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**Summary of 2011 New Jersey Family Law Published Opinions,
Court Rules and Statutes**

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ALIMONY

Dudas v. Dudas, 423 N.J. Super. 69 (Ch. Div. 2011). Opinion by L.R. Jones.

Issue: Should the payor spouse's substantial increase in income between the filing of the complaint for divorce and trial be considered by the Court in determining the payor's alimony obligation?

Holding: Yes. The trial court held that the payor's post-complaint increase in his income should be considered in determining the appropriate alimony award because *N.J.S.A. 2A:34-23* directs that the court take into consideration, among other factors, the following: the actual needs and ability of a party to pay; the earning capacities of the parties; and any other factor which the court may deem relevant. The trial court rejected the payor's contention that the "standard living established during the marriage" is dispositive on the issue of alimony to the exclusion of all other factors under the alimony statute.

The trial court, in discussing the factor under the alimony statute that permits the court to consider "any other factors which the court may deem relevant", cited the financial principle of "marginal cost estimation" and the legal principle of "momentum of the marriage". The trial court defined "marginal cost estimation" as the economic differences between a couple living together in one single, intact household versus living separately in two distinct households. The court noted that "marginal cost estimation" is included under the Child Support Guidelines and is equally relevant and pertinent in an alimony analysis. The trial court utilized this financial principle to support its finding that the payor's substantial increase in post-complaint earnings resulted in additional available funds to allocate in attempting to maintain the "status quo enjoyed during the marriage."

The legal principle of "momentum of the marriage" was previously created and discussed by Cargulia v. Cargulia, 309 N.J. Super. 649 (Ch. Div. 1996), and Guglielmo v. Guglielmo, 253

N.J. Super. 531 (App. Div. 1992). This principle recognizes that a party's increase in earnings in many cases represents the fruits of the parties' collective efforts and sacrifices throughout a marriage. The trial court provided examples of continued education, experience and perseverance throughout the course of the marriage that may result in the post-complaint increase in earnings. In the instant matter, the payor developed his education and work experience throughout the parties' 26 year marriage while his spouse sacrificed her career in psychology to raise a family and support the payor's advancement. Accordingly, the court found by a preponderance of the evidence that the payor's increased earnings was directly attributable to the hard work and combined labors of both parties during the long term marriage.

BUSINESS VALUATION

Estate of Cohen v. Booth Computers, 421 N.J. Super. 134 (App. Div. 2011). Before Judges Carchman, Graves and St. John. Opinion by Carchman, P.J.A.D.

Issue: In a non-matrimonial matter, may a family partnership agreement that provides for a buyout based on net book value be enforced where the disparity between book value and market value is significant?

Holding: Yes. The formula utilized in calculating net book value was appropriate, and therefore the buyout was enforceable. The disparity between the market value and book value does not render the agreement unconscionable under the facts because the terms of the contract were clear. The partnership agreement provided a formula in the event of death or in the event of the divorce or separation of any partner who is married. The full value of the partnership was calculated based on the net book value as shown on the most recent Partnership financial statement at the end of the month ending with or immediately preceding the date of valuation plus \$50,000. Although using the formula in the contract provided the estate with a buyout of \$178,000 rather than \$11,526,162 based on fair market value, the disparity between the prices

was not sufficient to shock the judicial conscience particularly in light of the family's use of the formula to buyout a predeceased sibling. The court distinguished between the circumstances here and the circumstances in Addesa v. Addesa, 392 N.J. Super. 58, 70-71 (App. Div. 2007), where the husband and wife agreed to distribute a business 50-50 and the wife received \$642,920 for her interest in the business, which was sold not long after the divorce for \$16,000,000. The court explained that Addesa involved procedural unconscionability in the context of equitable distribution as opposed to substantive unconscionability in the context of a family business relationship, which was being asserted here.

CHILD SUPPORT

Jacobson v. U.S., 422 N.J. Super. 561 (App. Div. 2011). Before Judges Parillo, Grall, and Skillman. Opinion by Parillo.

Issue: Whether the United States enjoys sovereign immunity from liability for damages arising from the Social Security Administration's (SSA) failure to withhold disability benefit payments pursuant to a proper order for garnishment of child support?

Holding: Yes. The Law Division entered Summary Judgment in plaintiff's favor against the United States for compensatory damages, pre-judgment interest and counsel fees based upon its failure to garnish a \$58,947.60 SSA disability payment that was awarded to the child's father who owed approximately \$79,546.00 in child support arrears. The Appellate Division reversed the Summary Judgment award and remanded for the trial court to dismiss plaintiff's complaint against the government with prejudice. The panel rejected plaintiff's argument that the government's enactment of the Child Support Enforcement Act (42 U.S.C.A. § 659) should result in a waiver of its sovereign immunity against a claim for money damages.

DOMESTIC VIOLENCE

C.M.F. v. R.G.F., 418 N.J. Super. 396 (App. Div. 2011). Before Judges Parrillo, Espinosa, and Skillman. Opinion by Espinosa.

Issue: Does defendant's actions of using "offensively coarse" language (pig, whore, slut, f__ing bitch) directed toward the plaintiff in a public setting in front of their children, and parents of their children's friends, qualify as harassment per New Jersey Law?

Holding: Yes. The court ruled that this conduct falls squarely within the statutory limits of harassment because (1) the defendant communicated with the plaintiff; (2) the defendant's purpose of communicating was to harass the plaintiff; and (3) the communication was made in a manner that was likely to cause annoyance or alarm to its intended recipient. While the defendant argues that his actions lack the second element, because he was angered by a mistaken municipal court order, the court ruled that the nature, manner of delivery, and the audience of the verbal attack "strongly suggest a purpose to harass."

J.D. v. M.D.F., 207 N.J. 458 (2011). Opinion by Justice Hoens.

Issue 1: In a domestic violence proceeding, is it a violation of due process to permit prior acts of violence that were not listed in the complaint?

Holding 1: Yes. Additional acts are deemed an amendment to a complaint. The defendant is entitled to due process that requires notice and an adequate opportunity to prepare and respond. The rights of both parties can be protected by granting an adjournment and by continuing the temporary restraining order. A court should liberally grant an adjournment if the "heart of the complaint" has been expanded.

Issue 2. Was defendant deprived of due process due to the court's refusal to allow him to call plaintiff's boyfriend as a witness for the purpose of undermining plaintiff's credibility?

Holding 2. Yes. The pressure of “heavy calendars and volatile proceedings” should not be paramount and not interfere with the rights of the parties to a full and fair hearing.

Issue 3. Is a “not guilty” finding of harassment in the municipal court relevant to the domestic violence proceeding?

Holding 3. No. The burden of proof in the municipal proceeding is beyond a reasonable doubt; the burden in the Domestic Violence proceeding is preponderance of the evidence.

L.M.F. v. J.A.F., 421 N.J. Super. 523 (App. Div. 2011). Before Judges Fuentes, Ashrafi and Nugent. Opinion by Fuentes.

Issue 1: Under the Domestic Violence Statute was it harassment if a defendant sent 18 text messages about his daughter’s SAT scores and plaintiff only responded once?

Holding 1: No. The purpose of defendant’s messages was not to harass plaintiff. Although defendant’s behavior may have been dysfunctional, if plaintiff provided the information to defendant, the messages would have stopped.

Issue 2: Was a prior act of telling his wife that “it was his house and he could do what he wanted” harassing conduct?

Holding 2: No. It was an isolated incident reflecting an expression of anger during a stressful period in defendant’s life. The line between harassment and marital contretemps is a challenging task. There was no need to enter a restraining order to prevent further abuse under Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006).

Issue 3: Should a court ask a witness questions to elicit material facts?

Holding 3: Yes and No. A trial judge must exercise specific care to pose questions in a manner to avoid being perceived as an advocate.

S.Z. v. M.C., 417 N.J. Super. 622 (App. Div. 2011). Before Judges Baxter, Koblitz and Newman.
Opinion by Koblitz.

Issue: Was the defendant encompassed within the meaning of “household member” under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-19(d), where he lived in the same household for a period of seven months with the plaintiff’s family?

Holding: Yes. Although the adult male defendant was not in a traditional familial, romantic or sexual relationship with the adult male plaintiff, the defendant was a household member under the Prevention of Domestic Violence Act. Relying on Bryant v. Burnett, 264 N.J. Super. 222, 224-26 (App. Div.), certif. denied, 134 N.J. 478 (1993), the court held that it had proper jurisdiction under the Act, and the matter was remanded to be tried on the merits.

E.M.B. v. R.F.B., 419 N.J. Super. 177 (App. Div. 2011). Before Judges Skillman, Parrillo, and Espinosa. Opinion by Espinosa, J.S.C.

Issue 1: Was it harassment under the under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-19 for defendant to call his mother a “senile old bitch”?

Holding 1: No. Under N.J.S.A. 2C:25-19, the court does not assess the effect of the speech on the victim, who was clearly upset, but rather the intent of the actor. A mere expression of an opinion utilizing offensive language is not sufficient to prove harassment.

Issue 2: Does a theft of personal property by defendant qualify as harassment?

Holding 2: No. In order to qualify as harassment, the act needs to be committed with the intent to alarm or seriously annoy such other person. The mere acts alone do not warrant a violation of the harassment statute. Moreover, theft by itself, does not qualify as a predicate act enumerated in N.J.S.A. 2C:25-19.

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.

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.

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.

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, \$800,000 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.

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.

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?¹

¹ 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.

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.

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.

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.

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.

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.

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).

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.

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.

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 with 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.