District Judge. By Judge Rendell.

Issue 1: Whether the District Court erred in establishing that the date of a child's wrongful retention for purposes of the Hague Convention was synonymous with the date of the parent's petition for return of the child?

Holding 1: Yes. The District Court erred in finding the date of wrongful retention to be synonymous with the date the petition for return of the child was filed since evidence demonstrated that the petitioner had withdrawn her consent to have the child remain in the United States prior to her filing the petition. While it is clear that the filing of a petition is an unequivocal communication of a party's desire to regain custody and is, therefore, sufficient to establish the retention date, the retention date may also be established upon the party's clear communication to the other party that it seeks the return of the child and opposes the withholding of said child.

Issue 2: Whether the District Court erred in determining that the United States was the child's country of habitual residence for purposes of the Hague Convention?

Holding 2: No. The District Court did not err in determining that the United States was the child’s habitual residence for purposes of the Hague Convention. An inquiry into a child’s habitual residence is a fact-sensitive determination that cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case. The child’s habitual residence is “the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective.” This approach considers a child’s experience with her surroundings, focusing on whether a routine has been formed, a sense of normalcy developed and meaningful relationships established. Some weight must also be given to the parent’s intentions regarding the child’s presence in the country.

The Court held that the facts established that the parents had a shared intention that the child would be permitted to decide in which country she wished to remain, and that the child acclimatized to the United States prior to her retention by enrolling in school for the fall semester, taking summer classes, exploring the United States and developing relationships with family and friends. Further, the Court found evidence existed that the child abandoned her residence in Finland in that she said goodbye to friends and told many that she would be moving to the United States. Based upon these facts, the Court determined that the United States was the child’s habitual residence.

DOMESTIC VIOLENCE

Finamore v. Aronson, 382 N.J. Super. 514 (App. Div. 2006). Before Judges Stern, Parker and Lihotz. By Judge Lihotz, J.A.D. (temporarily assigned).

Issue: Whether a Final Restraining Order bars a party from attending activities and events of his son at school when defendant-mother is also present?

Holding: No. The Appellate Division took issue with the trial court's view that the entry of a FRO prohibits litigants "from being in the same place at the same time." The Appellate Division stated that while such relief is authorized under the Prevention of Domestic Violence Act, it must be specifically ordered by the court and cannot be inferred or presumed. The court reversed and remanded for a plenary hearing to determine the totality of the circumstances, including the past history of domestic violence and the evaluation of the child's relationship with his father and the child's interest in having his father present.

State v. McGovern, 385 N.J. Super. 428 (App. Div. 2006). Before Judges Collester, Lisa and S.L. Reisner. By Judge Lisa, J.A.D.

Issue: Whether the trial court properly denied defendant's motion to dismiss a weapons forfeiture petition based upon the Prosecutor's failure to file the forfeiture petition within forty-five days of the seizure as required by N.J.S.A. 2C:25-21d(3)?

Holding: Yes. The Appellate Division affirmed the trial court's determination that the filing was timely under the circumstances presented. The forty-five day period for filing the forfeiture petition does not begin to run until the prosecutor comes into possession of the weapon or has knowledge of the seizure. The court noted that a literal interpretation

of the statute of commencing the forty-five day period on the date of the weapon seizure would frustrate the intent of N.J.S.A. 2C:25-21d(3).

Franklin v. Sloskey, 385 N.J. Super. 534 (App. Div. 2006). Before Judges Skillman, Axelrad and Payne. By Judge Axelrad J.S.C. (temporarily assigned).

Issue 1: Whether the trial court violated a former boyfriend’s right of due process by issuing a Final Restraining Order (“FRO”) against him, based upon his consent to same while pursuing his own Final Restraining Order against his former girlfriend?

Holding 1: Yes. The trial court violated the former boyfriend’s due process rights based upon the following: the former girlfriend never filed a domestic violence complaint; she did not assert charges of domestic violence; the trial court made no findings of domestic violence; the former boyfriend made no admission to committing an act of domestic violence; and the trial court never informed the former boyfriend as to the act of domestic violence to which he was tacitly consenting by agreeing to the entry of the FRO. The Appellate Division cited N.J.S.A. 2C:25-29a in stating that a restraining order may be issued “only after a finding or an admission that an act of domestic violence was committed by that person.

Issue 2: Whether the trial court erred by issuing an FRO against the former girlfriend based upon its finding that “there may be harassment”?

Holding 2: Yes. The Appellate Division reversed the entry of the FRO based upon the trial court’s failure to make a finding of credibility or that the former girlfriend committed the predicate act of domestic violence.

Issue 3: Whether the trial court’s failure to afford a former girlfriend the opportunity to cross-examine her former boyfriend violated her due process rights?

Holding 3: Yes. The trial court’s failure to afford the former girlfriend an opportunity to cross-examine her former boyfriend, or even apprise her of her right to do so, is a violation of her due process rights.

Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006). Before Judges Fall, Grall and King. By Judge Fall, J.A.D.

Issue 1: Whether defendant’s acts of simple assault and trespass constitute “domestic violence” under the Prevention of Domestic Violence Act (“PDVA”)?

Holding 1: Yes. Trespass, accompanied by violence or the threat of violence present in the act of assault, does constitute domestic violence under the PDVA. The trial court found by a preponderance of the evidence that defendant committed trespass by entering plaintiff’s vehicle uninvited and assaulted plaintiff by attacking the him once she was inside the vehicle.

Issue 2: If there is a finding of a predicate act of domestic violence, does it automatically follow that a Final Restraining Order should be entered?

Holding 2: Upon finding that an act of domestic violence had been committed against a person protected under the statute, the second inquiry is whether a FRO is necessary to protect the victim from immediate danger or to prevent further abuse. The Appellate Division reversed and remanded for the trial court to determine whether its findings of “an acrimonious relationship manifested by volatility and rage” required that a FRO be issued for the protection of the plaintiff.

State v. Castagna, 387 N.J. Super. 598 (App. Div. 2006). Before Judges Stern, Parker and Grall. By Judge Grall, J.A.D.

Issue: Whether the record in this domestic violence matter supported the trial court’s finding of harassment and contempt of a Temporary Restraining Order?

Holding: No. The purpose of defendant’s conversation with his wife’s uncle was not to harass or to have the uncle deliver a message in a “manner likely to cause annoyance or alarm” his wife under N.J.S.A. 2C:33-4a.

Coleman v. Romano, 388 N.J. Super. 342 (Ch. Div. 2006). By Judge Ostrer, J.S.C.

Issue: Whether a mother and daughter that had not lived in the same house for almost thirty years qualify as “former household members” under the Prevention of Domestic Violence Act (“PDVA”)?

Holding: Yes. Following an evidentiary hearing, the trial court held that the mother and daughter were “former household members” on the basis of their “continuing, entangled relationship”, and set forth six factors that should be considered in determining whether the court has jurisdiction over a “former relationship” under the PDVA. The six factors are: (1) the nature and duration of the prior relationship; (2) whether the past domestic relationship provides a special opportunity for abuse and controlling behavior; (3) the passage of time since the end of the relationship; (4) the extent and nature of any intervening contacts; (5) the nature of the precipitating incident; and (6) the likelihood of ongoing contact or relationship.

M.A. v. E.A., 388 N.J. Super. 612 (App. Div. 2006). Before Judges Rodriguez, Collester and Sabatino. By Judge Sabatino, J.A.D.

Issue 1: Is a sexually abused minor step-child properly defined as a “victim” under the Prevention of Domestic Violence Act?

Holding 1: No. As defined by N.J.S.A. 2C:25-19(d), unemancipated minors are not victims within the definition of the statute and unable to secure a Temporary Restraining Order. The abused child was not over the age of eighteen, nor was she previously emancipated (by operation of marriage, military service, pregnancy or administrative declaration) in order to qualify as a victim of domestic violence. The trial judge correctly declined to characterize the sexual abuse as evidence of a “dating relationship” to fit within the statutory definition because it would not be consistent with legislative intent.

Issue 2: Does the mother of a sexually abused child have standing under the Prevention of Domestic Violence Act to obtain a Temporary Restraining Order against her husband who is the step-father and abuser of her child?

Holding 2: No. “There is nothing in the text of [N.J.S.A. 2C:25-19(a)] that allows plaintiff to file a domestic violence complaint on behalf of her minor child”. Plaintiff was not a victim of domestic violence as it related to the abuse to her daughter, because her daughter was not a “protected person” under the Prevention of domestic Violence Act. Furthermore, the abuse against plaintiff’s daughter does not qualify as a predicate act of domestic violence under N.J.S.A. 2C:33-4 because it could not be shown that the abuse was perpetrated with the intent to harass plaintiff.

DIVISION OF YOUTH AND FAMILY SERVICES

Division of Youth and Family Services v. M.M. v. C.B., 382 N.J. Super. 264 (App. Div. 2006). Before Judges Kestin, Hoens and Seltzer. By Judge Kestin, P.J.A.D.

Issue: Whether the trial court properly terminated the parental rights of a child's biological mother and father under N.J.S.A. 30:4C-15.1a?

Holding: Yes as to the mother. No as to the father. The Appellate Division affirmed the trial court's termination of the mother's parental rights under N.J.S.A. 30:4C-15.1a based upon the record establishing that she possessed the cognitive ability of a five year old, an I.Q. in the mid-sixties, exhibited substantial immaturity, had been sexually abused as a child, suffered from an alcohol problem and that she periodically disrupted the family stability by running away from home. The Appellate Division reversed the termination of the father's parental rights, holding that "one parent cannot be held responsible for the shortcomings of the other, at the cost of forfeiting his parental rights; the non-culpable parent is only required to exert reasonably successful efforts to protect the child from the harm inflicted by the deficient parent." The evidence established that the father was industrious and hardworking, a competent parent, dedicated to his family, supportive of his wife and that he was already successful in protecting another child, a fifteen year old daughter, from any potential harm by the mother.

Division of Youth and Family Services v. S.A., 382 N.J. Super. 525 (App. Div. 2006) Before Judges Axelrad, Payne and Sabatino. By Judge Payne, J.A.D.

Issue: Whether the trial court properly terminated the parental rights of the biological parent mother?

Holding: No. The Appellate Division emphasized that parental rights can only be abrogated upon a showing, “by clear and convincing evidence, obtained by reasoned application of the best interest standard, that the State’s *parens patriae* responsibility to protect the welfare of the child requires the Court’s intervention...the test serves as an essential protection to the rights of parent and child alike.” In so holding, the Appellate Division criticized the speed at which the termination of the mother’s parental rights was accomplished; the excessive reliance upon the mother’s short period of incarceration to justify the termination; the trial court’s failure to assess the importance of the mother’s commitment to remaining drug-free; and the absence of testimony regarding the child’s foster mother as an adoptive parent, the degree of bonding that had occurred, or any potential harm that the child would sustain if the bond was severed.

Division of Youth and Family Servs. v. A.C. and K.W., 389 N.J. Super. 97 (Ch. Div. 2005). By Judge Ryan, J.S.C.

Issue: Whether DYFS met its burden to prove that a biological mother committed an act of abuse or neglect, where the evidence was wholly circumstantial, apart from the facts related to the injury sustained by the child?

Holding: Yes. The trial court held that the minor was a neglected child under N.J.S.A. 9:6-8(21)(c)(4) based upon the direct evidence concerning the child’s injury, a bi-lateral skull fracture, and the circumstantial evidence consisting of the biological mother’s lack of credibility, prior inconsistent statements and inability to rebut DYFS’ *prima facie* showing of neglect.

Division of Youth and Family Services v. T.H. and W.W., 386 N.J. Super. 271 (Ch. Div. 2006). By Judge Guadagno, J.S.C.

Issue: Whether the Fifth and Sixth Amendment rights of a mother, facing criminal charges for aggravated manslaughter and endangering the welfare of a child relating to the death of her infant son, should have access to the DYFS file generated in a parallel child abuse and neglect proceeding that had already been completed in the Family Part?

Holding: Yes. Based upon the possibility that the DYFS file may contain records that the defendant is entitled to in the criminal matter, the trial court ordered that DYFS produce its entire file to the trial judge in the criminal matter for an *in camera* review to determine whether material in the DYFS file is relevant to the criminal matter and should be disclosed.

Division of Youth and Family Services v. V.J. and R.J., 386 N.J. Super. 71 (Ch. Div. 2004) By Judge Page, J.S.C.

Issue: Whether an attorney retained by defendant-parent can represent defendant in parallel pending cases based upon the same facts, for child abuse under Title 9, and criminal charges for endangerment and aggravated assault?

Holding: Yes. The trial court held that the confidentiality of the DYFS files, not normally discoverable outside Title 9 litigation, would not be jeopardized as “all of the relevant rules of evidence, including but not limited to privileges and the admissibility of DYFS records, remain in full force and effect and are not in any way altered or changed by the representation of the defendants by specific counsel.”

Division of Youth and Family Services v. C.R. and R.R., 387 N.J. Super. 363 (Ch. Div. 2006). By Judge Mendez, P.J.F.P.

Issue: What is the applicable standard in determining a defendant’s request for a suspended judgment under N.J.S.A. 9:6-8.52?

Holding: The trial court, after emphasizing the absence of any legal precedent on this issue, discussed the similarities between a suspended judgment in abuse and neglect cases, and Pretrial Intervention (“PTI”) in criminal dispositions. The trial court borrowed language from the PTI factors enumerated under N.J.S.A. 2C:43-12(e), to develop the standard to be taken into consideration in determining a defendant’s request for a suspended judgment under N.J.S.A. 9:6-8.52, as follows: (1) defendant’s prior history; (2) seriousness of the offense; (3) defendant’s remorse and acknowledgment of the abusive/neglectful nature of his or her actions; and (4) defendant’s amenability to correction, including compliance with court-ordered services, treatment and his or her efforts in rehabilitating the relationship with the child[ren].

Division of Youth and Family Services v. S.S., 187 N.J. 556 (2006). By Justice Albin writing for a unanimous court.

Issue: Whether DYFS or the courts have an affirmative duty to ensure ongoing contact between siblings, even in a post-adoption context, when the siblings are in separate homes?

Holding: Upon determining that there was not a controversy before the Court because the subject sibling relationships were not in jeopardy, the Court declined to address the issue. In so holding, the Court emphasized the legal precedent and public policy recognizing the importance of maintaining sibling relationships, particularly where the biological parent’s rights have been terminated and the children have been placed in separate foster and/or adoptive homes. The Court suggested that the competing public policy concerns on the issue would benefit from legislative review.

Division of Youth and Family Services v. R.L. and E.L., 388 N.J. Super. 81 (App. Div. 2006). Before Judges Coburn, Collester and Lisa. By Judge Collester, J.A.D.

Issue 1: Whether the trial court properly terminated the paternal rights of the biological mother?

Holding 1: Yes. The Appellate Division affirmed the trial court's decision based upon the following: the infant child suffered numerous injuries while in the mother's care; the mother refused to cooperate with DYFS; the mother failed to give a reasonable explanation for the injuries; the mother's attempt to blame the injuries on the babysitter was clearly contradicted by the record indicating that the child was not under the babysitter's care at the time of the injuries; the overwhelming proof that the mother is unable or unwilling to eliminate the harm to the child; her inability to provide a safe and stable home; and the fact that no significant bond existed between the mother and the child.

Issue 2: Whether the trial court properly terminated the paternal rights of the biological father?

Holding 2: No. Relying on Division of Youth and Family Services v. M.M. for the premise that one parent cannot be held responsible for the shortcomings of the other, the Appellate Division reversed and remanded in holding that DYFS failed to establish that the father's parental rights should be terminated under N.J.S.A. 30:4C-15(a)(1),(2) and (4).

Division of Youth and Family Services v. S.A. and A.C., 388 N.J. Super. 324 (Ch. Div. 2005). By Judge Covie-Leese, J.S.C.

Issue 1: Does the trial court have to make findings of abuse or neglect against the biological parent before conducting a permanency hearing?

Holding 1: No. The trial court held that no statute, other legal authority or public policy supported the position that a permanency hearing cannot be held prior to a finding of abuse and neglect against the biological parent.

Issue 2: Was the placement of the child with the biological father in the child's best interests?

Holding 2: No. While there is a presumption of custody in favor of the natural parent, the trial court determined that it was not in the child's best interests to be placed with the biological father based upon the following: the child had been in placement for twenty-one months with the maternal great aunt and uncle; the placement family had sufficient financial resources to support the child; the placement home provided a safe, healthy and stable home for the child; the child had developed a bond with the placement family and stated a desire to remain with them; the biological father is a repeat criminal offender that had served several terms of imprisonment; the biological father did not have the financial means to provide for the child, nor had he ever done so in the past; the biological father had little contact with the child in the past; and the permanency plan submitted by DYFS would not preclude the biological father from developing a relationship with the child.

Issue 3: Did DYFS make reasonable efforts to finalize a permanency plan?

Holding 3: Yes. The trial court rejected the biological father's argument that DYFS did not make reasonable efforts due to its failure to pay for the father's transportation from Georgia to New Jersey for purposes of visitation. The trial court noted the absence of any recognized legal right for state-subsidized travel to effectuate visitation for an out-of-state parent.

In the Matter of A.S., 388 N.J. Super. 521 (App. Div. 2006) Before Judges Kestin, Graves and Liholtz. By Judge Liholtz, J.A.D.

Issue: Can a natural parent surrender their parental rights to an approved agency after they have already transferred custody to another party, from whose care DYFS removed the child and assumed custody on an emergent basis?

Holding: No. The desire of the natural mother to have her child adopted (and concurrent statement of intent to the approved intervening agency) was invalid because she had already relinquished custody to a third party from whose care DYFS was required to execute an emergency removal. DYFS properly effectuated an emergency removal and assumed custody of the child pursuant to its statutory authority. It would thus be inconsistent with the *parens patriae* power of the State to allow the adoption agency to intervene in the placement of the child in furtherance of her best interests. The adoption agency was without standing because the basis of its claim was a letter of intent from the natural mother who sought to transfer an interest which had been awarded to DYFS.

EQUITABLE DISTRIBUTION

Sagi v. Sagi, 386 N.J. Super. 517 (App. Div. 2006). Before Judges Coburn, Collester and Lisa. By Judge Collester, J.A.D.

Issue 1: Can a dependent spouse obtain an *ex parte* order via an Order to Show Cause, that directs an innocent third party creditor who has negotiated a foreclosure settlement with her debtor husband, to forward to her all payments made by husband to satisfy the judgment owed to her pursuant to a separate divorce action in which the creditor had intervened?

Holding 1: No. R. 4:52-1(a) requires a showing of immediate and irreparable harm to the moving party as a requisite to securing *ex parte* emergent relief. Under the circumstances, the wife would have realized a benefit had her ex-husband made the negotiated settlement payments to the mortgage company instead of using the funds to satisfy his support obligation to her, because the result would have been to clear the title to the marital home in which she lived. Thus, notice should have been given to the mortgage company as an intervening third party to the divorce action because the wife had not demonstrated the necessary showing of harm to warrant granting her *ex parte* application.

Issue 2: Does a judgment for support arrears take priority over a third party creditor's judgment, which was prior in time?

Holding 2: No. Trial judge's decision improperly subordinated the mortgage company's claim to the disputed funds from the husband. The foreclosure settlement negotiated was the result of a previously recorded final judgment by the mortgage company against the husband alone. The effect of the trial judge's ruling consequently barred the mortgage company from enforcement of a judgment which was entered thirteen years before the

parties' divorce action. The Court reasoned that the basic laws governing mortgage law and lien priority were offended by allowing an *ex parte* restraint that elevated the wife's status and her ability to collect.

In re Hill, 342 B.R. 183 (Bankr. N.J. 2006)

Issue: May a Chapter 7 Trustee in Bankruptcy seek to avoid, as fraudulent, transfers that the debtor/spouse made to her ex-husband pursuant to their Property Settlement Agreement?

Holding: Yes. A debtor/spouse may not give his/her spouse an unusually generous financial settlement in divorce, which frustrates creditors. Section 548 of the Bankruptcy Code provides that a transfer is deemed fraudulent if it is executed with the intent to "hinder, delay, and/or defraud the creditors" of the transferee. The Bankruptcy Court found that wife attempted such a transfer in her divorce action when she entered into a Property Settlement Agreement that waived her right to the equitable distribution of substantial marital assets and gave her ex-husband an unusually generous financial settlement, well beyond what he would have likely received had the case been tried.

The court found several "badges of fraud" present in the parties' Property Settlement Agreement in its analysis of the Fraudulent Conveyance statute using a preponderance of the evidence standard of proof. Specifically, the court found: the provision entitling the parties' daughters to a share of the proceeds from the future share of the marital home was a transfer to an "insider"; the equitable distribution of the marital assets constituted an attempt to conceal the transfer of assets from the creditor of the wife, evidenced by two provisions whereby the husband agreed not to communicate with the creditor; the intent of the wife to hinder the ability of the creditor to collect on its debt was denoted by the timing of the transfer as it relates to her being sued; the equitable

distribution was unequal in nature and that “the value of the consideration received by the debtor [was] not reasonably equivalent to the value of the asset transferred” (whereby the wife waived her claim to investment properties acquired during the marriage, all interest in the marital home, as well as a reduced interest in the husband’s government pension); the transfer of the wife’s interest to assets occurred shortly after a substantial debt was incurred in that she had been ordered by an arbitrator to pay in excess of \$100,000 to the creditor mortgage company.

Pursuant to 11 U.S.C. § 550 (a)(1), the Trustee was entitled to recover the value of the property fraudulently transferred. The Bankruptcy Court declined to undo the Property Settlement Agreement and equitable distribution of assets because of logistical issues dealing with the titles to certain properties, their sale and anticipated future legal costs, and instead preferred to enter a money judgment against the wife.

PALIMONY

In the Matter of Estate of Sasson, 387 N.J. Super. 459 (App. Div. 2006) Before Judges Collester, Lisa, and S.L. Reisner. By Judge Collester, J.A.D.

Issue: Whether a prima facie case for palimony can be established where the parties only lived together for two and one-half years, and the extent to which detrimental reliance of a promise to support can be found within that time.

Holding: The trial judge correctly considered the brief two and one-half year period that the parties lived together before the unexpected death of the decedent in granting summary judgment to his estate. More importantly, the circumstances did not sustain a finding of detrimental reliance on a promise to support. Decedent's paramour voluntarily left her associate position in a law firm to spend more time with him. In addition to the brief period of cohabitation and lack of inducement, the facts of the case distinguish it from other palimony suits where the claimants were of an advanced age and left destitute.

Levine v. Konvitz, 383 N.J. Super. 1 (App. Div. 2006) Before Judges Wefing, Wecker and Fuentes. By Judge Fuentes, J.A.D.

Issue: Whether cohabitation is a requisite element for a palimony claim where the parties' extramarital romantic relationship exceeded seventy years, and otherwise satisfied the necessary showings to sustain the claim?

Holding: Yes. Cohabitation is "an implied and indispensable" element of any cause of action seeking palimony. While the "quality, nature, and extent of the consideration" necessary to sustain a palimony action may vary depending on the circumstances, the rendering of such consideration must occur in a setting of cohabitation. The Appellate

Division commented that the absence of such a bright-line requirement would result in the concept of ‘marital-type’ relationships being vulnerable to duplicitous manipulation.

McDonald v. Estate of Mavety, 383 N.J. Super. 347 (App. Div. 2006) Before Judges Coburn, Lisa and S.L. Reisner. By Judge Lisa, J.A.D.

Issue 1: Whether the trial court applied an overly narrow view of the standards governing palimony, and erred by not considering the issue of cohabitation within the context of the parties’ lifestyle of having multiple residences?

Holding 2: No. The trial court properly considered the evidence in making its factual findings and credibility determinations, and did so in light of the specific lifestyle which defined the parties’ relationship. “A palimony cause of action continues to require living together in a household or households under the same roof or roofs on a regular basis as dictated by the circumstances.” The Appellate Division acknowledged the possibility of a successful palimony action where a wealthy couple simultaneously owned and resided in multiple residences while dedicating themselves to one another and their relationship as if they were a married couple. Here, although the parties often lived together on weekends and traveled together, each still maintained their own residences.

Issue 2: Whether the clear and convincing standard of proof pursuant to the “Dead Man’s Statute” is properly applicable to palimony claims?

Holding 2: Yes. The contractual nature of palimony requires the clear and convincing standard of proof pursuant to N.J.S.A. 2A:81-2 (“Dead Man’s Statute”) which applies to situations where a party’s claim is founded on the statement or promise of a deceased party. Despite the fact that the headnote of the section in which the statute appears is titled “transactions with lunatic or decedent; proof required”, its applicability is not limited to commercial transactions. Headnotes are not the product of legislative action and cannot be relied on for alternative statutory interpretations.

MISCELLANEOUS

Lehr v. Afflito, 382 N.J. Super. 376 (App. Div. 2006). Before Judges Stern, Fall and Grall. By Judge Fall, J.A.D.

Issue: Is the testimony of a mediator appointed by the court admissible at a *Harrington* Hearing?

Holding: No. The trial judge erred in allowing the court appointed economic mediator to testify as to the existence of a binding agreement between the parties because there had not been an express waiver of confidentiality as protected by the consent requirement embodied in R:1:40-4.

There was insufficient evidence of an agreement reached between the parties to pierce the confidentiality privilege under statutory or case law. The record did not reveal a basis for allowing the mediator's testimony pursuant to N.J.S.A. 2A:23C-6 because the communications did not fall squarely into the following categories: evidence of a signed agreement (subsection one); public arbitration sessions that were required by law to be open to the public (subsection two); the result of a threat or fear of harm (subsection three); made with the intent to commit or further criminal activities (subsection four); offered as evidence of a claim filed against the mediator in the context of their services (subsection five); offered to support a claim of malpractice or professional misconduct for the actions of a party during the mediation sessions (subsection six); or offered as evidence of child abuse in which DYFS is a party to the action (subsection seven). Nor did the evidence support piercing mediator confidentiality under the balancing test of State v. Williams, 184 N.J. 432, which considers the policy considerations of confidentiality against the need for a mediator's testimony.

Roberts v. Roberts, 388 N.J. Super. 442 (Ch. Div. 2006) By Judge Ostrer, J.S.C.

Issue: Is a parent required to access a custodial account maintained for the benefit of a minor child to defray his private high school tuition?

Holding: No. A parent acting as custodian over funds maintained for the benefit of their child is given broad discretion pursuant to the Uniform Gift to Minors Act (N.J.S.A. 46:38-13 to 41). Consequently, courts will defer to judgment of a parent acting as custodian of such accounts absent an abuse of discretion. The court applied the principal articulated in Cohen v. Cohen, 258 N.J. Super. 24, that a parent cannot properly access an account under the Uniform Gift to Minors Act to fulfill a legal obligation which they are otherwise obligated to provide. The court further examined the nature of private school tuition and concluded that while it may be considered an extraordinary expense which may be covered under a child support obligation (pursuant to the Child Support Guidelines Appendix IX-A, P 9(d) to R. 5:6A), such an expense is not automatically characterized as an obligation which parents are legally bound to provide. As a consequence, the court concluded that custodial parent, who was also the custodian of the account, was within his discretion to refuse to access funds to pay for the private school tuition and his authority would not be overturned. The court noted that N.J.S.A. 46:38A-33 allows it to use custodial or trust property of a child, but should not do so unless the custodian has abused his/her discretion.

All Modes Transport, Inc. v. Hecksteden, et al., Docket No. A-0361-05T5 (App. Div. 2006) Before Judges Skillman, Lisa and Grall. By Judge Skillman.

Issue: Was it coercive for the trial court to interrupt the testimony of a party to a contract dispute to advise them of the judicial duty to report intentional misrepresentation of income?

Holding: Yes. It was coercive for the trial court to issue a Sheridan warning to defendant's counsel despite its intent. "[T]he court apparently conceived that it had an obligation to warn [defendant] of the possible penal consequences of his anticipated testimony. However, even if the court's purpose in issuing this warning was to protect [defendant] from self-incrimination, the determination whether the settlement was coerced does not turn on the court's purpose in issuing the warning but rather its effect on defendant's decision to enter into the settlement." The direction of the trial court to reconsider a settlement on the basis of its duty to disclose evidence of wrongdoing "exerted substantial pressure" on defendant, who was able to escape enforcement of his settlement and have the matter remanded for further consideration. The Court in dicta (See Footnote #2) declined to adjudicate under what circumstances a trial court should report criminal activity to a prosecutor, but rather limited its holding to state that the testimony of a party should not be interrupted to advise them of potential liability if a settlement is not reached.

Shulas v. Estabrook v. B.B.J., Inc., 385 N.J. Super. 91 (App. Div. 2006). Before Judges Fall, C.S. Fisher and Miniman. By Judge Fisher, J.A.D.

Issue: Can a party dismiss their complaint to avoid the consequences of a discovery end date with the intent to file a later action?

Holding: No. A party is not entitled to circumvent the rules governing discovery by dismissing their complaint, only to re-file the action at a later date. The Appellate Division reversed the holding of the trial court in an action brought against homeowners for injuries suffered by worker performing renovations, citing the intent of the Rules of Court and Best Practices to provide "efficiency and expedition of the litigation practice". The court reasoned that the proper recourse for a party who requires an extension to

discovery deadlines should be to first make the proper application before burdening their adversary and court system with re-litigating the matter. “Plaintiff’s obvious intent was to avoid the consequences of the discovery end date, defendant’s summary judgment motion, and the impending trial date, and to relitigate their disputes in a new action.” The court further observed that the circumstances did not warrant a dismissal under R. 4:37-1(b) because the discretion of the court was justified in protecting the rights of the defendants. “Whether to dismiss with or without prejudice, whether to impose terms, and the crafting of terms that are fair and just in the circumstances, are all matters that lie within the sound discretion of the court.”

Kimm v. Blisset, LLC, et al., 388 N.J. Super. 14 (App. Div. 2006). Before Judges Kestin, Hoens and R.B. Coleman. By Judge Hoens, J.A.D.

Issue: May an arbitrator’s award be modified to include attorney fees after its issuance?

Holding: No. The trial court correctly concluded that an arbitrator lacks the authority to supplement his original award after it has been issued. The additional post-arbitration award granted to the attorney in the subject fee dispute hearing was vacated because the ability of the arbitrator to act ceased upon the issuance of his decision.

In the Matter of Kenneth Van Orden, Jr., 383 N.J. Super. 410 (App. Div. 2006). Before Judges Stern, Fall and Levy. By Judge Levy (temporarily assigned).

Issue: Does the Public Employee Retirement System (PERS) have the right to bar a pensioner from changing his beneficiary designation if he is out of time where the family court previously ordered that he name his wife the survivor beneficiary?

Holding: No. Since the wife relinquished any claim against her husband's pension in the divorce settlement, equity dictates that he be allowed to change the beneficiary, even if he is out of time.

Pellettieri, et al. v. Protopapas, 383 N.J. Super. 142 (App. Div. 2006). Before Judges Cuff, Lintner and Gilroy. By Judge Lintner, J.A.D.

Issue: At what point in time does a law firm's action for unpaid legal fees against a client accrue in determining the application of the six year statute of limitations?

Holding: A cause of action for unpaid legal fees does not accrue until the termination of the attorney-client relationship. The partial summary judgment of the trial court limiting the plaintiff-law firm's recovery was reversed because it was not in a position to make a proper application to recover unpaid fees until after its representation of defendant had ceased. Thus, the statute of limitation was not a bar to seeking payment of the full amount due for services rendered in matrimonial and bankruptcy proceedings.

Deo v. Morello, 388 N.J. Super. 226 (Law Div. 2006). By Judge Simonelli, J.S.C.

Issue: If a prenuptial agreement provides for a wife's waiver of all ERISA retirement benefits of her spouse, can the wife make a claim to the benefits even if the deceased party's children were named as beneficiaries?

Holding: Yes. All the plans (profit sharing and savings) were ERISA plans and subject to mandatory requirements that the benefits be automatically paid to the surviving spouse unless the spouse: (a) executes a written consent to the designation of another beneficiary; (b) the consent includes an acknowledgment of such a waiver; as well as (c) designation of a beneficiary with the signature of a notary public or plan representative as a witness. Here, there was non-compliance with these requirements.

ENACTED LEGISLATION

Department of Children & Families: On July 11, 2006, Governor Corzine signed legislation that established the New Jersey Department of Children and Families (“DCF”). The DCF “is staffed by over 6,600 state child welfare employees who were already working in divisions within the Department of Human Services (DHS) focused on child protection, welfare, education and permanency, child behavioral health and abuse prevention.”¹

Creation of Civil Unions N.J.S.A. 37:1-28, et seq., effective Feb. 19, 2007: Bill and Joint Resolutions signed by Governor Corzine, awaiting final format. In light of the New Jersey State Supreme Court's ruling in Lewis v. Harris, this bill provides the gay and lesbian community within New Jersey with the required statutory rights of marriage through the form of Civil Unions. Under this legislation, a same-sex couple over the age of 18 can enter into a Civil Union that will provide them with "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage."

¹ Taken from the New Jersey Department of Children and Families Website found at <http://www.state.nj.us/dcf/about/>

PENDING LEGISLATION

S-1467 Irreconcilable Difference Bill: Irreconcilable differences would constitute a new cause of action for divorce under N.J.S.A. 2A:34-2 where there was a breakdown of the marriage for a period of six months, it appears that the marriage should be dissolved and that there is no reasonable prospect of reconciliation. Governor Corzine received the bill on December 11, 2006, giving him 45 days, or January 25, 2007 to sign it and make it law.

S-1087 Open Adoption Bill: S-1087 would permit adopted persons 18 and older access to their original birth certificates and to allow birthparents to file "contact preferences" with the state registrar. The bill was passed by the Senate and referred to the Assembly Human Services Committee on December 4, 2006.

NEW JERSEY RULES OF COURT²

R. 1:5-7 (Default) If a judgment for default is sought, plaintiff is required to either provide an affidavit of non-military service based upon personal knowledge, or file as part of the proofs a statement from the Department of Defense that the defendant is not in military service. If a plaintiff cannot ascertain if the defendant is in military service, courts may now enter a judgment of default where plaintiff posts a bond to indemnify the defendant pending the expiration of the time for appeal and setting aside the judgment.

R. 1:20A-5 (Fee Arbitration Confidentiality) This **proposed amendment** to R. 1:20A-5 would eliminate the confidentiality of the fee arbitration process that is currently in place. If implemented, this amendment would have a great impact on attorneys practicing in Family Law.

R. 4:10-2(a) (Discovery) The September 2006 amendment to the rule specifically added electronically stored information such as emails, database files and MP3 files to within the scope of discovery.

R. 4:10-3 (Protective Orders) The rule was amended to permit the entry of a protective order based upon the stipulation of the parties. Prior to the amendment, a court could only enter a protective order based upon a motion filed by one of the parties.

² The Wilentz, Goldman & Spitzer Matrimonial Department would like to thank John P. Paone, Jr., of Paone & Zaleski, as his article “New Rule Changes Relevant to the Practice of Family Law” which served as a guide in organizing this section of the Digest.

R. 4:43-2(b) (Default-Not Applicable to Family Part) The rule requires that a party must file a motion pursuant to R. 1:6 to obtain a judgment by default. By order of the New Jersey Supreme Court, retroactive to September 1, 2006, R. 4:43-2(b) does not apply to matters in the Family Part.

R. 5:4-2(h) (Complaint) Paragraph (h) was added to require a certification by each party in their first pleading stating that the litigant was informed about the various forms of Complementary Dispute Resolution including mediation, arbitration and (“CDR”) provided with appropriate information for each. Litigants are now advised of and encouraged to utilize CDR alternatives during the early stages of divorce litigation. See forms attached.

R. 5:5-2(f) (Case Information Statement (“CIS”)) This paragraph was added to the rule to provide for determination of the marital standard of living. The rule provides that in any matter in which an agreement or settlement contains an award of alimony, the parties must do one of the following: (1) declare that the marital standard of living is satisfied by the parties’ agreement of settlement; (2) define the marital standard of living; (3) preserve copies of their respective filed CIS; or (4) any party who has not filed a CIS shall prepare Part D (“Monthly Expenses”) of the CIS form serving a copy thereof on the other party and preserving that completed Part D until such time as alimony is terminated.

R. 5:5-6 (post-ESP settlement program) A new rule that requires participation in a post-Early Settlement Program (“ESP”) where the economic aspects of divorce are present. If the parties are unable to settle the economic issues at the ESP, an order for mediation or

another form of Complementary Dispute Resolution (“CDR”) shall be entered. Litigants may select a mediator from the statewide-approved list of mediators provided by the court, and will not be charged for the first two hours of mediation. In the alternative, litigants may select a mediator on their own who may charge a fee for services and is not required to provide two fee hours of service.

R. 5:5-9 New rule provides that where the parties enter a settlement and a final judgment of divorce on the record, a written final judgment of divorce shall be entered on that date. Parties then have ten days to submit a proposed amended form of final judgment of divorce setting forth the terms of the settlement or specifically incorporating a written property settlement agreement. The court may in its discretion relax the ten-day period.

R. 5:7-4(c) (establishing arrearages) The new rule provides that in all proceedings in the Family Part in which the payment of support is ordered, the judge, child support hearing officer, attorneys, or court staff, shall calculate the child support obligation, payment on arrears, and total arrears owed so that these amounts will be known to the parties before they leave court. In establishing arrears, the court shall make findings on (1) any direct payments made by the obligor to the obligee between the effective date of the order and the date of the hearing, based upon a showing of credible proof, and (2) the amount and frequency of regular payments to be made toward the arrears.

R. 5:19-1(a)(1) (venue) Amended to simplify and clarify venue and the transfer of venue in juvenile delinquency actions. Paragraph (a)(1) provides that when the juvenile charged is domiciled in a county other than the county of the alleged occurrence, venue

shall be laid in the county of the juvenile's domicile unless the court finds good cause for venue to be retained in the county where the incident allegedly occurred.

Appendix IX-F Prior to this amendment, the Child Support Guidelines were calculated up to a combined weekly net income of \$2,900.00. The amended Child Support Guidelines calculate awards up to a combined weekly net income of \$4,420.00.

Appendix IX-A, Note 18 The Child Support Guidelines generally do not apply to children over the age of 18 who are no longer in school. This amendment provides the court with the discretion to apply the Child Support Guidelines to support for a student over 18 years of age who commutes to college.

Appendix A (Form Certifications and Descriptive Literature to Comply with R. 5:4-2(h)).