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2018 Family Law Case Digest

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Summary of 2018 New Jersey Family Law Published Opinions, Court Rules and Statutes

Click on the links below to jump to the relevant content and cases.

- ALIMONY
- ARBITRATION
- ATTORNEY LIEN
- CHILD SUPPORT
- CONSTITUTIONAL ISSUES
- CUSTODY
- DIVISION OF CHILD PROTECTION AND PERMANENCY
- DOMESTIC VIOLENCE
- EQUITABLE DISTRIBUTION
- EVIDENCE
- JURISDICTION
- JUVENILE SENTENCING
- MEGAN'S LAW
- PARTITION
- RETROACTIVE APPLICATION OF SEXUAL ASSAULT SURVIVOR PREVENTION ACT (SASPA)
- STATUTORY INTERPRETATION
- AMENDED OR NEW COURT RULES
- GESTATIONAL CARRIER STATUTE

ALIMONY

Bermeo v. Bermeo, 2018 WL 6070768 (App. Div. 2018). Opinion by Judge Firko.

Issue: Whether the trial court erred in denying a motion for increased alimony based on reasonable expectations that the husband would receive additional income in the future?

Facts: the MSA required husband to pay $4,000 per month in alimony based on a gross imputed income of $160,000. Prior to the MSA, he was earning an average of $467,100. At the time of the MSA, husband started a new job earning $120,000 per year. The MSA provided for supplemental alimony based on a percentage of husband's enhanced income, up to $550,000. Wife claims husband is under-employed and she had expectations of receiving supplemental alimony. She further asserts she cannot maintain the middle-class-life-style she previously maintained. Husband asserts that the parties agreed in the MSA that neither could maintain their prior lifestyle and that he agreed to impute $160,000 per year when in fact, he only earned $120,000 per year.

Holding: The trial court was correct in not imputing income based on his earning history when the history was considered in the MSA. The wife failed to show changed circumstances. There was no proof that

husband was underemployed, that husband concealed his income, or that an employment evaluation was necessary. An employment evaluation was not necessary because the parties waived the determination of lifestyle in the MSA. Back to the top.

ARBITRATION

Curran v. Curran, 453 N.J. Super. 315 (App. Div. 2018). Opinion by Judge Currier.

Issue: Whether the court can properly sever an unenforceable clause in the parties' arbitration agreement while still enforcing the remainder of the agreement?

Holding: Yes, as long as the unenforceable clause does not affect the primary purpose of the agreement, the court can sever the clause while still enforcing the remainder of the arbitration agreement and award. The parties entered into an arbitration agreement to resolve issues relating to their divorce. The arbitration agreement stated "[t]he parties reserve their rights to appeal the arbitrator's award to the appellate division as if the matter was determined by the trial court." The husband filed a motion in the Law Division to modify the arbitration award based upon the arbitrator's "mistakes of law." The trial court determined no basis existed to vacate the award under any of the grounds listed in N.J.S.A. 2A: 23B-23. Additionally, the trial court ruled that the right to appeal the award in the Appellate Division was unenforceable because the parties cannot create subject matter jurisdiction in the Appellate Division. The trial judge confirmed the arbitration award and this appeal followed. "The only recourse available to the parties is the review by the trial court provided under the statue." However, the Appellate Division found that striking the unenforceable provision did not render the rest of the arbitration agreement unenforceable because "it did not defeat the central purpose of the contract." The primary purpose of the arbitration agreement was to resolve the parties' issues related to their divorce. The Appellate Division found that, even without this provision, the parties could still accomplish the primary purpose of the agreement, making the remainder of the agreement valid and enforceable. In fact, not enforcing the remainder of the agreement would defeat the central purpose of the agreement, frustrating the parties' intent. Back to the top.

ATTORNEY LIEN

Giarusso v. Giarusso, 455 N.J. Super. 42 (App. Div. 2018). Opinion by Judge Geiger.

Issue 1: Does the Attorney's Lien Act, N.J.S.A. 2A:13-5 ("the Act"), apply to legal services performed entirely post-judgment?

Holding 1: No, the Attorney's Lien Act does not apply to services rendered entirely post-judgment. The Act provides that upon a verdict, report, decision, award, judgment or final order in his client's favor for a cause of action, claim or counterclaim or cross-claim, an attorney shall have a lien for compensation. N.J.S.A. 2A:13-5. After the firm's post-judgment representation ended, they filed a post-judgment application in the divorce proceeding in an attempt to (1) determine and enforce an attorney's charging lien against plaintiff in the amount of $99,356.10 plus interest pursuant to N.J.S.A. 2A:13-5; and (2) enter judgment against plaintiff in the amount of the fee award. After initially imposing an interim charging lien, the trial court conducted a plenary hearing where they discharged the interim lien, denied entry of a final charging lien, and granted a judgment in favor of the law firm in the amount of $50,000. Because the firm did not represent the client in the underlying divorce matters, but instead only represented plaintiff in the post-judgment proceedings, no statutory right to a lien exists. As such, the trial court did not err in determining the Act does not apply to legal services performed entirely post-judgment.

Issue 2: Whether the trial court erred in determining the reasonable amount of attorney's fees to be $50,000 since the court did not include an explanation of its decision?

Holding 2: Yes. Since petitioner failed to submit proper evidence of the reasonableness of the hours charged, the trial court did not err in their determination of reasonable fees. However, because the trial judge did not state his reasons for his findings, the matter was remanded. "Petitioner bears the burden of proving the reasonableness of the fees by a preponderance of the evidence in accordance with RPC 1.5(a)." When determining the reasonableness of attorney's fees, the court should look to the complete record presented at the plenary hearing to determine "the time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal service properly;" "the amount involved and the results obtained;" and "whether the fee is fixed or contingent." R.P.C. 1.5(a)(1), (4), and (8); see also Levine v. Levine, 381 N.J. Super. 1, 12-13 (App. Div. 2005). Additionally, "meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Rule 1:7-4(a); Strahan v. Strahan, 402 N.J. Super. 298, 310 (App. Div. 2008). Petitioner provided a detailed summary of the hours expended, but failed to include an explanation of what each attorney worked on during the hours billed. Since the record provided insufficient information, the trial court could not determine the reasonableness of the time spent. However, this also caused the trial judge to omit the reasons for finding the reasonable fees as half the price of the firm's calculation, violating Rule 1:7-4(a). As such, the case should be remanded in an attempt to cure the Rule 1:7-4(a) violation. The Court noted that an award of fees is rarely disturbed unless there is a clear abuse of discretion.

Issue 3: Whether petitioner must commence a separate collection action in order to obtain a judgment against his or her client for unpaid attorney's fees?

Holding 3: No. An attorney can obtain a judgment for fees without filing a separate collection action. Under the holding in Levine v. Levine, 381 N.J. Super. 1, 9 (App. Div. 2005), "a petition for attorney's fees may be filed either before or after entry of judgment in the underlying action." It is preferable for the judge who presided over the matter to address the fee dispute. As such, an attorney may obtain a judgment for reasonable attorney's fees without commencing a separate action. However, when this occurs, the petition should be tried as a separate and distinct plenary action in the Chancery Division. Back to the top.

CHILD SUPPORT

Garden State Anesthesia-Raritan Bay v. Ketty Sibilly, 456 N.J. Super. 410 (Law Div. July 27, 2017). Opinion by Judge Anklowitz.

Issue: Whether child support deposited in a savings account of the parent is exempt from levy, attachment and execution on a money judgment against a parent.

Holding: Yes, child support is exempt from levy. After the court entered judgment in favor of the creditor and against the parent, a Writ of Execution was issued on the account of the parent. The Court held that child support belongs to the child and cannot be levied against. Back to the top.

CONSTITUTIONAL ISSUES

State of New Jersey in the Interest of J.A., 233 N.J. 432 (2018). Opinion by Justice Fernandez-Vina.

Issue 1: Whether the officer's warrantless entry into juvenile's home was justified by exigent circumstances?

Holding 1: No, the officer's warrantless entry into juvenile's house was not justified by exigent circumstances. This case stems from a robbery at a bus stop in Willingboro where a man's cell phone was stolen. After the victim and a police officer tracked the phone to a nearby house using a phone tracking application, several officers arrived at the house. Upon arrival, one officer spotted the cell phone through a window. After no one answered the officers' knocks on the door, the officers entered the home through an unlocked window. At this time, the officers conducted a protective sweep of the house and found

defendant, J.A., in the home. Shortly after, defendant's mother and brother arrived home. After explaining their investigation, defendant's mother consented to the search, and defendant's brother voluntarily retrieved the stolen cell-phone. After J.A. was charged with second-degree robbery, he filed a motion to suppress the evidence, arguing that the officers' entry into the home was unconstitutional because the officers entered without a warrant and no circumstances could justify an exception to the warrant requirement. The trial court denied this motion, stating that it was defendant's brother, with no coercion from police, who retrieved the phone. The Appellate Division affirmed, finding the probable cause to search the house and that the exigent circumstances justified the warrantless entry. The Fourth Amendment of the United States Constitution and Article 1, Paragraph 7 of the New Jersey Constitution both safeguard the right to privacy and forbid warrantless entry into a home, except under certain circumstances. State v. Davila, 203 N.J. 97, 111-12 (2012). Therefore, a warrantless entry into the home is presumptively invalid unless the State can show one of the specific, delineated exceptions applies. Ibid. Evidence found pursuant to a warrantless search not justified by an exception to the warrant requirement is subject to suppression. See State v. Edmonds, 211 N.J. 117, 121-22 (2012). One recognized exception to the warrant requirement is the presence of exigent circumstances. State v. Johnson, 193 N.J. 528, 552 (2008). To invoke that exception, the State must show that the officers had probable cause and faced an objective exigency. State v. Bolte, 115 N.J. 579, 585 (1989). The "hot-pursuit" of a defendant may, in certain circumstances, constitute an exigent circumstance sufficient to support a warrantless home entry. Id. at 598. However, for this exception to apply, the officers must have probable cause and be "in immediate or continuous pursuit of the [suspect] from the scene of [the] crime." Ibid. Here, the State argues that the warrantless entry was lawful because it was justified by the exigency faced by the officers. The Supreme Court disagreed. The Court here found that although the officers had probable cause to search the home, the exigent circumstances could not justify the use of the "hot pursuit" doctrine. Since a cell phone differs from controlled substances or narcotics, in that it cannot easily be destroyed, the police officers had no emergent reason to not obtain a warrant. As such, the Court found that these circumstances could not override the requirement of obtaining a warrant. However, due to their reasoning in Issue 2, the Court affirmed the trial court's denial of defendant's motion to suppress.

Issue 2: Whether the search for the phone in question by the juvenile's brother constitutes independent non-state action, making the act sufficiently attenuated from police's illegal entry to allow admission of the evidence?

Holding 2: Yes, the search for the phone in question by the juvenile's brother constitutes independent non-state action, allowing the evidence found to be admitted. The exclusionary rule applies to the suppression of evidence only when such evidence is suitably linked to the police misconduct. State v. Bedessa, 185 N.J. 303, 311 (2005). As such, when evidence is acquired by constitutionally valid means after initial unconstitutional action by law enforcement, courts must consider whether they can apply the exclusionary rule. To do this, courts should determine whether the evidence was "the product of the 'exploitation' of [the unconstitutional police action] or of a 'means sufficiently distinguishable' from the constitutional violation such that the 'taint' of the violation was 'purged.'" State v. Shaw, 213 N.J. 398, 414 (2012) (quoting Hudson v. Michigan, 547 U.S. 586, 592 (2006)). Courts should admit this evidence "when the connection between the unconstitutional police action and the secured evidence becomes 'so attenuated as to dissipate the taint' from the unlawful conduct." Ibid. (quoting State v. Badessa, 185 N.J. 303, 311 (2005)). Here, the Supreme Court found that the brother's action qualified as sufficiently attenuated from the unlawful search, ruling that the lower court did not err in admitting the evidence. Since defendant's brother searched the house without solicitation or encouragement from police officers, the Court found that he acted independent of the officer's investigation. This independent action resulted in the finding of the phone, which the brother gave to officers without request. Since this action was sufficiently attenuated from the investigation to qualify as independent action, the Court affirmed the trial court's admission of the evidence. Back to the top.

CUSTODY

Dever v. Howell, 456 N.J. Super. 300 (App. Div. 2018). Opinion by Judge Fasciale.

Issue 1: Whether a parent can seek a best interests analysis after violating N.J.S.A. 9:2-2 by removing children from New Jersey.

Holding 1: No, without first attempting to obtain an order to remove the children, the court should not perform a best interests analysis. Plaintiff and defendant have joint custody of two children. Plaintiff became the parent of primary residence in 2013. After the parties entered into a consent order allowing relocation to Florida, plaintiff told defendant that he planned to move to South Carolina the next morning. Defendant adamantly objected, but plaintiff moved to South Carolina anyway. In September 2016, after the lower court allowed the children to temporarily remain in South Carolina, defendant filed her OTSC. Following trial, the court concluded that plaintiff violated N.J.S.A. 9:2-2 because the original order did not allow a relocation to South Carolina and entered an order requiring plaintiff to return the children to New Jersey. Plaintiff moved for reconsideration of the order, arguing, for the first time, that the judge should perform a best interests of the child analysis, and that the original order granting permission to relocate to Florida satisfied the requirement that a parent must obtain a court order before relocating pursuant to N.J.S.A. 9:2-2. The lower court rejected this argument, and denied reconsideration of the original order. Plaintiff then filed an appeal to this court, arguing that N.J.S.A. 9:2-2 does not require he first obtain an order permitting relocation before the actual move. N.J.S.A. 9:2-2 states that no minor child shall be removed out of this jurisdiction without consent of both parents, unless the court, upon cause shown, shall otherwise order. The statutory language gives no doubt as to the requirement to first obtain an order allowing the relocation.

Monzon v. De La Roca, 2018 WL 6424956 (3rd Cir. 2018). Opinion by Judge McKee, Third Circuit Court of Appeals.

Issue 1: Whether an application filed with Guatemalan authorities and the Department of State constitutes a "proceeding" under International Child Abduction Remedies Act (ICARA)?

Holding 1: No, an application filed with Guatemalan authorities and the Department of State does not constitute a "proceeding" under ICARA. Under the Hague Convention on Civil Aspects of International Child Abduction, one can seek the return of a child wrongfully removed from one signatory state to another. Where a court determines a parent wrongfully removed the child, the return of the child shall be "forthwith," as long as the proceedings have been commenced in "the judicial or administrative authority of the Contracting State where the child is" less than one year before the date of wrongful removal. In order to initiate judicial proceedings for the return of the child under the Convention, one may do so by "commencing a civil action by filing a petition for the relief sought *in any court which has jurisdiction of such action* and which is authorized to exercise its jurisdiction in the place where the child is located at the time petition is filed." 22 U.S.C. § 9003(b) (emphasis added). Where the petitioner fails to commence the proceedings before the one-year deadline, the petitioner is no longer entitled to the child's automatic return, and if the court finds respondent sufficiently proves a relevant affirmative defense, the court will not order return of the child. The parties were divorced in Guatemala, and the mother retained custody of H.C. After the divorce, the mother married a man who lived in New Jersey. At this time, the mother told the father she intended to move to New Jersey from Guatemala with H.C. The father refused to consent to the move. The mother ignored the denial of consent, and moved to New Jersey with H.C. The father filed an Application for Return of the Child under the Hague Convention with the Central Authority of Guatemala. About sixteen months later, the father filed a petition for return of the Child ("the Petition") in the District Court of New Jersey. After considering the evidence and the parties' arguments, the District Court entered judgment in favor of the mother, refusing to return H.C. to Guatemala. Additionally, the court did not address the mother's affirmative defense that H.C.'s return to Guatemala constitutes a grave risk because the court found that De La Roca presented sufficient evidence for the affirmative defense that H.C. was well settled in the United States. The father argues that his intent to commence an action coupled with the filing of the original application with the Guatemalan Central Authority should constitute a proceeding, making the start date of the proceeding within one year of removal of the child, entitling him to

the child's automatic return. However, the Court disagreed. Under the plain language of the statute, one can only initiate a judicial proceeding by commencing a civil action in any court which has jurisdiction and which is authorized to exercise that jurisdiction in the place where the child is located when the original petition is filed. In this case, that court is the District Court of New Jersey. The father did not file an action in the District Court of New Jersey for sixteen months after the removal of the child. As such, the Court here held that the father did not initiate the proceeding until the filing of the Petition with the lower court.

Issue 2: Whether the district court erred in their determination that satisfying one defense under a preponderance of the evidence standard according to ICARA should block return of the child?

Holding 2: No, the district court did not err in their determination that satisfying one defense under a preponderance of the evidence standard according to ICARA should block return of the child. Where the petitioner fails to commence the proceedings before the one-year deadline, petitioner is no longer entitled to the child's automatic return. In this case, a rebuttable presumption arises whereby the child's return is subject to certain affirmative defenses, including that "the child is now settled in its new environment." While the petitioner initially bears the burden of proving, by a preponderance of the evidence, that the child was wrongfully removed, respondent must prove one of the affirmative defenses according to its burden of proof to oppose the return of the child. 22 U.S.C. § 9003(e)(2)(A) and (B). The defenses in § 9003(e)(2)(A) are subject to a clear and convincing evidence burden, while the defenses in § 9003(e)(2)(B) are subject to a preponderance of the evidence burden. Father argues that under a literal reading of the statute, which uses the conjunctive "and," one must prove their defense under both burdens of proof. The disagreed with that assertion. The Court reasoned that because Congress declared that ICARA does not abrogate any of the remedies under the convention, a valid showing of one affirmative defense should block removal of the child. In doing this, the Court distinguished the burdens, stating that the affirmative defenses that the return of the child would be, (1) a grave risk to the child's physical or psychological health, based on a preponderance of the evidence or (2) return of the child would not be permitted by fundamental principles relating to the protection of human rights and fundamental freedoms, should be subject to a burden of clear and convincing evidence

Issue 3: Whether the district court erred in finding the mother offered sufficient evidence that the child was well settled in the United States?

Holding 3: No, the district court did not err in finding the child's mother offered sufficient evidence that child was well settled in the United States. The Court stated that the lower court undertook an exceedingly thorough, careful, and thoughtful analysis of the evidence and various factors pertaining to how well H.C. settled in his home and community. The Court affirmed, thus blocking the removal of the child under ICARA. Back to the top.

DIVISION OF CHILD PROTECTION AND PERMANENCY

New Jersey Division of Child Protection and Permanency v. M.C. & J.R., 2018 WL 5851142 (App. Div. 2018). Opinion by Judge Koblitz.

Issue: Whether the trial court erred in reviewing confidential juvenile records of the defendant in relation to Title 30 litigation brought by the Division?

Holding: No, the trial court did not err in choosing to conduct an in camera review of the confidential records. N.J.S.A. 2A:4A-60 generally requires the confidentiality of juvenile records where those records pertain to "social, medical, psychological, legal and other records of the court and probation division," or when those records concern matters of juveniles charged as a delinquent or found to be part of a juvenile-family crisis. However, exceptions to this provision exist, including exceptions allowing juvenile records to be released to any court or probation division, or when a subsequent legal proceeding involves the juvenile and the court approves the release. N.J.S.A. 2A:4A-60(a)(1) and 60(c)(4). The Court interprets Rule 5:19-2(b) as "a rule of limited disclosure, not a rule of non-disclosure." State ex rel. D.A., 385 N.J.

Super. 411, 417 (App. Div. 2006) (holding that where an organization or individual possesses a legitimate interest in the matter, the records should be made available in the interests of justice). When a child-welfare case is brought by the Division under Title 30, the court applies the best interest of the child standard, requiring the court to consider a number of general factors, including but not limited to, the safety of the child and fitness of the parents. See N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 33 (2013); see also N.J.S.A. 9:2-4(c). Here, defendant-father was adjudicated delinquent in 2009 for committing sexual offenses upon two minors, but the records were sealed as confidential. In the current case, the child was removed from the care of the mother after the Division filed a verified complaint and a judge determined removing the child was necessary to avoid ongoing risk to the child's life, safety, or health. As a result of this complaint, the parents appeared before the Family Part for a Title 30 summary proceeding, where the Law Guardian alleged the father had a history of sexual and assault offenses as a juvenile. At this time, the father requested, through counsel, unsupervised visitation. The judge rejected this request pending an exploration of the allegations. After the Law Guardian filed a motion for release of the records, the lower court heard oral argument and ultimately reviewed the father's records in camera, releasing the records in their entirety to counsel, pursuant to a protective order confining the use of these records to this Title 30 litigation. Eventually, the judge suspended the father's visitation unless and until he submitted to a psychological evaluation.

N.J. Div. of Child Prot. & Permanency v. R.L.M., 2018 WL 6441140 (N.J. 2018). Opinion by Judge Sabatino.

Issue: Does a parent have the right to represent himself/herself in an action to terminate parental rights pursuant to N.J.S.A. 30:4C-15 to -20?

Holding: Yes, a parent does have the right of self-representation in an action to terminate parental rights pursuant to N.J.S.A. 30:4C-15 to -20. New Jersey courts hold that a competent litigant may represent himself or herself in a matter in which he or she is a party, subject to limitations set out in statutes, court rules, and case law. In re Civil Commitment of D.Y., 218 N.J. 359, 365 (2014). When a parent intends to represent themselves in an action to terminate parental rights, they must do so timely, clearly, and unequivocally. In re Adoption of a Child by J.E.V. and D.G.V., 226 N.J. 90, 114 (2016). The Supreme Court held that a parent does have a right to represent themselves in an action to terminate parental rights. However, this must be stated as early as possible, well before the start of trial, clearly and unequivocally, and, if the trial court feels necessary, they may appoint standby counsel. Additionally, the Court here found that a judge may take appropriate steps if, a self-represented parent declines to follow the court's instructions, disrespects the court or any participant in the hearing, or refuses to take part in the proceeding. The Division brought a guardianship action in the Family Part against R.L.M. and J.J., seeking to terminate defendants' parental rights for their daughter. Early in the proceeding, J.J. informed the court he intended to represent himself in the matter. Minutes later, J.J. changed his mind and requested the court assign counsel to represent him. J.J. did not reassert his right to represent himself until the guardianship trial was underway. The trial court denied this request, reasoning that dismissing J.J.'s counsel in the midst of a trial would suspend the proceedings, causing a detriment to the child at the heart of this case. At conclusion of the trial, the court terminated the parental rights of defendants. On appeal, an Appellate Division panel affirmed the termination of both parents' parental rights, and again rejected J.J.'s claim to a right of self-representation. The Court held that although J.J. did have the right of self-representation, he did not voice his intention to represent himself timely, clearly, or unequivocally. Since J.J. took back his request to represent himself within minutes, and did not reassert this claim until the middle of the underlying trial, the lower court properly denied J.J.'s request to represent himself. If the trial court did choose to accept this request, they would need to suspend the trial, causing a detriment to the child at the heart of this case. As such, the Supreme Court affirmed the judgment of the Appellate Division, finding that although J.J. did have a right of self-representation, he did not assert that right timely, clearly, or unequivocally.

New Jersey Division of Child Prot. and Permanency v. S.D., 453 N.J. Super. 245 (App. Div. 2018). Opinion by Judge Koblitz.

Issue 1: Whether the trial court erred in finding the defendant willfully and wantonly failed to enroll her daughter in school?

Holding 1: No, the trial court did not err in finding the defendant willfully and wantonly failed to enroll her daughter in school resulting in abuse and neglect. "The main goal of Title 9 is to protect the children 'from acts or conditions which threaten their welfare.'" G.S. v. Dep't of Human Services, 157 N.J. 161, 176 (1999) (quoting State v. Demarest, 252 N.J. Super. 323, 330 (App. Div. 1991)). Title 9 balances a parent's fundamental right to raise a child without undue influence from the State against the State's parens patriae responsibility to protect the welfare of the children. N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 18 (2018). To prove abuse or neglect under N.J.S.A. 9:6-8.21(c)(4), the Division must establish, by a preponderance of the evidence, 1) the child's physical mental, or emotional condition has been impaired or is in imminent danger of becoming impaired; and 2) the impairment or imminent impairment result from the parent's failure to exercise a minimum degree of care. N.J. Div. of Child Prot. & Permanency v. A.B., 231 N.J. 354, 369 (2017). Under Title 9, a parent's failure to provide an education qualifies as neglect. See N.J. Div. of Youth and Family Servs. v. M.W., 398 N.J. Super. 266, 285-86 (App. Div. 2018). The issues in this case began when the Division removed defendant's children, including K.D., the child whose education is at issue in this case. This removal came after the Division learned that defendant refused to send K.D. to school, showing that the child missed over one-hundred days of school. Pursuant to this complaint, the lower court ordered the defendant to send the child to school, and after defendant failed to attend a truancy hearing, she was arrested. In February, 2015, the court held a fact-finding hearing, immediately followed by a custody hearing under the FD docket. At this hearing, the court determined that defendant did willfully and wantonly fail to enroll the child in school, constituting neglect, and placed six of defendant's seven children in legal custody of defendant's mother. As a result of the custody hearing, the court ordered that the children remain in the custody of defendant's mother, and dismissed the pending FN litigation. This appeal follows. Here, the Division presented evidence at the fact-finding hearing that showed K.D. missed over one-hundred days of school. Although defendant claims this stemmed from a move, making the new school assigned to K.D. impossible for the child to attend due to distance, the Court disagreed. After the move, the school offered to bus K.D. for no cost to defendant. However, defendant refused this service, still keeping K.D. from attending school. As such, the Court found that the Division presented sufficient evidence to support a finding of neglect under Title 9, and affirmed the lower court's finding.

Issue 2: Whether the trial court erred in failing to conduct a dispositional evidentiary hearing?

Holding 2: Yes, the trial court erred in not conducting an evidentiary hearing under the FD docket. However, due to the consent of defendant to the order and the amount of time passed, the Court found no need to remand the case. After a fact-finding hearing in which the court determines neglect occurred, a dispositional hearing may commence immediately or at a later time. N.J. Div. of Youth and Family Servs. v. G.M., 198 N.J. 382, 399 (2009) (citing N.J.S.A. 9:6-8.47) (finding that where the lower court failed to conduct a dispositional hearing, the Supreme Court should vacate the judgment of the lower court). The lower court did not conduct the necessary dispositional hearing. However, defendant consented to the custody arrangement by filing for visitation rights of the eldest child, and by not contesting the placement of the other children with her mother. As such, the Court found no need to remand the case for further proceedings.[1]

Issue 3: Whether the trial court erred in dismissing the pending FN litigation?

Holding 3: Yes, the trial court erred in dismissing the FN hearing. The Court recognizes that the defendant only wished to keep this litigation open so as to allow her more time to complete the required services. However, the Court states that the FD litigation could be an appropriate avenue of doing this. Additionally, the Court determined that due to a lack of legal authority to support this reason, defendant's position was not a strong one. However, because a strong importance exists for the Court to further the welfare of the children, the lower court erred in not designating the hearing as a combination FD/FN

hearing to ensure participation from defense counsel and the Law Guardian. However, since the actual docket designation did not affect the outcome of the matter, the Court affirmed the lower court's decision.

N.J. Div. of Child Prot. and Permanency v. S.K., 456 N.J. Super. 245 (App. Div. 2018). Opinion by Judge Fuentes.

Issue 1: Whether a Family Part Judge may draw an adverse inference of culpability against a defendant who invokes his right of self-incrimination to refuse to testify at a Title 9 fact-finding hearing when there is a parallel criminal proceeding pending?

Holding 1: No, a Family Part Judge may not draw an adverse inference of culpability against a defendant who invokes his right of self-incrimination to refuse to testify at a Title 9 fact-finding hearing. When a party in a civil matter asserts Fifth Amendment privilege against self-incrimination, the fact-finder may find an adverse inference of guilt. Attor v. Attor, 384 N.J. Super. 154, 165-66 (App. Div. 2006) (citing Mahne v. Mahne, 66 N.J. 53, 60 (1974)); see also Bastas v. Bd. of Review, 155 N.J. Super. 312, 315 (App. Div. 1978). This is true even for administrative hearings. See State Dep't of Law and Pub. Safety v. Merlino, 216 N.J. Super. 579, 587-88 (App. Div. 1987). However, when the coercive effects of the statements made would substantially affect a parallel criminal proceeding, this right is limited. N.J. Div. of Child Prot. and Permanency v. S.K., 456 N.J. Super. 245, 271 (App. Div. 2018). Defendant was charged with sexual abuse and arrested. While these criminal charges were pending, the Family Part conducted a fact-finding hearing pursuant to N.J.S.A. 9:6-8.44. At this hearing, the Division called defendant as a witness, who asserted his fifth amendment right against self-incrimination. As a result, the Family Part Judge drew an adverse inference of culpability against defendant. The judge later used this adverse inference as substantive evidence in finding the allegations of Jane's sexual abuse were corroborated. The Court refused to extend the Family Part Judge's ability to draw an adverse inference when pending criminal charges against the defendant in question exist. Because of the related criminal charges, defendant's belief that answering the DAG's questions here would violate his right against self-incrimination under the Fifth Amendment and N.J.R.E. 503 was well founded. Although in previous cases the Court held that a Family Part Judge could make this inference, those cases differed in that no parallel criminal charges were pending. Here, the defendant's right to avoid giving the State any incriminating information that may affect his fundamental right to control the upbringing of his child outweighs the coercive effects of making the inference. As such, the Court found the Family Part Judge erred in drawing the negative inference.

Issue 2: Whether defendant produced enough evidence to satisfy the burden of showing ineffective assistance of counsel?

Holding 2: Yes, defendant presented sufficient evidence to prove ineffective assistance of counsel. For a parent named as a defendant in an abuse and neglect complaint to show ineffective assistance of counsel, defendant must satisfy the Strickland standard. Under that standard, to show an effective assistance of counsel, a defendant must: 1) identify acts or omissions allegedly showing unreasonable professional judgment, and 2) show that those acts had a prejudicial effect on the judgment. State v. Fritz, 105 N.J. 42, 58 (1987). Multiple acts by defense counsel satisfy this standard. First, defense counsel stated that he researched whether the Family Part Judge could draw an adverse inference due to defendant's assertion of his Fifth Amendment privilege, concluding, incorrectly, that the judge could. Additionally, at the fact-finding hearing, defense counsel did not cite any legal authority to support an argument against this aspect of the Division's case, essentially conceding the point. Despite evidence in the record that Jane made numerous inconsistent statements concerning the nature and duration of the sexual abuse, defense counsel did not call her as a witness. Finally, at no time did defense counsel argue that the Division based their entire case on hearsay evidence, leaving him unable to cross-examine any of the witnesses who provided prerecorded statements considered by the judge. Any one of these things alone would likely satisfy the Strickland standard, so all of them considered together definitely satisfy this standard. Thus, the Court found that defendant established both prongs of the Strickland-Fritz standard, and reversed the decision below.

N.J. Div. of Child Protection & Permanency v. T.D., 454 N.J. Super. 353 (App. Div. 2018). Opinion by Judge Koblitz.

Issue: Did the Division fail to meet its burden to terminate parental rights under N.J.S.A. 30:4C-15.1?

Holding: Yes. The Division is required to establish all four prongs under the statute to terminate parental rights. Prong one requires that the Division establish that the "health, safety, and development of a child has been or would continue to be endangered if a relationship with the parents was allowed to continue." Under prong two, the Division must show that "[t]he parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm." The third prong requires that the Division provided "more than reasonable efforts" aimed at reunification of the family. The fourth prong requires that "termination would not do more harm than good" for the children. The Court found that the trial judge's conclusions as to prongs one and two were not correct. The Appellate Division determined that there was evidence of harm or risk of harm to the children, such as the Division's knowledge of R.C.'s convictions, T.D.'s difficulty in raising Mary and R.C.'s failure to cooperate with the Division. However, the analysis of the remaining prongs prevented the Appellate Division from remaining prongs prevented the Appellate Division form reversing. The Appellate Division found ample support in the trial court's opinion that the Division did not make reasonable efforts in providing services to T.D. The Division utilized a "cookie cutter" approach for T.D. and did not make reasonable efforts in providing T.D. services. The Division failed to take into account T.D.'s individual needs and her disability. As to prong four, the Appellate Division determined that the children had very little contact with T.D. and that experts opined that "severing the parental bond would therefore not harm the children." However, "[p]roof of the fourth prong cannot overcome the lack of proof concerning another prong." Because the Division did not satisfy all four prongs, the Division could not terminate T.D.'s parental rights. Therefore, the Appellate Division affirmed. Back to the top.

DOMESTIC VIOLENCE

G.M. v. C.V., 179 A.3d 413 (N.J. Super. Ct. App. Div. 2018). Opinion by Judge Suter.

Issue: Whether a trial court should deny a defendant's request to vacate a Final Restraining Order ("FRO") when the FRO transcript is unavailable through no fault of the defendant?

Holding: No, a trial court should not deny the request to vacate the FRO transcript. A defendant can file a motion to vacate a final restraining order without a transcript if the moving party did not contribute to the unavailability of the transcript. The court entered a final restraining order ("FRO") against defendant. Defendant filed an application twelve years later to dissolve the FRO pursuant to N.J.S.A. 2C:25-29(d), alleging a substantial change in circumstances. However, the defendant did not include the transcript of the 2004 FRO hearing in her application. As a result, the trial judge denied defendant's motion, based upon the requirement in N.J.S.A. 2C:25-29(d) that the moving party provide a complete record of the hearing before the court determines whether to dissolve the FRO. Defendant filed a motion for reconsideration and requested that the judge reconstruct the FRO record so as to accord defendant due process. The trial court denied the defendant's motion for reconsideration. Defendant then filed this appeal. The Appellate Division explains that when a party seeks to vacate an FRO and the transcript is available, the court should deny an application for dissolution of an FRO that does not include the transcript. Kanaszka v. Kunen, 313 N.J. Super. 600, 606-07 (App. Div. 1998). However, if the transcript is unavailable, the court must then determine if the moving party caused the absence of the transcript. If the court determines that the moving party did not cause the absence, then the court must determine if the transcript is completely unavailable or if it may be retrievable through Court Smart. Ibid. If the court cannot retrieve the transcript, they must determine if "the applicant can produce evidence to establish a prima facie case that changed circumstances exist" in order to modify or dissolve the FRO. Id. at 423. The court may weigh the evidence in light of the factors outlined in Carfagno v. Carfagno, 288 N.J. Super. 424 (Ch. Div. 1995). Ibid. If the evidence convinces the court that a prima facie showing of changed

circumstances exists but the court still cannot assess whether to deny the application, the court should then reconstruct the record of the FRO hearing. Ibid. The record need not provide a complete recitation of the FRO hearing, but must "provide reasonable assurances of accuracy and completeness." State v. Izaguirre, 272 N.J. Super. 51, 57 (App. Div. 1994). Once a reconstruction of the record exists, the court must determine if the moving party presented sufficient evidence to establish good cause to modify or dissolve the FRO. Here, the Family Part judge did not confirm an inability to produce a transcript. As such, the Appellate Division remanded the case for proceedings consistent with this opinion.

M.C. v. G.T., 2018 WL 259384 (App. Div. 2018). Opinion by Judge Fisher.

Issue: Whether the trial court erred in granting a restraining order against defendant where plaintiff failed to prove the defendant committed an act of domestic violence under N.J.S.A. 2C:25-17 to -35?

Holding: Yes, the trial court erred in granting the restraining order. A trial court can only enter restraints upon a person when a court finds that the person committed an act of domestic violence. Without such a showing, the court lacks a jurisdictional basis to enter a final restraining order. The plaintiff did not establish the defendant harassed her, according to the definition presented in N.J.S.A. 2C:25-17 to -35. However, the trial court judge still imposed a restraining order in the plaintiff's favor, asserting the court's "equitable power." The Appellate Division found the trial court improperly relied on the holding in P.J.G. v. P.S.S., 297 N.J. Super. 468, 688 (App. Div. 1997). In that case, the court held restraints could be imposed "based on evidence heard in the failed domestic violence action – in another pending case between the parties." Here, however, no separate matrimonial action exists. As such, the trial judge here imposed restraints "in the very action that resulted in [the plaintiff's] failure to prove [the defendant] committed an act of domestic violence."

T.M. v. R.M.W., 456 N.J. Super. 446 (Ch. Div. 2017). Opinion by Judge Ryan.

Issue 1: Whether a plaintiff can qualify as a "victim of domestic violence" based upon a "dating relationship" pursuant to N.J.S.A. 2C:25-19(e), which involves consensual, but sporadic, private sexual relations between adults with few, if any, of the traditional elements of a dating relationship?

Holding 1: Yes, one engaged in a relationship of this type can qualify as a "victim of domestic violence." Plaintiff filed a complaint asserting that defendant assaulted her during "consensual rough sex." Plaintiff and defendant's relationship lasted eight years, consisting mostly of private, sporadic sexual encounters. On the day in question, plaintiff alleges that "during rough sex," defendant "punched plaintiff in the face with a closed fist" while he told her he hated her. When plaintiff later questioned defendant about the punch, he laughed and allegedly punched her again. This resulted in the lower court granting a TRO against defendant. When the court questioned plaintiff on the six factors of Andrews v. Rutherford, 363 N.J. Super. 252, 260 (Ch. Div. 2003), to determine if a dating relationship existed, they determined there was "little interpersonal bonding; the relationship was mostly based upon sporadic and casual sexual encounters; the relationship, while not seen by either as 'dating,' lasted eight years; the frequency of the encounters varied from 'more frequently' while in high school, to a three-year period of no sexual relations, to approximately once every three months for the last year or more; neither party had any ongoing expectations with respect to the future or permanency of the relationship; the parties did not demonstrate an affirmation of their relationship to others, nor did they hold themselves out to friends and family as 'boyfriend and girlfriend.' Thus, except for the eight-year duration, most of the Andrews factors weighed against a finding of a 'dating relationship.'" Plaintiff testified that the she "consented to a slap with an open palm and hair pulling, but [she] did not consent to [a] closed fist," however, she admitted the parties never verbalized or delineated the limits of use of force during relations. During the testimony regarding the need for a final restraining order, the court found that plaintiff was inconsistent in her version of events. The court found defendant's testimony as credible. The Court noted that when reviewing the Andrews factors, it seems as though this relationship would not qualify as a dating relationship, and thus, the statute would not protect it. However, the Court states that there can be no dispute that parties who engage in several public dates, hold themselves out to friends and family as dating and hope to progress

in their relationship, likely qualify as having a dating relationship. As such, the Court finds it illogical to protect that hypothetical relationship while denying this plaintiff "victim" status. Because the couple engaged in a consensual, but sporadic, sexual relationship for eight years and the two shared intimate and highly personal encounters with each other, the Court recognized this relationship as protected. In doing so, the Court pointed to a footnote in Andrews that left open the possibility of a "secret" dating relationship. In a "secret" relationship, factors 2 and 6 hold more weight, and the duration and intensity of the relationship here would support a finding of a "dating relationship." The Court found that this relationship qualifies as a "dating relationship," and held that a person engaged in sporadic, consensual sexual encounters can qualify as a victim in regards to a complaint of domestic violence.

Issue 2: Whether a defendant may assert the defense of consent to allegations of simple assault and harassment by offensive touching when the plaintiff admittedly agreed to "consensual rough sex" with defendant?

Holding 2: Yes, a defendant may assert the defense of consent to allegations of simple assault and harassment by offensive touching when the plaintiff admittedly agreed to "consensual rough sex" with defendant. Under the New Jersey criminal code, a defendant may present consent as an affirmative defense. N.J.S.A. 2C:2-10. When defendant invokes this affirmative defense, the court places the burden of establishing the defense by a preponderance of the evidence on defendant. N.J.R.E. 101(b); Clark v. Clark, 429 N.J. Super. 61, 78 (App. Div. 2012). Plaintiff consented to "slapping, choking, and hair pulling." Although plaintiff never expressly consented to being punched, she did not stop engaging in sexual behavior with defendant after the incident. Additionally, due to plaintiff's lack of credibility, the Court found that defendant's version of events were more credible, in which he defined the contact as "a tap on the jaw" with no intent of injuring plaintiff, was a more accurate representation of events than plaintiff's. Additionally, the Court recognized that this incident should not be viewed in a vacuum, and found that based upon the history of the relationship, lacking any credible claim of previous domestic violence, the ruling is a close call as to whether defendant's decision to elevate the "rough sex" to a punch was appropriate. Since the Court found no history of domestic violence between these parties, as well as no evidence of an immediate danger to persons or property, the Court held no reason existed to issue an FRO. As such, the Court dismissed the domestic violence complaint and vacated the TRO. Back to the top.

EQUITABLE DISTRIBUTION

M.G. v. S.M., 179 N.J. Super. LEXIS 177 (App. Div. 2018). Opinion by Judge Mawla.

Issue: Whether a portion of restricted stock transferred to an employee, which vests after the date of the divorce complaint, is subject to equitable distribution if the vesting is contingent upon post-complaint efforts?

Holding: No, when the receipt of those stocks is dependent upon post-complaint efforts, the court should not subject those stocks to equitable distribution. Plaintiff began his employment in 2001. Beginning in August 2003, plaintiff received a stock award from his employer, which would vest in yearly tranches. Plaintiff filed a complaint for divorce, at which time he had been granted eight stock awards. However, only three of these awards had fully vested, with the remainder due to vest post-complaint. Plaintiff argued that because these awards were contingent upon future efforts, as stated in the employer's explanation of the benefits package, they should not be considered as a marital asset. The Appellate Division relied on the formula set out in Baccanti v. Morton, 752 N.E.2d 718, 729-30 (Mass. 2001). Under this theory, the judge must determine if the options were given for efforts expended before, during, or after the marriage. Ibid. In making this finding, the judge may look to the employee's stock option plan, testimony from the employee or a representative of the employer, or testimony from an expert witness. Ibid. Additionally, the judge may consider other relevant factors, such as "whether the options were intended to (1) secure optimal tax treatment, (2) induce the employee to accept employment, (3) induce the employee to remain with the employer, (4) induce the employee to leave his or her employment, (5)

reward the employee for completing a specific project or attaining a particular goal, [or] (6) be granted on a regular or irregular basis." Ibid. The party challenging the inclusion of the assets bears the burden of proving the options were given for future services to be performed after dissolution of the marriage, as well as proving the non-employee spouse did not contribute to the employee spouse's ability to acquire the options at issue. The Court held that where a stock award has been made during the marriage and vests prior to the date of complaint it is subject to equitable distribution. Where an award is made during the marriage for work performed during the marriage, but becomes vested after the date of complaint, it too is subject to equitable distribution. Where the award is made during the marriage, but vests following the date of complaint, there is a rebuttable presumption the award is subject to equitable distribution unless there is a material dispute of fact regarding whether the stock, either in whole or in part, is for future performance. The party seeking to exclude the options bears the burden of proving the award was given for efforts outside of the marriage and must introduce objective evidence the employer intended the stock to vest for future services and not as a form of deferred compensation attributable to the award date. Both through testimony and the employer's explanation of the benefit package, that sufficiently rebut the presumption, the options should be subject to equitable distribution. Since the employer's explanation showed that in order to receive the stocks when they vest one must continually perform at a high-level, the Court found the vesting of these stocks required post-complaint efforts. As such, the Court reversed the lower decision and remanded the case for further proceedings consistent with this opinion. Back to the top.

EVIDENCE

New Jersey Division of Child Protection and Permanency v. A.D., 455 N.J. Super. 144 (App. Div. 2018). Opinion by Judge Veronia.

Issue 1: Whether the lower court erred in admitting into evidence the subjective findings of a non-testifying expert?

Holding 1: Yes, the lower court erred in allowing the subjective findings of a non-testifying expert into evidence. A court may admit a non-testifying expert's diagnosis and opinion when it finds "the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness." N.J.R.E. 808; N.J. Div. of Child Prot. & Permanency v. N.T., 445 N.J. Super. 478, 501 (App. Div. 2016). Since coming to these conclusions often involves complex analysis of the patient, as well as the importance of the ability to cross-examine these witnesses, a court will generally find an expert medical opinion contained in a report inadmissible. Ibid.; see also Knopp v. Rosen, 425 N.J. Super. 391, 405 (App. Div. 2012) (finding that when no opportunity exists for cross-examination, medical opinions in hospital records should not qualify as admissible under the business records exception). After Nancy, a minor, told Newark police officers and the Division that defendant, her step-father, sexually assaulted her. In her statements, Nancy alleged that defendant sexually assaulted her. Following her report, Nancy visited Newark Beth Israel Medical Center, where Dr. Kereese Gayle wrote in her notes that it was her "clinical impression" Nancy was sexually assaulted. Although Dr. Gayle did not testify, the court based their determination that Nancy's allegations regarding the February 7, 2015 assault were corroborated largely on parts of Dr. Gayle's reports. Dr. Gayle's statements qualify as sufficiently complex and controversial. Since she did not testify, and therefore could not be cross-examined, the Court found the lower court erred in admitting the medical opinion within the hospital records.

Issue 2: Whether any other admissible evidence could corroborate Nancy's statements as required by N.J.S.A. 9:6-8.46(a)(4)?

Holding 2: Yes, the objective part of a non-testifying expert's report as well as other eye witness accounts of events are sufficient to find that the allegations are corroborated under N.J.S.A. 9:6-8.46(a)(4). N.J.S.A. 9:6-8.46(a)(4) states "previous statements made by the child relating to any allegations of

abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect." See N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 32-33 (2011). To corroborate an allegation, the Division only must supply some direct or circumstantial evidence beyond the child's original statement. N.J. Div. of Child Prot. & Permanency v. N.B., 452 N.J. Super. 513, 522 (App. Div. 2017). Additionally, the evidence must qualify as independently admissible to corroborate a child's statement. Id. at 524-26 (finding evidence that constituted inadmissible hearsay could not corroborate a child's statement. Although the Court here found the lower court erred in admitting statements regarding Nancy's mental state and Dr. Gayle's medical opinion that Nancy was sexually assaulted, other evidence within the report qualified as admissible to corroborate Nancy's claims. Within the report, Dr. Gayle reported that Nancy's hymen was not intact and that Nancy suffered from tenderness in her vaginal area. Because this part of the report constitutes an objective finding that does not rely on Dr. Gayle's own opinions, the Court here found the lower court properly admitted this evidence. Additionally, defendant's own recitation of events could corroborate Nancy's claims. Because defendant's statement to the police on February 7, 2015 matched Nancy's allegations so closely, these statements qualify as circumstantial evidence capable of corroboration. As such, the lower court did not err in finding other admissible evidence existed to corroborate Nancy's claims, and the Court affirmed their judgment.

New Jersey Department of Children and Families, Division of Child Protection and Permanency v. R.R., 455 N.J. Super. 144 (App. Div. 2018). Opinion by Judge Ostrer.

Issue: Whether an appellate court should reverse the Division of Child Protection and Permanency's ("the Division") finding that an allegation of child abuse was "not established," where the Division did not rely on all available relevant documents?

Holding: Yes, when the record lacks relevant information, the Court should reverse a finding of "not established." When investigating an alleged claim of child abuse, the Division may reach one of four outcomes, "substantiated", "established", "not established", and "unfounded." N.J.A.C. 3A:10-7.3(c)(1)-(4). The Division should find that an allegation qualifies as "not established" "if there is not a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, but evidence indicates that the child was harmed or placed at risk of harm." N.J.A.C. 3A:10-7.3(c)(3). The Division must keep on file a finding of "not established," while a finding of "unfounded" is generally expunged. See N.J.A.C. 3A:10-8.1(b). See also N.J.A.C. 3A:10-8.1(a), -8.3. In order for the appellate court to overturn the findings of the Division, the finding must have been clearly "'arbitrary, capricious, or unreasonable,' or lacked 'fair support in the record.'" Dep't of Children & Families v. T.B., 207 N.J. 294, 301 (2011) (quoting In re Herrman, 192 N.J. 19, 27-28 (2007)). The Court may find this standard met when the Division overlooked relevant information during their investigation. See In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 386 (2013). This case stems from the filing of an Order to Show Cause ("OCS") by the mother of two children, L.R. and E.R, after an alleged abusive incident involving the children's father, R.R. Upon receiving the OCS, the Division engaged in an investigation. During this investigation, multiple accounts of the relevant incident were revealed. The mother states that the father pushed the child and the child hit her head on the bed. The child states that her parents argued, but never became violent, and that she was not the child being disciplined during the incident. A second child told the Division that she was throwing things when her father grabbed her, but that she could not remember if he pushed her or if she simply fell into the wall. Based solely on these facts, the Division found that the allegations were "not established". However, they failed to include in their findings the testimony of the father, as well as a video of the incident taken by a child. Because the Division ignored the videotape of the incident, as well as R.R.'s testimony, the finding of "not established" should be reversed. Since both pieces of evidence are relevant to the Division's investigation, a failure to use them in a determination of child abuse or neglect qualifies as lacking fair support, arbitrary, capricious, or unreasonable, which would not meet a preponderance of the evidence standard. Without the necessary preponderance of the evidence standard met, the Division cannot rule a claim as "not established," and as such, the Court should reverse the finding.

State in the Interest of A.A., 2018 WL 3624853 (App. Div. 2018). Opinion by Judge Manahan.

Issue: Whether the trial court erred in admitting statements made by a juvenile to his mother before the police gave the juvenile his Miranda warnings?

Holding: Since police placed the juvenile in custody at the time of the statements, the failure to provide Miranda warnings required suppression of the statements. The trial court conducted an N.J.R.E. 104(c) hearing to determine whether the juvenile's statements could be admitted at trial. The judge found the statements to be admissible because they did not expressly result from the police interrogation, and therefore, did not implicate Miranda rights. At the conclusion of trial, the court adjudicated delinquent A.A., the child at the heart of this matter. One implicates Miranda rights when police place them in custody, subjecting them to police interrogation. A waiver of Miranda requires the person to knowingly, voluntarily, and intelligently waive the warnings. In the context of juvenile cases, the court applies a higher scrutiny to the waiver of Miranda rights because of the juvenile's age, experience, and level of education. Additionally, a parent plays a special role in the interrogation because the parent acts as an "advisor" to the juvenile, helping the child determine who can offer support in this type of setting. The State argues that A.A.'s statement did not expressly arise from police interrogation or its equivalent, and as such, no violation of A.A.'s Miranda rights occurred. However, the Appellate Division disagreed. Whenever a person is "subjected to either express questioning or its functional equivalent," the police must give Miranda warnings. The Appellate Division found that although the statement at issue did not arise from express questioning by the police, the statement did arise due to actions of the police. The Court reasoned that the boy's mother served the same purpose as a police officer in interrogating A.A. Additionally, the police listened to the conversation between the boy and his mother before giving Miranda warnings. At this time, the police officers should have reasonably known that such an interaction with A.A.'s mother would elicit incriminating information, sparking the need for Miranda warnings. The Appellate Division found the lower court erred because the police officer's reasonably should have known that the conversation between A.A. and his mother would elicit incriminating information, as well as the boy's mother serving the same purpose as a police officer, the police erred by not giving the boy Miranda warnings.

State of New Jersey in the interest of A.R., 234 N.J. 82 (2018). Opinion by Justice Albin.

Issue: Whether a child's video-recorded statement lacking a sufficient probability of trustworthiness should be admitted into evidence?

Holding: No, a video-recorded statement that does not possess a sufficient probability of trustworthiness to justify its introduction at trial under N.J.R.E. 803(c)(27) should not be admitted into evidence. In this case, Alex, a fourteen-year-old, was charged in a juvenile delinquency complaint with committing an act of sexual assault "by contact" on seven-year-old John in violation of N.J.S.A. 2C:14-2(b) after John told his mother's cousin that Alex touched him inappropriately on the bus. After the boy's mother reported the incident to police, a detective with the Hudson County Prosecutor's Office conducted a video-recorded interview with John. During this interview, John told the detective Alex touched him "on his belly button and pee-pee," but could not properly identify those areas on an anatomical doll. During the trial, the family court ruled the video-interview admissible as long as John could testify. Later, the court ruled John incompetent because he could not determine the difference between a truth and a lie, but still admitted the video-interview into evidence. At the end of this trial, the family court found "that the State established beyond a reasonable doubt that [Alex] purposely committed an act of sexual contact" by "touching John's penis underneath his clothes." The Appellate Division held that because the court ruled John incompetent to testify, they violated Alex's sixth amendment right of confrontation. In doing this, the court struck as evidence John's video-recorded statement and his testimony, remanding the case to the family part. However, they did not disturb the delinquency adjudication. Here, the Supreme Court reversed the Appellate Division, holding that the tender-years exception cannot authorize the admission of John's video-recorded statement. Additionally, due to this, the Court held that the Appellate Division erred in remanding the case to the family part, and dismissed the delinquent adjudication. Before admitting a

child's out of court statement, the court must determine whether "on the basis of time, content and circumstances of the statement there is a probability that the statement is trustworthy." N.J.R.E. 803(c)(27). Additionally, the court should not admit this evidence unless the child testifies, or, if the child is unavailable as a witness, on the presentation of "admissible evidence corroborating the act of sexual abuse." Ibid. In determining the trustworthiness of a statement, the court should look to a non-exclusive list of factors, including "spontaneity, consistency, repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate." State v. P.S., 202 N.J. 232, 249 (2010). The Supreme Court found the facts of this case did not support a finding of trustworthiness regarding John's out of court statement. In coming to this decision, the Court referenced John's inability to determine the difference between right and wrong, the inability to determine the difference between fantasy and reality, the inconsistency of the statements over time, and the fact that John had the developmental capacity of a three-year-old. Looking at the totality of the circumstances, the Court determined that these things qualified as sufficient to overcome the standard of deference owed to determinations made by family court judges, and reversed the ruling of the Appellate Division, ordering that the delinquency charge against Alex be dismissed due to the record's clear establishment that there is insufficient evidence to support the delinquency charge.

State v. J.L.G., 234 N.J. 265 (2018). Opinion by Chief Justice Rabner.

Issue: Whether the trial court properly denied defendant's motion to exclude expert testimony on Child Sexual Abuse Accommodation Syndrome ("CSAAS")?

Holding: Yes, the trial court properly excluded this testimony. The Supreme Court held courts should no longer admit expert testimony on CSAAS in criminal trials, except on issues relating to delayed disclosure. However, the Court held expert testimony on delayed disclosure must still comply with N.J.R.E. 702 and satisfy a determination that it will assist the trier of fact. Defendant was convicted of first-degree aggravated sexual assault, third-degree aggravated criminal sexual contact, second-degree endangering the welfare of a child, and third-degree witness tampering. In a pre-trial motion, defendant argued the court should exclude expert testimony regarding CSAAS. The trial court rejected that motion, eventually convicting defendant. The Appellate Division found the trial judge properly instructed the jury with regard to the limiting instructions. Further, the Appellate Division determined the admissibility of CSAAS is "well settled" and that here, the prosecution did not use the testimony to prove sexual abuse occurred, but rather to explain why the victim delayed her disclosure. The New Jersey Supreme Court granted defendant's certification to determine whether the trial court properly denied defendant's motion to exclude the expert testimony. Before hearing the merits of defendant's argument, the Supreme Court remanded for a hearing to evaluate "whether CSAAS evidence meets the reliability standard of N.J.R.E. 702, in light of recent scientific evidence." The Supreme Court concluded that based upon the relevant evidence, "it did not appear that CSAAS's five-category theory had been tested and empirically validated as a whole." The five categories relevant here include secrecy, helplessness, accommodation, delayed disclosure, and retraction. The expert testimony here showed that little scientific support of CSAAS exists, except for in delayed exposure. Pursuant to N.J.R.E. 702, in order for a party to present evidence at trial, that evidence must qualify as reliable. Here, CSAAS as a whole does not qualify as reliable, except in relation to delayed disclosure. However, when a party presents expert testimony on delayed disclosure, the judge should provide limiting instructions to the jury both before the expert testifies and as part of the jury charge. To testify about delayed disclosure, experts still must satisfy all prongs of N.J.R.E. 702. Additionally, when determining whether such evidence is "beyond the ken" of a juror, the court should apply the specific facts of each case. The Court held the trial court erred by admitting expert testimony on CSAAS because it no longer satisfies reliability and admissibility standards. Back to the top.

JURISDICTION

A.E.C. v. P.S.C., 2018 WL 480298 (App. Div. 2018). Opinion by Judge Reisner.

Issue: Whether the Family Court has jurisdiction to grant an application for custody related to a special immigrant juvenile related application ("SIJ") where the child is over eighteen but under twenty-one?

Holding: Yes, the Family court has jurisdiction over this matter. J.S.E. fled to the United States from Guatemala to be reunited with his mother, plaintiff A.E.C. When J.S.E. came to the United States, he enrolled in a special school and met with a counselor for emotional trauma. J.S.E.'s mother filed an application seeking the required findings for SIJ status, including sole physical and legal custody of J.S.E., who at this time was a "full time student still dependent on his mother for his emotional, financial, educational and safety needs." The trial court found it was in the best interest of J.S.E. to remain in the care of his mother but the court declined to grant custody, noting that the court lacked jurisdiction since J.S.E. was over eighteen. The court did not view the fact that J.S.E. was not emancipated as a factor. In an SIJ application, the Family Part's role is "not to adjudicate a juvenile applicant's immigration status, but to make the predicate findings needed so that the federal government can adjudicate the juvenile's SIJ application." The Family Part is "obligated to make SIJ findings in cases where the child is between eighteen and twenty-one." Since J.S.E. was between eighteen and twenty-one at the time of these proceedings, the Appellate Division found the trial court did in fact have jurisdiction over the matter. As such, they remanded the case to the trial court "for the limited purpose of issuing an amended order finding that J.S.E. is dependent on the court for SIJ purposes."

Ben-Haim v. Edri, 435 N.J. Super. 526 (App. Div. 2018). Opinion by Judge Gilson.

Issue: Whether New Jersey Courts have jurisdiction over civil claims against foreign officials when the State Department has issued a Suggestion of Immunity (SOI)?

Holding: No. New Jersey Courts do not have jurisdiction. Under common law, courts applied a "two-step procedure" to determine if a foreign diplomat qualifies for foreign sovereign immunity. This stated that a diplomatic representative could request a "suggestion of immunity" from the relevant State Court. Ibid. If the State granted the SOI, the diplomatic representative would gain immunity, and as such, the court would surrender its jurisdiction. Ibid. If the State Department granted immunity, that decision was binding on the court. Republic of Mex. v. Hoffman, 324 U.S. 30, 35 (1945). However, if the State Department did not grant immunity, the court could still grant immunity if "the ground of immunity is one which it is the established policy of the [State Department] to recognize." Samantar, 560 U.S. at 312 (quoting Hoffman, 324 U.S. at 36). In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA"). This act established the limitations of whether a foreign sovereign nation, or its agents or instrumentalities, could be sued in a United States Courts. FSIA limited immunity under this theory to suits involving a foreign state's public acts, and did not extend to cases involving a foreign state's purely commercial acts. 28 U.S.C. § 1604; Id. at 312-13. However, in 2010, the United States Supreme Court "clarified that the FSIA governs the determination of sovereign immunity for foreign states, but not for foreign officials." Samantar, 560 U.S. at 320. Defendant mother filed for divorce in an Israeli court. The Israeli court refused to grant the divorce, but did award custody of the couple's daughter to wife, denying plaintiff's request for custody under the Hague convention. Husband, a New Jersey and Israeli citizen, filed a civil complaint in the Law Division in New Jersey seeking damages against the judges in the Israeli Rabbinical court for aiding and abetting the kidnapping of their child. It was at this time that the Israeli government, on behalf of defendant, requested an SOI, which the State Department granted in December 2015. Because this case involved the State of Israel requesting immunity on behalf of defendants, as opposed to an Israeli diplomat requesting immunity directly, the Court held that the Law Division correctly accepted the SOI as binding, and, therefore, did not err in dismissing plaintiff's complaints.

Peisch v. Ochs, 2018 WL 3756446 (D.N.J. 2018). Opinion by Judge Esther Salas, U.S.D.J.

Issue: Whether the federal court has subject matter jurisdiction over plaintiff's application to restrain defendant from interfering with his parenting rights, pursuant to the Rooker-Feldman doctrine?

Holding: No. Pursuant to the Rooker-Feldman doctrine, the federal district court was barred from hearing plaintiff's application for lack of subject matter jurisdiction despite the fact that parenting rights are

constitutionally protected. The Rooker-Feldman doctrine provides that a federal court does not have jurisdiction if an actions satisfies all four of the following requirements: (1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgment. Here, plaintiff argues this action does not satisfy the fourth prong of the Rooker-Feldman doctrine, and as such, the federal court has subject matter jurisdiction. However, through his application, plaintiff is attempting to appeal the state court judgment in federal court. The Court held that such an action falls within the fourth prong of the Rooker-Feldman doctrine, and since all other prongs are met, the Court found they do not have jurisdiction. As a result of this holding, the District Court denied plaintiff's application and dismissed the case with prejudice for lack of subject matter jurisdiction.

P.H. v. L.W., 2018 WL 5914128 (App. Div. 2018). Opinion by Judge Ostrer.

Issue: Whether the trial court erred in finding that New Jersey had jurisdiction in this matter under the Uniform Child Custody Jurisdiction Act ("UCCJE"), N.J.S.A. 2A:34-53 to -95?

Holding: Yes, the trial court erred in finding that New Jersey had jurisdiction over the matter. Mother lived in South Dakota, where she became pregnant with the two children whose custody is at issue in this case. Sometime thereafter, father returned to his home in New York City. In June 2015, mother and the children moved to New York City. During this time, mother alleges father assaulted her. Father signed a lease for a house in Dumont, New Jersey and mother and the children joined father at that house. Father allegedly assaulted mother again at this home, and mother filed a complaint, securing a temporary restraining order. Father alleges that mother assaulted him, and he secured a TRO. Father left New Jersey with the children, moving back to South Dakota. After the court dismissed mother's domestic violence complaint, father filed the instant case, seeking a determination of paternity and custody in New Jersey. After mother did not appear, the New Jersey court entered an order requiring her to return to New Jersey with the children and submit to genetic testing to determine paternity. Mother failed to comply. The New Jersey Court found that the State had "home state jurisdiction" pursuant to N.J.S.A. 2A:34-54. As a result, the court granted father temporary custody and ordered mother to return to New Jersey with the children. Father sought modification of an order from a South Dakota court granting mother custody. Agreeing with the New Jersey order, the South Dakota court vacated mother's custody of the children and ordered her to comply with the genetic testing. Mother challenged New Jersey's jurisdiction in both courts. Both courts denied the motion, holding that New Jersey maintained jurisdiction over the matter. The Uniform Child Custody Jurisdiction Enforcement Act ("the act") is designed to reduce conflict among states, ensuring that custody determinations are made in the state that can best decide the case, prioritizing the child's home state. N.J.S.A. 2A:34-53 to -95. Griffith v. Tressel, 394 N.J. Super. 128, 138 (App. Div. 2007). Sajjad v. Cheema, 428 N.J. Super. 160, 171 (App. Div. 2012). A New Jersey court has jurisdiction if it was the child's home state at the time the proceeding began, or within six months of the start of the proceeding when a parent remains in that state. N.J.S.A. 2A:34-65(a)(1). The Court found that New Jersey does not qualify as the home state. At the time of the commencement of this proceeding, the children were living in South Dakota. Additionally, although the children were living in New Jersey close to six months before the start of the action, and their father remained in New Jersey, the children left New Jersey five days short of six months before the commencement of the proceeding. Moreover, New Jersey is not a convenient forum, as the weight of the evidence is in South Dakota. As such, the Court found that New Jersey courts did not have jurisdiction, and reversed the lower court's decision. Back to the top.

JUVENILE SENTENCING

State of New Jersey in the Interest of T.C., 454 N.J. Super. 189 (App. Div. 2018). Opinion by Judge Koblitz.

Issue: Whether New Jersey courts may sentence a developmentally disabled juvenile to serve time in a juvenile detention center?

Holding: No, because not every county in New Jersey has access to a juvenile detention center, state courts may not order developmentally disabled juveniles to serve time in a juvenile detention center. This case arises from the actions of T.C., a seventeen-year-old defendant. T.C. admits to participating with two other juveniles in the unarmed forcible theft of marijuana from the backpack of a fourth individual. However, the Pre-dispositional Report stated T.C. was originally classified as "[m]ultiply disabled and on the autistic spectrum" beginning "around the age of [four]." T.C.'s developmental disability was disputed by the State, but tacitly accepted by the judge. In exchange for the guilty plea, the State recommended a probationary period of two-years conditioned on sixty days confinement in the Ocean County Juvenile Detention Center ("OCJDC"). T.C. argued instead for sixty days electronic monitoring, reasoning he should not receive a custodial sentence because of his developmental disability. Accepting that T.C. was developmentally disabled, the court nonetheless imposed a two-year probationary term conditioned on thirty days incarceration in the OCJDC, followed by thirty days of electronic monitoring. Although the sixty day period passed at the time of this appeal, the Court decided to address these issues due to the public importance and likelihood this issue will occur again. The Code "empowers Family Part courts handling juvenile cases to enter dispositions that comport with the Code's rehabilitative goals." State In re. C.V., 201 N.J. 281, 294 (2010). "Once the court adjudicates a juvenile to be delinquent, the Code permits the court to order incarceration, or, in lieu of incarceration, any of twenty enumerated dispositions under N.J.S.A. 2A:4A-43(b)." Ibid. However, juveniles "who are developmentally disabled as defined in paragraph (1) of subsection a. of [N.J.S.A. 30:6D-3]" shall not be committed to a State juvenile facility. N.J.S.A. 2A:4A-44(c)(2). Here, the Court found that if the court were to apply the plain language of this statute, it would impose different standards for confinement among similarly situated individuals based on geography, an arbitrary factor. As such, under either the State or federal equal protection analysis, the court should review disparate administration of fundamental rights with heightened scrutiny. Since not every county in New Jersey can access a juvenile detention facility, this standard applies in this case. The Court here held that the disparate treatment of developmentally disabled juveniles did not further a legitimate government purpose as needed under the heightened scrutiny. As such, the Court held that New Jersey State Courts may not order developmentally disabled juveniles to serve time in a juvenile detention center until every county in the state had equal access to a juvenile detention center. Back to the top.

MEGAN'S LAW

State in the Interest of C.K., 233 N.J. 44 (2018). Opinion by Justice Albin.

Issue: Whether the requirement that a sex offender abide by the registration and community notification provisions of Megan's law may be lifted where the offender was adjudicated delinquent and more than fifteen years have passed since the offense occurred?

Holding: Yes, a court may lift the registration and community notification requirements when a Superior Court Judge is persuaded that the offender has been offense-free and does not likely pose a societal risk after a fifteen-year look-back period. C.K. was adjudicated delinquent for committing aggravated sexual assault against his adopted brother. After a guilty plea, C.K. was sentenced to a three-year probationary period, and ordered to comply with the Megan's Law registration and community notification requirements. In the twenty years since his arrest, C.K. has not been convicted of any unlawful activity, has received a master's degree in counseling from Montclair State University, and has held full-time employment. Under N.J.S.A. 2C:7-1 to -11, -19 and 2(g), juveniles adjudicated delinquent of certain sexual offenses are barred for life from seeking relief from the registration and community notification provisions of Megan's Law. Under this section, this lifetime bar cannot be lifted, even when the juvenile becomes an adult and poses no public safety risk, is fully rehabilitated, and is a fully productive member of society. Subsection (f) of N.J.S.A. 2C:7-2 also subjects all sex offenders, including juveniles, to presumptive lifetime registration and notification requirements. However, this subsection allows a registrant to seek relief from those requirements fifteen years after his juvenile adjudication, provided the offender has been offense-free and is "not likely to pose a threat to the safety of others." The Supreme

Court found that subsection (g)'s lifetime registration and notification requirements as applied to juveniles violates the substantive due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution. The Court held that permanently barring juveniles who have committed certain sex offenses from petition for relief from the Megan's Law requirements bears no rational relationship to a legitimate governmental objective. Due process requires that a statute not place arbitrary burdens on a class of individuals. As such, the court held that, pursuant to the provision in subsection (f), defendant here can petition the court for relief from the Megan's Law requirements after fifteen years from the date of his juvenile adjudication. At that time, if the Superior Court Judge is persuaded that he has been offense-free and does not likely pose a societal risk after a fifteen-year look-back period, defendant may be relieved of those requirements. Back to the top.

PARTITION

Jimenez v. Jimenez, 454 N.J. Super. 432 (App. Div. 2018). Opinion by Judge Sabatino.

Issue: Whether N.J.S.A. 46:3-17.4 precludes a spouse's unsecured creditor from obtaining the forced partition of real property owned by the spouse and non-debtor spouse as tenants by the entirety?

Holding: Yes, the statute prohibits the non-consensual partition of the real property. Defendant and his wife own real estate as tenants by the entirety. Plaintiff obtained a judgment against the debtor spouse and filed a partition action to sell the property. In order to obtain collection of the judgment, plaintiffs filed a petition to compel the partition and sale of New Jersey real property. The Appellate Division held that N.J.S.A. 46:3-17.4 prohibits the partition of property where "one spouse's failure to pay his personal debts to third-party creditors resulted in a money judgment entered against him alone. Otherwise, a free-wheeling spouse by amassing such individual debt, could detrimentally 'affect' the other spouse's interests in their co-owned property. The Court also noted that the legislative intent of the statute is to protect a spouse's interest from a "non-consensual diminution of his or her interests." However, the Court determined that the statue does "not preclude a remedy by a creditor against property held by tenants by the entirety when the title was deeded as fraudulent conveyance in order to avoid known debts to creditors." Back to the top.

RETROACTIVE APPLICATION OF SEXUAL ASSAULT SURVIVOR PROTECTION ACT (SASPA)

R.L.U. v. J.P., 2018 WL 6314012 (N.J. Super. Ct. App. Div. 2018). Opinion by Judge Whipple.

Issue: Whether the lower court erred in determining that SASPA should be applied retroactively?

Holding: Yes, the lower court erred in finding that SASPA should be applied retroactively. In 2005, defendant pled guilty to endangering plaintiff R.L.U., then eleven-years-old. As a result of this plea, the court sentenced defendant to a three-year suspended term and parole supervision for life. Additionally, the court ordered defendant to have no contact with plaintiff and to register under Megan's Law. On March 13, 2017, defendant approached plaintiff, for the first time since 2005, at the convenience store where she worked. Ten days later, defendant returned to the convenience store, where he stared at plaintiff through the glass door for five seconds. After calling the police, plaintiff sought a restraining order under the Sexual Assault Survivor Protection Act ("SASPA"), N.J.S.A. 2C:14-13 to -21. After a two-day hearing, the court granted a final protective order on April 19, 2017. Defendant then moved to dismiss the case, arguing that SASPA violated the ex post facto clause of both the United States and New Jersey Constitutions. The court disagreed, denying defendant's motion for reconsideration and affirming the protective order, triggering the revocation of defendant's parole. The Court here held that SASPA cannot be used to impose a restraining order based on conduct that occurred before SASPA's effective date. The Legislature passed SASPA with the intention of expanding the remedies available to victims of sexual violence. N.J.S.A. 2C:14-13. The statute provides: Any person alleging to be a victim of non-consensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, and who is not eligible

for a restraining order as a "victim of domestic violence" as defined by [the PDVA], may … file an application with the Superior Court … alleging the commission of such conduct or attempted conduct and seeking a temporary protective order. [N.J.S.A. 2C:14-14(a)(1).] In order for a judge to enter a final protective order, they must find that non-consensual sexual contact, penetration, or lewdness occurred, and that the possibility of future risk to the safety or well-being of the victim exists. Senate Judiciary Report. "Generally, newly enacted laws are applied prospectively." Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 387 (2016). In order for a law to apply retroactively, at least one source of intent must be shown. Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 46 (2008). This intent can be shown "(1) when the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly; (2) when an amendment is curative; or (3) when the expectations of the parties so warrant." Ardan v. Bd. of Review, 213 N.J. 589, 610 (2018). Here, the Court found the lower court's holding constituted error. In the present case, the predicate act occurred before the passage of SASPA. Additionally, the text of SASPA makes no mention of retroactivity. When the Court looked to the legislative history, no implicit intention of retroactivity was found. As such, the default rule that a new statute should be applied prospectively governs, and the lower court erred by applying SASPA retroactively. Additionally, the Court here noted that plaintiff did not allege a qualifying act in her SASPA complaint. The defendant did not attempt to make non-consensual physical contact with the defendant, but solely harassed her verbally. As such, the Court here found that no non-consensual physical contact was alleged, and the lower court erred in granting a final protective order. Since the Legislature did not intend, expressly or implicitly, for SASPA to apply retroactively, the Court here held that the lower court erred in deviating from the standard of applying new laws prospectively. Back to the top.

STATUTORY INTERPRETATION

State of New Jersey in the Interest of N.C., 453 N.J. Super. 449 (App. Div. 2018). Opinion by Judge Accurso.

Issue: Whether the competency statutes of the criminal code, specifically N.J.S.A. 2C:4-4 to -6, apply to juveniles?

Holding: Yes, the competency statutes do apply to juveniles. Additionally, N.J.S.A. 2C:4-5(a)(2) requires the Department of Human Services ("DHS"), or its successor, to provide or arrange for examination of a juvenile for fitness to proceed as DHS would for an adult, with such accommodation for the juvenile's youth as is necessary and appropriate. The juvenile code guarantees to juveniles "[a]ll defenses available to an adult charged with a crime," and, but for indictment, trial by jury and bail, all rights under the Federal and State Constitutions guaranteed to adult criminal defendants. N.J.S.A. 2A:4A-40; State ex rel. P.M.P., 200 N.J. 166, 173-74 (2009). The Legislature safeguarded a defendant's right not to be tried or convicted while incompetent to stand trial by the procedures set forth in N.J.S.A. 2C:4-4 to -6. However, no equivalent exists in the Code of Juvenile Justice. N.J.S.A. 2A:4A-20 to -48. N.J.S.A. 2C:4-5(a)(2) expressly provides a court with the ability to order an independent examination of a defendant by DHS when it reasonably doubts "the defendant's fitness to proceed." See State v. Purnell, 394 N.J. Super. 28, 47 (App. Div. 2007). In this case, fourteen-year-old defendant, N.C., was charged in two juvenile complaints with delinquency conduct that would constitute aggravated sexual assault and endangering the welfare of a child if he were an adult. Following consultation with the Law Guardian appointed to represent N.C. in the DCPP matter, N.C.'s initial counsel in this case, a pool attorney appointed by the Office of the Public Defender, made a motion to have N.C. examined by the Department of Human Services for fitness to proceed pursuant to N.J.S.A. 2C:4-5(a)(2). Counsel argued N.C.'s intellectual functioning was in the lower extreme range and that he suffered from certain psychological disorders, raising doubts as to his ability to comprehend the juvenile proceedings. After this motion, the prosecutor argued that if the court were to grant this motion, the Public Defender should pay for the evaluation. The trial court found a competency evaluation was necessary but concluded it did not "have the authority to order … another State agency besides the Office of the Public Defender … to pay for it." The court entered an order finding N.C. in need of a competency evaluation and directing the Office of the Public Defender to provide and pay for it. After the Deputy Public Defender for Warren County substituted

himself into the case and moved for reconsideration, the lower court reaffirmed their original decision. This appeal followed. The Court here found it necessary to subject N.C. to a competency evaluation. Being that the legislature intended to safeguard a defendant's right not to stand trial while legally incompetent, evidenced by the codification of the statue, the Court here found no reason why this intent would not apply to juveniles. The issue then became if the lower court could properly order DHS to provide and arrange for this examination. The Court held that because N.J.S.A. 2C:4-5(a)(2) expressly provides a court the ability to order an independent examination when reasons to doubt the defendant's fitness to proceed exist, the court holds the power to order DHS to provide for this examination. Because serious doubts as to N.C.'s fitness to stand trial had been raised, this statute becomes relevant, and the Court held the lower court erred in determining the Office of the Public Defender should pay for and provide this examination. As such, the Court reversed the lower court's determination and remanded the case for further proceedings.

State v. Young, 233 N.J. 345 (2018). Opinion published Per Curiam.

Issue: Did the trial court err in convicting defendant, an unauthorized recipient, of permitting or encouraging the release of a confidential child abuse record in violation of N.J.S.A. 9:6-8.10b?

Holding: Yes, the trial court erred in their conviction. Applying the rule of lenity, the Supreme Court adopted the Appellate Division panel's construction of the statutes, finding that defendant's conduct qualifies as beyond the reach of N.J.S.A. 9:6-8.10b. In this case, Defendant was convicted in the Superior Court, Law Division of permitting or encouraging the release of a confidential child abuse record. Defendant was an unauthorized recipient who knowingly gained access to and disseminated confidential documents pertaining to a record of child abuse. The Appellate Division opinion explains the heart of the matter. There, the panel notes that the Legislature specifically limited culpability under the above-referenced statutes to authorized individuals or entities that receive confidential documents from the Division but then fail to maintain their confidentiality or anyone who encourages their improper release." However, the Supreme Court acknowledged that the State's view of the statute, which provides that records of child abuse made pursuant to N.J.S.A. 9:6-8.10 and reports of findings forwarded to the central registry pursuant to N.J.S.A. 9:6-8.11 "shall be kept confidential and may be disclosed only under the circumstances expressly authorized under" N.J.S.A. 9:6-8.10a(b) to (f). N.J.S.A. 9:6-8.10a(a). Relying on the rule of lenity, which states that the statute governing the offense of permitting or encouraging the release of a confidential child abuse record does not apply to an individual who is unauthorized to view such records but nonetheless knowingly gains access to such confidential records and disseminates them to others, N.J.S.A. 9:6-8.10b, the Supreme Court agreed with the Appellate Division panel in reversing the conviction. Since defendant qualified as an unauthorized recipient, the statutes governing this offense did not apply to him, and the Superior Court erred in convicting defendant. Back to the top.

AMENDED OR NEW COURT RULES

2:4-1(a)(1): Time for appeal.

This rule was amended to read that appeals from final judgments terminating parental rights shall be filed within 21 days of their entry.

R:4:3-1(a)(4)(B): Partition.

This rule, as amended, states that, notwithstanding a family or family-type relationship, when partition is the only relief sought, the matter should be filed and heard in the Chancery Division, General Equity. If any other relief affecting the family or family-type relationship is sought, the matter should be filed and heard in the Chancery Division, Family Part.

4:3-1(a)(4)(G): Requests for Transcripts of Closed Family Court Proceedings Made in a Civil Action.

This rule states that in a Civil action, when a request for a transcript of a Chancery Division, Family Part proceeding that has been deemed closed is made, an application shall be filed and heard in the Law Division, Civil Part to determine the disclosure of the transcript. Additionally, this hearing should establish whether any conditions should be attached to the provision of the transcript. The parties of the Family Part matter shall be provided notice of the application.

4:3-1(a)(4)l): Post-Judgment Relief Relating to Incapacitated Adult child of Parents Subject to Family Part Order.

An action that seeks to modify or enforce the terms of a Chancery Division, Family Part order that addresses custody and/or parenting time/visitation of an unemancipated minor child who was later adjudicated incapacitated after reaching age eighteen shall be filed and heard in the Chancery Division, Probate Court. If the action affects support and the child has not turned twenty-three yet, the action should be filed in the Chancery Division, Probate Court. However, if the incapacitated child has turned twenty-three and either parent remains subject to a Family Part support or financial maintenance order related to other dependents, the support issue for the incapacitated child shall be determined in the Chancery Division, Family Part.

4:72-1(a)(2): Return to Prior Name or Assumption of New Surname in Dissolution Matters.

This rule now states that any action for return to a name used prior to a marriage or civil union shall be filed and heard in the Chancery Division, Family Part. This should be filed either as part of the dissolution complaint or by post-judgment motion. When an action to assume a new surname is sought as part of the final relief in a pending dissolution case, it may be filed and heard in the Chancery Division, Family Part.

4:72-1(b)

The amended rule provides that an action for the change of name of a minor shall be filed and heard in the Chancery Division, Family Part. The action can commence by a parent or guardian of the minor filing a verified complaint which shall contain the date of birth of the minor and shall state : (1) that the application is not made with the intent to avoid creditors or to obstruct criminal prosecution or for other fraudulent purposes; (2) whether the minor has ever been adjudicated delinquent or convicted of a crime, and, if so, the nature of the crime and the disposition/sentence imposed; (3) whether any criminal charges are pending against the minor and, if so, such detail regarding the charges as is reasonably necessary to enable the Division of Criminal Justice or the appropriate county prosecutor to identify the matter. If criminal charges are pending, at least 20 days prior to the hearing a copy of the complaint shall be served on the Director of the Division of Criminal Justice if the charges were initiated by the Division of Criminal Justice. If not initiated by the Division of Criminal Justice, the complaint shall be served on the appropriate county prosecutor. Service shall be accompanied by a request that the official make such response as may be deemed appropriate. Absent extraordinary circumstances, where the parent or guardian of the minor consents to the name change, the court shall conduct the hearing in a summary fashion for the limited purpose of creating a record and confirming the information set forth in the verified complaint.

4:72-1(c): Change of Name of Adults and Minors in Same Family.

This statute was amended to state that an action for change of name of both adults and minors in the same family shall be filed and heard in the Chancery Division, Family Part. This proceeding should follow the same process as set forth in paragraph (b) of this rule. Back to the top.

GESTATIONAL CARRIER STATUTE

N.J.S.A. 9:17-60

Effective May 30, 2018 (applied to all gestational carrier agreements entered into on or after May 30, 2018)

SUMMARY

Authorizes gestational carrier agreements. A gestational carrier agreement is a written contract pursuant to which a woman agrees to carry and give birth to a child with whom she has no genetic relationship and who is created using assisted reproduction on behalf of an intended parent. Upon the birth of the child, the intended parent becomes the legal parent of the child and the woman, who is called a "gestational carrier," has no parental rights or obligations.

The general premise is, unlike what is now regarded as traditional surrogacy, where a woman is artificially inseminated with the semen of the intended father and gives birth to a child through the use of her own egg, gestational surrogacy is the result of developments in reproductive technology and involves a woman who does not make use of her own egg. She, therefore, is not genetically related to the child. This bill would take into account this advance in reproductive technology and would permit gestational carrier agreements that satisfy certain requirements.

INTENT

1. Establish consistent standards and procedural safeguards to promote the best interests of the children who will be born as a result of gestational carrier agreements;
2. Protect all parties involved in gestational carrier agreements;
3. Recognize the technological advances in assisted reproductive medicine in ways that allow the use of these advances by intended parents and gestational carriers.

IMPORTANT DEFINITIONS

Gestational Carrier Agreement: The written contract between the gestational carrier and the intended parent, pursuant to which the intended parent agrees to become the legal parent of a child created through assisted reproductive technology and carried by the gestational carrier.

Gestational carrier**:** A woman 21 years of age or old who agrees to become pregnant for an intended parent by assisted reproductive technology without the use of her own egg.

Intended parent**:** A person who enters into a gestational carrier agreement with a gestational carrier pursuant to section 6 of P.L. 2018, c. 18 (C.9:17-65), pursuant to which the person shall be the legal parent of the resulting child. The term shall include persons who are single, married, partners in a civil union or domestic partnership, and couples who are not married or in a civil union or domestic partnership. Any reference to an intended parent shall include both spouses or partners in a civil union or domestic partnership. This term shall include the intended mother, the intended father, the intended mother and intended father, the intended mother and intended mother, or the intended father and intended father.

ELIGIBILITY REQUIREMENTS

1. A gestational carrier shall be deemed to have satisfied the requirements of P.L.2018, c. 18 (C. (:17-60 et al.) if at the time of the gestational carrier agreement is executed, she:
2. Is at least 21 years of age;
3. Has given birth to at least one child;
4. Has completed a medical evaluation approving her suitability to serve as a gestational carrier;
5. Has completed a psychological evaluation approving her suitability to serve as a gestational carrier;
6. Has retained an attorney, independent of the intended parent, but for whose services the intended parent may pay, who has consulted with her about the terms of the gestational carrier agreement and the potential legal consequences of being a gestational carrier under the terms of this agreement.

7. The intended parent shall be deemed to have satisfied the requirements, if at the time the gestational carrier agreement is executed, the intended parent:
8. Has completed a psychological evaluation approving the intended parents suitability to participate in a gestational carrier agreement; and
9. Is represented by an attorney who consulted with the intended parent about the terms of the gestational carrier agreement and the potential legal consequences of the agreement.

TERMS OF THE GESTATIONAL CARRIER AGREEMENT

A gestational carrier agreement shall satisfy the following requirements:

(1) It is in writing and executed by the gestational carrier, her spouse or partner in a civil union or domestic partnership, if any, and each intended parent. If the intended parent is married or in a domestic partnership or civil union at the time the intended parent enters the agreement, both spouses or partners shall meet the requirements of subsection b. of section 5 of P.L.2018, c. 18 (C.9:17-64) and shall be required to enter into the agreement as intended parents. If the intended parent is not married or in a civil union or domestic partnership, no other person shall be deemed a legal parent of the child unless that person meets the requirements of subsection b. of section 5 of P.L.2018, c.18 (C.9:17-64) and duly executes the agreement;

(2) It is executed after the required medical and psychological screenings of the gestational carrier and the psychological screening of the intended parent, but prior to the commencement of any other necessary medical procedures in furtherance of the implantation of the pre-embryo; and

(3) The gestational carrier and her spouse or partner, if any, and the intended parent shall have been represented by separate attorneys in all matters relating to the gestational carrier agreement and each attorney provides an affidavit of such representation.

A gestational carrier agreement shall provide:

(1) Express terms that the gestational carrier shall:

(a) Undergo pre-embryo transfer and attempt to carry and give birth to the child;

(b) Surrender custody of the child to the intended parent immediately upon the child's birth; and

(c) Have the right to medical care for the pregnancy, labor, delivery, and postpartum recovery provided by a physician, physician assistant, advance practice nurse, or certified nurse midwife of her choice, after she notifies, in writing, the intended parent of her choice;

(2) An express term that, if the gestational carrier is married or in a civil union or domestic partnership, the spouse or partner agrees to the obligations imposed on the gestational carrier pursuant to the terms of the gestational carrier agreement and to surrender custody of the child to the intended parent immediately upon the child's birth; and

(3) Express terms that the intended parent shall:

(a) Accept custody of the child immediately upon the child's birth; and

(b) Assume sole responsibility for the support of the child immediately upon the child's birth.

A gestational carrier agreement shall be presumed enforceable if:

(1) It satisfies the contractual requirements set forth in subsection a. of this section; and

(2) It contains at a minimum each of the terms set forth in subsection b. of this section.

In addition, an enforceable gestational carrier agreement shall include a provision setting forth the financial responsibilities of the parties and shall include a provision that the intended parent shall pay the gestational carrier's reasonable expenses, as defined herein, unless expressly waived, in whole or in part, in writing by the gestational carrier.

In the event that any of the requirements of this section are not met, a court of competent jurisdiction shall determine parentage based on the parties' intent. Back to the top.

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

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