CLE SEMINAR MATERIAL

CHALLENGING ISSUES FOR THE FAMILY LAWYER

Presented By

Hon. Robert A. Fall, J.S.C. (On Recall),

Hon. Madelin F. Einbinder, P.J.S.C. (Ocean),

Hon. Thomas J. Walsh, J.S.C. (Union),

Abby Webb, Esq., & R. Joseph Gunteski, CPA, CFF

Presented:
September 23, 2017
The Crystal Ballroom - Located at the Ramada Plaza • 160 Frontage Road, Newark, New Jersey 07114

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GLEF CLE Outline
September 23, 2017

Challenging Issues For The Family Lawyer

Presented by

Robert A. Fall, J.A.D., retired, on recall
Hon. Madelin F. Einbinder, P.J.F.P.
Hon. Thomas J. Walsh, J.S.C.
Abby Webb, Esq.
R. Joseph Gunteski, CPA

1:20 pm Introduction of Panel Members and Topic

1:25 pm Removal Applications after Bisbing v. Bisbing, ____ N.J. ____ (August 8, 2017)

2:00 pm Termination of Child Support, N.J.S.A. 2A:17-56.67, et seq., Rule 5:6-9 (eff. 9-1-17)

2:30 pm Valuing and Equitably Distributing Business assets and discussion

3:15 pm Handling Alimony Modifications due to loss of job, retirement, or cohabitation

4:00 pm Navigating High-Conflict Custody cases

4:30 pm Question/Answer Period

GANN LEGAL EDUCATION FOUNDATION

CHALLENGING ISSUES FOR THE FAMILY LAWYER

Saturday, September 23, 2017

Robert A. Fall, J.A.D., Retired, On Recall
Madelin F. Einbinder, P.J.F.P.
Thomas J. Walsh, J.S.C.
Albertina Webb, Esq.
R. Joseph Gunteski, CPA, CFF

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INTRODUCTION

This seminar is designed to provide information and strategies that will assist family practitioners in handling difficult issues faced by their clients in the ever-evolving area of family law. We have chosen five topics to discuss during our three-hour and forty-minute presentation:

1. ***Removal Applications after Bisbing v. Bisbing***
2. ***Termination of Child Support After Age 23, regardless of emancipation***
3. ***Basics of Business Valuation and Cash Flow Analyses***
4. ***Alimony Modification amid the 2014 Statutory Changes***
5. ***What to Do When You Have a High-Conflict Custody Case***

THE NEW REMOVAL LANDSCAPE

On April 23, 2001, our Supreme Court modified the approach to be followed by courts in handling applications for removal pursuant to N.J.S.A. 9:2-2 with its decision in Baures v. Lewis, 167 N.J. 91 (2001). The focal statute provides, as follows:

> When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, ***they shall not be removed out of its jurisdiction*** against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, ***unless the court, upon cause shown, shall otherwise order***. The court, upon application of any person in behalf of such minors, may require such security and issue such writs and processes as shall be deemed proper to effect the purposes of this section.
>
> [N.J.S.A. 9:2-2 (emphasis added).]

In a unanimous decision, delivered by Justice Virginia Long, the Court explained the perplexing dilemma of removal, and outlined the Court's approach, as follows:

> In our global economy, relocation for employment purposes is common. On a personal level, people remarry and move away. Noncustodial parents may relocate to pursue other interests regardless of the strength of the bond they have developed with their children. Custodial parents may do so only with the consent of the former spouse. Otherwise, a court application is required.
>
> Inevitably, upon objection by a noncustodial parent, there is a clash between the custodial

parent's interest in self-determination and the noncustodial parent's interest in the companionship of the child. There is rarely an easy answer or even an entirely satisfactory one when a noncustodial parent objects. If the removal is denied, the custodial parent may be embittered by the assault on his or her autonomy. If it is granted, the noncustodial parent may live with the abiding belief that his or her connection to the child has been lost forever.

Courts throughout the country, grappling with the issue of relocation, have not developed a uniform approach. Ann M. Driscoll, Note, *In Search of a Standard: Resolving the Relocation Problem in New York*, 26 Hofstra L. Rev. 175, 176 (1997). Some use a presumption against removal as their point of departure; others use a presumption in favor of removal; still others presume nothing, but rely on a classic best-interests analysis. Id. at 178.

We have struggled to accommodate the interests of parents and children in a removal situation in our prior cases. Holder v. Polanski, 111 N.J. 344 (1988); Cooper v. Cooper, 99 N.J. 42 (1984). In so doing, we have developed something of a hybrid scheme. Although it is not based upon a presumption in favor of the custodial parent, it does recognize the identity of the interests of the custodial parent and the child, and, as a result, accords particular respect to the custodial parent's right to seek happiness and fulfillment. At the same time, it emphasizes the importance of the noncustodial parent's relationship with the child by guaranteeing regular communication and contact of a nature and quality to sustain that relationship. Further, it incorporates a variation on a best interests analysis by requiring proof that the child will not suffer from the move.

We revisit the issue in this appeal, not only to resolve the matter before us, but because of what we perceive as confusion among the bench, Bar, and litigants over the legal standards that should apply in addressing a removal application, and particularly over what role visitation plays in the calculus.

[Id. at 96-98.]

In Baures, the parties married in 1985. The father was a career officer in the Navy. They had one child in 1990, and they moved to New Jersey in 1994, where the father was stationed. While living in New Jersey, the child was diagnosed with a mild form of autism. The parties discussed moving to Wisconsin once the father was discharge from the Navy, which was scheduled to occur in 1998. The mother was a native of Wisconsin and her parents, who were retired teachers living in Wisconsin, agreed to assist the parties in caring for the child. In anticipation of the parties' move, her parents sold their home and moved to a town in Wisconsin that was close to a specialized institute for treatment of autistic children. Id. at 98-99.

However, in 1996, a complaint for divorce was filed by the mother and the father sought an order prohibiting the mother from removing the child to Wisconsin. In 1997, the mother filed an application seeking permission to move to Wisconsin with the child. Id. at 99.

Following a three-day trial, during which the parties and an autism expert testified, the trial court denied the removal application, finding that the move to Wisconsin would not be in the "best interests" of the child. Id. at 102.

The judgment of divorce was entered in early 1998, the father was discharged from the Navy in mid-1988, and he secured

a job as an electronics technician in Edison. The mother was designated as the primary residential custodial parent. She again sought permissions to relocate to Wisconsin, citing to Rampolla v. Rampolla, 269 N.J. Super. 300, 307-08 (App. Div. 1993), which held that, in a removal case, the court should make inquiry concerning the capacity of the noncustodial parent to relocate as a method of ensuring the vitality of a shared custodial arrangement. Id. at 103. The trial court appointed a psychologist to determine the best interests of the child, conducted a Rampolla hearing, and again denied the removal application. The Appellate Division affirmed, and the Supreme Court granted certification. Id. at 104.

The Court reversed and remanded for further proceedings consistent with the criteria and standards set forth in its opinion. Relying, in part, upon social science research that confirmed the principle that, in general, what is good for the custodial parent is good for the child, the Court eased the burden on custodial parents in removal cases, ruling that:

> In a removal case, the burden is on the custodial parent, who seeks to relocate, to prove two things: a ***good faith motive*** and that the ***move will not be inimical to the interests of the child***. Visitation is not an independent prong of the standard, but an important element of proof on the ultimate issue of whether the child's interest will suffer from the move.
>
> [Id. at 122 (emphasis added).]

In analyzing the appropriate criteria to be applied in removal cases, the Court first noted that "[a] removal case is entirely different from an initial custody determination[,]" where "the ultimate judgment is squarely dependent on what is in the child's best interests." Id. at 115. The Court explained, as follows:

> Removal is quite different. In a removal case, the parents' interests take on importance. However, although the parties often do not seem to realize it, the conflict in a removal case is not purely between the parents' needs and desires. Rather, it is a conflict based on the extent to which those needs and desires can be viewed as intertwined with the child's interests. Cooper[v. Cooper, 99 N.J. 42 (1984)], and more particularly, Holder[v. Polanski,111 N.J. 344 (1988)], recognize that subtlety by according special respect to the liberty interests of the custodial parent to seek happiness and fulfillment because that parent's happiness and fulfillment inure to the child's benefit in the new family unit. At the same time those cases underscore the importance of the child's relationship with the noncustodial parent and require a visitation schedule sufficient to support and nurture that relationship. The critical path to a removal disposition therefore is not necessarily the one that satisfies one parent or even splits the difference between the parents, but the one that will not cause detriment to the child.
>
> [Id. at 115-16.]

The Court then noted the need for a different approach in removal actions ***when the parents share joint physical custody***, stating:

> One final important point is that the Cooper/Holder scheme is entirely inapplicable to a case in which the noncustodial parent shares physical custody either de facto or de jure or exercises the

> bulk of custodial responsibilities due to the incapacity of the custodial parent or by formal or informal agreement. In those circumstances, ***the removal application effectively constitutes a motion for a change in custody*** and will be governed initially by a changed circumstances inquiry and ultimately by a simple best interests analysis. Chen[v. Heller, 334 N.J. Super. 361, 381-82 (App. Div. 2000)]. Obviously then, the preliminary question in any case in which a parent seeks to relocate with a child is whether it is a removal case or whether by virtue of the arrangement between the parties, it is actually a motion for a change in custody.
>
> [Id. at 116 (emphasis added).]

The Baures Court then ruled that, in assessing whether to order removal, the trial court should look to the following factors relevant to the moving party's burden of proving ***"good faith"*** and that the move ***"will not be inimical to the child's interest***:"

> (1) the reasons given for the move;
>
> (2) the reasons given for the opposition;
>
> (3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move;
>
> (4) whether the child will receive educational, health and leisure opportunities at least equal to what is available here;
>
> (5) any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location;
>
> (6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child;

(7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed;

(8) the effect of the move on extended family relationships here and in the new location;

(9) if the child is of age, his or her preference;

(10) whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent;

(11) whether the noncustodial parent has the ability to relocate;

(12) any other factor bearing on the child's interest.

[Id. at 116-17.]

The Baures Court further explained the application and consideration of these factors, as follows:

> Obviously not all factors will be relevant and of equal weight in every case. For example, in a case in which the parties have no extended family in either location, that factor will not be considered. Likewise, when the children are not of the age of reason, consent will not come into play. Contrariwise, if the focus of the challenge to removal is the inadequacy of the out-of-state health or educational facilities, that factor will take on greater significance. It is likely that the main objection that will be lodged by the majority of noncustodial parents will be the change in the visitation structure thus; that will be the primary factor for consideration in most cases.
>
> Again, a mere change, even a reduction, in the noncustodial parent's visitation is not an independent basis on which to deny removal. It is one important consideration relevant to the question of whether a child's interest will be impaired, although not the only one. It is not the alteration in the visitation schedule that is the focus of the inquiry. Indeed,

> alterations in the visitation scheme when one party moves are inevitable and acceptable. If that were not the case, removal could never occur and what Cooper and Holder attempted to achieve would be illusory.
>
> We reiterate, however, the importance of mutual efforts to develop an alternative visitation scheme that can bridge the physical divide between the noncustodial parent and the child. By mutual is meant that the noncustodial parent is not free to reject every scheme offered by the custodial parent without advancing other suggestions. Innovative technology should be considered where applicable, along with traditional visitation initiatives. In many cases, vacations, holidays, school breaks, daily phone calls, and E-mail, for example, may sustain a parent-child relationship as well as alternate weekends. No set scheme can ever guarantee a relationship. What is necessary is that communication and visitation is extensive enough to maintain and nurture the connection between the noncustodial parent and the child.
>
> [Id. at 117-18.]

For the past sixteen (16) years removal applications have been considered, negotiated, and adjudicated under the standards and criteria set forth in Baures. However, on August 8, 2017, the Court issued its ruling in Bisbing v. Bisbing, ___ N.J. ___ (2017), recognizing a special justification to abandon the standard it established in Baures for determining the outcome of contested relocation determinations and, in place of the Baures standard, required trial courts to conduct ***a best interests analysis to determine "cause"*** under N.J.S.A. 9:2-2 in all contested relocation disputes ***in which the parents share legal custody***. The opinion, delivered by Justice Patterson, was

unanimous. Only Justice LaVecchia participated in both the Baures and Bisbing rulings.

In Bisbing, the Court framed the issue presented, as follows:

> This appeal arises from a trial court's post-judgment determination authorizing a mother to permanently relocate with her children out of state, notwithstanding their father's objection to the children's move. It requires that we address the showing necessary to establish "cause" under N.J.S.A. 9:2-2 for the entry of an order authorizing a parent to relocate out of state with his or her child, despite the other parent's opposition to the child's interstate move.
>
> [Id. at slip op. 9-10.]

In Bisbing, the parties were divorced when their twin daughters were age seven. The parties had entered into a marital settlement agreement (MSA) under a ***joint legal custodial relationship*** under which the mother would be the parent of primary residence and the father would be the parent of alternate residence. The MSA also specifically provided that neither party would permanently relocate out of state with the children without the prior written consent of the other. Id., at slip op. 10. Several months after entry of the divorce judgment, the mother informed the father that she intended to marry the man whom she had been dating, a resident of Utah, and she sought an order permitting her to remove the children to that state. Ibid.

The parties were married in 2005, and their twin daughters were born in 2006. They resided in Stanhope, New Jersey, near their respective families in Pennsylvania. The children's grandmothers assisted in care of the children while both parents worked. The mother commuted to work in New York City and the father worked in New Jersey. They separated in 2013 and, without counsel, but with the assistance of a mediator, negotiated and signed the MSA on March 8, 2014. The MSA provided that they would share joint legal custody, with the primary residential custodial parent being the mother, and the father would have the children every other weekend and one weeknight every other week. They further agreed on a parenting schedule for holidays, agreed they were both entitled to attend all of the children's events, and granted each other the right of first refusal if one parent was unable to care for the children during his or her parenting time. Id. at slip op. 12-13.

The MSA specifically addressed the issue of relocation, as follows:

> Relocation. The parties agree that each shall inform the other with respect to any change of residence concerning himself or herself or the said minor Children for the period of time wherein any provision contained in this Agreement remains unfulfilled. The parties represent that they both will make every effort to remain in close proximity, within a fifteen (15) minute drive from the other. ***Neither party shall permanently relocate with the Children from the State***

> ***of New Jersey without the prior written consent of the other.*** Neither parent shall relocate intrastate further than 20 miles from the other party. In the event either party relocates more than 20 miles from the other party, the parties agree to return to mediation to review the custody arrangement. In the event a job would necessitate a move, the parties agree to discuss this together and neither will make a unilateral decision. Neither party shall travel with the minor Children out of the United States without the prior written consent of the other party.
>
> The parties hereby acknowledge that the Children's quality of life and style of life are provided equally by Husband and Wife.
>
> The parties hereby acknowledge a direct causal connection between the frequency and duration of the Children's contact with both parties and the quality of the relationship of the Children and each party.
>
> The parties hereby acknowledge that any proposed move that relocates the Children further away from either party may have a detrimental impact upon the frequency and duration of the contact between the Children and the non-moving party.
>
> [Id. at slip op. 13-14 (emphasis added).]

The MSA was incorporated into a judgment of divorce entered on April 16, 2014. Id. at slip op. 15.

Sometime prior to entry of the divorce judgment, the mother had begun dating a man who lived and operated his business in the state of Utah. There was a dispute between the parties as to whether the mother had informed the father, prior to entry into the agreement providing for the mother to be the primary residential parent, that her relationship with that man was serious. The mother left her job in New York City on July 1,

2014, and, on January 8, 2015, informed the father that she intended to marry and move to Utah with the children. The father refused to give his consent to the proposed removal. They were unable to negotiate a resolution of the issue, and the mother filed a motion seeking court permission to remove the children with her to Utah. Id. at slip op. 17-18.

Applying the Baures standard, that the removal-applying parent must only demonstrate that there is a good faith reason for the interstate move, and that the removal would not be inimical to the children's interest, and without conducting a plenary hearing, the trial court permitted the move, finding the mother had satisfied both prongs of that standard. Id. at slip op. 10-11; 19-20.

In an opinion reported at 445 N.J. Super. 207 (App. Div. 2016), the Appellate Division reversed, holding that if the father could make a showing on remand that the mother had negotiated the parties' custodial agreement in bad faith, the trial court should not apply the two-prong test in Baures, but should instead determine whether the proposed relocation would be in the best interests of the children. Thus, the Appellate Division imposed on a removal application, where a custodial parent had negotiated a custody arrangement in bad faith, a higher burden of proof on the question of "cause" under N.J.S.A.

9:2-2 than the burden imposed under Baures. Id. at slip op. 11; 20-22.

The Court affirmed, but modified, the Appellate Division's opinion, ruling as follows:

> We depart from the two-part test that Baures prescribed for a relocation application brought by a parent of primary residence. ***We apply the same standard to all interstate relocation disputes under N.J.S.A. 9:2-2 in which the parents share legal custody -- cases in which one parent is designated as the parent of primary residence and the other is designated as the parent of alternate residence and cases in which custody is equally shared.*** In all such disputes, the trial court should decide whether there is "cause" under N.J.S.A. 9:2-2 to authorize a child's relocation out of state by weighing the factors set forth in N.J.S.A. 9:2-4, and other relevant considerations, and determining whether the relocation is in the child's best interests.
>
> Accordingly, we modify and affirm the Appellate Division's judgment and remand to the trial court for a plenary hearing to determine whether the proposed relocation of the parties' daughters to Utah is in the children's best interests.
>
> [Id. at slip op. 11-12 (emphasis added).]

In its opinion, the Court first emphasized the importance of the legislative intent and criteria set forth in N.J.S.A. 9:2-4, stating:

> The custody statute affords to the Family Part a range of options to serve the needs of children and their families: "[j]oint custody of a minor child to both parents," "[s]ole custody to one parent with appropriate parenting time for the noncustodial parent," and "[a]ny other custody arrangement as the court may determine to be in the best interests of the child." N.J.S.A. 9:2-4(a), (b), (c). The Legislature

prescribed a non-exclusive list of factors to guide a court charged to determine the custody arrangement that most effectively serves the child's best interests:

> the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.
>
> [N.J.S.A. 9:2-4(c).]

When "the parents cannot agree to a custody arrangement," the court may require each parent to submit a custody plan for its consideration. *N.J.S.A.* 9:2-4(e). When a court orders a custody arrangement that is not agreed to by both parents, it must identify on the record the specific factors that justify the arrangement. N.J.S.A. 9:2-4(f).

The Court then turned to N.J.S.A. 9:2-2, noting that "[i]t requires a showing of 'cause' before a court will authorize the permanent removal of a child to another state without the

consent of both parents or, if the child is of 'suitable age' to decide, the consent of the child[,]" and that "[t]he Legislature required a showing of "cause" for an out-of-state relocation under N.J.S.A. 9:2-2 in order "to preserve the rights of the noncustodial parent and the child to maintain and develop their familial relationship." Holder v. Polanski, 111 N.J. 344, 350 (1988) (quoting Cooper v. Cooper, 99 N.J. 42, 50 (1984)). Id. at slip. op. 26-27.

The Bisbing Court then discussed the Baures standard at length, noting that there were two developments that had been identified by the Court in Baures that supported relaxation of the removal standards. First, was the Baures Court's conclusion that social research supported the proposition that concluded when a relocation benefits a "custodial parent," it will, as a general rule, similarly benefit the child. 167 N.J. at 106-08. Second, the Court invoked "the growing trend in the law easing restrictions on the custodial parent's right to relocate with the children and recognizing the identity of interest of the custodial parent and child." 167 N.J. at 107-09. The Bisbing Court further noted that:

> In the wake of Baures, trial courts routinely conduct a threshold determination of whether the parties' custody arrangement assigns to one parent a primary role or involves equally shared custody. See, e.g., Morgan v. Morgan, 205 N.J. 50, 66-67 (2011) (rejecting father's contention that notwithstanding terms of parties' agreement, parties' custody

arrangement was in effect shared custody for purposes of threshold determination under Baures); Barblock v. Barblock, 383 N.J. Super. 114, 124-25 (App. Div. 2006) (rejecting father's claim that custody arrangement constituted shared custody due to parents' equal allocation of time with children); O'Connor[v. O'Connor, 445 N.J. Super. 381, 385 (App. Div. 2002)] (affirming trial court's determination that despite terms of parties' agreement, father assumed most custodial responsibilities and arrangement was in effect shared custody); Mamolen v. Mamolen, 346 N.J. Super. 493, 501-02 (App. Div. 2002) (reversing trial court's determination that custody arrangement amounted to shared custody based primarily on children's emotional relationship with father). By virtue of the Baures standard, the parties' custody arrangement is the focus of the court's initial inquiry.

Because the parties' custodial arrangement is potentially dispositive when a court determines whether to authorize relocation under Baures, a collateral dispute regarding the parties' good faith in their custody negotiations may arise. In Shea v. Shea, after the parent of primary residence sought an order authorizing her to relocate the child out of state, the parent of alternate residence accused her of "a subterfuge in that she planned to seek removal [of the child from New Jersey] shortly after the divorce was entered." 384 N.J. Super. 266, 268-70 (Ch. Div. 2005). The parent of primary residence "denie[d] any manipulative purpose." Id. at 270. The court held that when a request for relocation closely follows a settlement and a final judgment of divorce, and the party seeking to remove the child knew of "the material facts and circumstances forming the good faith reason for the removal request" when judgment was entered, the best interests standard would apply, whether or not "the parties had a true shared parenting arrangement." Id. at 271. The court observed that "[t]o rule otherwise could potentially encourage disingenuous settlements, encourage a party to use the Baures line of cases as a sword, or alternatively compel a cautious party to exhaustively litigate custody when not truly necessary." Ibid.

> That principle was applied by the panel in this case, which held that if a remand hearing revealed that plaintiff manipulated the parties' negotiations to gain an advantage in an anticipated relocation dispute, "'fundamental fairness' requires the trial court to apply the 'best interests of the child' standard rather than the Baures standard." Bisbing, supra, 445 N.J. Super. at 217 (quoting Shea, supra, 384 N.J. Super. at 273-74).
>
> [Bisbing, supra, ___ N.J. at slip op. 32-34.]

In departing from the standards set forth in Baures, the Bisbing Court noted that, in deciding Baures, the Court did not intend to diverge from the "best interests of the child" standard at the core of the custody statute, or to circumvent the legislative policy requiring that parents have equal rights in custodial disputes. Id. at slip op. 35. Rather, the Court noted that, in "confronting a dispute that defies simple solutions, the Court sought guidance in social science research as to the best interests of the child, which at that time tethered the best interests of the child to the custodial parent's well-being[,]" and "discerned a trend in the law 'significantly eas[ing] the burden on custodial parents in removal cases.'" Ibid. (quoting Baures, 167 N.J. at 107).

The Bisbing Court first found that social scientists who have studied the impact of relocation on children following divorce have not reached a consensus; rather, instead, the scholarly debate in this area reveals that relocation may affect children in many different ways, and the Baures Court's

conclusion that in general, "what is good for the custodial parent is good for the child" is not universally true, and that a relocation far away from a parent may have a significant adverse effect on a child. Id. at slip op. 37-38. The Bisbing Court also found that "the progression in the law toward recognition of a parent of primary residence's presumptive right to relocate with children, anticipated by this Court in Baures has not materialized." Id. at slip op. 38. Rather, the Court noted:

> Today, the majority of states, either by statute or by case law, impose a best interests test when considering a relocation application filed by a parent with primary custody or custody for the majority of the child's time; some have recently abandoned a presumption in favor of the parent of primary residence. A minority of jurisdictions apply a standard that expressly or implicitly favors the relocation decision of the parent with primary or majority-time custody; some but not all of those jurisdictions characterize that preference as a "presumption." As experience has proven, the standard adopted in Baures did not represent a lasting trend in the law.
>
> [Id. at slip op. 39 (footnotes omitted).]

Thus, the Court concluded that it did not consider the Baures standard to be compelled by social science or grounded in legal authority today, as the Court had anticipated that it would be when it decided that case. The Bisbing Court also expressed the following concern:

> Moreover, the threshold determination mandated by Baures may engender unnecessary disputes between

> parents over the designation of the parent of primary residence and accusations that a parent sought that designation in bad faith, anticipating a relocation. Our custody statute clearly envisions that a custody arrangement will serve a paramount purpose: the promotion of the child's best interests. N.J.S.A. 9:2-4. The parties and the court should select the parent of primary residence based on that parent's capacity to meet the needs of the child. Ibid. If a designation as the parent of primary residence will determine the result of a relocation dispute, parties may be motivated to contest that designation even if one parent is clearly in a better position to serve that primary role. As this case illustrates, the advantage afforded to a parent of primary residence in a relocation conflict may raise divisive accusations of bad faith after custody negotiations conclude. See Bisbing, supra, 445 N.J. Super. at 217; see also Shea, supra, 384 N.J. Super. at 271-72. In short, by tethering the relocation standard to one party's status as the parent of primary residence, the Baures standard may generate unnecessary disputes regarding that designation.
>
> [Id. at slip op. 39-40.]

The Court also concluded that its decision to replace the Baures test with a "best interests" analysis is consistent with the Court's analysis in Emma v. Evans, 215 N.J. 197, 216-23 (2013), which established the child's "best interests" as the standard to be utilized when considering a parent's application for the change of a child's surname, the Court departing from the previous standard, set forth in Gubernat v. Deremer, 140 N.J. 120, 123 (1995), that there was a rebuttable presumption that the surname selected by the custodial parent was presumed to be consistent with the best interests of the child. Id. at slip op. 40—41.

The Bisbing Court concluded by ruling:

> In place of the Baures standard, ***courts should conduct a best interests analysis to determine "cause" under N.J.S.A. 9:2-2 in all contested relocation disputes in which the parents share legal custody -- whether the custody arrangement designates a parent of primary residence and a parent of alternate residence, or provides for equally shared custody.*** That standard comports with our custody statute, in which the Legislature unequivocally declared that the rights of parents are to be equally respected in custody determinations and stated that custody arrangements must serve the best interests of the child. N.J.S.A. 9:2-4. A number of the statutory best interests factors will be directly relevant in typical relocation decisions and additional factors not set forth in the statute may also be considered in a given case. Ibid.
>
> In the best interests analysis, the parent of primary residence may have important insights about the arrangement that will most effectively serve the child. The parent of alternate residence may similarly offer significant information about the child. The views of other adults with close relationships with the child may also inform the court's decision. See Emma, supra, 215 N.J. at 216-23 (holding that in best interests analysis regarding child's name, court should consider both parents' views and views of other adults close to child). The trial court may consider other evidence, including documentary evidence, interviews with the children at the court's discretion, and expert testimony. See R. 5:8-6 ("As part of the custody hearing, the court may on its own motion or at the request of a litigant conduct an in camera interview with the child(ren)."); Pressler & Verniero, supra, comment 1.4.5 on R. 5:8-6 (stating that in custody hearings, "[i]t is clear that the parties must have an appropriate opportunity for experts' assistance"); Kinsella v. Kinsella, 150 N.J. 276, 318 (1997) ("In implementing the 'best-interest-of-the child' standard, courts rely heavily on the expertise of psychologists and other mental health professionals.").

[Id. at slip op. 41-43 (emphasis added).].

Accordingly, ***in all cases where there is a joint legal custodial relationship, whether the custodial arrangement designates a parent of primary residence and a parent of alternate residence, or provides for equally shared custody, the removal application must be analyzed through an application of the following statutory criteria set forth in N.J.S.A. 9:2-4(c) to determine whether the contemplated move serves the "best interests" of the child***:

1. The parents' ability to agree, communicate and cooperate in matters relating to the child;

2. The parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;

3. The interaction and relationship of the child with its parents and siblings;

4. The history of domestic violence, if any;

5. The safety of the child and the safety of either parent from physical abuse by the other parent;

6. The preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;

7. The needs of the child;

8. The stability of the home environment offered;

9. The quality and continuity of the child's education;

10. The fitness of the parents;

11. The geographical proximity of the parents' homes;

12. The extent and quality of the time spent with the child prior to or subsequent to the separation;

13. The parents' employment responsibilities; and

14. The age and number of the children.

It should also be noted that the Bisbing Court stated that ***additional factors not set forth in the statute*** may also be considered in a given case. Bisbing, supra, ___ N.J. at slip op. 42. Specifically, the Court stated trial courts may consider other evidence, ***including documentary evidence, interviews with the children at the court's discretion, and expert testimony.*** Ibid. It would also seem fully appropriate, in a given case, for the trial court to also consider the factors set forth in Baures, supra, 167 N.J. at 116-17 when considering whether the proposed move is in the best interest of the child.

N.J.S.A. 9:2-4(c) also authorizes the court for good cause and upon its own motion, to appoint a *guardian ad litem* or an attorney or both to represent the minor child's interests, and to award a counsel fee to the *guardian ad litem* and the attorney and to assess that cost between the parties to the litigation. See R. 5:8B, R. 5:8A.

Since the ruling in Bisbing is limited to circumstances where there is a "joint legal" or "joint physical" custodial relationship, it would appear that the Baures standard and it

factors would still be applicable where one parent is awarded sole custody, without a designation of shared legal custody.

TERMINATION OF CHILD SUPPORT

On January 19, 2016, the Legislature enacted, and the Governor signed into law, Chapter 223 of the Laws of 2015, "An Act concerning child support and supplementing chapter 17 of Title 2A of the New Jersey Statutes." Effective February 1, 2017, and codified as N.J.S.A. 2A:17-56.67 to -56.75, it provides for significant and far-reaching changes to the law regarding the termination of child support. In terms of application, the new law applies to all child support orders entered prior or subsequent to February 1, 2017. Essentially the new law establishes age 19 as the presumptive age for the automatic termination of child support, and a procedure for the continuation of child support thereafter, up until age 23. No child support order can be entered or continued for a child who has attained age 23, but an order converting a child support order to another form of "financial maintenance" for a child who has attained age 23 may be entered, upon application, and a judicial determination of the presence of "exceptional circumstances including, but not limited to, a mental or physical disability."

The statute authorized the adoption of court rules to implement its provisions. The issue of the form of such a rule was referred to the Supreme Court Family Practice Committee and, in its 2017-2018 Report to the Court, the Committee recommended

that the Court adopt proposed new Rule 5:6-9. Pending the Court's review of that Report, the Court issued an "Interim Protocol for Termination of Child Support Obligations" on January 31, 2017.

On July 28, 2017, the Court adopted Rule 5:6-9, effective September 1, 2017, which provides as follows:

> **Rule 5:6-9. Termination of Child Support Obligations**
>
> **(a) Duration of Support.** In accordance with N.J.S.A. 2A:17-56.67 et seq., unless otherwise provided in a court order, judgment, or preexisting agreement, the obligation to pay current child support, including health care coverage, shall terminate by operation of law when the child being supported:
>
> (1) dies;
>
> (2) marries;
>
> (3) enters the military service; or
>
> (4) reaches 19 years of age, except as otherwise provided within this rule.
>
> In no case shall a child support obligation extend beyond the date the child reaches the age of 23.
>
> **(b) Termination of Obligation in Cases Administered by the Probation Division.**
>
> **(1) Notices of Proposed Termination.** Where no other emancipation date or termination has been ordered by the court, the Probation Division shall send the obligor and obligee notice of proposed termination of child support prior to the child reaching 19 years of age in accordance with N.J.S.A. 2A:17-56.67 et seq. Notices shall contain the proposed termination date and information for the obligee to submit a written request for continuation of support beyond the date the child reaches 19 years of age.

(2) Written Request for Continuation. In response to the notice prescribed in section (1), the obligee may submit to the court a written request for continuation, on a form and within timeframes promulgated by the Administrative Office of the Courts, with supporting documentation and a future termination date, seeking the continuation of support beyond the child's nineteenth birthday if the child being supported:

(A) is still enrolled in high school or other secondary educational program;

(B) is enrolled full-time in a post-secondary educational program; or

(C) has a physical or mental disability as determined by a federal or state agency that existed prior to the child reaching the age of 19 and requires continued support.

(3) Review of Written Request for Continuation. The Probation Division shall review the obligee's written request and documentation and shall make recommendation to the court as to whether the support obligation will continue beyond the child's nineteenth birthday. If sufficient proof has been provided, the court shall issue an order to both parties establishing the future termination date. If sufficient proof has not been provided, the court shall issue an order to both parties terminating the current support obligation as of the date of the child's nineteenth birthday. No additional notice need be provided to the parties.

(4) No Response to Notice of Proposed Termination. If the Probation Division receives no response to the notices of proposed termination of child support, the court shall issue an order to both parties establishing the termination of obligation as of the child's nineteenth birthday. No additional notice need be provided to the parties.

(5) Motion or Application. If a party disagrees with the termination or continuation order entered, the party may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter requesting either termination or continuation of the child support obligation, as applicable.

(6) Arrears Remain Due and Enforceable. Any arrearages accrued prior to the date of termination shall remain due and enforceable by the Probation Division as appropriate until either they are paid in full or the court terminates the Probation Division's supervision of the support order. Upon termination of an obligation to pay current support, the amount to be paid to satisfy the arrearage shall be the sum of the obligation amount in effect immediately prior to the termination plus any arrears repayment amount if there are no other children remaining on the support order.

(7) Notice of Termination. Where an emancipation date or termination date has been ordered by the court, the Probation Division shall send the obligor and obligee notice of termination of child support prior to the child reaching the court ordered emancipation date or future termination date in accordance with N.J.S.A. 2A:17-56.67 et seq. Such notice shall contain the date on which child support shall terminate and information regarding the adjustments that will be made to the obligation, as applicable.

(8) Unallocated Orders. Whenever there is an unallocated child support order for two or more children and the obligation to pay support for one or more of the children is terminated pursuant to N.J.S.A. 2A:17-56.67 et seq., the amount to be paid prior to the termination shall remain in effect for the other children. Either party may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter to adjust the support amount.

(9) Allocated Orders. Whenever there is an allocated child support order for two or more children and the obligation to pay support for one or more of the children is terminated pursuant to N.J.S.A. 2A:17-56.67 et seq., the amount to be paid shall be adjusted to reflect the reduction of the terminated obligation(s) for the other children. Either party may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter to adjust the support amount.

(c) Termination or Continuation of Child Support Obligations Not Administered by the Probation Division. Where an obligor has been ordered to pay child support

directly to the obligee, the child support obligation shall terminate by operation of law in accordance with N.J.S.A. 2A:17-56.67 et seq., unless otherwise provided in a court order or judgment. Notwithstanding any other provision of law, a party may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter requesting termination or continuation of a child support obligation at any time, for good cause. The Probation Division shall not be required to provide any noticing, monitoring or enforcement services in any case where the obligor has been ordered to pay child support directly to the obligee.

(d) Other Reasons for Termination of Child Support Obligations. A party to a child support order, at any time, may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter requesting termination of a child support obligation based on good cause. Any arrearages accrued prior to the date of termination shall remain due and enforceable by the obligee or the Probation Division, as appropriate.

(e) Emancipation. Except as otherwise provided by these rules, and in accordance with N.J.S.A. 2A:34-23, N.J.S.A. 2A:17-56.67 et seq., and related case law, a party to a child support order at any time may file a motion in a dissolution matter or an application in a non-dissolution or domestic violence matter requesting emancipation of a child. Court-ordered emancipation shall terminate the obligation of an obligor to pay current child support, as of the effective date set forth in the order of emancipation. Any arrearages accrued prior to the date of emancipation shall remain due and enforceable by the obligee or the Probation Division, as appropriate.

(f) Support for Children in Out-of-Home Placement through the Division of Child Protection and Permanency. A child support obligation payable to the Division of Child Protection and Permanency (DCP&P) for children in an out-of-home placement shall not be terminated by operation of law upon the child turning 19 years of age. A child support obligation payable to DCP&P shall terminate upon notification that the child is no longer in placement or upon the child turning 23 years of age, whichever occurs first.

(g) Financial Maintenance for a Child Beyond 23 Years of Age. Pursuant to N.J.S.A. 2A:34-23, N.J.S.A. 2A:17-56.67 et seq., and related case law:

(1) a child beyond 23 years of age may apply to the court for an order requiring the payment of financial maintenance or reimbursement from a parent;

(2) a parent, or a child over the age of 23, may apply to the court for an order converting a child support obligation to another form of financial maintenance in exceptional circumstances, including but not limited to the child's physical or mental disability that existed prior to the date that the child reached the age of 23;

(3) Any arrearages accrued prior to the date of termination or conversion shall remain due and enforceable by the obligee or Probation Division, as appropriate; and

(4) Court-ordered financial maintenance or reimbursement from a parent shall not be payable or enforceable as child support. The Probation Division shall not be required to provide any establishment, monitoring or enforcement of such maintenance or reimbursement order.

(h) Foreign Orders or Judgments. The provisions of N.J.S.A. 2A:17-56.67 et seq. shall not apply to child support provisions contained in orders or judgments entered by a foreign jurisdiction and registered in New Jersey for modification or enforcement pursuant to the Uniform Interstate Family Support Act, N.J.S.A. 2A:4-30.124 et seq.

The apparent rationale for these sweeping changes is that, prior to this enactment, a parent paying child support who desired to terminate that obligation was required to ether obtain the consent of the obligee, or file an application with the court. Thus, the procedure for termination was initially

placed upon the obligor, notwithstanding that most of the information regarding a child's education and employment status was often only in the hands of the custodial parent. See Stollen, Mia V. and Rutkowski, Kelley M., "Changes to Child Support and Emancipation in New Jersey," 223 N.J.L.J. 269, 271 (Jan. 23, 2017). The goal of the statute was to eliminate circumstances where the obligor continues to pay child support unknowingly, or is forced to resort to self-help due to lack of access to necessary and relevant information regarding the child. Ibid.

Additionally, the enactment of this new statute, and consequent court rule, followed years of legislative efforts, going back to 2002, to join the vast majority of states that decline to presumptively provide child support for children over age 18. Most states use age 18 as the age of majority, and some states even hold no duty to support beyond age 18. See Vitale, Katrina, Stolfe, Abigale, Parker, Lisa P., and Serviss, Daniel M., "New Law: Termination of Obligation to Pay Child Support," New Jersey Family Lawyer, Vol. 37, No. 6, pp. 25-31 (July 2017).

New Jersey, as with all states, receives federal funding under the Title IV-D program of the Social Security Act for its establishment, collection and enforcement of child support obligations. Federal funding levels are based on the cost effectiveness of a state's program, with yearly audits

conducted. New Jersey's child support system was faced with an ever-growing docket of cases requiring monitoring and enforcement, as well as a declining collection rate as compared with other states. Id. at p. 25 (citing to 42 U.S.C. § 458).

As pointed out by the cited article in the New Jersey Family Lawyer, although the intent of the new law has merit, the question raised is whether shifting the burden from the obligor to the obligee is appropriate given that approximately 68.6% of New Jersey children attend college. Ibid. (citing a higher education information website) Notwithstanding, the benefit to the probation system is apparent, since implementation of the statutory scheme will likely result in a decline in probation cases, which approximated 297,541 matters monitored through the New Jersey probation system as of the end of 2016. Id. at p. 26.

Under New Jersey law, there is no automatic emancipation date for a child. See, e.g., Newburgh v. Arrigo, 85 N.J. 529, 543-45 (1980) (holding that whether a child is emancipated at age 18, with the correlative termination of the right to parental support, depends upon the facts of each case). That has not changed. However, under the new statute, child support automatically terminates when the child marries, dies, or enters military service. N.J.S.A. 2A:17-56.67(a). In addition, under that statutory section, child support terminates for a child who

has reached age 19 unless: (1) an order specifies another age for the termination of child support, which shall not be beyond age 23; (2) there is a written request by the custodial parent for continuation of child support beyond age 19; or (3) the child receiving support is in an out-of-home placement through the New Jersey Division of Child Protection and Permanency. See R. 5:6-9(a).

The statute requires that the probation department must send both parents at least two written notices of a proposed termination of child support, which must include information and a request form to facilitate continuation of child support beyond age 19. The first notice must be sent at least 180 days prior to the proposed termination date, and the second notice must be sent at least 90 days prior to the proposed termination date, but the second notice is not required if the custodial parent has submitted the form requesting continuation of child support beyond age 19, or a new date of child support termination has already been established. N.J.S.A. 2A:17-56.67(d).

R. 5:6-9(b)(1) requires the notice of proposed termination to be sent ***"[w]here no other emancipation date or termination has been ordered by the court[.]"*** Thus, from a practitioner's viewpoint, if possible, it would be prudent to negotiate a specific termination date to avoid the notice being sent, which

would potentially result in another court event. In that connection, R. 5:6-9(b)(2) provides for the right of the oblige, upon receipt of the notice of proposed termination, to submit a written request to the court for the continuation of child support beyond age 19 if the child is, (A) still enrolled in high school or other secondary educational program, (B) is enrolled ***full-time*** in a post-secondary educational program, or (C) has a physical or mental disability ***as determined by a federal or state agency that existed prior to the child reaching age 19,*** and ***requires continued support***. (Emphasis added).

This section raises the issue of the extent of proofs necessary for the obligee to submit in order to satisfy probation that child support should continue. Presumptively, enrollment verification as to either high school, a secondary education program, full-time in a post-secondary educational program, or, as to a physical or mental disability, federal or state documentation of that disability would suffice. It is interesting to note that a physical or mental disability may, or may not, have the required "determination by a federal or state agency," yet the child may actually be suffering from a mental or physical disability. That same federal or state agency determination requirement apparently is not required as to the conversion of a child support order to another form of "financial maintenance" under N.J.S.A. 2A:17-56.68 for a child

who has attained age 23. It is unclear what position Probation will take where the physical or mental disability has not been determined by a federal or state agency. Presumptively, assuming the lack of a state or federal agency finding in that regard, the obligee should submit as much information as possible in an attempt to document a "physical or mental disability."

In any event, upon submission of the request for continuation of child support beyond age 19, probation will review the request and documentation and make a recommendation to the court, which then enters an order, either continuing child support and setting a future termination date, or, if the court deems the request and documentation insufficient, terminating the current child support obligation as of the date of the child's 19th birthday. See R. 5:6-9(b)(3). If there is no response to the notice, the court will enter and order terminating child support as of the date of the child's 19th birthday. R. 5:6-9(b)(4).

However, if a party disagrees with either the termination or continuation order entered, that party may file a motion requesting either termination or continuation of the child support obligation. R. 5:6-9(b)(5). It would appear reasonable to conclude that there will be a significant number of court applications pursuant to the statute and this rule primarily on

the issue of whether the child is attending a post-secondary educational program on a full-time basis, and in the area of a claimed child's physical or mental disability, i.e., whether the physical or mental condition arises to the level of a "disability."

Additionally, if not covered by court order or an agreement, courts often receive requests to modify child support when a child attends a post-secondary educational institution, based on the potential inapplicability of the child support guidelines,[1] and application of the factors set forth in N.J.S.A. 2A:34-23(a). And, nothing in the new statute should be construed to prevent a parent from petitioning the court for the termination of child support prior to the child reaching age 19, or, as noted, to contest the extension of child support for a child beyond the date the child attains age 19. N.J.S.A. 2A:17-56.72.

The statute and rule also make clear that child support arrears accruing prior to the date of termination will remain due and enforceable by probation. N.J.S.A. 2A:17-56.69; R. 5:6-9(b)(6).

Where there is an unallocated child support order for two or more children, and there is a termination of child support

[1] The Guidelines may be applied if the child attending college lives at home and commutes to school. See Appendix IX-A, "Considerations in the Use of the Child Support Guidelines," ¶18.

for one child, the amount ordered to be paid prior to the termination shall remain in effect for the other children, but either party may file a motion to adjust the child support in light of those changed circumstances. N.J.S.A. 2A:17-56.68(a); R. 5:6-9(b)(8). If the child support amount was allocated, the amount of the remaining child support obligation shall be adjusted to reflect only the amount allocated for the remaining child or children, but, again, either party may file a motion to adjust the support amount. N.J.S.A. 2A:17-56.68(b); R. 5:6-9(b)(9).

In circumstances where the obligor has been ordered to pay child support directly to the obligee, without Probation's involvement, the child support obligation shall terminate in accordance with the provisions of the new statute, unless otherwise provided in a court order or judgment. R. 5:6-9(c). This would, of course, include an agreement of the parties incorporated into an order or judgment. However, Probation is not required to monitor or provide any notices in a direct-payment situation; rather, notwithstanding the applicability of the provisions of the new law, a party would be required to make an application to the court or obtain consent from the other party in order to effectuate its provisions.

The statute makes it clear that the obligation to pay child support terminates by operation of law when a child reaches age

23. N.J.S.A. 2A:17-56.67(e). In such circumstances, Probation will send both parties a written notice of termination at least 90 days prior to the child attaining age 23. However, it is also clear that this section does not prevent a child who has reached age 23 from seeking a court order "requiring the payment of other forms of financial maintenance or reimbursement from a parent as authorized by law to the extent that such financial maintenance or reimbursement is not payable or enforceable as child support[.]" N.J.S.A. 2A:17-56.67(e)(1). Additionally, the court, upon application of a parent or child, may convert a child support obligation to "another form of financial maintenance for a child who has reached age 23" due to "exceptional circumstances including, but not limited to, a mental of physical disability[.]" N.J.S.A. 2A:17-56.67(e)(2). Any financial maintenance or reimbursement ordered pursuant to these sections shall not be payable or enforceable as child support and the Probation has no responsibilities for the establishment, monitoring or enforcement of such orders. R. 5:6-9(g).

As noted by one group of commentators on this issue:

> How the court will apply this provision of the new statute remains to be seen. In particular, whether there should be financial maintenance for a child over the age of 23 who is still attending college or, possibly graduate school, will be a fact-sensitive determination made on a case-by-case basis.

[Vitale, et al., supra, at p. 28.]

Additionally, it would appear that the form of "financial maintenance," assuming a determination that the child is not emancipated, would most appropriately be related to the nature of reason for that unemancipated status. In a college or graduate school setting the financial maintenance might relate to tuition and living expenses related thereto. In a physical or mental disability circumstance, appropriate financial maintenance might relate to living expenses as well as uninsured medical or mental health treatment, therapy, or uncovered medical costs. Again it is a fact-sensitive issue.

There is also no specific definition of "exceptional circumstances," beyond a mental or physical disability, that would warrant the continuation of a form of financial maintenance beyond age 23.

It is also noteworthy that all of enforcement tools available in R. 5:7, including income withholding (R. 5:7-2(e); R. 5:7-4A)), suspension and revocation of licenses (R. 5:7-5(b)), automatic entry of judgments (R. 5:7-5(d)), and other probation-related services are not available to enforce "financial maintenance" orders entered under N.J.S.A. 2A:17-56.67(e) and R. 5:6-9(g).

The afore-cited commentators also raise an interesting issue as to whether the new law prohibits parents from agreeing

to the payment of monetary support or even healthcare coverage for their children beyond age 23, even if the child is a full-time student in college or graduate school, based on the definition of "child support" contained in N.J.S.A. 2A:17-56.52, which encompasses monetary support and healthcare coverage. Vitale, et al., supra, at p. 29. If would appear, however, that this view does not take into account the sanctity courts afford to agreement between parties in a family-law setting. See, e.g., Konzelman v. Konzelman, 158 N.J. 185, 193-94 (1997). Certainly, the counter argument would be whether such agreements would be contrary to public policy. And, the issue remains as to what form of "financial maintenance" a court may order in a contested situation.

Finally, the new statute is not applicable to child support provisions contained in orders or judgments entered by a foreign jurisdiction, and which have been registered in New Jersey for modification pursuant to the Uniform Interstate Family Support Act (UIFSA), N.J.S.A. 2A:4-30.124, et seq. See N.J.S.A. 2A:17-56.70; R. 5:6-9(h).

VALUING CLOSELY-HELD BUSINESS INTERESTS

Definition: A closely-held business is an organization that has one or a limited number of owners, and the stock of the company is not traded on the public market. (sole proprietorships; partnerships; corporations).

Goal: A ***valuation*** attempts to mirror the real-world value public markets by analyzing company historical data and information, searching for comparable firms, developing estimates and projections about the future, and applying formulas and calculations to the data gathered.

Standard: ***FAIR VALUE*** (not Market Value)– Brown v. Brown, 348 N.J. Super. 466, certif. denied, 174 N.J. 193 (2002); Balsamides v. Proteen Chemicals, Inc., 160 N.J. 352 (1999); Lawson Marden Wheaton, Inc. v. Smith, 160 N.J. 383 (1999).

Methods: Three approaches to valuation are:

1. Asset-Based (Cost to replace or replicate the entity – most often used to value investment or holding companies and used in liquidations or bankruptcies).

2. Market (Uses guideline comparative entities from databases of publicly traded or privately transaction companies to benchmark value).

3. Income Approach (Value is derived from a multiple of the entity's benefit stream, defined as either earnings or cash flow).

With regard to approaches to valuation in general, as aptly explained by the Appellate Division in Brown, supra:

> As the Court recently observed in Balsamides v. Protameen Chemicals, Inc., 160 N.J. 352, 368 (1999) ("Balsamides"), and Lawson Mardon Wheaton, Inc. v. Smith, 160 N.J. 383, 397 (1999) ("Lawson"), valuation is not an exact science. See also Bowen v. Bowen, 96 N.J. 36, 44 (1984) (quoting Lavene v. Lavene, 162 N.J. Super. 187, 193, 392 (Ch. Div.1978) (on remand) (Lavene II)); John R. MacKay, II, 2 New Jersey

Business Corporations § 14-6(d)(1) (2d ed. 1996) ("MacKay"). ***Careful analysis on a case by case basis is required, with sensitivity and adjustment for the particular circumstances and the flexibility to deal with extraordinary circumstances.*** In Lavene v. Lavene, 148 N.J. Super. 267 (App. Div.), certif. denied, 75 N.J. 28 (1977) (Lavene I), where we held that the husband's 43% interest in a closely-held corporation "constitute[d] a distributable asset" and remanded for valuation, Judge Pressler noted:

> There are probably few assets whose valuation imposes as difficult, intricate and sophisticated a task as interests in close corporations. They cannot be realistically evaluated by a simplistic approach which is based solely on book value, which fails to deal with the realities of the good will concept, which does not consider investment value of a business in terms of actual profit, and which does not deal with the question of discounting the value of a minority interest.

[Id. at 275 (emphasis added).]

The court went on to observe that in Lawson, supra, the Supreme Court expressly adopted the approach of § 7.22(a) of the American Law Institute, Principles of Corporate Governance that the ***fair value*** of shares is the value of the holder's proportionate interest in the corporation without any discount for minority status or, absent extraordinary circumstances, lack of marketability. Brown, supra, 348 N.J. Super. at 485.

In explaining the "fair value" standard to be utilized in the valuation of an interest in a close-held business, and the rejection of the use of marketability or minority discounts in the valuation formula, the court stated, in pertinent part:

Statutory appraisal rights accorded to dissenting shareholders in New Jersey (and in most states) include the right to a determination of the "fair value" (not "fair market value") of their shares. N.J.S.A. 14A:11-3; see Bobbie J. Hollis, II, The Unfairness of Applying Lack of Marketability Discounts to Determine Fair Value in Dissenter's Rights Cases, 25 J. Corp. L. 137, 139 (1999), explaining the distinction between "fair value" and "fair market value":

> "Fair value" is not the same as, or short-hand for, "fair market value." "Fair value" carries with it the statutory purpose that shareholders be fairly compensated, which may or may not equate with the market's judgment about the stock's value. This is particularly appropriate in the close corporation setting where there is no ready market for the shares and consequently no fair market value. A closely-held corporation is one that has few shareholders and little market for the stock, or one that has an integration of ownership and management. When appraising shares of a close corporation, fair value cannot be fairly equated with the company's fair market value. Close corporations by their nature have less value to outsiders, but at the same time their value may be even greater to other shareholders who want to keep the business in the form of a close corporation.
>
> [Footnotes omitted.]

The "fair value" concept is inherently inconsistent with discounting value to reflect limited marketability. That which has been labeled a "marketability discount" reflects the theoretically limited market for the sale of a privately-held, small business. That which has been labeled a "minority discount" reflects a theoretically more limited market for sale of a non-controlling interest in such a business. The significance of a limited market is that the asset is illiquid. Both discounts represent an attempt to account for the fact that unlike shares in a publicly-traded company, shares in a closely-held corporation have limited liquidity.

[Id. at 487-88.]

Succinctly stated, ***fair value*** carries with it the statutory purpose that shareholders, or a business owner in any form of ownership, be fairly compensated, which may or may not equate with the market's judgment about the value of that interest. Thus, when appraising an interest in a close corporation, ***fair value*** cannot be fairly equated with the company's ***fair market value***. Id. at 487. Therefore, given the purpose of equitable distribution to fairly divide the accumulated wealth of a marital partnership, and that the purpose of valuing the spouse's interest is to determine the other spouse's fair share of marital assets, where the business will be retained and the divorce will not trigger a sale, lack of liquidity does not affect the fair share of the business owner, and neither a marketability or minority discount is appropriate in the valuation process. Id. at 490.

The method of valuation that is almost always most applicable to the determining the value of a spouse's interest in a close corporation, for equitable distribution purposes, is the ***Income Approach***, which estimates the value of the entity as a whole, based on a capitalization of its future earnings and cash flow capacity. The theory behind this valuation method is that the value of a company is the sum of the present value of future earnings that can be expected to be generated, where the

growth of the earnings and benefit stream is expected to remain relatively constant into the future. An earnings stream, such as operating income or cash flows, is converted to an estimate of value by discounting forecasted future economic earnings or economic cash flows, or by capitalizing future economic earnings or economic cash flows, using applicable discount or capitalization rates.

There is an assumption that future economic income, whether defined as an earnings flow stream, or as a cash flow stream, is predictive of the present value of a business enterprise. The earnings and/or cash flow streams are predicated on upon assumptions about prospective flows using forecasts, or using historic results, of operations. The going-concern premise of value is also assumed. The income approach estimates the value of the entity as a whole, including tangible and intangible asset values, such as unrecorded entity goodwill. Because closely-held businesses tend to be earnings or cash-flow driven, this valuation approach is normally considered most appropriate.

The two methods commonly used in the income approach for valuation are the ***Discounted Future Earnings*** approach and the ***Capitalization of Future Economic Income*** approach.

The ***Discounted Future Earnings*** approach is typically used when the growth rate in each discrete future period of earnings or cash flows are expected to vary. Discounting discrete

periods of forecasted future economic earnings or economic cash flows is generally considered reliable for only a relatively few number of years into the immediate future, since forecasting models become less reliable the further into the future the forecast are made.

The ***Capitalization of Future Economic Income*** approach reverts to a ***capitalization*** of future economic income for the remaining future years into perpetuity. This method is used when the defined income, economic earnings flows or economic cash flows are expected to grow as a constant rate over time into perpetuity.

A ***capitalization rate*** is a divisor used to convert a single-point business economic benefit (business earnings) into a business value. It is the rate of return based on the income that the company is expected to generate.

This process of the capitalization of future earnings includes determining ***Weighted Average Normalized Income Before Reasonable Compensation***. This is the normalized net income of the company, as weighted according to the judgment of the valuator. The weighting of the years reflects the valuation analyst's opinion on the best representation of the ongoing income stream that the company is capable of generating. Normalizing net income is akin to auditing. The valuator needs to examine all balance-sheet and income-statement items and

search for patterns, relationships, abnormal items, and management's reporting choices. The process of normalization involves making adjustments to the reported net income by adding or subtracting income or expenses that could be considered discretionary, non-recurring, non-business or personal in nature. Typically, the valuator normalizes the last five (5) years of historical financial statements. Most typically, common adjustments include:

1. Compensation – owner's compensation is added-back in full and normalized by subtracting an estimate reasonable compensation. Additionally, any other compensation that is beyond reasonable market cost, such as salaries for family members who are not actually performing any work for the company, are added back as well.

2. Personal Expenses – any perquisites that are paid for by the company and reflected as expenses on the tax return are added back, which can include things such as automobile payments, automobile insurance, personal items charge in business credit cards, call phone payments, life insurance, pension contributions, travel, meals and entertainment.

3. Taxes on Income – reported Federal and State taxes on income are added back to the net income and the taxes on normalized net income are deducted in the computation of ***Fair Value***.

4. Rent – if the company pays rent expense or receives rental income from a related party, which often is not an arms-length transaction, with the company paying or receiving rent that is either above or below the market rate – such rental expense or income would be adjusted to reflect the arms-length transaction at fair market rent.

5. Depreciation – has to be analyzed to determine if the manner in which depreciation is

reported on the company's tax return actually inflates actual expenses, which may require normalization. If so, an adjustment must be made.

The valuator must also determine ***Reasonable Compensation***. It is not unusual for owners of small companies to either over-pay or under-pay themselves. To determine whether that is the case, the valuator engages in a process of normalizing an owner's compensation, which includes adding-back compensation as reported on tax returns or the company's books, and then subtracting a ***reasonable compensation*** as calculated by the valuator. The factors utilized in determining ***reasonable compensation*** are usually, (1) Experience; (2) Hours worked; and (3) Job responsibilities. In addition, in order to determine ***reasonable compensation***, the valuator usually utilizes several tools, including, for example: (1) Data from the Economic Research Institute; (2) Data from the U.S. Department of Labor; (3) Data, if applicable, from the Medical Group Management Association Physician Compensation and Production Survey; Data from www.salary.com; and data from www.salaryexpert.com.

The ***normalized net income before taxes*** is then calculated by subtracting the ***reasonable compensation*** from the ***weighted average normalized net income*** before reasonable compensation and taxes. The effect of income taxes on the normalized net income is considered in order to be consistent with the ***capitalization rate***, which is an after-tax rate. Federal and State income

taxes are calculated on the pre-tax normalized net income at applicable corporate statutory rates and then subtracted to arrive at the ***normalized net income***.

Because the ***capitalization of earnings method*** uses a sustainable normalized net income for calculating value, a growth rate must be applied in order to estimate the growth into the next year for the company.

The ***capitalization rate*** is determined by adding and subtracting a series premium and discounts for risk factors from the "safe rate," using the 20-year U.S. Treasury Bond rate. The ***capitalization rate*** is defined as the ***discount rate*** less the expected rate of growth. The first step in determining the ***capitalization rate*** is the build-up of the ***discount rate***, which is the rate of return necessary to induce investors to commit funds to an investment. The components used in the process of the build-up of the ***discount rate*** are:

1. Safe Rate or Risk-Free Rate - the rate of return available on a risk-free security, i.e., the 20-year Treasury Bond Rate.

2. Equity Risk Premium – the premium used to reflect the additional risk of investing in the stock market over the risk-free security.

3. Small Company Risk Premium – the premium used to reflect the additional risk of investing in smaller companies.

The source used to determine the Equity Risk and Small Company Risk Premium is the Valuation Handbook – "Guide to Cost of

Capital," Duff & Phelps, Center for Research in Security Prices (2017).

As the build-up of the discount rate is calculated, a long-term growth rate is subtracted from the discount rate to calculate the ***capitalization rate***. That rate is estimated based on a long-term inflation forecast detailed in the Livingston Survey published by the Federal Reserve Bank of Philadelphia, which summarizes forecasts of economists from industry, government, banking, and academia, and is released every six (6) months in June and December.

FAIR VALUE, using the income approach, is then calculated by dividing the sustainable ***normalized net income*** by the ***capitalization rate***.

Just a word on ***Cash Flow Analyses***, which are important in determining the appropriate level of effective income received by a payor spouse when determining issues of alimony and child support. Generally, the reported income a spouse is receiving from a closely-held business must be ***normalized*** by making adjustments to the reported income by adding-back perquisites, items paid by the company that constitute personal benefits, such as:

1. Additional Income;
2. Other Salaries;
3. Auto Expenses;

4. Telephone Costs;

5. Insurance Costs;

6. Charitable Contributions;

7. Meals and Entertainment;

8. Travel Expenses;

9. Credit Card payments;

10. Personal Income taxes;

11. Any other ***personal*** expenses deducted by the business for the benefit of the spouse or his or her family.

For ***valuation*** calculation purposes, the actual effective income received by the business owner is replaced by the determination of ***reasonable compensation*** for that party. For support calculation purposes, the actual effective ***cash flow*** received by that party is utilized. See Steneken v. Steneken, 183 N.J. 290, 293 (2005).

Key Rules Regarding Financial Experts

There are a number of Rules with which practitioners should be familiar:

> **N.J.R.E. 702:** If specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.
>
> **R. 5:3-3(c):** Whenever the court concludes that disposition of an economic issue will be assisted by expert opinion, it may in the same manner as provided in Paragraph (a) of this rule appoint an expert to appraise the value of any property or to report and recommend as to any other issue, and may further order any person or

entity to produce documents or to make available for inspection any information or property, which is not privileged, that the court determines is necessary to aid the expert in rendering an opinion.

R. 5:3-3(d): Experts appointed hereunder may be selected by the mutual agreement of the parties or independently by the court. The court shall establish the scope of the expert's assignment in the order of appointment. Neither party shall be bound by the report of the expert so appointed.

R. 5:3-3(e): Any expert appointed by the court shall be permitted to conduct an investigation independently to obtain information reasonable and necessary to complete his or her report from any source, and may make contact directly with any party from whom information is sought within the scope of the order of appointment. The parties shall be entitled to have their attorneys and/or experts present during any examination by a court appointed expert. The expert shall not communicate with the court except upon prior notice to the parties and their attorneys who shall be afforded an opportunity to be present and to be heard during any such communication between the expert and the court. A request for communication with the court may be informally conveyed by the expert by letter or telephonic means, whereafter further communications with the court, which may be conducted informally by conference or conference call, shall be done only with the participation of the parties and their counsel.

R. 5:3-3(f): Any finding or report by an expert appointed by the court shall be submitted upon completion to both the court and the parties. At the time of submission of the court's experts' reports, the reports of any other expert may be submitted by either party to the court and the other parties. The parties shall thereafter be permitted a reasonable opportunity to conduct discovery in regard thereto, including, but not limited to, the right to take the deposition of the expert.

R. 5:3-3(g): An expert appointed by the court shall be subject to the same examination as a privately retained expert and the court shall not entertain any presumption in favor of the appointed expert's findings. Any finding

or report by an expert appointed by the court may be entered into evidence upon the court's own motion or the motion of any party in a manner consistent with the rules of evidence, subject to cross-examination by the parties.

R. 5:3-3(h) Nothing in this rule shall be construed to preclude the parties from retaining their own experts, either before or after the appointment of an expert by the court, on the same or similar issues.

ALIMONY MODIFICATION OR TERMINATION

This portion of the program deals with the basics in handling a post-judgment motion to modify, suspend, or terminate alimony based upon ***LOSS OF EMPLOYMENT OR REDUCTION IN INCOME***, ***RETIREMENT***, ***COHABITATION***, or ***DISABILITY*** amid the 2014 statutory changes

Modification in General

Alimony may be revised and altered by the court from time-to-time as circumstances may require. N.J.S.A. 2A:34-23. In September 2014, the Legislature amended the alimony and maintenance statute, N.J.S.A. 2A:34-23, "to more clearly quantify considerations examined when faced with a request to establish or modify alimony." Spangenberg v. Kolakowski, 442 N.J. Super. 529, 536-37 (App. Div. 2015). No doubt, this was an attempt to achieve some sort of uniformity and consistency in the handling, hearing and adjudication of applications to modify alimony by providing additional statutory standards. The amendment became effective September 10, 2014. L. 2014, c. 42, § 1. The Legislature, however,

> clarified that [the amendments] "shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into: a. a final judgment of divorce or dissolution; b. a final order that has concluded post-judgment litigation; or c. any enforceable written agreement between the parties."

> [Quinn v. Quinn, 225 N.J. 34, 51 n.3, (2016) (quoting L. 2014, c. 42, § 2).]

"This additional statement signals the legislative recognition of the need to uphold prior agreements executed or final orders filed before adoption of the statutory amendments." Spangenberg, supra, 442 N.J. Super. at 538.

The 2014 amendments eliminated the designation "permanent alimony" in favor of "open durational alimony," which is limited to marriages of 20 years in duration, or longer, N.J.S.A. 2A:34-23(c), but retained the designations of rehabilitative, limited duration, or reimbursement alimony, N.J.S.A. 2A:34-23(b), or any form of alimony, "separately or in any combination, as warranted by the circumstances of the parties and the nature of the case." N.J.S.A. 2A:34-23(f).

Moreover, with respect to marriages or civil unions less than 20 years in duration, the duration of the alimony cannot exceed the length of the marriage or civil union, "except in exceptional circumstances." N.J.S.A. 2A:34-23(c). Under that section, "exceptional circumstances" which may require an adjustment to the duration of alimony include:

> (1) The ages of the parties at the time of the marriage or civil union and at the time of the alimony award;
>
> (2) The degree and duration of the dependency of one party on the other party during the marriage or civil union;

(3) Whether a spouse or partner has a chronic illness or unusual health circumstance;

(4) Whether a spouse or partner has given up a career or a career opportunity or otherwise supported the career of the other spouse or partner;

(5) Whether a spouse or partner has received a disproportionate share of equitable distribution;

(6) The impact of the marriage or civil union on either party's ability to become self-supporting, including but not limited to either party's responsibility as primary caretaker of a child;

(7) Tax considerations of either party;

(8) Any other factors or circumstances that the court deems equitable, relevant and material.

[Ibid.]

The determination of the length and amount of alimony shall be made by the court pursuant to the factors set forth in N.J.S.A. 2A:34-23(b), which are:

(1) The actual need and ability of the parties to pay;

(2) The duration of the marriage or civil union;

(3) The age, physical and emotional health of the parties;

(4) The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living, ***with neither party having a greater entitlement to that standard of living than the other***;

(5) The earning capacities, educational levels, vocational skills, and employability of the parties;

(6) The length of absence from the job market of the party seeking maintenance;

(7) The parental responsibilities for the children;

(8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;

(9) The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;

(10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;

(11) The income available to either party through investment of any assets held by that party;

(12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;

(13) The nature, amount, and length of pendente lite support paid, if any; and

(14) Any other factors which the court may deem relevant.

In each case where the court is asked to make an award of alimony, the court shall consider and assess evidence with respect to all relevant statutory factors. If the court determines that certain factors are more or less relevant than others, the court shall make specific written findings of fact and conclusions of law on the reasons why the court reached that conclusion. No factor shall be elevated in importance over any other factor unless the court finds

> ***otherwise, in which case the court shall make specific written findings of fact and conclusions of law in that regard.***
>
> [Id. (emphases added to delineate changes by the 2014 amendments.]

Moreover, in determining the length and amount of alimony, in addition to consideration of the factors set forth in N.J.S.A. 2A:34-23(b),

> the court shall also consider the practical impact of the parties' need for separate residences and the attendant increase in living expenses on the ability of both parties to maintain a standard of living reasonably comparable to the standard of living established in the marriage or civil union, to which both parties are entitled, with neither party having a greater entitlement thereto.
>
> [N.J.S.A. 2A:34-23(c).]

The statute has always provided that it "is not intended to preclude a court from modifying alimony awards based upon the law[,]" N.J.S.A. 2A:34-23(d), but under the 2014 amendments, "[a]n award of reimbursement alimony shall not be modified for any reason." N.J.S.A. 2A:34-23(e).

Modification Based Upon Retirement

With respect to modification applications based upon the prospective or actual retirement of the obligor, the 2014 Amendments provide significant and comprehensive guidance, as follows:

> j. Alimony may be modified or terminated upon the prospective or actual retirement of the obligor.

(1) There shall be a rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age, except that any arrearages that have accrued prior to the termination date shall not be vacated or annulled. The court may set a different alimony termination date for good cause shown based on specific written findings of fact and conclusions of law.

The rebuttable presumption may be overcome if, upon consideration of the following factors and for good cause shown, the court determines that alimony should continue:

(a) The ages of the parties at the time of the application for retirement;

(b) The ages of the parties at the time of the marriage or civil union and their ages at the time of entry of the alimony award;

(c) The degree and duration of the economic dependency of the recipient upon the payor during the marriage or civil union;

(d) Whether the recipient has foregone or relinquished or otherwise sacrificed claims, rights or property in exchange for a more substantial or longer alimony award;

(e) The duration or amount of alimony already paid;

(f) The health of the parties at the time of the retirement application;

(g) Assets of the parties at the time of the retirement application;

(h) Whether the recipient has reached full retirement age as defined in this section;

(i) Sources of income, both earned and unearned, of the parties;

(j) The ability of the recipient to have saved adequately for retirement; and

(k) Any other factors that the court may deem relevant.

If the court determines, for good cause shown based on specific written findings of fact and conclusions of law, that the presumption has been overcome, then the court shall apply the alimony factors as set forth in subsection b. of this section [N.J.S.A. 2A:34-23(b)] to the parties' current circumstances in order to determine whether modification or termination of alimony is appropriate. If the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective.

(2) Where the obligor seeks to retire prior to attaining the full retirement age as defined in this section, the obligor shall have the burden of demonstrating by a preponderance of the evidence that the prospective or actual retirement is reasonable and made in good faith. 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 or other relevant documents as required by the Rules of Court, as well as the Case Information Statements or other documents from the date of entry of the original alimony award and from the date of any subsequent modification.

In order to determine whether the obligor has met the burden of demonstrating that the obligor's prospective or actual retirement is reasonable and made in good faith, the court shall consider the following factors:

(a) The age and health of the parties at the time of the application;

(b) The obligor's field of employment and the generally accepted age of retirement for those in that field;

(c) The age when the obligor becomes eligible for retirement at the obligor's place of

employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

(d) The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

(e) The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

(f) The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

(g) The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

(h) Any other relevant factors affecting the obligor's decision to retire and the parties' respective financial positions.

If the obligor intends to retire but has not yet retired, the court shall establish the conditions under which the modification or termination of alimony will be effective.

(3) When a retirement application is filed in cases in which there is an existing final alimony order or enforceable written agreement established prior to the effective date of this act, the obligor's reaching full retirement age as defined in this section shall be deemed a good faith retirement age. Upon application by the obligor to modify or terminate alimony, 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 or other relevant documents as required by the Rules of Court, as well as the Case Information Statements or other documents from the date of entry of the original

alimony award and from the date of any subsequent modification. In making its determination, the court shall consider the ability of the obligee to have saved adequately for retirement as well as the following factors in order to determine whether the obligor, by a preponderance of the evidence, has demonstrated that modification or termination of alimony is appropriate:

(a) The age and health of the parties at the time of the application;

(b) The obligor's field of employment and the generally accepted age of retirement for those in that field;

(c) The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

(d) The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

(e) The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

(f) The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

(g) The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

(h) Any other relevant factors affecting the parties' respective financial positions.

(4) The assets distributed between the parties at the time of the entry of a final order of divorce or

> dissolution of a civil union shall not be considered by the court for purposes of determining the obligor's ability to pay alimony following retirement.
>
> [N.J.S.A. 2A:34-23(j).]

Additionally, "'Full retirement age' shall mean the age at which a person is eligible to receive full retirement for full retirement benefits under section 216 of the federal Social Security Act (42 U.S.C. § 416)." N.J.S.A. 2A:34-23(n).

The point in outlining the statutory requirements in detail is that if you are either advancing or defending against an application to modify or terminate alimony based upon the prospective or actual retirement of an obligor, you must present evidence and facts that address these rather comprehensive factors that the court must consider, as well as an analysis as to their application in your case. This is particularly critical, because the court must consider these factors, make findings concerning same, and reach conclusions of law based thereon.

There have been two reported cases decided since the 2014 amendments were enacted that deal with the issue of retirement. In Landers v. Landers, 444 N.J. Super. 315 (App. Div. 2016), the opinion delivered by Judge Lihotz, the court clarified the application of the newly enacted alimony statute amendments, addressing modification of alimony when an obligor retires under N.J.S.A. 2A:34-23(j). There, the obligee appealed from a March

27, 2015 Family Part order terminating the alimony obligation of the obligor as a result of his retirement. The court concluded that the motion judge incorrectly applied N.J.S.A. 2A:34-23(j)(1), which it found is limited to alimony awards entered after the effective date of the amended statute, i.e., after September 10, 2014, rather than subsection (j)(3), which governs review of final alimony awards established prior to the effective date of the statutory amendments. Id. at 316-17. In Landers, the alimony award was contained in a final judgment of divorce entered in 1991 after a 22-year marriage. Following the obligor's 66th birthday, he moved to terminate alimony based on his retirement, after having paid alimony for approximately 24 years. Id. at 317.

In addressing the issue of retirement and whether the 2014 amendments were applicable in these circumstances, the court first stated:

> Prior to recent amendments, which became effective on September 10, 2014, "[o]ur courts have interpreted this statute to require a party who seeks modification to prove 'changed circumstances[.]'" Spangenberg v. Kolakowski, 442 N.J. Super. 529, 536 (App. Div. 2015) (alteration in original) (quoting Lepis v. Lepis, 83 N.J. 139, 157 (1980)). More specifically, the party moving for modification "must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself." Lepis, supra, 83 N.J. at 157.
>
> An income reduction resulting from a "good faith retirement" after age sixty-five is a well-recognized change of circumstances event, prompting a detailed

> review of the financial situation facing the parties to evaluate the impact retirement has on a preexisting alimony award. Silvan v. Sylvan, 267 N.J. Super. 578, 581 (App. Div. 1993) (identifying factors to be considered in analyzing whether retirement justifies alimony modification); see also Deegan v. Deegan, 254 N.J. Super. 350, 357-58 (App. Div. 1992).
>
> The 2014 amendments added a new subsection (j), which lists objective considerations a judge must examine and weigh when reviewing an obligor's request to modify or terminate alimony when an obligor retires. L. 2014, c. 42, § 1.
>
> [Id. at 320-21.]

The court then addressed the applicability of the 2014 statutory amendments to judicial alimony determinations and those contained in the agreement of parties incorporated into judicial orders entered prior to September 10, 2014, citing to the legislative intent set forth in section 2 of chapter 42 of the Laws of 2014, which provides:

> This act shall take effect immediately and shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have bene incorporated into:
>
> a. a final judgment of divorce or dissolution;
>
> b. a final order that has concluded post-judgment litigation; or
>
> c. any enforceable written agreement between the parties.

The Landers court then ruled, as follows:

> "This additional statement signals the legislative recognition of the need to uphold prior agreements executed or final orders filed before

adoption of the statutory amendments." Spangenberg, supra, 442 N.J. Super. at 538.

Unlike other amended provisions of N.J.S.A. 2A:34-23, subsection (j) distinguishes alimony orders executed prior to the amendment's effective date and those executed afterwards. See N.J.S.A. 2A:34-23(j)(1), (3). Therefore, this unambiguous legislative directive governs a court's examination of alimony modification requests arising when an obligor retires, depending on the original date alimony is awarded.

Subsection (j)(3) applies "[w]hen a retirement application is filed in cases in which ***there is an existing final alimony order or enforceable written agreement established prior to the effective date of this act*** . . . . " N.J.S.A. 2A:34-23(j)(3) (emphasis added). This purposeful design demonstrates an intent to address such circumstances somewhat differently than orders entered following the enactment of the statutory amendments.

Notably, the rebuttable presumption included in subsection (j)(1), which places the burden on the obligee to demonstrate continuation of the alimony award once an obligor attains full retirement age, N.J.S.A. 2A:34-23(j)(1), is not repeated, but replaced by a different standard in subsection (j)(3). The latter provision follows the prior principles outlined in Lepis and its progeny, by mandating "the court shall consider the ability of the obligee to have saved adequately for retirement as well as the following factors in order to determine ***whether the obligor, by a preponderance of the evidence, has demonstrated that modification or termination of alimony is appropriate*** . . . ." N.J.S.A. 2A:34-23(j)(3) (emphasis added).

Importantly, subsection (j)(3) elevates the ability of the obligee to have saved adequately for retirement, listed only as a factor under N.J.S.A. 2A:34-23(j)(1)(j), setting it apart from other considerations and requiring its explicit analysis. N.J.S.A. 2A:34-23(j)(3). Also, factors identified in the two subsections are not identical, making the court's focus different. For example, most apt to

> plaintiff's arguments are subsections (j)(3)(f) and (g), mandating an examination of the obligor's ability to maintain payments upon retirement, and "[t]he obligee's level of financial independence."
>
> We understand that subsection (j)(1), if read in isolation, appears to apply to any motion to modify or terminate alimony upon an obligor's retirement. However, when construing these two subsections "together as a unitary and harmonious whole," Am. Fire & Cas. Co. v. N.J. Div. of Taxation, 189 N.J. 65, 80 (2006) (quoting St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 15 (2005)), the particular language used in subsection (j)(3) clarifies the Legislature's intent to apply (j)(1) only to orders entered after the amendments' effective date.
>
> [Id. at 323-34.]

The Landers court found that the obligor's application to modify or terminate his alimony obligation contained in an order entered prior to September 10, 2014 triggered judicial review pursuant to the factors listed in N.J.S.A. 2A:34-23(j)(3), not subsection (j)(1). Accordingly, the court remanded the matter to the Family Part judge to conduct proceedings as he deemed necessary and to apply the burden of proof and specific standards defined in N.J.S.A. 2A:34-23(j)(3). Id. at 324-25.

In Mueller v. Mueller, 446 N.J. Super. 582 (Ch. Div. 2016), decided two months after Landers, Judge Jones considered an application by an obligor to modify his alimony obligation based upon his prospective retirement based on N.J.S.A. 2A:34-23(j). The court ruled, as follows:

> 1) The amended alimony statute does not set a specific minimum or maximum time period for obtaining an

> advance ruling on a prospective retirement and its effect upon an existing support obligation. The spirit of the amended statute, however, inherently contemplates that the prospective retirement will take effect within reasonable proximity to the application itself, rather than several years in advance of same.
>
> 2) In the present case, an application by an obligor to terminate alimony based upon a prospective retirement, filed five years before the applicant's anticipated retirement date, is brought too far in advance for the court to undertake an objectively reasonable analysis of the application, as contemplated under the statute. In order for a court to reasonably consider the issue of termination or modification of alimony based upon a prospective rather than actual retirement, the court logically needs to review reasonably current information, relative to the time period of the proposed retirement itself, in order to appropriately analyze the various factors and comparative equities set forth for consideration under the amended statute.
>
> 3) An order for prospective termination or modification of alimony based upon reaching a certain retirement age inherently contemplates that the obligor not only reaches a specific age, but also actually retires at that point. If an obligor reaches the statutory retirement age, but does not actually retire at that point, then the "retirement age" provisions triggering a potential termination or modification of alimony are inapplicable until such time as the obligor actually retires or submits an application regarding a prospective retirement in the near future, for the court's consideration under N.J.S.A. 2A:34-23(j).
>
> [Id. at 585-86.]

Judge Jones, citing to the Landers decision provided the following excellent discussion of application to modify or terminate alimony based upon the actual or prospective retirement of an obligor:

On September 10, 2014, the New Jersey Legislature formally amended the state's alimony statute, N.J.S.A. 2A:34-23, to include the establishment of statutory standards for consideration of termination or modification of one's alimony obligation based upon actual or prospective retirement. The effective date of the statute was September 10, 2014. The new retirement sections are N.J.S.A. 2A:34-23(j)(1), which covers termination of an alimony obligation established in an order entered after September 10, 2014; N.J.S.A. 2A:34-23(j)(2), which covers termination of alimony based upon early retirement; and N.J.S.A. 2A:34-23(j)(3), which covers termination of an alimony obligation established in an order entered before September 10, 2014. See Landers v. Landers, 444 N.J. Super. 315 (App. Div. 2016). Specifically, (j)(3) provides that where there is an existing final order or enforceable written agreement establishing an alimony obligation prior to the effective date of September 10, 2014, "the obligor's reaching full retirement age as defined in this section shall be deemed a good faith retirement age." "Full retirement age" means the age at which a person is eligible to receive full retirement benefits under section 216 of the federal Social Security Act (42 U.S.C. § 416). N.J.S.A. 2A:34-23(n).

At such point, the court may equitably weigh this factor against a series of additional statutory factors to determine whether alimony should be terminated, modified, or left intact. In making its determination, the court may consider various points, including but not limited to the ability of the obligee to have saved adequately for retirement. The following additional factors should also be considered to determine whether the obligor has demonstrated by a preponderance of the evidence that modification or termination of alimony is appropriate:

> (a) The age and health of the parties at the time of the application;
>
> (b) The obligor's field of employment and the generally accepted age of retirement for those in that field;

(c) The age when the obligor becomes eligible for retirement at the obligor's place of employment, including mandatory retirement dates or the dates upon which continued employment would no longer increase retirement benefits;

(d) The obligor's motives in retiring, including any pressures to retire applied by the obligor's employer or incentive plans offered by the obligor's employer;

(e) The reasonable expectations of the parties regarding retirement during the marriage or civil union and at the time of the divorce or dissolution;

(f) The ability of the obligor to maintain support payments following retirement, including whether the obligor will continue to be employed part-time or work reduced hours;

(g) The obligee's level of financial independence and the financial impact of the obligor's retirement upon the obligee; and

(h) Any other relevant factors affecting the parties' respective financial positions.

There are both similarities and differences between the statutory provisions and criteria for considering termination of an alimony obligation established under a final judgment or order entered before September 10, 2014, ((j)(3)) and a final judgment or order entered after September 10, 2014, ((j)(1)). Most particularly, the statutory language in each section implicitly references the reaching or approaching of retirement age as a triggering event for a potential application regarding the status of an alimony obligation. For a pre-September 10, 2014, alimony order, (j)(3) provides that "the obligor's reaching full retirement age as defined in this section shall be deemed a good faith retirement age" with the burden of proof remaining with the payor to demonstrate why alimony should terminate." For a post-September 10, 2014, alimony order, however, (j)(1) provides that "there shall be a rebuttable presumption that alimony shall terminate upon the

obligor spouse or partner attaining full retirement age," with the burden of proof shifting to the recipient to demonstrate why alimony should not terminate.

The amended statute also covers scenarios where an obligor wishes to retire earlier than "full retirement age," which is the age when he or she is entitled to receive full social security retirement benefits. When an obligor seeks to retire earlier than "full retirement age," then section (j)(2) applies:

> Where the obligor seeks to retire prior to attaining the full retirement age as defined in this section, the obligor shall have the burden of demonstrating by a preponderance of the evidence that the prospective or actual retirement is reasonable and made in good faith. 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 or other relevant documents as required by the Rules of Court, as well as the Case Information Statements or other documents from the date of entry of the original alimony award and from the date of any subsequent modification.

As noted, the language in the amended alimony statute technically authorizes a court to consider an obligor's application for termination or modification of alimony not only upon an actual retirement, but upon a prospective retirement as well. Pursuant to N.J.S.A. 2A:34-23(j), if an obligor intends to prospectively retire but has not yet actually retired, the court may establish the conditions under which the modification or termination of alimony will be effective. If the evidence reflects that an obligor is either actually retiring, or prospectively planning to retire, such evidence may launch the applicable statutory analysis provided under the statute, which may potentially lead to termination or modification of an alimony obligation.

The amendment permitting a court to presently consider an obligor's prospective retirement, as

> opposed to an actual retirement, is logically designed to avoid placing an obligor in a "Catch 22" financial situation. Specifically, if an obligor is considering the possibility of retirement in the near future, he or she logically benefits from knowing in advance, before making the decision to actually leave the workforce, whether the existing alimony obligation will or will not change following retirement. Otherwise, if the obligor first retires and unilaterally terminates his or her primary significant stream of income before knowing whether the alimony obligation will end or change, then the obligor may find him/herself in a precarious financial position following such voluntary departure from employment if the court does not terminate or significantly reduce the existing alimony obligation.
>
> For this reason, when an obligor reasonably approaches retirement age, and files a motion setting forth a specific proposed plan for a prospective and projected retirement in the near future, a court may now address and consider the merits of same under the amended alimony statute, and render a ruling regarding a proposed termination or modification of alimony, to take effect upon the obligor's actual retirement in accordance with the proposed plan.
>
> [Id. at 587-89.]

Termination or Suspension of Alimony Upon Cohabitation

The 2014 amendments to N.J.S.A. 2A:34-23 specifically addresses applications to terminate or suspend alimony, as follows:

> n. Alimony ***may be suspended or terminated if the payee cohabits with another person***. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.
>
> When assessing whether cohabitation is occurring, the court shall consider the following:

(1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;

(2) Sharing or joint responsibility for living expenses;

(3) Recognition of the relationship in the couple's social and family circle;

(4) Living together, the frequency of contact, the duration of the relationship, and other indicia of a mutually supportive intimate personal relationship;

(5) Sharing household chores;

(6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of subsection h. of R.S.25:1-5; and

(7) All other relevant evidence.

In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. ***A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.***

[N.J.S.A. 2A:34-23(n) (emphasis added).]

Prior to the enactment of the 2014 amendments, courts in New Jersey applied an economic-means test when considering application for the modification or termination of alimony based upon any substantial change in circumstances, including cohabitation. Lepis, 83 N.J. 137 (1980); Gayet v. Gayet, 92 N.J. 149, 153 (1983). Specifically, the test was the extent to

which the cohabitation reduced the financial needs of the dependent spouse. Gayet, supra, 92 N.J. at 152-54.

In Spangenberg v. Kolakowski, 442 N.J. Super. 529 (App. Div. 2015), the Appellate Division, in an opinion delivered by Judge Lihotz, the parties were divorced in 2012, after a marriage of 22 years. The final judgment incorporated the parties' matrimonial settlement agreement (MSA) that provided for the payment of alimony, with a review of same in 2 years based on the expectation that the obligee's income would increase due to additional training or other factors. The MSA also provided that the obligee agreed to inform the obligor "when she [wa]s cohabiting with another," which would then trigger a review of alimony "consistent with the Gayet case and evolving case law. Id. at 532. Thereafter, the obligor moved to modify his alimony obligation, alleging the obligee was cohabiting. During the application, the obligee admitted she had moved into her boyfriend's residence on August 31, 2013. Id. at 532-33. In an order entered on December 18, 2013, the motion judge found that the obligee was receiving an economic benefit from the cohabitation, warranting modification of alimony. Id. at 533. Thereafter, on July 21, 2014, the obligor again moved to modify or terminate his alimony obligation under the 2-year review provision in the MSA. Ibid. The court entered an order on September 19, 2014, denying the motion without oral argument,

relying on the reduction in alimony previously ordered upon a finding of the obligee's cohabitation. Id. at 534.

On appeal, the obligor maintained that obligee's cohabitation, combined with his decreased earnings, required termination of alimony under newly enacted subsection (n), amending N.J.S.A. 2A:34-23. The court rejected the obligor's argument to apply N.J.S.A. 2A:34-23(n), finding that the statutory amendment is inapplicable to post-judgment orders finalized before the statute's effective date, citing to the provisions of section 2 to chapter 42 of the Laws of 2014 providing that the statutory amendments shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into a final judgment of divorce or dissolution, a final order that has concluded post-judgment litigation, or any enforceable written agreement between the parties. However, the court also concluded that a plenary hearing was necessary to determine whether a substantial change in economic circumstances warranted a modification of alimony and child support. Id. at 531.

It is clear that where the 2014 amendments are applicable to a matter involving a finding of cohabitation, the court's remedies are limited to either termination or suspension. The legislative history of the 2014 amendments specifically

demonstrate that there were two versions being considered regarding the issue of cohabitation, including a version that permitted "modification," "termination," or "suspension." See A-845, 216th Leg., at 11 (N.J. 2014); A-971, 216th Leg., at 5 (N.J. 2014); S-488, 216th Leg. At 5 (N.J. 2014) (Introduced pending technical review by legislative counsel). However, the Legislature elected to pass the current version, codified as N.J.S.A. 2A:34-23(n), which removed the word "modify." Additionally, the passed version eliminated language in the proposed version that included "modification" the language referencing any economic analysis of the effects of cohabitation.

In Quinn v. Quinn, 225 N.J. 34 (2016), decided about 6 months after Spangenberg, the Court considered whether the trial court may suspend alimony for the period of time the alimony recipient cohabited, rather than terminate alimony, as required by the express terms of the parties' 2006 agreement. Id. at 38. The Court ruled that marital agreements, including PSAs that clearly and unequivocally provide for the termination of alimony upon cohabitation, are enforceable when the parties enter such agreements knowingly and voluntarily, and reversed the judgment of the Appellate Division that had affirmed suspension of alimony during the period of cohabitation and reinstatement of alimony following cessation of cohabitation. Id. at 39. The

trial court order that had suspended alimony during the period of cohabitation, and directed resumption of alimony following the end of that period of cohabitation, was entered on October 20, 2011, and the Appellate Division decision affirmed that order was decided on September 25, 2014. Except for a footnote, there is no mention in the Court's decision in Quinn of the 2014 statutory amendments, or the Spangenberg decision. In a footnote, the Court did note that because the 2014 amendments were enacted after the parties' PSA was entered, it did not govern the case, and the terms of the PSA applied. Quinn, supra, 225 N.J. at 51, n.3. The import of Quinn relates to the Court's determination that if the parties' agreement provides for the remedy of "termination" upon a finding of cohabitation, then, unless specifically agree upon, "suspension" is not an option, nor is "modification" as to agreements and orders entered prior to September 10, 2014.

Modification Based Upon Loss of Employment or Reduction in Income

The 2014 amendments to N.J.S.A. 2A:34-23 specifically address alimony modification applications, and establish criteria to be considered, differentiating between self-employed and non-self-employed obligors. With respect to a non-self-employed party:

When a non-self-employed party seeks modification of alimony, the court shall consider the following factors:

(1) The reasons for any loss of income;

(2) Under circumstances where there has been a 0loss of employment, the obligor's documented efforts to obtain replacement employment or to pursue an alternative occupation;

(3) Under circumstances where there has been a loss of employment, whether the obligor is making a good faith effort to find remunerative employment at any level and in any field;

(4) The income of the obligee; the obligee's circumstances; and the obligee's reasonable efforts to obtain employment in view of those circumstances and existing opportunities;

(5) The impact of the parties' health on their ability to obtain employment;

(6) Any severance compensation or award made in connection with any loss of employment;

(7) Any changes in the respective financial circumstances of the parties that have occurred since the date of the order from which modification is sought;

(8) The reasons for any change in either party's financial circumstances since the date of the order from which modification is sought, including, but not limited to, assessment of the extent to which either party's financial circumstances at the time of the application are attributable to enhanced earnings or financial benefits received from any source since the date of the order;

(9) Whether a temporary remedy should be fashioned to provide adjustment of the support award from which modification is sought, and the terms of any such adjustment, pending continuing

> employment investigations by the unemployed spouse or partner; and
>
> (10) Any other factor the court deems relevant to fairly and equitably decide the application.
>
> Under circumstances where the changed circumstances arise from the loss of employment, the length of time a party has been involuntarily unemployed or has had an involuntary reduction in income shall not be the only factor considered by the court when an application is filed by a non-self-employed party to reduce alimony because of involuntary loss of employment. The court shall determine the application based upon all of the enumerated factors, however, no application shall be filed until a party has been unemployed, or has not been able to return to or attain employment at prior income levels, or both, for a period of 90 days. The court shall have discretion to make any relief granted retroactive to the date of the loss of employment or reduction of income.
>
> [N.J.S.A. 2A:34-23(k).]

With respect to an alimony modification application by a self-employed party, the 2014 amendments provide:

> When a self-employed party seeks modification of alimony because of an involuntary reduction in income since the date of the order from which modification is sought, then ***that party's application for relief must include an analysis that sets forth the economic and non-economic benefits the party receives from the business, and which compares these economic and non-economic benefits to those that were in existence at the time of the entry of the order.***
>
> [N.J.S.A. 2A:34-23(l) (emphasis added).]

In either circumstance, the 2014 amendments also provides for the option of a ***temporary remedy***:

> When assessing a temporary remedy, the court may temporarily suspend support, or reduce support on terms; direct that support be paid in some amount from

> assets pending further proceedings; direct a periodic review; or enter any other order the court finds appropriate to assure fairness and equity to both parties.
>
> [N.J.S.A. 2A:34-23(m).]

The basic criteria applicable to motion to modify still obtain. Alimony may be revised and altered by the court from time-to-time as circumstances may require. N.J.S.A. 2A:34-23. As noted, the 2014 amendments to that statute were enacted "to more clearly quantify considerations examined when faced with a request to establish or modify alimony." Spangenberg, supra, 442 N.J. Super. at 536-37. As discussed, the amendments became effective September 10, 2014, but the Legislature clarified that those amendments "shall not be construed either to modify the duration of alimony ordered or agreed upon or other specifically bargained for contractual provisions that have been incorporated into a final judgment of divorce or dissolution, a final order that has concluded post-judgment litigation, or c. any enforceable written agreement between the parties. See Quinn, supra, 225 N.J. at 51, n.3. As noted by Spangenerg, supra, 442 N.J. at 538, this statutory language signaled the legislative recognition of the need to uphold prior agreements executed or final orders filed before adoption of the statutory amendments.

Additionally, courts generally are reluctant to modify an award unless the change in circumstances is permanent. Lepis,

supra, 83 N.J. at 151; see Donnelly v. Donnelly, 405 N.J. Super. 117, 128 (App. Div. 2009) (affirming denial of second modification motion filed nine months after denial of first modification motion because obligor failed to demonstrate a substantial and permanent change); Larbig v. Larbig, 384 N.J. Super. 17, 22-23 (App. Div. 2006) (holding that trial court correctly rejected modification motion as "anything other than temporary" based on declining income where motion was filed only twenty months after divorce).

However, our courts have recognized that "[t]here is . . . no brightline rule by which to measure when a changed circumstance has endured long enough to warrant a modification of a support obligation. Instead, such matters turn on the discretionary determinations of Family Part judges, based upon their experience as applied to all the relevant circumstances presented." Donnelly, supra, 405 N.J. Super. at 128 (quoting Larbig, supra, 384 N.J. Super. at 23).

In making an application for modification of alimony due to the loss of employment or reduction in income, it is incumbent upon the family law practitioner to supply the court with all information and documentation that relates to the application statutory criteria, including, but not limited to:

1. Verification that the loss of employment was involuntary, such bas a letter from the employer or the unemployment eligibility determination.

2. Whether there is or has been any entitlement to severance pay and, if so, how much, and its disposition.

3. What amount, if any is being received in unemployment or other similar benefits.

4. The full employment history, education, training and skills.

5. Documentation of efforts at obtaining substitute or secondary employment.

6. Copy of the CIS from the time the alimony award was entered, as well as an updated and complete CIS.

7. Copy of the Social Security earnings history statement, documenting the history of earnings.

8. Any other documentation or information that relates to the reasons for the involuntary loss of job or reduction of income, the nature and status of the areas of employment in which the movant is trained, qualified for, or has experience in, as well as the prospect of employment at or comparable to prior earning levels.

9. The presentation of a plan for a temporary reduction in support, without prejudice to the final determination, that will lessen the accumulated arrears and temporary cessation of enforcement.

Modification of Alimony Based on Disability

In order to support an application to modify or termination alimony based upon a medical or mental disability in support of a claim of a substantial change of circumstances, the obligor bears the burden to submit evidence and documentation of the disability alleged. Golian v. Golian, 344 N.J. Super. 337, 341 (App. Div. 2001). Although an administrative determination of disability by the Social Security Administration constitutes

prima facie evidence of disability, and therefore, the inability to be gainfully employed, ibid., it is a rebuttable presumption and entire financial circumstances must be reviewed, including the availability of assets, income from investments, the amount of the disability benefit itself, and the ability to earn amounts permissible under applicable Social Security Administration regulations. Diehl v. Diehl, 389 N.J. Super. 443 (App. Div. 2006). In other words, an inability to work is not always equivalent to an inability to pay support. The rebuttable evidence may consist of lay testimony, expert testimony or medical records, consistent with the rules of evidence. Golian, supra, 344 N.J. Super. at 343.

In Wasserman v. Parciasepe, 377 N.J. Super. 191 (Ch. Div. 2004), the court addressed the degree of proof needed to overcome a presumption of unemployability as it relates to alimony. Id. at 194. There, the obligor was not working and on Social Security disability income because of kidney disease. Ibid. Judge Selser ruled that, as to alimony, the opponent of the presumed evidentiary fact of the disability determination by the Social Security Administration must offer proof that is clear and convincing in refuting that evidential fact. Id. at 200. However, it should be noted that in an unreported decision, the Appellate Division noted that the clear and convincing proof requirement recited in Wasserman was not

required in Golian or in any subsequent reported opinion. See Herbruck v. Herbruck, 2014 N.J. Super. Unpub. LEXIS 941 (App. Div. 2014). In any event, ultimately, however, the burden of persuasion remains with the proponent of the disability. Wasserman, supra, 377 N.J. Super. at 197.

HIGH-CONFLICT CUSTODY CASES

Just a word on high-conflict custodial disputes. There are a number of approaches to cases where the parents are constantly engaged in disputes over just about every aspect of what they respectively perceive constitutes the "best interests" of the child. Some approaches work in some cases, most do not.

The possible causation or the etiology for the existence of such circumstances are almost endless. The most easily identifiable relate to documented and diagnosable mental health issues, substance abuse addiction, or the presence of domestic violence. In those situations, it is usually relatively easy to determine a custodial and parenting-time plan that will most appropriately serve the best interests of the child. However, where those red-flag issues do not exist, yet the parents continue to be engaged in a high-conflict custodial dispute, effective judicial solutions are not easy to determine. Moreover, many people who suffer from some form of a personality disorder, with or without narcissistic attributes, are able to function rather well in society in terms of job performance and asset acquisition, but have a deep-seated inability to form a lasting interpersonal relationship. Normally, such personality disorders are not treatable with medication, but, rather can only be treated through counseling and therapy, which can only

be effective if there is a recognition of the existence of a problem or disorder.

Systematic and detailed studies of high-conflict child custody disputes are rare. Peoples, Ralph A., Reynolds, Suzanne, and Harris, Catherine T., "The Best Interests of the Child: Article & Empirical Study: It's the Conflict, Stupid: An Empirical Study of Factors that Inhibit Successful Mediation in High-Conflict Custody Cases," 43 Wake Forest L. Rev. 505, 506 (Summer 2008). One of the conclusions reached in that referenced study is that the highest incident of high-conflict custodial disputes was in circumstances where the parties shared physical custody. Id. at 529-30. The authors suggest that "in high-conflict custody cases that conclude by litigation, too often the courts order the parties to share custody, not to further the best interests of the child, but simply to reach a conclusion." Id. at 529. Perhaps another reason, at least in New Jersey, for such a result is the actual legislative intent set forth in various portions of N.J.S.A. 9:2-4:

> The Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

> In any proceeding involving the custody of a minor child, the rights of both parents shall be equal. . . .
>
> * * * *
>
> . . . A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.

These legislative declarations of policy are certainly admirably applicable in the vast majority of cases involving a custodial dispute. However, in a high-conflict custody case, those legislative declarations, which are based upon the fundamental nature of parental rights, can be used as a sword. In such cases, it is submitted, in a true "best interests" analysis, the focus should more appropriately be on the statutory custodial factor, "the parents' ability to agree, communicate and cooperate in matters relating to the child[,]" N.J.S.A. 9:2-4(c). See Nufrio v. Nufrio, 341 N.J. Super. 548, 550 (App. Div. 2001) (rejecting a joint legal custodial relationship, concluding that the ability of parents to put aside their personal differences and work together for the best interests of their child is the true measure of a healthy parent-child relationship, and a judicial custody determination must foster, not hamper, such a healthy relationship). Plainly stated, a joint or shared custodial relationship in a high-conflict custodial dispute is often contraindicated, and should be carefully analyzed.

One commentator recently described the problem of high conflict in custody disputes, as follows:

> Sixty-five percent of divorces in the United States involve families with minor children, affecting about one million children per year. Most custody arrangements in these cases are settled privately or through mediation, but 10 percent proceed to litigation before family courts. ***Due to the adversarial nature of the court system*** and the ***intensely emotional nature of divorce***, child custody battles can turn vicious, and some experts argue that ***divorce may be "the single most traumatic experience" of a child's life, with the potential to cause long-term psychological damage***. High-conflict custody cases are more likely to involve allegations of child abuse or domestic violence, and even when that is not the case, ***children can be used as pawns*** in a struggle between warring parents. Popular culture is filed with stories of ***parents brainwashing their children in an attempt to manipulate the legal system*** for their own personal gain.
>
> [Nichols, Allison, "Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes," 112 Mich. L. Rev. 663, 664 (Fe. 2014) (emphases added).]

That article suggests that by "appointing an independent representative of the child's interests, courts will enhance their ability to make custody determinations that properly address the child's safety, stability and happiness." Id. at 688. Accord, Johnson, Janet R., Ph.D., "High-Conflict Divorce," The Future of Children, Vol. 4, No. 1, Children and Divorce 165-82, Princeton University (Spring 1994); LeBow, Jay, Ph.D., "Integrated Family Therapy for High-Conflict Divorce With Disputes Over Child Custody and Visitation," Family Process, Vol

46, Issue 1, pp. 79-91 (Mar. 2007) (advocating an integrated family therapeutic approach to high-conflict custodial disputes to create a post-divorce climate in which a new family structure can be constituted in which parents maintain distance from one another, and conflict and triangulation can be minimized); Elrod, Linda D., "A Minnesota Comparative Family Law Symposium: Reforming the System to Protect Children in High Conflict Custody Cases," 28 Wm. Mitchell L. Rev. 495 (2002).

High-conflict custody cases are marked by a lack of trust between parents, a high level of anger and a willingness to engage in repetitive litigation. Elrod, supra, 28 Wm. Mitchell L. Rev. at 500. If the goal is to protect children and help conflicted parents in a high-conflict custodial and parenting-time dispute, it is clear that the key in the judicial handling of such matters is ***early identification*** and ***early intervention***. As Professor Elrod noted:

> Numerous reasons exist for high conflict – some systemic and some personal to the litigants. Among the systemic reasons are the adversarial legal system, the vague "best interests" of the child standard, the increasing frequency of joint custody awards requiring frequent interaction between the parents, and understaffed and under-funded court systems with insufficient resources to provide the necessary resources for litigants. The personal reasons for high conflict arise both from the context of the dispute and from the personalities of the individuals involved.
>
> [Ibid.]

Some suggestions for a meaningful judicial approach to the handling of high-conflict custody and parenting cases are:

1. Utilize the differentiated case management system in Rule 5:5-7, as well as the provisions of mandatory mediation under R. 1:40-5(a), to identify high-conflict cases early and to develop a strategy for an individualized approach based on the dynamics identified.

2. At case management, consider appointing a Guardian ad Litem under R. 5:8B, whose services are to the court on behalf of the child. The GAL acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The GAL submits a written report to the court and is available to testify. If the purpose of the appointment is for independent investigation and fact finding, then a GAL would be appointed. The GAL can be an attorney, a social worker, a mental health professional or other appropriate person. Early, independent reports with specific recommendations are critical, and provisions should be made for payments through an identified source, as well as specifically defining the role and compensation rate of the GAL.

3. In particularly high-conflict cases, consider appointing an attorney for the child under R. 5:8A, whose services are to the child. Counsel acts as an independent legal advocate for the best interests of the child and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted. If the purpose of the appointment is for legal advocacy, then counsel would be appointed. Again, a source of funds and rate for those services must be identified, as well as defining the role to be undertaken.

4. Consider appointment of an expert under R. 5:3-3(b) to perform a forensic evaluation, with specific recommendations, again, identifying a source and method of payment, as well as setting

forth a time scheduled for completion of the evaluation.

5. Require parents to submit parenting plans in accordance with R. 5:8-5.

6. Encourage utilization of alternative dispute resolution approaches such as private mediation or even arbitration. See Fawzy v. Fawzy, 199 N.J. 456 (2008); N.H. v. H.H., 418 N.J. Super. 262 (App. Div. 2011).

7. Consider carefully whether the normally statutorily "preferred" joint legal custodial relationship will be helpful or simply lead to perpetual conflict.

8. Consider whether some form of a therapeutic approach will be helpful, such as individual therapy, co-parenting therapy, or re-unification therapy is indicated.

9. Where there are non-compliance issues as to existing orders, utilize the enforcement tools provided in R. 5:3-7(a).

10. The Custody Neutral Assessment Program (CNA) is available for high conflict cases that are inappropriate for, or are unable to be resolved, through mediation. This program utilizes several mental health practitioners in the community who meet with the parties, discuss contested issues and make clinical recommendations to the court on how to resolve disputed issues. This can be an effective device to identify cases that need special attention and potential appointment of a Guardian ad Litem, Attorney for the child, or appointment of an expert to perform a forensic evaluation.

11. Parent Education Programs can also be a useful tool.

There is no cookie-cutter approach to a high-conflict custody or parenting-time dispute. The absence of sufficient

financial resources, for example, can often dictate, or limit, what can be done to lessen the conflict. Each case must be individually evaluated, and receive continued attention through management and monitoring as may be necessary to move the matter through the system with a minimum of trauma to the child, and with the least amount of financial stress upon the family.