WILENTZ
—ATTORNEYS AT LAW—
WILENTZ, GOLDMAN & SPITZER, P.A.

2019 Family Law Case Digest

03/10/20

Summary of 2019 New Jersey Family Law Published Opinions, Court Rules and Statutes

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

ALIMONY

Imposimato v. Imposimato, 2019 WL 1568091 (unreported). Before Judges Suter and Geiger.

Issue:

If a payor's ex-spouse has good cause to retire and his income is now reduced, can the court deny his application to terminate alimony because he now has significant post-divorce savings and his ex-wife dissipated her assets and has debt? Yes.

Holding:

Based on the totality of the circumstances, there would be minimal consequences to ex-husband if alimony continued but great hardship to ex-wife if alimony stopped. The court weighted all the factors under 2A: 34-23(i)(3).

Facts and Reasoning:

The parties were married for 23 years. The MSA provided that wife would receive $40,000/year alimony. At age 75 ex-husband was forced to close his business and retired. Wife was 65 at the time. His income was $46,000 consisting of Social security and IRA distributions. Husband had four million dollars of post-divorce savings that were primarily liquid. Ex-wife was earning $70,000/year but could not save money because she was supporting her daughter and grandchildren. Back to Top

CHILD SUPPORT

Kavadas v. Martinez, Docket No. MER-L-1004-15 (Law Div. 2018). Opinion by Judge Jacobson. (Unreported)

Issue:

1) Is it a violation of due process to suspend a driver's license for non-support without proving adequate notices and an opportunity to be heard prior to the revocation? Yes.

2) Whether an indigent person is entitled to representation if his or her license will be suspended for non-support? Yes.

Holding:

Judge Mary Jacobson delivered a 187-page written decision which took over 500 days to write:

1) Procedural due process entitles obligors facing suspension to sufficient notice and an opportunity to be heard, explaining the circumstances leading up to their failure to pay support before a suspension takes effect.

2) The court determined indigent obligors are entitled to appointed counsel for child support proceedings at which they face suspension of their driver's licenses because it is a "consequence of magnitude".

Facts and Reasoning:

Plaintiffs challenged the statutory child support enforcement mechanism, N.J.S.A. 2A:17-56.41, by which the State suspends a delinquent obligor's driver's license automatically by operation of law.

The court granted summary judgment for the plaintiffs on their procedural due process claims. Focusing on inconsistencies and deficiencies in the process by which the State routinely suspended the driver's licenses of obligors in arrears, and noting the policy's impact on the poor, the court determined a license suspension is a "consequence of magnitude" which requires "significant procedural protections."

The court directed the Probation Division, DFD and the MVC to create a process that ensures sufficient notice is sent to obligors before the date of suspension, providing sufficient time to take action to avoid suspension.

In accordance with the loss of license being a "consequence of magnitude", the court concluded that as a matter of simple justice, counsel be provided for indigent obligors at child support hearings when they are facing suspension of their driving privileges.

In a March, 2019 letter, Attorney General Gurbir Grewal advised Judge Jacobson that the State would cease the practice of automatic suspensions of driver's licenses when a warrant issues for non-payment of child support as of April 1, 2019.

On December 20, 2019, Governor Phil Murphy signed S1080, which removed the provision that a person's driver's license be suspended by operation of law upon the issuance of a warrant for failure to pay child support. The bill signed into law amends N.J.S.A. 2A:17-56.41 to provide for suspension only after sufficient notice and the opportunity to be heard by a judge. Back to Top

COHABITATION

Landau v. Landau, 461 N.J. upper 107 (App. Div. 2019). Before Judges Fuentes, Accurso and Vernoia. Opinion by Judge Accurso.

Issue:

Whether the 2014 amendments to the alimony statute entitles a party to limited discovery to establish a prima facie cohabitation relationship? No.

Holding:

Nothing in the 2014 amendments to the alimony statute absolved the payor spouse of the burden to establish a prima facie case of changed circumstance (cohabitation) before a court will order discovery.

Facts and Reasoning:

An ex-husband moved to terminate, suspend or modify alimony based on the allegation that his former wife was cohabitating with her new boyfriend. The ex-husband filed a certification alleging various claims which suggested the ex-wife was cohabitating. The ex-wife admitted she was in a relationship with someone, but denied the allegation they were cohabitating. She argued her ex-husband failed to establish a prima facie showing of cohabitation. The plaintiff submitted a certification of the investigator whom the plaintiff hired to prove cohabitation, which alleged cohabitation, but only specified two instances where the defendant and her boyfriend were observed leaving one another's homes together.

Over the objections of the ex-wife, the court ordered limited discovery so the ex-husband could have a chance to establish a prima facie showing of cohabitation. The court ordered discovery of two years-worth of financial records, as well as all communications between the ex-wife and her boyfriend including text messages and social media. The court also ordered the ex-wife to provide access to her electronic calendar for the previous two years. The court also ordered depositions of the ex-wife and her boyfriend, interrogatories and a Notice to Produce. Ex-wife claimed this was an invasion of her privacy.

The Appellate Division granted ex-wife's motion for leave to appeal and stayed the discovery pending their disposition.

The Appellate Division reversed and held that it was error to grant discovery without establishing a prima facie showing of cohabitation based on the statute. The Appellate Division rejected the plaintiff's argument that the 2014 amendments somehow altered the burden required before courts will allow a plaintiff to access the intimate details of a defendant's affairs, which the Supreme Court articulated in Lepis v. Lepis. 83 N.J. 139, 416 A.2d 45 (1980) Back to Top

CUSTODY

A.J. v. R.J., 461 N.J. Super. 173 (App. Div. 2019). Before Judges Koblitz, Whipple, and Mawla. Opinion by Judge Mawla.

Issues:

After a mother unilaterally relocated over sixty miles intrastate, and failed to comply with a court order to return to within a 15-mile radius of the father's residence:

1) Did the court err when custody of children was transferred to the parent of alternate residence under R. 5:3-7(a)(6), as a sanction for violation of a court order (for not returning the children), without first determining if it is in the best interest of the children pursuant to N.J.S.A. 9:2-4? Yes.

2) Is Bisbing v. Bisbing, 230 NJ. 309 (2017), the applicable law when a party seeks intrastate removal? Yes.

3) If a party opposes an intrastate removal, which party has the burden to prove that there is a change in circumstances affecting the best interests of the children? The party objecting to the move.

4) Does the party seeking removal or the party opposing it have the obligation to make the application? Either party.

Holdings:

Reversed and remanded.

1) A best interest hearing is required pursuant to R. 9:2-4 before sanction or modification of children's custody is ordered.

2) The best interest of children standard, in Bisbing, governs intrastate removal of children.

3) Where a parent of primary residence seeks an intra-state relocation and the parent of alternate residence opposes it, the parent of alternate residence must convince the court the move constitutes a change in circumstance affecting the best interests of the children.

Facts and Reasoning:

This case arose post-judgment after the mother of two children relocated from Elizabeth, New Jersey to Mt. Holly, New Jersey, against the wishes of the children's father. Based on the marital settlement agreement, the mother was the primary custodian and the father had visitation every other weekend and one midweek overnight.

In March 2018, the mother moved, informing the father days later via text message. The father filed an order to show cause to bar the relocation and modify custody. In May 2018, the family court increased the father's visitation to three weekends per month, ordered that the children continue to attend school in Elizabeth, and scheduled a plenary hearing to determine whether the mother would be permitted to remain in Mt. Holly.

After the plenary hearing, the judge issued a written decision ordering the mother to return to within fifteen miles of Union, NJ, before the beginning of the school year. Upon her return, custody of the children would return to the terms of the original marital settlement agreement.

The mother did not return, arguing it was impossible. The husband filed an order to show cause seeking enforcement of the judge's July order, as well as primary custody and termination of child support. Thereafter, the family judge transferred primary custody to the father under Rule 5:3-7(a.)(6). The mother's appeal followed.

The Appellate Division held that the lower court's use of Rule 5:3-7(a)(6) (transfer of custody) was proper as a coercive tool for enforcement, but held Rule 5:3-7(a)(6) requires a separate adjudication, which considers the children's best interests and findings pursuant to N.J.S.A. 9:2-4, *before* the sanction is ordered. The Appellate Division reversed the order transferring primary custody to the father and remanded the matter because the trial court did not conduct a separate hearing, and only mentioned the children's best interests without considering the N.J.S.A. 9:2-4 factors.

The Appellate Division reversed the trial court's prior order requiring the mother to return to within 15 miles of Union because the lower court erroneously applied the Baures factors when it entered the order. The Appellate Division remanded for reconsideration applying the N.J.S.A. 9:2-4 best interest factors under Bisbing and overruled Schulze, 361 N.J. Super. cat 427 which relied on Baures.

The Appellate Division further held where a parent of primary residence seeks an intra-state relocation and the parent of alternate residence opposes it, the parent of alternate residence must convince the court the move constitutes a change in circumstance affecting the best interests of the children. If a prima facie case is established, the trial court must assess custody and parenting time, by applying the N.J.S.A. 9:2-4 factors to determine whether the best interests of the children requires a modification of one or both.

The Panel further noted in a footnote:

"We do not opine which parent must make the application to the court. However, in order to avoid a situation similar to this case, the obligation of each parent to keep the other apprised of a change in residence should be memorialized in writing regardless whether custody and parenting time are settled or adjudicated. This type of communication is not only common sense, but is the sort of communication envisioned by the Legislature as consonant with a child's best interests when it enacted N.J.S.A. 9:2-4, requiring the court to consider "the parents' ability to agree, communicate and cooperate in matters relating to the child[.]""

Bata v. Konan, 460 N.J. Super. 562 (Ch. Div. 2019). Opinion by Judge Passamano.

Issue:

Under the UCCJEA (N.J.S.A. 2A:34-54) can a period of absence from a state be included in the 6 month period necessary for jurisdiction? Yes.

Holding:

Under the New Jersey Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), New Jersey lacked jurisdiction to consider the matter because the child lived in New York for the six months prior to the application being filed with the court even though there were periods of absence from New York.

Facts and Reasoning:

The mother filed for custody and support in New Jersey. The Father who resided in New York challenged jurisdiction.

The UCCJEA imposes a bright-line, six-month residency rule to a child to establish where the child lived leading up to initiation of the proceedings. In Sajjad v. Cheema, the Appellate Division articulated the totality of the circumstances test, which utilizes four factors to determine whether the times a child was in New Jersey during the six-month period was temporary for purposes of the UCCJEA. 428 N.J. Super. 160, 170-71 (App. Div. 2012).

In applying the totality of the circumstances test, courts consider (1) the parent's purpose in removing the child from the state, rather than the length of the absence, (2) whether the parent remaining in the claimed home state believed the absence to be merely temporary, (3) whether the absence was of indefinite duration, and (4) any other circumstances particular to the case at issue.

Here, the New Jersey Mother was a flight attendant who's work schedule required her to be away for significant period of time, followed by significant periods of time at home. The child attended school, attended church, and participated in recreational activities in New York. The evidence showed that even when the child was with the Mother in New Jersey, the child's New York activities took precedence over her presence in New Jersey.

Here, the court found all four factors favored the finding that the child lived in New York. The final step in the totality of the circumstances test would be to give weight to the factors to determine the outcome, if necessary. Without jurisdiction, the court dismissed the action.

J.G. v. J.H., 457 N.J. Super. 365 (App. Div. 2019). Opinion by Judge Koblitz.

Issues:

- Whether the trial court erred in a FD matter by failing to conduct a plenary hearing to determine child custody where a dispute as to material facts existed? Yes.
- Whether the court erred by failing to make fact-findings and apply those facts to the custody factors provided in N.J.S.A. 9:2-4(c)? Yes.

Holding:

- Under K.A.F. v. D.L.M., a plenary hearing is required when the parents give materially conflicting representations of fact in custody matters.
- The lower court erred by not applying fact-findings to the custody factors provided in N.J.S.A. 9:2-4(c) because the best interests of the child is the "touchstone for all custody determinations."

Facts and Reasoning:

Two years after the birth of J.H., his parents consented to joint legal custody, giving primary residential custody to the mother and granting generous parenting time to the father. The following year, the agreement was nullified due to an attempt by the couple to reconcile. After the reconciliation failed, the mother became engaged to and pregnant by another man. The father alleges that J.H. was left alone with the mother's new fiancé, a "well-known drug user" and "convicted felon with multiple prison sentences."

The father filed an order to show cause, which the court denied, stating he failed to demonstrate irreparable or "actual imminent threat of harm to J.H." However, the court did award temporary sole custody to the father pending resolution of the application because "there appears to be potential for violence in the mother's home, which could spill over and adversely affect a four-year-old child."

The mother then filed an order to show cause, alleging that the abrupt removal of J.H. from her custody was harming the child. When the couple returned to court, they gave conflicting testimony each accusing the other of wrongdoing. The judge ordered joint legal and physical custody. The father was awarded primary residential custody and the mother's fiancé was prohibited from being alone with J.H. The judge denied discovery and did not allow cross-examination or the right to call witnesses. The mother's appeal followed.

In contested custody matters, a thorough plenary hearing is necessary when the parents make materially conflicting representations of fact, under K.A.F. v. D.L.M. 437 N.J. Super. 123, 137-38 (App. Div. 2014) The Appellate Division concluded that the court erred in not conducting a plenary hearing because the court received conflicting testimony during the initial hearing.

"The touchstone for all custody determinations has always been 'the best interests of the child.'" Faucett v. Vasquez, 411 N.J. Super. 108, 118 (App. Div. 2009) (quoting Kinsella v. Kinsella, 150 N.J. 276, 317 (1997)). "Custody issues are resolved using a best interests analysis that gives weight to the factors set forth in N.J.S.A. 9:2-4(c)." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007).

The Appellate Court found the judge made no mention of the child's best interests or any of the N.J.S.A. 9:2-4(c) factors and therefore erred when deciding the child's custody. The trial court's explanation was insufficient, only noting that the child had "already been uprooted."

The court admonished the trial judge for not ordering mediation R. 5:8-1 and to compel the parties to file a custody and parenting plan pursuant to N.J.S.A. 9:12-4(e) and R. 5:8-5(a). Although this was an FD matter (a summary proceeding) the court noted that thoughtful consideration by the court was required.

The Appellate Division remanded the case to the Family Part to be assigned to a different judge. Back to Top

DIVISION OF CHILD PROTECTION & PERMANENCY

New Jersey Department of Children & Families v. L.O., 460 N.J. Super. 1, 21 (App. Div. 2019). Before Judges Fisher, Suter and Firko. Opinion by Judge Fisher.

Issue:

Whether an indigent parent or guardian – substantiated for child abuse or neglect – is entitled to the appointment of counsel when exercising the right to an administrative hearing? Yes.

Holdings:

- The seriousness of potential consequences, impacts on a parent's constitutional rights. Simple justice entitles indigent parents to the appointment of counsel for the administrative proceedings which result in substantiation.
- The right to counsel attaches to an indigent parent's judicial appeal to a finding of substantiation because R. 2:2-3(a)(2) provides that an appeal for substantiation of abuse is available as a right for those who can pay for it.

Facts and Reasoning:

The mother appealed the substantiation finding and a hearing was scheduled and conducted before an administrative law judge. The mother was not offered counsel and was left to conduct her own defense. She had no experts and only provided her own testimony in response.

Indigent parents or guardians are entitled to counsel in these administrative proceedings due to the permanent and the potential consequences that often arise from inclusion in the Child Abuse Registry, from employment to the effect of disclosure to police, doctors, hospitals and more.

The Court acknowledged the dire and direct impact substantiation findings have on relationships between children and parents, having the potential to directly impact parents' constitutionally protected right to maintain a relationship with their children.

The Court concluded that simple justice requires granting indigent parents or guardians counsel in administrative hearings. Noting the powerful resources employed by the State and the complexity of these administrative proceedings, the Appellate Division held that "lawyers are necessities, not luxuries."

The Court held that an appeal from substantiation determination must be provided for those who can't afford it, since R. 2:2-3(a)(2) provides an appeal of substantiation determination is available as a right for those who can pay for it.

The Court determined the right to free transcripts is included because parents or guardians unable to afford the transcripts would be effectively denied an adequate appellate review, unlike those who have the money to pay the costs.

N.J. Division of Child Protection & Permanency v. A.S.K., 236 N.J. 429 (2019). Opinion Per Curiam.

Issue:

Whether the Appellate Division erred in terminating a parent's rights by finding the four prongs of the best-interests-of-the-child test had been met? No.

Holding:

The Appellate Division did not err because DCPP considered the best interests of the child.

Facts and Reasoning:

The child at issue in this case, was in the custody of DCPP. In an effort to give a permanent placement, DCPP attempted to find the child's biological parents who were "out of the picture." During this process, the Division was unable to locate the parents, even after making deviations from normal procedures to ensure they exercised reasonable efforts to locate and serve notice on the biological parent. The Appellate Division held that terminating the parental rights was proper under the best interests of the child test.

The Supreme Court affirmed the judgment of the Appellate Division, holding that the adoption could achieve permanency through the adoption plan that has been held in abeyance for him. However, the Court noted that

the DCPP should enhance their current processes by conducting a new search for a parent in each phase of litigation, regardless of how recently they previously searched for the parent, and retaining the parent's previous contact information.

New Jersey Div. of Child Prot. & Permanency v. B.H., 460 N.J. Super. 212 (App. Div. 2019). Before Judges Koblitz, Currier and Mayer. Opinion by Judge Mayer.

Issue:

Can a boyfriend who provides brief or temporary care of a child, be charged under Title 9 as a guardian with abuse and neglect? No.

Holding:

The Appellate Division concluded that the boyfriend was not the child's guardian because the relationship between the boyfriend and the child was only brief and temporary and he had no ongoing responsibility or obligation to provide regular care or supervision for the child.

Facts and Reasoning:

The trial court found the boyfriend abused and neglected the child because he placed her at a "risk of harm by driving with [her] in his car while under the influence of narcotics and impaired." The boyfriend lived apart from the child and the mother. He babysat the child once. On the day of his arrest, he drove the child in his car while under the influence of narcotics.

The Appellate Division adopted the proposition that Title 9 guardianship applies "to those who have assumed a general and ongoing responsibility for the care of the child," pointing to the Supreme Court's words in the related context of criminal child endangerment under N.J.S.A. 2C:24-4(a), which contains language similar to the language in Title 9. State v. Galloway, 133 N.J. 631, 661 (1993). The "general and ongoing responsibility" need not be based on a "legal and formal" relationship with the child, and instead "may arise from informal arrangements." Ibid. "It may be based on a parental relationship, legal custody, or on less-structured relations; or it may arise from cohabitation with the child's parent." Ibid. However, the requirements for a guardian are *not met* when a person only assumes "*temporary, brief, or occasional caretaking functions, such as irregular or infrequent babysitting*...." Id. at 661-62 (emphasis added).

New Jersey Div. of Child Prot. & Permanency v. J.B., 459 N.J. Super. 442 (App. Div. 2019). Before Judges Fisher, Geiger and Enright. Opinion by Judge Geiger.

Issue:

Whether the Division of Child Protection and Permanency (the Division) can obtain court approval to vaccinate children, who are in the Division's care, custody and supervision due to substantiated and admitted abuse and neglect of the parents despite the parents' religious objection? Yes.

Holding:

When the Division has the care, custody, and supervision of children due to substantiated and admitted abuse and neglect of the parents and despite the parents' religious objection, courts have the authority under their inherent *parens patriae* jurisdiction over the children to order necessary and appropriate medical care, including vaccinations to prevent a child from contracting infectious diseases.

Facts and Reasoning:

The Division placed two children with resource parents after an investigation into the parents revealed abuse and neglect. In addition to other indications of abuse and neglect, the Division discovered the parents failed to

provide any regular medical and dental care for the children. More specifically, the children, a 2-year old and a newborn, never received any vaccinations.

The Division moved in court to compel the administration of the MMR vaccination for the children, which prevents measles, mumps and rubella. The Family Part conducted a plenary hearing on January 16, 2019, hearing testimony from the child's pediatrician and the children's Mother. The pediatrician described the symptoms and effects of measles, as well as the risks versus benefits associated with immunization. The Mother testified about her objection to vaccinations, citing her religion and the First Amendment. The court ultimately ordered the children to receive the age appropriate vaccinations.

The Mother relied on N.J.S.A. 26:1A-9.1 and N.J.A.C. 8:57-4.4(a), which pertain to religious exemptions to mandatory vaccinations for students attending school. The Mother also submitted a May 19, 2017 administrative guidance letter issued by the New Jersey Department of Health (DOH) interpreting N.J.A.C. 8:57-4.3 and N.J.A.C. 8:57-4.4 regarding immunization of students, which stated a relatively permissive policy regarding exemptions for vaccines, requiring only a simple written, signed request.

The Appellate Division rejected the Mother's arguments, concluding the provisions the Mother relied on are inapplicable to the circumstances of this case because this matter had nothing to do with school. Here, the children were in the care and custody of the Division, so Title 9 governed the matter. Under the doctrine of *parens patriae*, the State can step in to protect those who cannot protect themselves. Accordingly, the Appellate Division determined that providing age-appropriate vaccinations to children in the care and custody of the Division will protect them from needlessly contracting diseases that would subject them to potentially serious complications.

New Jersey Div. of Child Prot. & Permanency v. K.G., 460 N.J. Super. 467 (App. Div. 2019). Before Judges Simonelli, Whipple and DeAlmeida. Opinion by Judge DeAlmeida.

Issue:

Whether the trial court erred when they ruled K.G. could not be represented by the same counsel in both criminal and Title Nine proceedings involving the same alleged acts against a child? Yes

Holding:

The trial court erred when it denied K.G. his choice of counsel because the lower court did not abide by the Appellate Division's previous holding in N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593 (App. Div. 2010).

Facts and Reasoning:

K.G. stood accused of sexual abuse of a child. K.G. hired an attorney to represent him in both the criminal proceeding and the Title Nine matter. At a hearing to determine if K.G. would be permitted to have the same attorney represent him in both proceedings, the judge declined to apply the analysis required by N.S. or consider any of the protective measures identified in the opinion. Instead, the lower court denied K.G.'s request for dual representation, declaring that the circumstances differentiated K.G.'s case from N.S., meaning N.S. was not binding.

After K.G.'s Title Nine proceedings, where he was represented by appointed counsel, the court found K.G. sexually abused the child. K.G. appealed, arguing he was deprived of his right to choose counsel when the trial court refused to allow his retained counsel to represent him in both the Title 9 and criminal proceedings.

N.S. set forth the considerations trial judges must weigh when defendants in parallel Title 9 and criminal proceedings request dual representation. The Appellate Division admonished the lower court for failing to follow its holding in N.S., which commands that "trial courts may not summarily reject a defendant's request to have the same counsel represent him in parallel Title Nine and criminal proceedings arising from the same

alleged abuse of a child." In N.S., the Appellate Division instructed that a court instead must weigh the competing demands of protecting the confidentiality of DCPP records and the defendant's right to counsel of his choice.

The balancing test safeguards the goals of the State to uncover and treat abuse and neglect, and protects victim children, without unnecessarily sacrificing a parent's right to exercise a desired choice of legal counsel.

Further, the Appellate Division directed the case to be assigned to a different judge on remand, because the original judge may have been committed to his previous findings.

New Jersey Div. of Child Prot. & Permanency v. M.M., 459 N.J. Super. 246 (App. Div. 2019). Before Judges Sabatino, Sumners and Mitterhoff. Opinion by Judge Sabatino.

Issue:

Did the Division of Child Protection and Permanency ("the DCPP") meet its burden of proof under N.J.S.A. 30:4C-15.1(a), when the court approved its plan for the adoption of three children who are in a grandmother's care, and for the maternal great aunt to likewise adopt the other three children, terminating the parental rights of M.M., the mother, and V.B., the father? Yes, subject to further findings on remand.

Holding:

The Appellate Division affirmed the findings of the family court, but due to the constitutional dimension that accompanies the termination of parental rights, remanded to clarify the record as to the potential alternative of Kinship Legal Guardianship because the record was not sufficiently clear to rule out the possibility of Kinship Legal Guardianship for the children.

Facts and Reasoning:

After the parents appealed the termination of their parental rights and court-ordered adoptions by the Grandmother and Great-Aunt of the children, the Appellate Division recognized a deficiency in the family court's otherwise well-reasoned, well-founded decision, which was fully supported by the Law Guardian and the DCPP.

The record below was unclear as to the Grandmother's and Great-Aunt's grasp of Kinship Legal Guardianship as an alternative to adoption. Neither the Grandmother nor the Great-Aunt testified, so any insight into their thinking was based on hearsay, some of which was objected to by counsel. The fact that the lower court's written analysis did not mention Kinship Legal Guardianship at all also supported the Appellate Division's decision.

The Kinship Legal Guardianship Act, N.J.S.A. 3B:12A-1-7, was enacted to provide an alternative to termination of parental rights and court-ordered adoption of children whose parents cannot provide them a safe environment to live. Where friends and family-members are caring for such children, but do not wish to adopt, Kinship Legal Guardianship operates to provide best possible outcomes for children, ensuring a stable guardian will care for and raise the children to adulthood. A notable feature of Kinship Legal Guardianship is that it does not terminate parental rights, so biological parents retain limited rights, like visitation and retain some responsibilities, like child support.

The Legislature recognized that the key to a caregiver's decision whether to adopt or elect Kinship Legal Guardianship must be an informed one. In 2005, the Legislature enacted the Kinship Legal Guardianship Notification Act (Notification Act), N.J.S.A. 30:4C-89 to -92. The Notification Act required the DCPP to implement rules and regulations to effect the Notification Act's goals.

Since no published opinion has interpreted the Notification Act, the Appellate Division sought to more clearly define the statute. In earlier published opinions involving parents who sought Kinship Legal Guardianship over

termination and adoption, courts, adopting the DCPP's position, have enforced a requirement that adoption must not be feasible or likely for Kinship Legal Guardianship to be appropriate. The DCPP maintained that a caregiver's preference of Kinship Legal Guardianship over adoption should have no bearing on a family court's ultimate decision.

Family courts should fully develop the record to erase as much doubt as possible about whether a caregiver is fully informed and their intentions. A family court's written analysis should thoroughly address Kinship Legal Guardianship as an alternative to termination and adoption.

N.J. Division of Child Prot. and Permanency v. V.F., 457 N.J. Super. 525 (App. Div. 2019). Opinion by Judge Sumners.

Issue:

Whether the Family Part erred in considering the police officer's testimony that defendant was under the influence based upon the results of a horizontal gaze nystagmus (HGN) test?

Holding:

The HGN test has not been accepted by the court as reliable. The judge erred in considering the HGN test when determining if defendant was under the influence of narcotics.

Facts and Reasoning:

After Rina, the mother of four children, two of which are defendant's, was unresponsive, her eldest son called the police. Upon arrival of the police, defendant was kneeling next to Rina's body. After talking to defendant, the police officers noticed defendant's red eyes and slurred speech. Defendant then consented to an HGN test which showed that he was under the influence of narcotics.

Defendant and Rina were charged with abuse or neglect of their children. Following the Title 9 hearing, the trial judge issued an order in and rendered an oral opinion in favor of the Division, explaining the decision was based upon the credible testimony of Division workers and the officer who arrived on the scene. After this hearing, the Division filed a complaint for termination of defendant's parental rights, which the court accepted. Defendant appeals, arguing that the lower court erred in finding he neglected or abused his children.

To prevail in a Title 9 proceeding, the Division must show by a preponderance of the competent, material, and relevant evidence that the parent or guardian abused or neglected the affected child. N.J.S.A. 9:6-8.46(b). Under Title 9, a child is "abused or neglected" if he or she is one:

> *"Whose physical, mental, or emotional condition has been impaired as the result of the failure of his parent or guardian . . . to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so."*
>
> [N.J.S.A. 9:6-8.21(c)(4).]

An HGN test is not admissible at trial to show an individual is guilty of DUI as "neither this court nor our Supreme Court has . . . endorsed HGN testing." State v. Dorguizzi, 334 N.J. Super. 530, 533 (App. Div. 2000). However, police can use the tests to ascertain probable cause for an arrest. Id. at 546. When a test requires technical, or other specialized knowledge to assist the trier of fact to understand the evidence, only a witness qualified as an expert may testify thereto. N.J.R.E. 702.

The Court found that the scientific unreliability of the HGN test excluded its use in proving one was under the influence. Since the testifying officer was not qualified as an expert, the Court found that the Family Part should have excluded him from testifying. Although the Court found that the results of the HGN test could not

be the basis for a finding of abuse or neglect, it found the officer provided enough other evidence that defendant was under the influence during the incident to uphold the ruling. As such, this Court affirmed the decision of the court that defendant abused or neglected his children. Back to Top

DOMESTIC VIOLENCE

E.S. v. C.D., 460 N.J. Super. 326 (Ch. Div. 2019). Opinion by Judge Steinhart.

Issue:

Is a parent, who hired a nanny, entitled to protection from the nanny as a household member under the Prevention of Domestic Violence Act (PDVA).

Holding:

Despite their economic relationship, a nanny who resided in the plaintiff's home is considered a household member for purposes of the PDVA.

Facts and Reasoning:

After a nanny was fired for mistreating the child, she began to harass and threaten the parent.

The judge cited to Coleman v. Romano, 388 N.J. Super. 342, 251-52 (Ch. Div. 2006) as authority which lists six factors to consider whether the parties qualify as household members for purposes of the PDVA:

- the nature and duration of the prior relationship;
- whether the past domestic violence relationship provided a special opportunity for abuse and controlling behavior;
- the passage of time since the end of the relationship;
- the extent and nature of any intervening contacts;
- the nature of the precipitating incident; and
- the likelihood of ongoing contact or relationship.

Applying the factors, the court determined that receipt of economic benefits to Defendant did not automatically disqualify the Plaintiff from seeking the protection of the PDVA.

State v. Hemenway, 239 N.J. 111 (2019). Opinion by Justice Albin.

Issue:

Whether a probable cause standard is applicable to the issuance of a domestic violence search warrant for weapons under the Domestic Violence Act, set forth in State v. Johnson, 352 N.J. Super. 15 (App. Div. 2002)? Yes.

Holding:

The Fourth Amendment and Article I, Paragraph 7 of the N.J. Constitution require that warrants may only issue upon probable cause, and the Domestic Violence Act can still accomplish the protection of domestic violence victims without weakening fundamental constitutional guarantees.

Facts and Reasoning:

A woman sought a TRO in a Union County family court alleging through a translator that Hemenway threatened her and her family. The woman also told the court that Hemenway had guns and knives at his apartment and in compartments in his cars. The family court issued a warrant to seize the weapons.

While police searched Hemenway's apartment, they discovered drugs in plain view. The police then obtained a telephonic criminal search warrant and uncovered large amounts of drugs and cash, but no weapons. After being charged, Hemenway moved to suppress the evidence, challenging the validity of the domestic violence search warrant and the criminal search warrant.

The trial court denied Hemenway's motion to suppress, concluding that the family court had a reasonable basis to permit a search of his home and cars because the woman testified Hemenway had guns and knives in those places and because Hemenway could potentially use those weapons harm the woman. Afterward, Hemenway pled guilty, receiving an eight year sentence. He unsuccessfully appealed, arguing that the trial court should have applied a probable cause standard when it issued the original search warrant.

The New Jersey Supreme Court rejected the State's argument that the special needs doctrine allows courts to issue domestic violence search warrants for weapons without finding probable cause. Instead, the Court concluded, under our current jurisprudence, in a domestic violence setting, law enforcement officers could execute a warrantless entry of a home to seize weapons based on exigent circumstances.

Before issuing a search warrant for weapons as part of a TRO under the Domestic Violence Act, a court must find that there is (1) probable cause to believe that an act of domestic violence has been committed by the defendant, (2) probable cause to believe that a search for and seizure of weapons is "necessary to protect the life, health or well-being of a victim on whose behalf the relief is sought," and (3) probable cause to believe that the weapons are located in the place to be searched.

The Court concluded that in the domestic violence context, the court issuing a weapons search warrant would merely have to find a "well-grounded suspicion" that the defendant committed an act of domestic violence, that a seizure of weapons is necessary to protect the life, health or well-being of the victim, and that the weapons are located in the place to be searched.

The Court noted that a showing of probable cause is not a high bar that would diminish or impede the State's mission under the DVA to protect victims. The Court found that the family court here failed to elicit sufficient facts from the woman to establish probable cause. Courts should ask questions to completely develop the record to determine whether or not to issue a search warrant.

The Court suppressed the evidence recovered from the domestic violence search warrant because the family court's decision was based on a deficient record. The evidence from the subsequent criminal warrants was suppressed as "fruit of the poisonous tree." The Court directed the lower court to allow Hemenway to withdraw his guilty plea. Back to Top

ENFORCEMENT OF JUDGEMENT

Orlowski v. Orlowski, 459 N.J. Super. 95 (App. Div. 2019). Before Judges Fisher, Hoffman and Geiger. Opinion by Judge Geiger.

Issue:

- In a post-judgment family law matter, can a court enforce obligations (counsel fees, college tuition, forensic account fees, equitable distribution) by a Qualified Domestic Relations Order (QDRO) against the payor's pension annuity funds? Yes.
- Can a family court garnish wages for counsel fees related to an alimony and child support judgment at the enhanced rate of 50% of the payor's income? Yes.

Holdings:

Although ERISA plans prohibit the alienation of assignment or alienation of pension benefits, QDRO's are an exception. An alternate payee includes any spouse, former spouse, child or other defendant related to

payments for alimony, child support, equitable distribution and counsel fees. The court distinguished Johnson v. Johnson, 320 N.J. Super. 371 (App. Div. 1999) which disallowed a QDRO because the payments for fees were paid directly to the attorney "arising out of the dissolution of the marriage" rather than directly to the spouse.

QDROS can be used to enforce counsel and expert fee award only when other assets don't exist or are unavailable. Child support includes college education and is an exception to the anti-alienation provision under ERISA.

The court further held that a judgment for counsel fees related to child support and spousal support are enforceable through enhanced wage garnishment of 50% of a payor's disposable income. Back to Top

EQUITABLE DISTRIBUTION

Fattore v. Fattore, 450 N.J. Super. 75 (App. Div. 2019). Opinion by Judge Mawla.

Issue:

- Whether a court may indemnify a payee spouse when the payor spouse who QDRO'd his pension waives a military pension and receives disability retirement benefits? No.
- Whether a court can treat a military pension waiver as a change in circumstances sufficient to award the payee alimony despite the fact that the MSA waived alimony? Yes.

Holdings:

- A trial court may not indemnify a payee spouse when the payor spouse waives a military pension based on Federal Law.
- A pension waiver which deprived the wife of her QDRO right is a substantial and permanent change in circumstances warranting consideration of a post-judgment award of alimony.

Facts and Reasoning:

In 1997, after thirty-five years of marriage, the parties divorced. The final judgment of divorce stated that both husband and wife waive alimony. Additionally, the order divided the parties' pensions. The parties agreed defendant had a fifty-percent interest in plaintiff's modest pension, which was applied against her equity in the marital home. Wife received fifty-percent of husband's pension, from husband's time in the Army National Guard. Wife was to receive that interest through a qualified domestic relations order (QDRO).

Defendant became eligible to begin receiving pension payouts, but opted to receive disability benefits instead. Ex-husband converted his pension to disability benefits, which made it exempt under the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 ("USFSPA").

Wife filed a motion to compel defendant to compensate her for her share of the military pension. After a two-day trial, the trial judge ordered husband to pay wife $1,800 a month as equitable distribution for the value of the lost benefits, as well as denying wife's request for alimony, finding that both parties waived alimony when they divorced.

Under the Uniformed Services Former Spouse Protection Act (USFSPA), state courts could treat "disposable retired pay" as subject to equitable distribution, but excluded any pay waived in order to receive veteran's disability benefits from equitable distribution. 10 U.S.C. § 1408(c)(1) and (a)(4)(ii). In Howell v. Howell, the Supreme Court ruled that "federal law completely pre-empts the States from treating waived military retirement pay as divisible community property." Howell v. Howell, 137 S. Ct. 1400, 1405 (2017).

The Appellate Division held that although the state order required defendant to pay plaintiff the reasonable amount of the hypothetical military pension, USFSPA pre-empted that order. As such, the Appellate Division reversed the trial court's decision and awarded alimony to wife to compensate her from loss of pension.

Courts may award alimony "as the circumstances of the parties and the nature of the case shall render fit, reasonable and just." N.J.S.A. 2A:34-23. "Courts have the equitable power to establish alimony and support orders in connection with a pending matrimonial action, or after a judgment of divorce or maintenance, and to revise such orders as circumstances may require." Crews v. Crews, 164 N.J. 11, 24 (2000) (citing Lepsis v. Lepsis, 83 N.J. 139, 145 (1980)).

The Appellate Division held the alimony waiver was not a bar to a consideration of a post-judgment award of alimony to ex-wife. Because she gave valuable consideration for her waiver, the unforeseeable loss in the future pension benefits constituted a substantial and permanent change in circumstances that invalidated the previous waiver of alimony. To hold that the waiver precluded ex-wife from showing a change in circumstances would be wholly unfair and violate principles of equity.

The Appellate Division reversed and remanded the trial court's decision because plaintiff showed a substantial and permanent change in circumstances warranting alimony. The award of attorney's fees was overturned.
Back to Top

JUVENILE JUSTICE

State of New Jersey in the Interest of C.F., State of New Jersey in the Interest of A.G., State of New Jersey in the Interest of T.S., 458 N.J. Super. 134 (App. Div. 2019). Before Judges Messano, Gooden Brown and Rose. Opinion by Judge Rose.

Issue:

Whether a family judge may divert a delinquency complaint from court action after conducting a diversion hearing without affording the juvenile an opportunity to appear at the hearing? No.

Holdings:

- Juveniles have a constitutional right to appear at diversionary hearings, whether to object or argue for admission.
- Courts handling juvenile complaints must require complete assessment by intake services of juveniles' personal and family circumstances before making a decision to divert.

Facts and Reasoning:

This appeal was consolidated, arising from three separate juvenile cases of marijuana possession under 50 grams. A family judge interpreted the holding in State in the Interest of N.P. to mean that courts must only provide notice to the State, and not juvenile defendants, when conducting diversion hearings related to conduct that would constitute disorderly persons offenses under chapter 35 and chapter 36 of Title 2C of the New Jersey statutes. 453 N.J. Super. 480 (App. Div. 2018). The family judge diverted the three juveniles to either the JCC or ISC after conducting diversion hearings where only the prosecutor was notified and present.

The prosecutor objected, arguing the court could not make a proper determination without more information and without the juveniles present. The court based its decision entirely on the complaints, without any information about the juveniles' personal or family circumstances. Because the juveniles were not present, the prosecutor could not introduce the police reports for the judge to review. The prosecutor pointed to the assessments by intake services, which only mentioned one of eleven factors listed in N.J.S.A. 2A:4A-71(b), known as Section 71.

After the State filed its appeal, the judge issued an amplification statement, wherein the judge reasoned mandatory appearance at diversion hearings exposes juvenile offenders to the formal calendar of the court and requires they obtain counsel, contrary to the "whole purpose" of diversion.

The Appellate Division rejected the lower court's narrow interpretation of N.P., but recognized the judge's good intentions. Due process under the 14th Amendment requires juveniles be afforded the opportunity to be represented by counsel and be heard at mandatory diversion hearings. Circumstances could exist where juvenile offenders object to diversion or may need to argue for it. The Appellate Division concluded diversion, all though well-intentioned, may preclude a juvenile offender from asserting innocence or a defense, either of which is required under the law.

The Appellate Division determined that intake services' failure to make complete assessments of the juveniles pursuant to Section 71 adversely impacted the prosecutor's ability to present the judge with information about the juveniles. The Appellate Division determined the lack of information upon which the lower court based its decisions to divert was traceable to the incomplete assessments by intake services. Rejecting the lower court's argument that the ISC or JCC can refer unsuitable cases back to the court, the Appellate Division held that any substance abuse issues should have been considered *before* the decision to divert.

State in the Interest of D.M., 238 N.J. 2 (2019). Opinion by Justice Patterson.

Issues:

- Whether a juvenile, age 14, can be adjudicated delinquent, for endangering the welfare of a child, age 11, in violation of N.J.S.A. 2C:24-4(a)(1) where there were no findings of sexual penetration force or coercion? Yes.
- Whether the Family Part's conflicting characterizations, at the adjudication and disposition hearings, of its factual findings regarding the juvenile's conduct are sufficient to uphold the adjudication. No.

Holdings:

- A juvenile can be adjudicated delinquent for endangering the welfare of a child under N.J.S.A. 2C:24-4(a)(1), when the juvenile and his alleged victim are fewer than four years apart and the Family Part judge made no findings of sexual penetration, force, or coercion because there is no evidence in the plain language of the statute that the Legislature intended to incorporate elements of the sexual assault statutes or criminal sexual contact statutes into the endangering statute. The Court called for legislative review of the statute to clarify the law's application to circumstances involving sexual conduct between juveniles close in age.

Facts and Reasoning:

The State charged fourteen-year-old D.M. with delinquency based on conduct which, if committed by an adult, would constitute first-degree aggravated sexual assault, contrary to N.J.S.A. 2C:14-2(a)(1). The State alleged that D.M. committed acts of sexual penetration against an eleven-year-old acquaintance.

Following a trial, the court found the State had failed to prove beyond a reasonable doubt sexual penetration, an element of the first-degree aggravated sexual assault charge under N.J.S.A. 2C:14-2(a)(1). The court found that the State had proven the elements of the third-degree endangering offense, including "sexual conduct which would impair or debauch the morals of the child." N.J.S.A. 2C:24-4(a)(1).

At the disposition hearing later, however, the trial court contradicted its earlier findings. The court said the State had actually met its burden to prove sexual penetration, but the court instead adjudicated D.M. delinquent on the third-degree charge "as a humanitarian gesture" warranted by the juvenile's personal qualities like the lack of prior offenses on his record, the grandmother whose devotion to D.M. had impressed the court, D.M.'s "trials and tribulations," and the juvenile's admirable extracurricular activities.

The Appellate Division reversed the juvenile adjudication, reasoning that the Legislature did not intend for the endangering statute, N.J.S.A. 2C:24-4(a)(1), to support a delinquency adjudication based on a juvenile's sexual contact with another minor fewer than four years younger, in the absence of a finding of sexual penetration, force, or coercion. More specifically, the Appellate Division determined that the Legislature intended for the endangering statute to include the sexual penetration element of N.J.S.A. 2C:14-2(a), and the age disparity element of N.J.S.A. 2C:14-2(b). The State petitioned the New Jersey Supreme Court for certification.

The Supreme Court declined to adopt the view of the Appellate Division. Instead, the Court found the plain language of N.J.S.A. 2C:24-4(a)(1) controlling. In the absence of clear language importing the elements cited from the other statutes, the Court concluded in "appropriate settings, the endangering statute, N.J.S.A. 2C:24-4(a)(1), as currently drafted may apply to a juvenile, even when the specific conduct involved does not involve sexual penetration, force, or coercion and the juvenile and alleged victim are fewer than four years apart in age."

Although the Court declined to rewrite the law, they did recommend a legislative review of this statute. The Court called for clearer guidance for "courts, counsel and the public" for cases arising under similar circumstances, noting the Model Penal Code's endangering provision is particularly clear.

The Court reversed and remanded because the Family Part judge's conflicting statements as to whether the State met its burden of proof on the original aggravated sexual assault charge.

State of New Jersey in the Interest of T.D., 460 N.J. Super. 297 (Ch. Div. 2019). Opinion by Judge Gramiccioni.

Issue:

May a court set aside a mandatory penalty for community service for a juvenile who is homeless? Yes.

Holding:

The court vacated the incomplete community service hours, in accordance with the discretion Family Part judges have when imposing penalties. Family Part judges retain jurisdiction and can recall the parties, to modify penalties when circumstances show the original conditions of a deferred disposition agreement would harm a juvenile more than correct behavior, in keeping with the rehabilitative purposes of the Juvenile Code.

Facts and Reasoning:

The juvenile, T.D., became homeless shortly after the original order to complete 30 hours of community service. The probation office assigned several community service locations for T.D. to fulfill her obligation, but T.D. failed to do so. Recognizing that T.D. was running out of time to comply with the court's order, the probation division filed a return for disposition.

Citing the N.J. Code of Juvenile Justice, N.J.S.A. 2A:4A-20 to -48, which "authorizes a Family Part judge to enter dispositions that comport with the Code's rehabilitative goals." The court vacated all of T.D.'s remaining community service hours, under its authority to "recall any matter previously before the court to change or modify a disposition at any time," under N.J.S.A. 2A:4A-45.

The court found that here, in view of T.D.'s unique circumstances, imposition of the community service hours was not only not mandatory, but inappropriate for T.D. and contrary to the purposes of the Juvenile Code. Back to Top

MARITAL SETTLEMENT AGREEMENTS

Holtham v. Lucas, 460 N.J. Super. 308 (App. Div. 2019). Before Judges Ostrer, Currier and Mayer. Opinion by Judge Ostrer.

Issue:

Is an MSA enforceable which provided for a per diem penalty of $150, plus counsel fees, if any provision of the agreement is breached? Yes.

Holding:

Family judges are not bound by the common-law contract principles related to the penalty rule, and may impose significant sanctions to ensure compliance with an MSA.

Facts and Reasoning:

The trial court ordered the ex-husband to pay $18,450 representing a $150 per diem penalty for failing to transfer title to a car to pay off a car loan of the payee in the amount of $50,000.

The penalty rule, applicable to contract cases, limits damages to measurable compensable losses. As a contract law doctrine, the penalty rule is intended to avoid oppression, excessive recovery and deterrence of efficient breach.

The penalty rule does not apply to marital agreements because penalties will secure post-divorce harmony and stability and may compensate the non-breaching party for the emotional harm resulting from the breach. However, the family court retains the inherent power to modify penalty provisions to assume fairness and equity. The court can invalidate a penalty claim if it is unconscionable or the product of fraud, undue pressure or where a party lacks independent counsel.

The court must scrutinize a penalty provision in light of the totality of circumstance and consider the following:

1. Negotiations preceding the MSA.
2. Bargaining power of parties.
3. Sophistication of parties and whether a party had independent counsel.
4. Extent of penalty in light of the breach.
5. Emotional distress on non-defaulting party and post-divorce place.
6. Ability to pay.
7. Breaching parties good faith.

Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 206 A.3d 386 (2019). Opinion by Justice Solomon.

Issue:

Did ex-husband breach his obligation in MSA to provide life insurance when he committed suicide within a two year period of the issuance of the policy which barred coverage upon suicide? Yes.

Holdings:

When a marital settlement agreement requires a party to maintain a life insurance policy, and the party commits suicide in violation of a contract provision in the life insurance policy, it is a breach of the marital settlement agreement.

The Chancery Division has considerable discretion to shape remedies, and did not abuse its discretion when it ordered the estate be paid to the children.

Facts and Reasoning:

The Supreme Court concurred with the Appellate Court that calculating a precise monetary value of support, college, medical, etc. was speculative and unnecessary since the support obligations exceeded the amount in the estate of the deceased. Back to Top

RESTRAINING ORDERS

C.R. v. M.T., 2019 WL 5946985 (App. Div.). Opinion by Judge Fisher.

Issues:

What is the standard of proof for a victim under the Sexual Assault Survivor Protection Act (SASPA) to claim that she didn't consent to a sexual encounter because she was intoxicated?

Holdings:

Under SASPA, an alleged victim may prove the lack of consent by proving intoxication voluntary or involuntary, to such a degree that her faculties were prostrated to the point of being incapable of consenting to the sexual act.

Facts and Reasoning:

An alleged sexual assault victim brought an action under SASPA in Family Court, seeking to restrain the alleged attacker from having any contact or communication with her. SASPA allows victims of sexual abuse who cannot seek relief under the Prevention of Domestic Violence Act to potentially obtain restraining orders against their attackers.

The first prong of SASPA requires the plaintiff to prove, by a preponderance of the evidence, that there was a nonconsensual sexual encounter. Lack of consent can be shown by proof of mental incapacity, which can be caused by the victim's intoxication under N.J.S.A. 2C:14-1(i). SASPA's second prong permits issuance of restraining orders to protect alleged victims at risk, under 2C:14-16(a)(2).

The trial focused on whether the plaintiff consented, or was able to consent, to the undisputed sexual contact. The trial court concluded the plaintiff did not prove she refused to engage in sexual conduct, consented out of fear, or that she revoked consent during the encounter because the defendant's testimony about the encounter was equally plausible. However, the trial judge determined that the plaintiff was so intoxicated that she was unable to consent, and entered judgment for her. The alleged defendant appealed, arguing the trial court improperly applied the standard.

The Appellate Division first examined the construction of N.J.S.A. 2C:14-1(i), holding that the Legislature intended no distinction between victims who were voluntarily intoxicated and those who were involuntarily intoxicated under SASPA. Next, the Appellate Division held that courts should apply the "prostration of faculties" standard to support a finding that a victim could not consent due to intoxication. The prostration of faculties standard is an extremely high level of intoxication and cannot by itself be established by showing the victim consumed large amounts of alcohol.

The Appellate Division reversed and remanded for further consideration because the trial court failed to apply the "prostration of faculties" standard when judgment was entered in favor of the alleged victim. Back to Top

BILL SIGNED INTO LAW

Bill S1080 eliminates the use of mandatory driver's license suspensions as a penalty for certain non-moving offenses.

S1080 removes the provision that a person's driver's license be suspended by operation of law upon the issuance of a child support-related warrant. **S1080** also repeals the provision for suspension of driving privileges for juveniles convicted of certain offenses. Back to Top

AMENDED OR NEW COURT RULES

5:1-4. Differentiated Case Management in Civil Family Actions

Subparagraph (a)(5) was amended with a minor change, requiring the parties to execute the Arbitration Questionnaire, set forth in Appendix XXIX-A, and the Arbitrator/Umpire Disclosure Form, which is set forth in Appendix XXIX-D, in order for the matter to be assigned to the Arbitration Track.

5:1-5. Arbitration

Subparagraphs amended and adopted, providing new instructions for filing and a disclosure form to identify any potential conflicts of interest between the parties and the arbitrator.

5:5-4. Motions in Family Actions

Paragraph (a) reorganized and amended, creating five new subparagraphs with different rules for attachments to motions, depending on the type of proceeding. New subparagraph (5) distinguishes retirees seeking modification or termination of alimony from all others seeking modification or termination:

> *Subparagraph (5) Motion Attachments for Modification or Termination of Alimony Based on Retirement.*
>
> *Upon application by the obligor to modify or terminate alimony based upon retirement pursuant to N.J.S.A. 2A:34-23(j)(2) and (j)(3), both the obligor's application to the court for modification or termination of alimony and the obligee's response to the application shall be accompanied by current case information statements as well as the case information statements previously executed or filed, or other relevant financial documents if there was no case information statement executed or filed, in connection with the order, judgment or agreement sought to be modified. In the event the previous case information statement cannot be obtained after diligent efforts or was never prepared, a certification shall be submitted detailing said diligent efforts or the non-existence of said documents.*

Paragraph (b) was amended to provide that the page limit for certifications in support of a motion increased to 25 pages from 15. The page limit for certifications in opposition to a motion or in support of a cross-motion or both is now increased to 25 pages from 10.

5:7A. Domestic Violence: Restraining Orders

Paragraphs reorganized. Amended paragraph (c), Application for Temporary Restraining Order, now includes an explicit requirement that an applicant for a TRO, must qualify as a "victim of domestic violence" as defined by N.J.S.A. 2C:25-19d. In paragraph (e), Final Restraining Order, A hearing for a final restraining order shall be held in the Superior Court within 10 days of the filing of an application. paragraph (f), Procedure After Arrest, language was removed differentiating procedure for those arrested without a warrant, as well as a clause related to bail.

5:7B. Sexual Assault Survivor Protection Act: Protective Orders

The Rule was reorganized and language was added to paragraph (c), Application for Temporary Protective Order, that "Any person alleging to be a victim of nonconsensual 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 N.J.S.A. 2C:25-19d may apply for a temporary protective order." Paragraph

(e) now provides that a hearing for a final protective order shall be held in the Superior Court within 10 days of the filing of an application.

5:10-4. Surrogate Action

Subparagraph (b)(3) amended, providing a requirement that the Surrogate serve parents whose parental rights are subject to a termination proceeding of the procedure to object to the adoption, the right to legal counsel, and how to apply for a court-appointed attorney. Service of the form on the child's parent whose rights are not being terminated shall not be required.

5:10-5. Post-Complaint Submissions

Subparagraph (a)(4) amended, providing for service of the Notice of Rights in an Adoption Proceeding form on a parent whose parental rights are subject to a termination proceeding.

5:14-4. Gestational Carrier Matters; Orders of Parentage

Paragraphs (a), (b), (c), (d) amended, providing minor procedural changes and to include “domestic partners” in the potential parties to an agreement.

5:20-1. Complaint

Paragraph (c) amended, clarifying that juveniles may not be diverted before being reviewed by intake services and until after “a hearing wherein all parties have an opportunity to be heard.” Back to Top

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

Attorneys

- Joseph J. Russell, Jr.
- David M. Wildstein
- Jay J. Ziznewski

Practice

- Family Law