Pennsylvania Family Lawyer

Your Other Partner

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IN THIS ISSUE

MIXED THOUGHTS ON PARENT COORDINATION

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Mark R. Ashton

All of us in this practice know the eternal frustration of custody work. People communicate poorly under the best of circumstances, and disruption of a family relationship has never enhanced communication in my world.

When I started in this business 36 years ago, courts were more often than not fairly hostile to anyone who walked through the door with a child custody dispute. Many litigants were met with a stern lecture that this was a waste of the court's resources and that they should step back outside and come up with a solution.

It was also a time when the result was fairly standard. Mom got custody and Dad got every other weekend Saturday noon until Sunday dinner. Most men accepted this, and those who did not were thought to be odd and stubborn.

For me, the watershed in custody litigation was 1988 when the Supreme Court decided that custody could be modified without showing a change in circumstance. *Karis v. Karis,* 518 A.2d 601 (Pa. 1988) trial courts had effectively stopped most custody modifications cold by finding that no substantial change had occurred and that stability was better than change.

The other sea change has been the role of fathers. Today they are deeply involved and, in most instances, for good reasons. But now with a best interest "polestar" and no threshold of proof to seek a modification, parents in dispute have flooded the courts with controversies. No dispute is too petty for judicial review. Everything from summer camp to Halloween appears on the dockets, and as those dockets have exploded with work, the new mantra is

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"emergency."

Meanwhile, our appellate courts have insisted that trial courts act with speed (Pa. R.C.P. 1915.4), without any sacrifice of thoroughness. See *S.W. D. v. S.A.R.* 96 A.3rd 396 (Pa. Super. 2014). Candidly, something has to give. And as we all know, what gives are the temporal deadlines suggested in the rules. After all, an appeals judge can easily reverse for failure to make a complete analysis and record. But no judge gets dinged for taking 15 months to conclude a trial.

And much as the bar would like to, it is not easy to blame the judiciary. For while we are waiting for a two-day custody trial with a complete analysis under 23 Pa.C.S 5328, we are also filing countless emergencies because our client has not had Easter morning in three years and because football causes concussions that can addle the brain.

Candidly, I do not need the wisdom and experience of a common pleas court judge to decide whether Grandmother's decennial visit to Altoona trumps little Ariel's appearance in "The Nutcracker." But there I am in the hallway of the courthouse waiting for an otherwise very busy judge to perform the role of Solomon (who was not in "The Nutcracker") to decide that perhaps Grandmother could see "The Nutcracker" as part of her visit. As we all know, that is impossible because that is the night when all of Grandmother's family will be paying homage to Grandmama at Uncle Ben's homestead in Holidaysburg.

Folks, we don't need a full record to decide this. I might even venture that we dispense with the ubiquitous criminal or abuse history, although there was the time Uncle Ben's collection of pornography was left in the DVD player during the family gathering. 18 Pa.C.S. 6301. These are not actually custody decisions. These are power games where the anxiety and sadness of a broken family spill over into "litigation" falsely advanced on "principle."

Someone needs to cut these Gordian knots and do it in a timely and cost effective way. Every year at this time, custody courtrooms begin to fill with litigants who discovered that Christmas is on December 25 and that there is a conflict. Are these conflicts real? Try telling your client they are not. But year after year we pull judicial manpower away from hearing cases involving abuse, relocation and other really affecting problems to split holidays.

There are three choices. Accept the fact that real custody cases must take a backseat to the flotsam and jetsam of daily "emergencies," close the courthouse doors to any but life threatening disputes or let lawyers with training make the decisions tied more to "power" than "best interests."

Best interest decisions belong with judges. They require a full hearing and deliberation. There is no best interest associated with who has Christmas morning. Candidly, for children with parents who love to fight, it is probably in their best interest to remove Christmas from the calendar so that their parents would act their age. What are we doing with holiday fights is trying to be fair. The same is true with the battles over camp, football versus soccer and whether Grandmother's visit vanquishes "The Nutcracker."

Recommendation 155 attempts to parse custodial "fairness" (we split the holidays) from "interests" (Adam needs private school or to move to Akron) and free the judiciary from refereeing disputes that will not affect a child's welfare one whit. There are controversies that fall in the middle, and to that end the recommendation allows litigants to appeal for judicial intervention. But for those of us who have wandered the halls of the courthouse during the holiday season searching for a judge while our client frantically texts us about the decision, there needs to be a cost efficient and effective means to secure that decision. When it is December 22 and your client wants to know whether she gets to board the plane to Florida with her 8-year-old, you realize that the stress to the child and the parents is harming the family the law wants to celebrate and preserve. And you realize that a prompt decision by a trained neutral will be every bit as effective as one that comes from the person in the robe you have been trying to get to for two hours.

In short, we have too many controversies and insufficient judicial manpower to address them effectively. We must either better manage the controversies or declare that some of these controversies are not worthy of judicial involvement.

I should add that before the Supreme Court halted parent coordination in May 2013, I had some experience with this remedy. It was not always good. Just as children's athletic fields are often populated with overzealous and sometimes insane coaches who think they are managing Division I teams, we have seen coordinators who luxuriate in the power of being the "decider" or insinuate themselves into a family's custodial arrangements for their own amusement or profit. Inevitably, there are going to be coordinators who are overbearing, ineffective or both. But just as with private arbitration proceedings, the bar quickly ascertains the wheat from the chaf. I have seen settings where the only thing parents could agree upon was the loathsomeness of the coordinator. It happens, even in judicial world. But we need to do something to allow judges to do judging in contrast to deciding. We try to select judges for wisdom and experience. It takes wisdom to decide whether a child should be allowed to relocate far away from a parent or whether shared physical custody is merited in a world where both parents love the child but relish the fight even more. But I do not need wisdom or experience to assess whether soccer camp is superior to reading camp. I need a decision, and the sooner the better. I submit that in nine instances out of 10, camp decisions and others of their ilk are driven by a parental need to control in contrast to a child's developmental need.

Recommendation 155 attempts to fix an ever-growing problem that is actually crippling the judiciary's ability to effectively manage real custody problems. It segregates decisions where "fairness" is the controlling need from those where "best interests" need to be carefully evaluated. It is not perfect, but as any judge who decides custody cases will tell you, nothing ever is perfect.

FROM THE EDITOR

By David S. Pollock, Esq.
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THANKSGIVING

The American Presidency Project

By the President of the United States of America
A Proclamation


John F. Kennedy 1963

Over three centuries ago, our forefathers in Virginia and in Massachusetts, far from home in a lonely wilderness, set aside a time of thanksgiving. On the appointed day, they gave reverent thanks for their safety, for the health of their children, for the fertility of their fields, for the love which bound them together and for the faith which united them with their God.

So too when the colonies achieved their independence, our first President in the first year of his first Administration proclaimed November 26, 1789, as "a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God" and called upon the people of the new republic to "beseech Him to pardon our national and other transgressions... to promote the knowledge and practice of true religion and virtue . . . and generally to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best."

And so too, in the midst of America's tragic civil war, President Lincoln proclaimed the last Thursday of November 1863 as a day to renew our gratitude for America's "fruitful fields," for our "national strength and vigor," and for all our "singular deliverances and blessings."

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From time to time, the *Pennsylvania Family Lawyer* will publish articles that it receives for submission. The views expressed in those articles are solely those of the authors of the articles and do not reflect the views or policies of the editors, the *Pennsylvania Family Lawyer*, the Family Law Section or the Pennsylvania Bar Association, and no endorsements of those views should be inferred therefrom.

Much time has passed since the first colonists came to rocky shores and dark forests of an unknown continent, much time since President Washington led a young people into the experience of nationhood, much time since President Lincoln saw the American nation through the ordeal of fraternal war--and in these years our population, our plenty and our power have all grown apace. Today we are a nation of nearly two hundred million souls, stretching from coast to coast, on into the Pacific and north toward the Arctic, a nation enjoying the fruits of an ever-expanding agriculture and industry and achieving standards of living unknown in previous history. We give our humble thanks for this.

Yet, as our power has grown, so has our peril. Today we give our thanks, most of all, for the ideals of honor and faith we inherit from our forefathers--for the decency of purpose, steadfastness of resolve and strength of will, for the courage and the humility, which they possessed and which we must seek every day to emulate. As we express our gratitude, we must never forget that the highest appreciation is not to utter words but to live by them.

Let us therefore proclaim our gratitude to Providence for manifold blessings--let us be humbly thankful for inherited ideals--and let us resolve to share those blessings and those ideals with our fellow human beings throughout the world.

Now, Therefore, I, John F. Kennedy, President of the United States of America, in consonance with the joint resolution of the Congress approved December 26, 1941, 55 Stat. 862 (5 U.S.C. 87b), designating the fourth Thursday of November in each year as Thanksgiving Day, do hereby proclaim Thursday, November 28, 1963, as a day of national thanksgiving.

On that day let us gather in sanctuaries dedicated to worship and in homes blessed by family affection to express our gratitude for the glorious gifts of God; and let us earnestly and humbly pray that He will continue to guide and sustain us in the great unfinished tasks of achieving peace, justice, and understanding among all men and nations and of ending misery and suffering wherever they exist.

In Witness Whereof, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this fourth day of November, in the year of our Lord nineteen hundred and sixty-three, and of the Independence of the United States of America the one hundred and eighty-eighth.

JOHN F. KENNEDY

By the President:
DEAN RUSK,
Secretary of State

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Rabbi Abraham Joshua Heschel (1907 – 1972)

When I was young, I admired clever people. Now that I am old, I admire kind people.
Just to be is a blessing. Just to live is holy.
Self-respect is the fruit of discipline; the sense of dignity grows with the ability to say no to oneself.
Wonder rather than doubt is the root of all knowledge.
Racism is man's gravest threat to man - the maximum of hatred for a minimum of reason.
Worship is a way of seeing the world in the light of God.
God is of no importance unless He is of supreme importance.
Man's sin is in his failure to live what he is. Being the master of the earth, man forgets that he is the servant of God.
We are closer to God when we are asking questions than when we think we have the answers
The course of life is unpredictable, no one can write his autobiography in advance.

The Place Gratitude Fills in a Fine Character

by Walt Whitman

From the Philadelphia Press, Nov. 27, 1884,
(Thanksgiving number)

Scene.—A large family supper party, a night or two ago, with voices and laughter of the young, mellow faces of the old, and a by-and-by pause in the general joviality. "Now, Mr. Whitman," spoke up one of the girls, "what have you to say about Thanksgiving? Won't you give us a sermon in advance, to sober us down?" The sage nodded smilingly, look'd a moment at the blaze of the great wood fire, ran his forefinger right and left through the heavy white mustache that might have otherwise impeded his voice, and began: "Thanksgiving goes probably far deeper than you folks suppose. I am not sure but it is the source of the highest poetry—as in parts of the Bible. Ruskin, indeed, makes the central source of all great art to be praise (gratitude) to the Almighty for life, and the universe with its objects and play of action.

"We Americans devote an official day to it every year; yet I sometimes fear the real article is almost dead or dying in our self-sufficient, independent Republic. Gratitude, anyhow, has never been made half enough of by the moralists; it is indispensable to a complete character, man's or woman's—the disposition to be appreciative, thankful. That is the main matter, the element, inclination—what geologists call the trend. Of my own life and writings I estimate the giving thanks part, with what it infers, as essentially the best item. I should say the quality of gratitude rounds the whole emotional nature; I should say love and faith would quite lack vitality without it. There are people—shall I call them even religious people, as things go?—who have no such trend to their disposition."

Washington, D.C.
October 3, 1863

By the President of the United States of America. A Proclamation.

The year that is drawing towards its close, has been filled with the blessings of fruitful fields and healthful skies. To these bounties, which are so constantly enjoyed that we are prone to forget the source from which they come, others have been added, which are of so extraordinary a nature, that they cannot fail to penetrate and soften even the heart which is habitually insensible to the ever watchful providence of Almighty God. In the midst of a civil war of unequalled magnitude and severity, which has sometimes seemed to foreign States to invite and to provoke their aggression, peace has been preserved with all nations, order has been maintained, the laws have been respected and obeyed, and harmony has prevailed everywhere except in the theatre of military conflict; while that theatre has been greatly contracted by the advancing armies and navies of the Union. Needful diversions of wealth and of strength from the fields of peaceful industry to the national defense, have not arrested the plough, the shuttle or the ship; the axe has enlarged the borders of our settlements, and the mines, as well of iron and coal as of the precious metals, have yielded even more abundantly than heretofore. Population has steadily increased, notwithstanding the waste that has been made in the camp, the siege and the battle-field; and the country, rejoicing in the consciousness of augmented strength and vigor, is permitted to expect continuance of years with large increase of freedom. No human counsel hath devised nor hath any mortal hand worked out these great things. They are the gracious gifts of the Most High God, who, while dealing with us in anger for our sins, hath nevertheless remembered mercy. It has seemed to me fit and proper that they should be solemnly, reverently and gratefully acknowledged as with one heart and one voice by the whole American People. I do therefore invite my fellow citizens in every part of the United States, and also those who are at sea and those who are sojourning in foreign lands, to set apart and observe the last Thursday of November next, as a day of Thanksgiving and Praise to our beneficent Father who dwelleth in the Heavens. And I recommend to them that while offering up the ascriptions justly due to Him for such singular deliverances and blessings, they do also, with humble penitence for our national perverseness and disobedience, commend to His tender care all those who have become widows, orphans, mourners or sufferers in the lamentable civil strife in which we are unavoidably engaged, and fervently implore the interposition of the Almighty Hand to heal the wounds of the nation and to restore it as soon as may be consistent with the Divine

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purposes to the full enjoyment of peace, harmony, tranquility and Union.

In testimony whereof, I have hereunto set my hand and caused the Seal of the United States to be affixed.

Done at the City of Washington, this Third day of October, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States the Eighty-eighth.

By the President: Abraham Lincoln
William H. Seward,
Secretary of State

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PBA FAMILY LAW SECTION REPRESENTATIVES JOIN GOV. WOLF AT CEREMONIAL BILL SIGNING ON OCT. 7, 2016

Current and past chairs of the PBA Family Law Section and others joined Gov. Tom Wolf during his ceremonial signing of House Bill 380, which reduces the waiting period in unilateral, no-fault divorce proceedings from two years to one year. The PBA worked closely with Rep. Tarah Toohil, the sponsor of the bill, to advance the legislation.HB 380 is effective 60 days after signing.

Pictured during the signing of HB 380 are (front row, from left) Rep. Toohil; Gov. Wolf; Montgomery County Judge Daniel J. Clifford, a past chair of the PBA Family Law Section; (back row, from left) Conrad A. Falvello of the Falvello Law Firm; Jenna L. Harris of the office of Rep. Toohil; Mark R. Ashton, chair of the PBA Family Law Section, Fredrick Cabell Jr., PBA director of legislative affairs; J. Paul Helvy, a past chair of the PBA Family Law Section; and Samantha M. Laverty, PBA legislative counsel

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INTERLOCUTORY APPEALS OF DISCOVERY ORDERS: CURSE OF THE PRIVILEGE

BY MARK R. ASHTON, ESQ., mashton@foxrothschild.com

In 2008, the representative of an estate brought an action for the wrongful death of his son. The action was brought against three family members alleged to be responsible for causing the child's death. The gravamen of the case was that the decedent at age 14 had access to a handgun; the defendants owned it and knew that he played with it, as did their 16-year-old son. The 14-year-old's parents went away, and the two young men got possession of the gun. The following morning, the 14-year-old was found dead of a gunshot to the head. It appears uncontested that the 14-year-old took his own life.

The defense of the gun owners was that their 16-year-old son asked the 14-year-old if he had the gun before they went to bed the night before the shooting, and the 14-year-old said he did not have it.

In the wrongful death and survival action, the plaintiffs issued interrogatories (written questions) asking whether the defendants had sought any mental health care following the shooting. The defendants (including the 16-year-old) objected to the question on the basis that this question would not lead to admissible evidence. Plaintiffs also asked defendants to produce documents related to a criminal trial that appears to have been brought against the 16-year-old's father. Defendants also objected to this. The trial court granted a motion to compel the discovery requiring the 16-year-old's mother to reveal the identity of her mental health counselor. It sustained the objection to the request that the 16-year-old's father produce any notes he provided to his attorney in a criminal trial. The 16-year-old's mother did provide the name of her therapist but objected to any further inquiry on the basis that her meetings with the licensed psychologist were privileged. Concerning the defendant father's trial notes, his criminal trial counsel produced a letter that said the father took the notes and provided them solely to counsel as part of the criminal defense. The trial court ordered production of the notes and the psychological records or a privilege log explicitly setting forth the basis for the objections. The defendants produced two logs for the psychological records; one applicable to treatment by a psychologist and a second related to sessions with a social worker employed in the psychologist's practice. Another log defendants produced asserted that the defendant father made notes for trial and a related deposition solely to assist his attorney. Defendants filed a second motion to compel, and the trial court ordered production of the material to the court in camera for review. The defendants appealed that March 2015 order.

Was this order appealable? Clearly it did not dispose of the case. But the defendants relied on Pa.R.A.P. 313. The appellee response was that even if the matter was appealable as a collateral order, this was only an order for in camera review and, as such, it could be that the appeal might be moot if the trial court affirmed the claims of privilege.

The Superior Court panel opinion pointed to *Yocabet v. UPMC Presbyterian,* holding that even a purported claim of privilege subjects an order to produce to appellate review under Pa.R.A.P.313. 119 A.3d 1012 (Pa. Super. 2015). This decision relied upon *Ben v. Schwartz*, 729 A.2d 547 (Pa. Super. 1999), which held that denial of a claim of privilege is appealable. The appeals court further noted that privileged materials are not subject to provisional release to a judge for review until it is determined that they are not subject to privilege. *Com. v. Kyle,* 533 A.2d 120,129 (Pa. Super. 1987); *Com. v. Simmons*, 719 A.2d. 336 (Pa. Super. 1998). Accordingly, the orders to produce were appealable and the fact that they were to be produced to the court alone (in camera) was immaterial.

On the substantive questions, the court noted that its scope of review was plenary. Having so held, the Superior Court found no language in the trial court opinion addressing either the mental

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health or attorney-client privilege. The opinion begins by noting that statutory privileges such as these are not to be disregarded.

In seeking to know what the defendant told her mental health professional, the plaintiffs inappropriately crossed the privilege line. The court appears to open the door to discovery of what the therapist diagnosed, observed or opined, but the patient's statements are out of bounds. (Opinion p. 22). On the subject of whether such declarations to a social worker fall within the ambit of the privilege, the court sidestepped the issue directly and ruled that any statement made to an agent who is part of a treatment team managed by a psychiatrist is protected. See *Com v. Simmons,* 719 A.2d. 336, 341 (Pa. Super. 1998). Under *Com v. Kyle*, *supra,* the same principle appears to apply to a psychologist. This court however, did not extend this to social workers not working under a psychologist/psychiatrist. (Opinion 25)

On the subject of the notes taken by the defendant father in the context of the criminal proceeding at the specific request of his attorneys, these documents were also held to be attorney-client privileged even though the defendant could not recall how they came about. The warranty of the attorneys representing him that they had asked their client to provide the notes (as reflected in their affidavits) was sufficient to uphold the privilege.

Although decided in a tort setting, the parsing of the extent of these privileges is worthy of consideration in both a custody and family law setting generally. Note as well that a claim of privilege and a ruling against it might well become a device to delay a proceeding for months as the privilege issue is subjected to appellate review.

Farrel v. Regola, ___ A.3d ___, 2016 Pa. Super. 241 (Pa. Super. 2016) (Decided 11/8/16; Judge Bowes writing for Bowes, Mundy and Jenkins, JJ, regarding Court of Common Pleas, Westmoreland County, Judge Caruso's Order of Court dated 3/11/15 at Docket No. 7977 of 2008)

WHAT CONSTITUTES MITIGATION OF A DECREASE IN EARNINGS FOR CHILD SUPPORT?

BY JAMES W. CUSHING, ESQ., jwc@fayerivacohen.com

It is axiomatic that the amount of child support one pays is calculated, in large part, according to the incomes of the parents of the child(ren) for which support is being sought. As a result, a reduction in one's income can, and often does, result in a reduction in one's child support obligation. There are, however, times when one experiences a reduction in income that does not permit a concomitant reduction in child support. The matter of *Grigoruk v. Grigoruk*, 912 A.2d 311 (Pa.Super.2006) helps clarify when one may reduce one's income and receive a consequent reduction in child support.

In Grigoruk, the mother, for the eight years prior to the opinion that is the subject of this article, was employed in various positions earning between $84,000 and $101,400 a year. She had an extensive education, including a doctorate degree, and had an impressive work history, including working as a certified teacher, school principle, and school superintendent. She also served as the chief executive director of the Greater Lehigh Valley Girl Scout Council, earning $90,000 a year. After several years working with the Girl Scouts, the mother chose to take her career in a different direction and secured a position as a reading specialist earning $52,000.

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The mother filed for a modification of her support obligation due to her decline in income, and that matter was appealed to Pennsylvania Superior Court, whose decision is the subject of this article.

At a hearing, the mother testified that she spent six months searching for a position and, pursuant to the same, sent out approximately 10 applications for employment. The reading specialist position was the only job application that resulted in a job offer to her. She explained during her testimony that she appreciated her new position as it was a less demanding job, which would allow her more time to spend with her children.

The father argued that the mother's support obligation should not be decreased as her reduction in income was potentially voluntary, and her earning capacity, on which her support payments would be based, should be assessed according to her higher paying position. Further, the father argued she had an ongoing duty to mitigate her loss of income by continuing to search for a position with an income similar to her history of greater earnings.

Pursuant to Rule 1910.16-2(d)(1), accepting a lower paying job will generally have no effect on a support obligation; however, a party may not voluntarily reduce her income to attempt to circumvent a support obligation. In *Grigoruk* it was undisputed that the mother did not attempt to reduce her support obligation through securing a lower paying job. Due to a confidentiality agreement, the nother was unable to detail the causes of her separation from the Girl Scouts. As a result, Lehigh County Judge Brian Johnson assumed she was terminated for willful misconduct. Per the rule cited above, termination for cause can reduce

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child support if the parent suffering the decline in income mitigates her decreased earnings.

The father argued that a six-month job search that produced only 10 job applications is a paltry effort that hardly qualifies as mitigation. Indeed, the father noted that the mother chose not to pursue positions with similar salaries to her former positions, choosing to investigate lower paying jobs instead.

The Superior Court (opinion by Judge Bowes, joined by Judges Klein and Kelly) took a different view of the mother's efforts. The court observed that the mother did apply for "quite a few positions" (including those with a salary similar to her earning history) and that she accepted the first offer that came her way. Indeed, refusing the job offer on the basis that its salary was too low would likely have caused her to be even more exposed to an argument that she did not mitigate her income reduction.

The father further argued that, regardless of the position the mother accepted, she has a continuing duty to continue to pursue employment offering a salary similar to her employment history.

The court observed that the issue of mitigation had not been addressed in existing case law. In analyzing the arguments, the court held that there was no argument or evidence suggesting that the mother's reduction compromised the best interests of the children at issue, which is the primary consideration. Their lives have remained substantially the same: they live in the same house, they attend the same private school, and they participate in the same extracurricular activities. Indeed, the mother's new position also affords her more time to spend with the children, which is in their best interests. Furthermore, the court also ruled that the law, as currently understood, does not require the mother to continue searching for a higher paying job in order to avoid being assessed a higher earning capacity.

The court respected the mother's decision to commit to a new job that allows her to spend more time with her children and believed she expended sufficient efforts to find satisfactory employment. Indeed, the court accepted the mother's assertion that continuing her job search could have jeopardized her current employment. The court, as an aside, commented that if the mother has an opportunity for advancement at her new employment, or is offered another job that carries a higher salary with it, and chooses not to pursue it, there may be an argument to assess her a higher earning capacity.

When it comes to mitigation in child support, the instant case has helped clarify what the law is and how it is to be applied.

LOCKING THE BARN DOORS AFTER THE HORSE HAS ESCAPED

BY GREGORY S. FORMAN, ESQ., attorney@gregoryforman.com

There are a half dozen critical moments in each family court case when having an experienced attorney is critical: motions for temporary relief; contempt actions; mediation; when trial is scheduled; trial; and when post-trial motions are due.

A motion for temporary relief is often outcome determinative. The party obtaining favorable results can likely keep those results until trial and use those results as the status quo at trial. The losing party will likely need the expense of trial to overcome those results, will likely be fighting the status quo at trial, and will be living with those results for a period of six to 18 months.

A successful contempt action can provide that party leverage in settlement negotiations and at trial. In extreme cases, it can even lead to an alteration of the temporary order or foreclose certain relief for the contemptuous party. Successfully defending a contempt petition removes that potential leverage.

Being prepared to advocate a reasonable but favorable outcome at mediation may enable one to avoid the expense and risk of trial. Being unprepared for mediation almost always leads to an unfavorable settlement or to trial being set.

Having an attorney begin trial preparation when the case is set for trial enables that attorney to conduct discovery and develop witnesses who increase the likelihood of success at trial. Lacking diligent counsel at this juncture leads to a less considered, more ad hoc, approach at trial.

At trial, a good attorney can frame winnable arguments on contested issues, insure that favorable evidence is presented and mitigate unfavorable evidence. A good attorney can also make sure that all favorable factors are presented to the trial court (which preserves these facts for appeal). No counsel or inadequate counsel generally means that these things are not done at trial, vastly increasing the likelihood of a bad result at trial and also reducing the chance of overcoming a disappointing result at trial on appeal.

Finally, having an attorney handle the post-trial motion means that all issues raised at trial are preserved for appeal. A lack of experienced counsel generally means that some favorable issues raised at trial many not be preserved for appeal.

Every year I get contacted by prospective clients shortly before one of these critical junctures, who either lack an attorney or lack confidence in their attorney. Typically they want to know whether they should hire or change counsel now or wait until later. My advice is always to hire/change counsel now. Often they reject this advice and contact me after they've received unfavor-

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able results at that critical juncture. Occasionally it's too late to help them in any manner. Frequently their likelihood of achieving their goals is now lower. Always I am unable to help them achieve the same results for the same budget.

A belief that it is relatively immaterial when in the process one hires an attorney is absurd. No one would think it is immaterial when one first sees a doctor to treat a serious medical problem. Folks understand that delaying medical treatment can cause easily treatable issues to turn dire and that failure to seek treatment can even be fatal. It is no different for the law.

At each step in the family law litigation process, failure to employ competent counsel makes the possibility of achieving successful results both more expensive and less likely. With the hope of saving money, such litigants actually court disaster. It's always disheartening to hear back from litigants whom I could have easily helped when they first contacted me but who have now made their situation vastly more complicated and less amenable to a successful resolution. They hope I can get them the same results at the same cost that they could have achieved when they first contacted me. That horse, however, has left the barn.

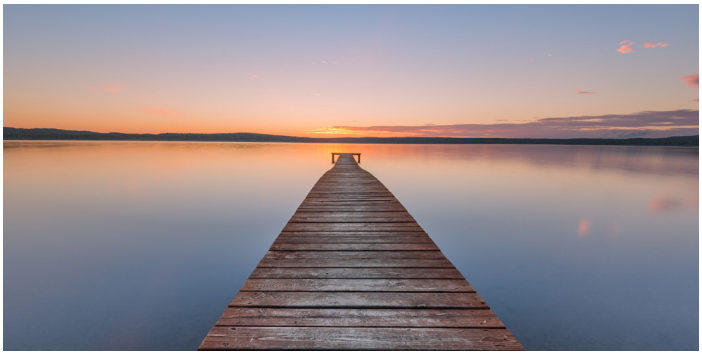
Gregory S. Forman is a sole practitioner in Charleston, South Carolina. A 1984 graduate of Haverford College and a 1991 Cum Laude graduate of Temple Law School, Mr. Forman has been a member of the South Carolina Bar since 1992 and practicing family law since 1993. His practices' emphasis is on family law at both the trial court and the appellate level. He is a past president of the South Carolina Bar's Trial & Appellate Advocacy Committee and has been a mentor to numerous family law attorneys. Mr. Forman lectures frequently on family law to judges, lawyers and law students. He has written numerous articles on family law for South Carolina Lawyer*, the* South Carolina Trial Lawyers' Magazine*,* The Bulletin*, the American Bar Association's* Family Advocate*, and the* American Journal of Family Law.

STAFF CHANGES AT PBA

Long-time Senior Newsletter Editor Patricia Graybill, who has worked as staff editorial liaison for the *The Pennsylvania Family Lawyer* quarterly, is the new Editor of *The Pennsylvania Lawyer* and editor of the PBA's website. Marcy C. Mallory, PBA's Communications Director, said, "Patricia is an excellent employee, and her editorial skills, knowledge of the PBA and professionalism will ensure that the association's flagship publication and website will remain among the top benefits of membership in the PBA."

Nancy H. Wilkes is the new Senior Newsletter Editor and *Pennsylvania Bar New*s Editor in the PBA Communications Department. She is the staff editorial liaison for the *Pennsylvania Family Lawyer* quarterly. Mallory said, "Nancy comes to the PBA with an impressive background in association communications, having worked at LeadingAge PA, the Pennsylvania Motor Truck Association and the Pennsylvania Medical Society. She is a former newspaper editor and reporter."

Mallory is retiring at the end of this month, ending a nearly 30-year career of service to PBA members. Throughout those many years, Marcy has proofed more newsletters and publications than can be counted and has never failed to provide sound communications counsel when needed. She has been the stable hand and guiding light throughout the 21 years that David S. Pollock has been at the helm of the *Pennsylvania Family Lawyer.* Her wisdom and calming influence will be missed.



GOODBYE TO 2016: A PLEA FOR PEACE

by Robert E. Rains

As years go, it was pretty rough;
We heard much we could do without.
The normal rules were all rebuffed;
The pols no longer talk, just shout.

So grab some folks whose views you hate
And take them to a joint that's near.
Lift a glass and celebrate:
We've made it through another year.

Robert E. Rains is Professor Emeritus at the Penn State Dickinson School of Law and Editor of the Pennsylvania Bar Quarterly.

PENSION VALUATIONS IN SAME-SEX MARRIAGE POST *OBERGEFELL*

BY MARK K. ALTSCHULER, pac1@pensionanalysis.com

On June 26, 2015, the U.S. Supreme Court legalized same sex marriage in the *Obergefell*[1] decision. It is important for family law lawyers to recognize that *Obergefell* provides clarity on a prospective basis. In other words, family law practitioners counseling same-sex married couples who entered unions following *Obergefell* will no longer have to consider and advise clients on the specific challenges and issues facing same-sex marriages. However, this is not true for couples who married before the *Obergefell* decision. While the constitutional basis by which the Supreme Court decided *Obergefell* means that same-sex marriage bans adopted by many states were unconstitutional, the retroactive contours of this decision leaves a number of unanswered questions, particularly where marital property is concerned.

Consider this scenario: Joanne and Sandy married in 2003 in Massachusetts. In 2005, the couple moved from Massachusetts to Pennsylvania. In May 2014, the Federal District Court found that Pennsylvania's ban on same-sex marriage was unconstitutional in the *Whitewood V. Wolf*[2] case. Then in July 2015, the couple separated. While living in Pennsylvania, Joanne worked as a federal civil servant and was covered under the Federal Employees Retirement System (FERS), and Sandy worked for the Ford Motor Company.

How will a Pennsylvania domestic relations judge approach the division of the two defined benefit plans in this scenario? The outcomes of the property division in this scenario are unclear at this point following *Obergefell*. It is important to keep in mind that domestic relations (DR) courts are courts of equity. It is a frequent criticism that DR courts pay short shrift to many elements of the law, e.g., rules of evidence. Those with a great deal of DR courtroom experience will frankly admit that many courts quickly come to a conclusion of what seems fair and work backwards to justify the property awards they consider equitable. This is not meant as criticism but more as a perspective one should keep in mind when looking at the complex issues of the retroactive nature of *Obergefell*. Courts will likely fall into two camps: the pensions earned after 2003 are marital versus the pensions earned after *Whitewood* or *Obergefell* are marital. The 2003 date of marriage would seem to be the more logical choice for a court of equity. For example, since same-sex marriage was not legal in Pennsylvania until *Whitewood,* the court could decide that the marriage began on May 20, 2014, the date of the *Whitewood* decision. This makes the length of the marriage a little over a year since they separated in July 2015. On the other hand, the court could decide that the marriage began in 2003 when they married in Massachusetts, possibly under a theory of retroactivity of *Obergefell* and under that assumption the application of the full faith and credit clause of the Constitution. Another way a court could find the earlier date of marriage is under the theory of common-law marriage.

For example, suppose the couple lived in the same state, Pennsylvania, and began living together in 1996. Since same-sex marriage became legal in Pennsylvania on May 20, 2014, a Pennsylvania DR court could decide that the marriage began in 2003 under a theory of common-law marriage (since common-law marriage in Pennsylvania required a 7-year cohabitation period) or began in 2014, when Pennsylvania recognized same-sex marriage. Common-law marriage was abolished in Pennsylvania in 2005 but still theoretically possible in 2003 between the same sexes under a theory of retroactivity for same-sex marriage. Since Massachusetts does not recognize common-law marriage, a Pennsylvania DR court could still find for the earlier marriage date under a theory of retroactivity, as discussed above.

The following sample FERS pension valuations will therefore have two dates for the date of marriage, because the date of marriage in this case is up to the discretion of the court, at least until this issue is settled by the appellate court. Obviously, the marital portion is much higher with the 2003 marriage date as opposed to a marriage lasting only a little over a year.

As dramatic as the difference between the Massachusetts date of marriage vs. the Whitewood date of marriage, suppose Pennsylvania did not recognize same sex marriage until Obergefell. In other words, suppose that Pennsylvania was one of the pre-Obergefell non-recognition states. In that case, the later date of marriage would be the date Obergefell was decided, June 26, 2015. Under this scenario, the period of the marriage, 6/26/2015 – 7/15/2015 is less than a month, in which case the coverture fraction is .00287 and the marital portion is de minimus. Again, the big question facing DR courts in both recognition and non-recognition states is: What is the date of the marriage for purposes of acquiring marital assets?

Mark K. Altschuler, M.S., Actuary, is President of Pension Analysis Consultants, Inc. (PAC) of Elkins Park, PA. Altschuler has prepared over 25,000 pension valuations and QDROs since PAC began in 1988. A leader in this field, Altschuler is co-author (along with Nora Kelley, Esq.) of the benchmark treatise, Value of Pensions in Divorce, *and contributor to* Valuation Strategies in Divorce *and* Guide to Specific Assets in Divorce *(Wolters Kluwer:NY.) His membership affiliations include the American Society of Pension Professionals and Actuaries (ASPPA), American Academy of Financial and Economic Experts and American Mensa Ltd. His over 50 articles have appeared in major law publications including the* American Journal of Family Law, Pennsylvania Family Lawyer *and* Family Lawyer Magazine. *This article is based on material in Chapter 9 of the Value of Pensions in Divorce.*

(continued from page 175)

PENSION VALUATION REPORT

August 5, 2016

PREPARED FOR: Pennsylvania Attorney

Name:	**Joanne Jones**		
Plan:	**FERS**		
Employer:	**Federal Government**		
Birth Date:	6/30/1973	**Retirement Age:**	62
Entry Date:	6/30/1998	**Retirement Date:**	7/1/2035
Marriage Date:	6/30/2003	**Status:**	Active
Cut-off Date:	7/15/2015	**Sex:**	Female
Valuation Date:	8/5/2016	**Age:**	43

1) Accrued monthly pension at valuation date	$1,500
2) Annuity Factor (present value of $1 per year annuity)	5.89593
3) Present Value (12 x Item 1 x Item 2)	$106,127
4) Length of plan service while married	12.04107
5) Length of plan service to valuation date	18.09993
6) Coverture Fraction (Item 4 ÷ Item 5)	0.66525
7) Marital present value (Item 3 x Item 6)	**$70,601**

Annual Percentage Increase	**Actuarial Present Value**	
Post-Retirement Cost-of-Living Benefit	Full Pension	Marital Coverture Portion of Pension
0.00 %	$106,127	$70,601
2.75 %	$142,718	$94,944

Pension form: Life Annuity

IRC interest rate 1.44% for 5 years; 3.46% for 15 years; then 4.48%
Mortality table: RP-2000 '08

PENSION VALUATION REPORT

August 5, 2016

PREPARED FOR: Pennsylvania Attorney

Name:	**Joanne Jones**		
Plan:	**FERS**		
Employer:	**Federal Government**		
Birth Date:	6/30/1973	**Retirement Age:**	62
Entry Date:	6/30/1998	**Retirement Date:**	7/1/2035
Marriage Date:	5/20/2014	**Status:**	Active
Cut-off Date:	7/15/2015	**Sex:**	Female
Valuation Date:	8/5/2016	**Age:**	43

1) Accrued monthly pension at valuation date	$1,500
2) Annuity Factor (present value of $1 per year annuity)	5.89593
3) Present Value (12 x Item 1 x Item 2)	$106,127
4) Length of plan service while married	1.15264
5) Length of plan service to valuation date	18.09993
6) Coverture Fraction (Item 4 ÷ Item 5)	0.06368
7) Marital present value (Item 3 x Item 6)	**$6,758**

Annual Percentage Increase	**Actuarial Present Value**	
Post-Retirement Cost-of-Living Benefit	Full Pension	Marital Coverture Portion of Pension
0.00 %	$106,127	$6,758
2.75 %	$142,718	$9,089

Pension form: Life Annuity

IRC interest rate 1.44% for 5 years; 3.46% for 15 years; then 4.48%
Mortality table: RP-2000 '08

Federal/Military Corner:

Mark E. Sullivan, Esq.
mark.sullivan@ncfamilylaw.com

FAMILY SUPPORT, GARNISHMENT AND MILITARY RETIRED PAY (PART 2)
BY MARK E. SULLIVAN, ESQ.

The first part of this article dealt with the rules for garnishment of military retired pay, how much can be collected, the Retiree Account Statement, the contents of the court order and where to serve it, and deductions from gross pay to arrive at "disposable earnings.

Obtaining Retired Military Pay Information

To fully understand how the family support garnishment from retired pay works, it is usually necessary for the attorney to have a working knowledge of military retired pay. The starting point is the document that shows how much an individual is receiving each month from the retired pay center as well as the deductions and allotments that are subtracted from gross retired pay. That military record is called the Retiree Account Statement (RAS). Defense Finance and Accounting Service (DFAS) posts this for Army, Navy, Air Force and Marine Corps retirees each month at a secure DFAS website, The Coast Guard has its own secure website, managed by the Pay and Personnel Center, Retiree and Annuitant Services Payroll System. It is called Global Pay Self Service. The website for retirees is www.uscg.mil/ppc/ras. Retirees can access their own monthly retired pay statement.

If the retiree will not voluntarily produce the RAS, counsel may resort to formal discovery procedures if the matter is in litigation. This could result in production by the retiree, or it could yield a response stating that the retiree doesn't use the Internet, that he's never heard of "myPay" or Global Pay Self Service, or that he doesn't have the documents in question in his possession. With that in mind, some attorneys turn to the federal government for production of documents.

Usually the best way to obtain federal government documents is through a written release from the individual. Neither DFAS nor the Coast Guard requires "magic wording." Avoid document requests that are overly broad or vague. Whenever possible, ask for documents by name (e.g., retired pay is shown on the RAS, the yearly tax summary of retired pay is found on Form 1099-R). Thus counsel might draft a statement for John Doe, the retiree, that would read, "I, John P. Doe, SSN 123-45-6789, hereby authorize the Defense Finance and Accounting Service to release to Marcia L. Williams, attorney at law, at 123 Green Street, Richmond, Virginia 22344, the following documents: a) my December 2015 Retiree Account Statement, b) my 2015 Form 1099-R, and c) my Combat-Related Special Compensation (CRSC) statement for 2015."

When there is a garnishment or income-withholding order for child support or alimony already in place, the non-military party may make use of interrogatories to obtain further information, facts and data concerning the military retiree. The rules for interrogatories are found at 5 C.F.R. Part 581. Appendix A to 5 C.F.R. Part 581 contains instructions on where to send the interrogatories. The questions might be directed to the gross amount of retired pay, the amount (if any) of the premium for Survivor Benefit Plan coverage, the relationship and birthdate of the covered individual, the amount of federal and state tax withholding, and the nature and amount of deductions and allotments, including any "VA waiver." The rules found in 5 C.F.R. Part 581 apply to all federal agencies, not just DFAS and the Coast Guard.

Documents from DFAS

In general, DFAS will usually honor a request for documents so long as it either signed by the individual concerned or else in the form of a court order or a subpoena signed by a judge; the Coast Guard does not follow DFAS in this regard. With a DFAS case, one should send the request, order or subpoena, with the individual's full name and Social Security Number (SSN), to:

Defense Finance and Accounting Service
DFAS- Cleveland Center
Records Retrieval (Code HAC)
1240 East 9th Street, Room 2679
Cleveland, OH 44199-2055
Fax 216-522-6530

There is no requirement that the subpoena or order be sent by certified mail, although that is strongly recommended. An example of the RAS extract from DFAS is at ATCH 2.

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Mark E. Sullivan, a retired Army Reserve JAG Colonel, practices family law at Sullivan & Tanner, PA, Raleigh, N.C., and is the author of The Military Divorce Handbook *(ABA May 2006), from which portions of this article are adapted. He is a Fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached by e-mail (above); 919-832-8507 or fax 919-833-7852.*

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Communications with the Coast Guard

With Coast Guard retirement cases, the agency's response time for an information request is usually faster than at DFAS, often as little as one or two weeks. But the USCG Pay and Personnel Center will not respond in the same manner as DFAS regarding orders and judge-signed subpoenas issued by the divorce court to obtain documents on retired pay issues. According to Robert D. Teetsel, chief of the Legal Services Office, U.S. Coast Guard Pay and Personnel Center, "The Coast Guard would refuse to honor a state court order; it takes the position that a state court is not considered a 'court of competent jurisdiction' for the release of federal records. This position is expressed in the Coast Guard FOIA/PA Manual, COMDTINST M5260.3, Chapter 13, Section C.11. Records release and testimony are covered by 6 CFR Part 5." Note that the Coast Guard is not a part of the Department of Defense; it is under the Department of Homeland Security and has its own rules and regulations, distinct from those of the Defense Department and the DFSA. Thus, when a "court of competent jurisdiction" (i.e., a federal court) issues an order or subpoena for information or records, that court document would be sent to the Office of General Counsel, U.S. Coast Guard. The address is: Commandant (CG-LGL), U.S. Coast Guard, 2703 Martin Luther King Jr. Ave., Stop 7213, Washington, DC 20593-7213.

"Consent and authorization cases" are treated differently. While generally, disclosure of personal or employee information is prohibited under the Privacy Act, subject to 12 exceptions, disclosure is allowed when the individual consents: "No agency shall disclose any record . . . by any means of communication to any person, or to another agency, except pursuant to a written request by or with the prior written consent of the individual to whom the records pertains, unless an exception applies." Cases in which there is consent by the individual involved do not require a court order or subpoena. Such an authorization to release information or documents about pay should be sent to the Pay and Personnel Center (PPC). The contact information is: Commanding Officer (LGL), U.S. Coast Guard Pay and Personnel Center, 444 SE Quincy St., Topeka, KS 66683-3591 (telephone 785-339-3595).

If this is a broader request for information (e.g., the entire service record of an individual), then the request and the member's consent should be sent to the Coast Guard's Personnel Service Command at: Commander, CCG Personnel Service Center PSC, ATTN: PSC-BOPS-C-MR, U.S. Coast Guard Stop 7200, 2703 Martin Luther King Jr. Ave., Washington DC 20593-7200

When dealing with the authentication of records and the use of a business-records custodian certification one size fits all is not the rule.

Records and Evidence

When third-party documents are involved, questions arise about how to get them into evidence. Since they are all hearsay records, some attorneys turn to the public records exception to the hearsay rule, found at Rule 803(8) of the rules of evidence in those states that have adopted the Federal Rules of Evidence.

In other cases counsel may decide that the document is a "business record" and will use a certification regarding the record to obtain admission into evidence. When dealing with the authentication of records and the use of a business-records custodian certification, one size fits all is not the rule. There are no standard affidavits that are used by all federal agencies. Usually the applicant's attorney will need to draft the affidavit, which is then reviewed and revised by the legal office in the agency. All agencies need time to respond to document requests. Sometimes several weeks or months are necessary to obtain the requested papers and forms. An example of a Coast Guard pay record certification is found at ATCH 3. A sample business records declaration from the VA is at ATCH 4.

Don't Take "NO" for an Answer

Sometimes the attorney for the retiree will disavow any knowledge of the existence of an RAS, or the retiree will claim that it was lost, misplaced, or "floated away in that big flood last month." As noted above, all Defense Department retirees are eligible for a free "myPay" account at the DFAS website (https://mypay.dfas.mil). There is a link to "myPay" on the initial webpage of DFAS, www.dfas.mil with instructions on how to create an account. Once the account is set up, all John Doe needs to do to obtain his current RAS is to enter his "LogIn ID" and password, go to the screen marked "Your Military Retiree Pay Account," and select "Retiree Account Statement (RAS)." When possible, get the court to order both attorneys and the retiree to use a computer right there in the courtroom to access the current or past RAS from the "myPay" website.

When in Doubt, ASK!

Another method of finding out the retiree's deductions is to ask DFAS. A little-known notice in the Federal Register makes this possible for those who are getting payments pursuant to USFSPA. Effective July 13, 2000, DFAS announced at 65 FR 43298 that it would disclose this information to a former spouse:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

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To former spouses, who receive payments under 10 U.S.C. 1408, for purposes of providing information on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

While this information may be difficult to obtain if the person at DFAS responding to the written request is a "new hire" who doesn't know about this rule, diligence and courtesy will get the former spouse through to someone in authority who will be able to assist. Be sure to include in the written request from the former spouse, or FS, full identifying information on the retiree (name and Social Security Number), the same information for the FS and – if appropriate – an authorization for DFAS to provide the information to the attorney for the FS. The request might look like this:

Defense Finance and Accounting Service
DFAS- Cleveland Center
Records Retrieval (Code HAC)
1240 East 9th Street, Room 2679
Cleveland, OH 44199-2055
Fax 216-522-6530

Pursuant to the Privacy Act Routine Use set out at 65 Fed Register 43298, I hereby request that you provide to me information on the current gross retired pay, current deductions and dollar amount for each deduction used in calculating my share of the pension in regard to my former husband, John Q. Doe, SSN 987-77-6543. My former spouse payments were calculated under 10 USC 1408. [OPTIONAL: I authorize you to provide this information to my attorney, Lucinda Lopez, Lopez and Pasquale, LLP, 123 Green Street, Apex, NC 27566]

____/s/____
Mary P. Doe
SSN 234-56-7899

The response time may be several weeks or longer. To check on the status of a request, call 216-522-5046 and be sure to have the retiree's SSN available.

Conclusion

Income withholding from military retired pay is a useful tool in collecting support and enforcing court orders. While there are limitations on how much may be collected and rules regarding how to obtain information, the garnishment requirements and procedures are clearly set out in the Code of Federal Regulations and, for DFAS cases, in the Department of Defense Financial Management Regulation. There is much useful information regarding income withholding on the DFAS website, www.dfas.mil. With knowledge of how the rules apply, what the RAS contains, how to obtain it and how to get it into evidence, the support claimant can expect in most cases to obtain a regular flow of support from military retired pay

[1]The name of the beneficiary is not shown on the Retiree Account Statement of a military retiree; only the relationship (.e.g., "former spouse") and the birthdate are displayed.
[2]38 U.S.C. § 5304-5305.
[3]E-mail from Robert Teetsel, Chief of the Legal Services Office, U.S. Coast Guard Pay and Personnel Center to Mark E. Sullivan, author (Dec. 22, 2015, 12:16pm EST), on file with author: "We do regularly receive subpoenas for pay information for both military and civilian employees (obviously tied to divorce situations, but not meeting the 5 CFR Part 581 requirements) and we routinely reply with a form-like letter stating that the Coast Guard is not subject to a state court's subpoena authority (per 6 CFR Part 5, Subpart C, concerning the testimony of Coast Guard employees and the production of records in legal proceedings). We then, however, will usually provide gross pay and other benefit information (such as SGLI coverage) that is otherwise releasable under the FOIA/PA…. When we are able to release information (e.g., member consents or federal subpoena) and we are specifically asked for such, we use a records custodian certification, and I edit it as necessary based on the requesting attorney's needs. The Coast Guard Claims and Litigation Manual, COMDTINST 5890.9, contains additional general information."
[4]E-mail from Robert Teetsel to the author, December 29. 2015, Subj.: "Getting Financial Information from USCG." Teetsel goes on to state that the Coast Guard is immune from the subpoena power of a state court, and refers the inquiring party to 6 C.F.R. Part 5, Subpart C for additional information about the testimony of Coast Guard employees and the production of records in legal proceedings. He goes on to say that he would then – separate and apart from the subpoena or order - release in my response letter general information about the member that we could release under the FOIA – such as gross pay and the date the member entered military service. I also mention in the letter that future military retired pay does not accrue nor is it an annuity or pension. Rather, it is a statutory entitlement computed at the time he retires and it is based on the average of his highest 36 months of basic pay ("high-3") and his total years and months of service at the time of retirement,' tailoring the letter depending on whether the member is active duty, retired, a reservist, etc. I also mention that as a uniformed member of the Coast Guard, the member and authorized dependents receive medical and dental care and are eligible to participate in the Service-members' Group Life Insurance Program (SGLI). Finally, I mention that other detailed information is protected by the Privacy Act, 5 U.S.C. 552a (1974) and that, although the Privacy Act prohibits us from releasing specific member allotment and allowance information, general information about allowances, special pay, incentive pay, retirement benefits and other information pertaining to all service members is freely available on the Internet."
[5]6 C.F.R. Part 5, Subpart C.
[6]5 U.S.C. § 552a(b).

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ATCH 2 – Retired Pay Extract

DEFENSE FINANCE AND ACCOUNTING SERVICE
CLEVELAND CENTER
P. O. BOX 7130
LONDON, KY 40741-7130

This letter is in response to your request for information from the retired pay account of the member listed below.

MAJ John P. Doe, USAF (Retired) Social Security Number 123-45-6789

Pmt Year	2006											
Pay Date	1-Jan	1-Feb	1-Mar	1-Apr	1-May	1-June	1-Jul	1-Aug	1-Sep	1-Oct	1-Nov	1-Dec
Gross Pay	$0.00	$0.00	$0.00	$0.00	$2,593.00	$2,593.00	$2,593.00	$2,593.00	$2,593.00	$2,593.00	$2,593.00	$2,593.00
Misc. Credit	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
FCE/DC Ded.												
VA Waiver	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$83.00
Taxable Income	$0.00	$0.00	$0.00	$0.00	$2,415.37	$2,415.37	$2,415.37	$2,415.37	$2,415.37	$2,415.37	$2,415.37	$2,332.37
FITW	$0.00	$0.00	$0.00	$0.00	$201.05	$201.05	$201.05	$201.05	$201.05	$201.05	$201.05	$188.60
Add'l FITW	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
SITW	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
W/H Stats	0	0	0	0	0	0	0	0	0	0	0	0
Allot.	$0.00	$0.00	$0.00	$0.00	$1,600.00	$1,600.00	$,600.00	$1,600.00	$1,600.00	$1,600.00	$1,600.00	$1,600.00
SBP	$0.00	$0.00	$0.00	$0.00	$177.63	$177.63	$177.63	$177.63	$177.63	$177.63	$177.63	$177.63
RSFPP	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Tax Levy	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Garn.	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Former Spouse	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Misc. Ded.	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$600.00	$600.00	$100.00
Ret'd Pay Deduction	$0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Net Pay	$0.00	$0.00	$0.00	$0.00	$614.32	$614.32	$614.32	$614.32	$614.32	$14.32	$14.32	$443.77

Sincerely,
Retired and Annuity Pay Operations

ATCH 3 – Coast Guard Records Custodian Certification

CERTIFICATION OF RECORDS
I, _____, of the United States Coast Guard (the "Coast Guard"), hereby state and depose as follows:
1. I am employed with the Coast Guard in the position of Pay and Personnel Center Retiree and Annuitant Service Branch Chief, Topeka, Kansas, and I have personal knowledge of the Coast Guard's record-keeping system.
2. The attached two pages of documents are records taken from the Coast Guard's files, as to John Q. Doe, SSN xxx-xx-1234. They are true copies of a one-page table of gross pay completed on December 23, 2002 and a one-page Survivor Benefit Plan audit completed in 2001.
3. These records were created at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.
4. These documents are kept in the course of the Coast Guard's regularly conducted business.
5. It is the Coast Guard's regular practice to keep such records.
6. The foregoing facts are known by me to be true. I am competent to testify to such facts, and would so testify if I appeared in court as a witness at the trial of this matter.
7. I declare and certify under penalties of perjury, pursuant to 28 U.S.C. § 1746, that the forgoing declaration is true and correct.

_____ Date:_____

Printed name……...
Custodian of Records
United States Coast Guard

Captured by camera at the November 2016 meeting of the American Academy of Matrimonial Lawyers are Raleigh, N.C., lawyer Mark Sullivan and his wife, Teresa. He has been the author of FEDERAL/MILITARY CORNER since Volume 32, Issue No. 4 (December 2010). Teri and Mark have been married for 40 years.

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ATCH 4 – Sample Business Records Declaration

DEPARTMENT OF VETERANS AFFAIRS
Regional Office
123 Green Street
Blacksboro, North Carolina
Phone: 919-832-6677

BUSINESS RECORDS DECLARATION
Pursuant to 28 U.S.C. § 1746

This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902 (11).

I, Larry G. West, attest under the penalties of perjury (or criminal punishment for false statement or false attestation) that:

1) I am employed by the United States Department of Veterans Affairs (DVA).
2) My official title is Paralegal.
3) I am a custodian of records for the DVA.
4) Each of the records attached hereto is the original record or a true and accurate duplicate of the original record in the custody of the DVA, and I am a custodian of the attached records.
5) The records attached to this certificate were made at or near the time of the occurrence of the matters set forth.
6) The records attached were made by (or from information transmitted by) a person with knowledge of those matters.
7) Such records were kept in the course of a regularly conducted business activity of the DVA.
8) Such records were made by the DVA as a regular business practice.

The enclosed records are:

- Letter to Jacob Harris Stein, XXX-XX-5566, dated April 12, 2010, titled "Your Original VA Disability Rating and Reasons for the Rating" and
- Letter to Jacob Harris Stein, XXX-XX-5566, dated June 15, 2012, titled "Your Revised VA Disability Rating and Reasons for the Rating."

Dated: July 13, 2013

Larry G. West
Larry G. West, Paralegal

Subscribed and sworn to before me this ____ day of _____, 2016.

Technology Corner:

Joel B. Bernbaum, Esq.
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Alicia A. Slade
slade@plummerslade.com

CYBERCRIMINAL TECHNICAL SUPPORT SCAMS
BY ALICIA A. SLADE

Have you ever received a call from someone impersonating a Microsoft tech support representative or a pop-up window on your computer while browsing on the internet that instructs you to call Microsoft or some other technical support company? Many people, including law office attorneys and staff, have been victims of these cybercriminal scams. Understanding these scams, alerting your staff to them, and instructing your staff what steps to take if something like this happens is very important. The security of your data and network depend upon it.

Many computer users think the only way they can get a virus, malware or hacked is through email. Unfortunately, cybercriminals have other ways to get into your PC and network.

Cybercriminals will make telephone calls pretending to be support representatives from major software manufacturers. No one thinks he or she would get scammed by a call like this, but many computer users have been caught up in this scam. The call seems real.

Here's how it happens: a person calls saying he is from Microsoft or another company to report that he has received an alert that your PC is infected with a virus or that your Windows operating system needs to be updated. He asks if he can connect to your PC to review your system or analyze the data to resolve the fabricated issue. When the user allows access to the PC or laptop, the user's personal information and more is now at risk.

Microsoft does not make calls directly to computer users telling them they need to fix their PC or they have received a report from their PC is infected. Software manufacturers do not call either. If you receive a call like this, hang up or have fun with them. Just don't give the fake representative any of your information. Do not allow them to connect to your PC or to convince you to download something to the PC. If they connect to your PC, what you don't see as you watch the person you are talking to manipulate your screen is in the background. Other cybercriminals are scanning your PC for personal information and other important information that they could use.

Microsoft does not make calls directly to computer users telling them they need to fix their PC or they received a report their PC is infected. Software manufacturers do not call either.

Another type of scam occurs when you are browsing on the internet and a window or pop-up appears on your PC. The window or pop-up appears as a warning that your computer is infected or says the PC needs a download. The message may instruct you to call a number for Microsoft or some other technical company. The message may instruct you to download software to protect your PC or to scan it for a virus. Because these messages appear to look like they are from the software manufacturer, users may call and think they are speaking to a software manufacturer representative. The user is really talking to a cybercriminal who convinces the user that he needs to connect to the PC or to download software that turns out to be malicious.

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Joel Bernbaum is the founder of the Bala Cynwyd family law firm of Bernbaum Family Law Group. He is a Fellow of the American Academy of Matrimonial Lawyers, serving as President of the Pa. Chapter in 2007. He is a member of the American, Pennsylvania, Illinois and Montgomery Bar Associations with active participation in their respective family law sections and/or committees. He was formally Co-Chair of the PBA's Technology Taskforce. He is a former Director and Chair of the Family Law Section of the Montgomery Bar Association and served two terms on Council of PBA Family Law Section. He can be reached by email (above); 610-667-7902 or fax 610-879-3745.

Alicia A. Slade, MS, MBA, is the president of Plummer Slade Inc., which has been providing computer networking and IT solutions to law offices since 1988, and Technology Corner Co-Editor of the Pennsylvania Family Lawyer. *Alicia has been a technical consultant for more than 20 years. She can be reached by email (above); 412-261-5600, ext. 202 or fax 412-261-1528. Plummer Slade is exclusively endorsed for IT Solutions by the Allegheny County Bar Association (ACBA)*

TECHNOLOGY CORNER
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Do not call a telephone number listed on a pop-up or on a warning message. Do not click on a link that looks like it will take you to the manufacturer's web page or to download a patch within a pop-up or warning message. One pop-up causes the PC to start beeping and making noises, so users feel they have no choice but to call the technical support number listed. Instead, call your IT provider. You can also always search for the manufacturer's website independently of the message or pop-up you received. You should obtain known downloads directly from the software manufacturers' websites, not from questionable pop-ups. Look for the official web page and pay attention to the actual URL of the web page link when you are searching. Do not click on anything that looks suspicious.

What should you do if you or someone at your office takes or makes a call like described above and allows a cybercriminal to connect to a PC? As soon as you realize that it is not a legitimate call, immediately hang up and disconnect your computer network cable from the data jack in the wall. This will disconnect your PC from the network and the internet and will disconnect the cybercriminal's connection. Your PC was being used as a gateway. Do not shut down your PC. Call your IT support provider immediately to report what happened. Your IT support will walk you through the process of making sure your PC and network are safe. This will entail running scans on the PC and the network. More than likely your IT provider will recommend wiping the PC and reloading the operating system and programs.

Unfortunately, computer users get lured into scams by cybercriminal callers and fake pop-up windows that sound or look authentic. Good computer users know that they need to keep their PC updated and free from viruses, which make them susceptible to the calls and messages. The cybercriminals capitalize on this knowledge. Within the past few months, a few local law offices have had staff fall victim to these scams, which inevitably puts the entire firm's network and data at risk. No software can prevent this type of scam since it takes an action by one of the users to allow the cybercriminal access to his or her PC. Educating your staff on cybersecurity and safe computing is the best risk management tool to reduce your firm's susceptibility to these scams.

Your PBA Family Law Section Listserv

A listserv is an electronic mailing list that allows subscribers to exchange information with each other simultaneously. Joining a listserv is like having a live conversation with a group, only all communication is by e-mail.

How does it work?
Any listserv subscriber may post a question or share information simply by sending an email to the listserv address. All subscribers will then receive that email message and may reply just to the sender or to the entire listserv.

To subscribe to the PBA Family Law Section listserv, go to www.pabar.org and sign in under "Member Login" in the upper right corner of the page. Then click on "Sections" to locate the Family Law Section Page. The "Listserv Sign-up" button is on the Section's main page. Once subscribed to the listserv you will get the following confirmation message:

You have been added to the FAMILY list.

To send a message to members of the listserv, address your email to family@list.pabar.org.

To reply only to the sender, hit "Reply," and type your personal reply to the sender. This response will only go to the sender, not to the entire listserv membership. You can manually add other recipients outside of the sender or the membership.

To reply to the entire listserv membership, hit "Reply to All," and type your response in the message body. This response will go to the sender and also to the entire listserv membership.

To unsubscribe, send a message to listserv@list.pabar.org with "unsubscribe family" in the body.

To change your email address, you must unsubscribe the old email address using the old email address and subscribe the new email address using your new email address. Sending an e-mail to the list will not change your email address on the listserv.

For customer service, contact Dan Fuentes, PBA Internet coordinator, 800-932-0311, Ext. 2255.

Financial Corner:

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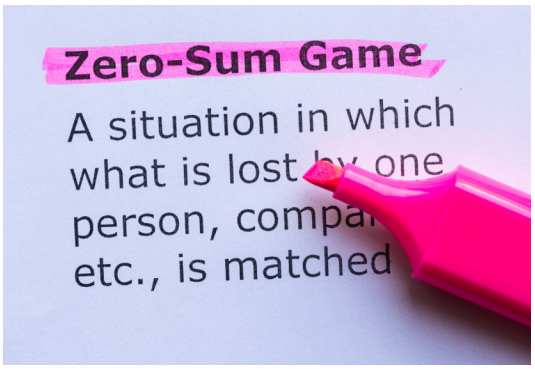
LIFE IS A ZERO-SUM GAME – HAVE YOU SOLVED YOUR SAVE-SPEND BALANCE?
BY CHRISTINE HOTWAGNER

A zero-sum game is a situation in which one person's gain is equivalent to another's loss, so the net change in wealth or benefit is zero. For example, let's look at your typical poker game. The first round of poker begins with each player placing a specific amount of money into the center of the table (the pot) based on how competitive they think their hand is compared with the other players. The game continues around the table until all players have either placed money into the center or folded. Once all money is placed, the players' hands are revealed and the player with the winning hand takes the pot. That player's gain is therefore equivalent to all other contributing players' losses and the net gain for the group is zero.

Unlike the name would suggest, zero-sum games are actually very real. As human beings, there are limitations on our time, money and energy. We do not get an endless supply of these things every day. When deciding how much of something—your time, your money, your energy—to use or give out, you are making the decision to take from one area of your life and give to another. You are continually evaluating how compromises may play out, hoping the ultimate outcome will strike a balance that gives you comfort and reward.



When we think about the term "work-life balance" aren't we basically talking about a zero-sum game? Every day we have to make the decision between how much time and energy we put towards our work and our careers and how much time and energy we dedicate to our life, whether that is our health, our families, our homes, our pets or our sports and hobbies. When we make that decision in favor of our career, we are essentially taking away from our personal life, and vice-versa. It's a delicate balance and one that is different for everyone, depending on careers, ambitions, expectations, characters, stages of life, etc.

This search for balance is no different for lawyers and legal professionals, and in fact some may argue that achieving this balance is even more difficult for these professionals. Traditionally, legal professionals tend to be very committed to their careers. They spend long hours in the office during the week and often work nights and weekends as well. Since they can essentially do their work anywhere and at any time, traditional office hours don't apply. The essence of the zero-sum game for lawyers likely manifests itself in the number and complexity of work and life obligations while bound by the irrevocable fact there are only 24 hours in each day. Since the speed of the earth's rotation onto its axis isn't likely to change anytime soon, the work and life trade-off becomes more difficult to manage when there is more work to get done and just as many personal matters to attend to.

We can draw many parallels between achieving work-life balance and achieving financial balance, where saving and spending are at odds. In each case, there is a finite amount available—time in the case of work-life balance and money in the case of save-spend balance. In effect, saving for retirement is also a zero-sum game. Every dollar we choose to save now is a dollar we choose not to spend on the latest cell phone, or a new outfit, or a night out on the town. The save-spend balance is further complicated by the fact that the rewards are not necessarily delivered under the same time table. Typically, spending comes with instant gratification. In the case of saving however, the reward is typically delivered at some point later. When saving for retirement, the reward may not come for several decades.

It's no secret that we humans have a tendency to value short-term rewards over longer-term rewards, even when mathematically they are worth the same. The farther away the reward, the more we tend to discount it. This is the concept of hyperbolic discounting.

How does it work? Assume someone has the choice between $20 now and $100 tomorrow. Most will wait a day and collect the $100 reward. But what if I were to offer you $20 now or $100 a year from now? Turns out many people will opt for the $20 now, discounting the value of a larger reward because it is so far

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into the future. Expressed another way, hyperbolic discounting is a person's desire for an immediate reward rather than a higher-value reward at some point later.

You don't have to be a lawyer to understand this concept, because it affects everyone the same. That's why legal professionals, just like the rest of us living in today's society, struggle to plan ahead and save adequately for retirement. What can you do now to help ensure you'll have what you need tomorrow? The short answer is take action today!

Planning for retirement also falls into the zero-sum game concept. To help plan for your retirement, consider establishing a retirement plan. As a solo practitioner or small firm owner, you need to understand your responsibilities as the plan sponsor if you establish a retirement plan for your firm. There are eligible employees you need to factor into the equation as well as save for your own retirement.

The "spend now or save now" decision is not the only challenge we face when it comes to planning and saving for retirement.

One of the biggest challenges is whether or not we have access to a retirement savings plan to begin with. Statistics have shown that people are much more likely to save for retirement if a 401(k) plan is available to them through the workplace. However, access to such plans has been a difficult hurdle to overcome when it comes to smaller employers who typically choose not to sponsor a plan. Of all small employers—those with 10 or fewer workers—only 16.5 percent sponsor a retirement plan, according to an Employee Benefit Research Institute estimate. This is especially noteworthy in light of the fact that, according to the latest statistical report by the American Bar Foundation, nine in 10 lawyers work for firms that have fewer than 10 attorneys. The propensity for law firms to be small means that most law professionals do not have access to a workplace retirement plan.

If you're like most working Americans, you see your 401(k) plan as the cornerstone to your retirement savings. But if you're not, and you believe you'll never retire from practicing law, consider this: one in five retirees does not retire on the planned-for date because of illness or health issues. One of life's realities is that with old age comes a variety of health concerns that may impact your ability and willingness to practice law. The uncertainty about what your health has in store for you down the road is cause for planning. Whether you plan to retire or not, consider just a few simple tips that can help you be ready to retire with the dignity and financial security you expect and deserve.

The spend now or save now decision is not the only challenge we face when it comes to planning and saving for retirement.

Tip #1: Participate in your retirement plan. If you haven't yet enrolled in your 401(k) plan, make it a point to do so now. People are living longer than ever before. According to a report by the U.S. Census Bureau, the United States is projected to have 9 million people above the age of 90 by 2050—up from 1.9 million in 2010 and only 720,000 in 1980. These statistics illustrate that our nation's 90-and-older population has nearly tripled over the past three decades and is projected to quadruple over the next four decades. These longer life spans, coupled with rocketing health care costs, the uncertain future of Social Security, and the decline of public pensions, means individuals are increasingly responsible for finding their own path to retirement income adequacy.

Contributing to a 401(k) plan can put you on the right track to be able to fund your retirement years. The money you contribute is tax deferred from both federal and state income taxes, which means you don't pay taxes on the contributions until you withdraw the funds, typically at retirement age. Furthermore, contributions to the plan are deducted automatically from your paycheck, making the process seamless for you.

For law professionals, this tip is especially important. The law profession is characterized by busy, time-consuming schedules with little time for planning outside of work. As a result, law professionals compulsively push off the decision to start saving. As inertia sets in, many people are left feeling as if their bank account is a ticking clock and too few years remain until retirement.

If you're unsure about how to get started, take advantage of the many helpful online interactive experiences and resources available to you, such as Voya's myOrangeMoney retirement calculator (voya.com). These tools offer an easy way for you to determine how much you need to save to reach your retirement goals, how different contribution rates may impact your retirement savings and when you can afford to retire.

Tip #2: Take advantage of matching contributions. If your retirement plan offers a company match, take advantage of it. This valuable benefit requires your employer to match your contributions—typically capped at a percentage of your pay. For example, a company may offer a dollar-for-dollar match up to 3 percent of pay or a 50 percent match up to 6 percent of pay. Find out what your employer will match and, at the very least, contribute enough to take advantage of the match.

Many law firms will offer generous matches and sometimes profit sharing plans where the employer has discretion to determine when and how much the company pays into the plan. The amount allocated to each individual account is usually based on the salary level of the employee.

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Tip #3: Make catch-up contributions. If you are age 50 or older (or will be by the end of the calendar year) and your retirement plan allows, take advantage of the catch-up provision outlined in the Pension Protection Act of 2006. In addition to the general deferral limit of $18,000 for 2016, you can contribute an additional $6,000 for a total of $24,000. This means if you are 50 years old this year and haven't started saving for retirement, you can contribute nearly as much as $250,000 over the next 10 years—tax-deferred—to your 401(k) plan. When you consider the potential of compound earnings, this can add up to significant savings.

Tip #4: Keep your savings working for you. Even if the plan allows you to borrow from your plan, think twice before doing so. Although it may sound appealing, borrowing from your 401(k) reduces the benefit of tax-free compounding that is the key to building up savings. Before you make the decision to take a loan, there are a few considerations to take into account:

•You will pay interest on the loan with after-tax dollars, thereby losing the tax advantage.

•You will pay taxes a second time when you eventually withdraw the money in retirement.

•Interest on the loan is not tax-deductible, even if funds are used for a home purchase.

•Most loans must be paid back within five years, but if you leave your job, the loan must be paid back in full immediately or the amount becomes a taxable withdrawal.

Tip #5: Invest for the long term. Once you set your investment allocations, be patient. Predicting the market is not like predicting the weather. There are no high-tech gadgets or radar systems to predict the highs and lows that may lie ahead. It's critical to remember that what is important is time in the market, not timing the market. Discipline yourself to maintain your allocation through down markets as well as up markets. Having a properly diversified portfolio will help make any market swing easier to digest. Conduct an annual review of your plan to confirm your allocations still align with your life stage and economic circumstances.

Tip #6: Consider spending time with a financial professional. According to Voya research, those who spend time with a financial professional save more than their peers and have greater investment knowledge and confidence in their ability to enjoy retirement. If you have never received help from a financial professional before, this assistance is something to consider pursuing.

We've discussed two of life's zero-sum games—work-life balance and save-spend balance. Both are similar in that they require you to make compromises. To what degree you are willing to compromise is up to you. When it comes to saving for retirement, it's important to understand how spending today may negatively impact your ability to retire comfortably in the future. You don't have to put away half of your income every month, but you do have to make sure that what you are putting away will adequately cover your needs once you reach retirement age. Do you want to live in financial security in retirement? Travel? Live in the home you want? Have enough to pay for health expenses? If so, then you need to value your save-spend balance as much as you do your work-life balance.

Christine Hotwanger is Program Operations Director for ABA Retirement Funds Program; 201-917-3030, christine.hotwanger@ABARetirement.com.

Legislative Update:

Yvonne Llewellyn Hursh, Esq.
yhursh@legis.state.pa.us

This article summarizes enactments and legislative proposals of the 2015-2016 General Assembly of Pennsylvania. With the legislature's adjournment sine die, any bill that was not enacted is now defeated. Some may be re-introduced in 2017-2018, but they will begin the process anew. The full text of the bills, as well as their legislative history, may be found at: http://www.legis.state.pa.us/cfdocs/legis/home/bills/.

New Laws in Pennsylvania

Family support, paternity, sex trafficking, missing and abducted children, dependent children: House Bill 1603 (2015) was signed by the governor as Act 94 of 2015. It adopts the latest version of the Uniform Interstate Family Support Act. In its final incarnation, it was amended to also add provisions to other related laws dealing with notification when a child is missing or abducted and human trafficking is suspected as well as provisions dealing with the disposition of a dependent child. Title 23 of the Consolidated Statutes (Domestic Relations) was amended by adding a new Chapter 57 (relating to sex trafficking and missing and abducted children); and Part VIII (relating to Uniform Interstate Family Support) was substantially amended. Amendments were also made to the Juvenile Act at 42 Pa.C.S. §§ 6302 and 6351. The addition of Chapter 57 became effective on Jan. 1, 2016, and the remainder of the act was effective on Dec. 28, 2015.

Domestic violence as grounds for divorce: House Bill 12 (2015) was signed by the governor as Act 24 of 2016. It provides that a conviction for a personal injury crime against a spouse is grounds for a divorce without the consent of the offending party. "Personal injury crime" is an act, criminal attempt, solicitation or conspiracy to commit the following crimes, whether graded as a misdemeanor or a felony: criminal homicide, assault, kidnapping, human trafficking, sexual offenses, arson and related offenses, robbery, victim and witness intimidation, homicide by vehicle, or accidents involving death or personal injury. The act amends 23 Pa.C.S. §§ 3101, 3301, 3302 and 3323, and was effective June 20, 2016.

Yvonne Llewellyn Hursh is Counsel with the Joint State Government Commission, the primary and central non-partisan, bicameral research and policy development agency for the General Assembly of Pennsylvania in Harrisburg, and the Legislative Editor of the Pennsylvania Family Lawyer*; 717-579-4223; yhursh@legis.state.pa.us.*

Child support: 23 Pa.C.S. § 4348 was amended by Senate Bill 936 (2015) and signed by the governor as Act 64 of 2016. It became effective on Aug. 31, 2016. It changes the fee structure for wage garnishment to pay child support. Formerly, an employer could retain 2 percent of each payment withheld; the new law changes this to a one-time fee of $50.

Divorce – separate and apart: House Bill 380 (2015) amended 23 Pa.C.S. §§ 3301 and 3323 to shorten the period of time a couple needed to live separate and apart to prove a marriage was irretrievably broken from two years to one year. It was signed by the governor as Act 102 of 2016 and became effective on Dec. 5, 2016.

Domestic violence: House Bill 1581 (2015) added 18 Pa.C.S. § 2718 to create the criminal offense of "strangulation." It was signed by the governor as Act 111 of 2016. The offense is a felony of the second degree if committed against a family or household member as defined in the Protection from Abuse (PFA) Act. It becomes a felony of the first degree if committed while under a PFA order that covers the victim. A second offense against a family or household member regardless of the existence of a PFA order is also a felony of the first degree. The act becomes effective on Dec. 26, 2016.

House Resolution 735 (2016) directed the Joint State Government Commission to conduct a study on the Protection from Abuse Act. The report was released on Nov. 15, 2016.

Adoption: House Bill 162 (2015) amended 23 Pa.C.S. §§ 2911 and 2937 to prove for more open adoption records. It was signed by the governor as Act 127 of 2016, and will be generally effective Nov. 3, 2017.

Legislation Receiving Consideration

The following bills all passed their house of origin and were referred to committee in their respective counterparts but did not receive further consideration:

Adoption

HB 1524 passed the House of Representatives on June 21, 2016, by a vote of 198-0. It was referred to the Senate Judiciary Committee on June 23, 2016. The bill provides for adoption-related counseling services.

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HB 1525 passed the House of Representatives on Oct. 18, 2016, by a vote of 194-0. It was referred to the Senate Judiciary Committee on Oct. 26, 2016. It addresses termination of parental rights.

HB 1526 passed the House of Representatives on June 21, 2016, by a vote of 185-13. It was referred to the Senate Judiciary Committee on June 23, 2016. It addresses revocation of adoption consent.

HB 1528 passed the House of Representatives on Oct. 17, 2016, by a vote of 192-0. It was referred to the Senate Public Health and Welfare Committee on Oct. 26, 2016. It addresses adoption subsidies.

HB 1529 passed the House of Representatives on June 21, 2016, by a vote of 198-0. It was referred to the Senate Judiciary Committee on June 23, 2016. It addresses reimbursement of living expenses of birth mothers.

HB 1530 passed the House of Representatives on Oct. 17, 2016, by a vote of 192-0. It was referred to the Senate Judiciary Committee on Oct., 2016. It addresses adoption consents.

HB 1531 passed the House of Representatives on June 13, 2016, by a vote of 190-1. It was referred to the Senate Judiciary Committee on June 22, 2016. It addresses the elimination of a hearing to confirm consent to an adoption in certain circumstances.

HB 1532 passed the House of Representatives on June 13, 2016, by a vote of 191-0. It was referred to the Senate Judiciary Committee on June 22, 2016. It addresses the definition of an adoption intermediary.

SB 163 (Printer's No. 99) passed the Senate on June 13, 2016, by a vote of 47-0. It was referred to the House Judiciary Committee on June 15, 2016. The bill would regulate the involuntary termination of parental rights of persons who are incarcerated and provide arrest protocols for situations in which minor children are present at the arrest of a parent.

Custody

SB 1056 (Printer's No. 1438) passed the Senate on March 14, 2016, by a vote of 49-0. It was referred to the House Judiciary Committee on March 17, 2016. It adopts the Uniform Deployed Parents Custody and Visitation Act.

Legislation Introduced with No Further Action

The following bills were introduced and referred to committee but saw no further consideration:

Adoption

HB 155: involuntary termination of parental rights; alcohol and substance abuse
HB 807: grounds for involuntary termination in parental incarceration cases
HB 1527: adoption reports
SB 454: grounds for involuntary termination; crime of violence against child's parent or other child in household (Kimberlee's Law)

Alimony and Support

HB 27: child support payments from perpetrators of rape
HB 242: relatives' liability for support
HB 410: liability for support of children born as result of sexual violence
HB 669: support guidelines
HB 721: liability for support and role of certain convictions
HB 767: publication of names of delinquent support obligors
HB 1355: creates the offense of indirect criminal contempt for willful failure to obey a support order
SB 39: Record of support payments and reporting to consumer credit reporting agency

Custody

HB 338: standing for siblings
HB 410: custody of children conceived as a result of sexual violence
HB 685: grandparents' standing
HB 1338: mandatory mediation in child custody disputes
HB 1971: use of domestic violence experts in child custody cases where domestic violence is alleged
HB 2109: grandparents standing
SB 723: consideration of certain criminal convictions in determining custody
SB 1400: domestic violence as a factor in child custody

Divorce

HB 2415: Mandatory financial disclosures in divorce proceedings

Domestic Violence

HB 570: use of GPS electronic monitoring devices in PFA orders

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LEGISLATIVE UPDATE
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HB 1369: use of GPS electronic monitoring devices in PFA orders
HB 1687: waiver of government fees to replace documents lost or destroyed in domestic violence circumstances
HB 1971: use of domestic violence experts in child custody cases where domestic violence is alleged
SB 658: arraignment procedures for violation of PFA order
SB 949: allows a domestic violence victim to terminate a telephone contract shared with a domestic violence perpetrator without contractual penalties from the service provider
SB 1143: limits the time for the personal service of a PFA order and permits law enforcement to accompany the person delivering the protective order
SB 1392: sentence enhancement for crimes of violence when committed by person in violation of a PFA order
SB 1393: dating violence as justification for PFA order
SB 1394: dating violence programs in schools

Equitable Distribution
HB 1612: the equitable distribution of military retirement income

Family Courts/Litigation
HB 879: Family Law and Justice Act
HB 880: family litigation

Marriage
HB 308: allowing all appointed judges to solemnize marriages
HB 489: permitting same-sex marriages
SB 372: eliminate waiting period after marriage license application
SB 754: fraud on marriage license application

Paternity
SB 757: tests to determine paternity

Related Issues
HB 314: liability for tortious acts of children

Support
HB 1563: intercept of gaming winnings to make restitution for back child support owed
HB 1975: authorizes the domestic relations section of the court to charge interest on overdue support
SB 1017: intercept of gaming winnings to make restitution for back child support owed

"Can we, just for a moment, Your Honor, ignore the facts?"

The *Pennsylvania Family Lawyer* is no longer printed or mailed.

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IN MEMORIAM: Stephen John Anderer

Stephen John Anderer, 52, of Wynnewood, a leading expert on family law and child custody, died Aug. 28 while competing in the Cedar Island 5K Swim in Avalon.

A gifted athlete, Anderer was in the third leg of the sunset swim around the island when he felt some discomfort, law partner Mark A. Momjian said.

Stephen J. Anderer

Rescuers in a boat pulled Anderer from the water and sped to a nearby dock, where paramedics were unable to revive him, Momjian said. The cause of death was atherosclerotic cardiovascular disease.

For more than three decades, Anderer advocated for children, using his dual expertise in the fields of family law and clinical psychology. One of only a few Pennsylvanians with such training, he became an expert in child custody evaluations.

In addition, he was regarded as the commonwealth's leading expert on parent coordination, a mediation process aimed at reducing stress on families and children in high-conflict custody cases.

Born in Philadelphia, Anderer grew up both in Lafayette Hill and Greenwood, S.C., where he starred as an offensive lineman in high school. In 1985, he earned a bachelor's degree in psychology from Yale University. While there, he played football and rowed.

"He was an amazing athlete," Momjian said. "You can't find me a modern college student who plays varsity football and also is on the crew team. Stephen did all of that."

One of Anderer's fondest memories occurred in November 1983 when he played football before 70,098 fans at the Yale Bowl, during the 100th game between rivals Yale and Harvard. Harvard won the game, 16-7."It was a great game, anyway," said his wife, Dr. Susan E. Anderer.

Anderer graduated from the law-psychology program at Villanova Law School and Hahnemann University. He completed a law degree in 1992 and a doctorate in clinical psychology in 1997.

His dissertation focused on ways of assessing whether senior citizens were competent enough to make personal care and financial decisions on their own. "He developed a measure to assess competency," his wife said.

Anderer taught family law at Villanova Law School for the last two years. He also completed a fellowship at the University of Pennsylvania under the supervision of Robert L. Sadoff, a noted forensic psychiatrist.

Anderer was a longtime partner in the Family Law Department of Philadelphia's Schnader Harrison Segal & Lewis. Six years ago, he and partner Momjian broke away to form their own law firm, Momjian Anderer L.L.C., in Center City.

He was the author of numerous articles on Pennsylvania family law, and his contributions on competency and child custody evaluations appeared in books published by Oxford University Press.

He gave dozens of panel presentations, especially on behalf of the Pennsylvania Bar Association and the Philadelphia Bar Association.

Anderer served on the board of directors for the Support Center for Child Advocates, a nonprofit that provides legal assistance and social service advocacy for abused and neglected children in Philadelphia. He was honored as its Advocate of the Year.

He was a diehard fan of the Philadelphia Phillies and was a frequent participant in the Broad Street Run and the Philadelphia Triathlon, as well as numerous half-marathons and bicycle tours.

After college graduation, Anderer rode a bicycle across the Pacific Northwest. Later, once he married and had a family, he was a coach and fan of his daughters' sporting and dancing events.

Friends thought of him as "larger than life," his wife said. "He was always seeking the next adventure, and was eternally optimistic. He was very warm and compassionate."

Besides his wife of 24 years, he is survived by daughters Arielle, Meredith, and Samantha; two brothers; and a sister.

Funeral services were Aug. 31, with interment in West Laurel Hill Cemetery.

Contributions may be made to the Gladwyne Jewish Memorial Cemetery, 1130 Vaughan Lane, Gladwyne, Pa. 19035, or to Friends of Stephen J. Anderer Fund, 20 Valley Stream Parkway, Suite 280, Malvern, Pa. 19355.

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Case Notes:

Robert D. Raver, Esq., Co-Editor,
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SHOULD I STAY, OR CAN WE GO?
BY JONATHAN C. NOBLE, ESQ.

***D.K.D. v. A.L.C.*, 141 A.3d 566 (Pa. Super. 2016)**

SUMMARY

The Superior Court reversed and remanded with directions a trial court order granting mother's relocation to Florida and denying father's petition seeking primary custody of the party's special needs son. The Superior Court kept the focus on the best interests of the child and refused to adopt trial court findings that cannot be sustained by competent evidence.

On June 15, 2016, in detailed published opinion, the Superior Court of Pennsylvania (Bowes, Mundy, Jenkins, JJ.) reversed, and remanded with directions, an Allegheny County Court of Common Pleas Family Court order (William F. Ward, J.), granting mother's permission to relocate from Pennsylvania to Florida with the party's special needs son. The Superior Court also reversed the trial court's denial of father's petition for primary custody. The Superior Court opinion (Bowes) provides a rich and detailed analysis of the facts contained in the certified record on appeal as applied to Pennsylvania Child Custody law, and more specifically, the factors a trial court must consider when determining whether to grant a proposed relocation. The Superior Court is not bound by the trial court's deductions or inferences. As this well-drafted opinion illustrates, the Superior Court is not constrained to adopt a trial court's findings that are not supported by competent evidence.

FACTUAL AND PROCEDURAL HISTORY

Mother and father married in 2004, separated in 2009, and divorced in March 2015. The family moved to the Pittsburgh area in 2011. One child, L.D., was born to the marriage in February 2008. In June 2009, L.D.'s doctor identified significant language and speech delays. L.D. was eventually diagnosed with Pervasive Development Disorder, not otherwise specified, which is a non-specific, descriptive diagnosis within the autism spectrum of developmental delays in two or more areas.

L.D. was prescribed 30 hours per week of intensive outpatient therapy, most of which was provided in the marital home. Stability and routine are two key factors for L.D.'s continued development. On July 1, 2009, father filed a divorce complaint that included a count for custody of L.D. The parties entered into a consent order that granted shared legal custody of L.D., and awarded mother primary physical custody. The consent order provided father with physical custody of L.D. for two hours on Tuesday and Thursday evenings and for three hours on alternating Saturday afternoons. The accord expressly limited the evening custody to the marital residence. While the consent order authorized father to exercise his custodial rights outside of the marital home on Saturday afternoons, mother regularly objected to L.D. leaving the home with father due to her concern that the disruption would be harmful to L.D.'s medical condition. Father generally acquiesced to mother's demands and exercised his alternate Saturday afternoon custody with L.D. at the marital residence.

In September 2014, father filed a petition to modify the consent order. Father wanted to expand his custodial time with L.D. Father also wanted more specific vacation time, holiday schedules and better enforcement of his custodial rights. Approximately one month after father filed a petition to modify the consent order, mother countered by issuing notice of her proposed location to Florida so she and L.D. could reside with her mother ("maternal grandmother").

Father opposed mother's relocation. After a two-day trial on the party's respective petitions, on March 23, 2015, the trial court entered an order that denied mother's petition to relocate, and granted father's petition to modify the custody arrangement. The new custody order increased father's physical custody time, including

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Robert D. Raver is an Associate with the Pittsburgh firm of Pollock Begg Komar Glasser & Vertz LLC, Articles/Comments and Case Notes Co-Editor of the Pennsylvania Family Lawyer. *He is the Social Committee Co-chair for the Allegheny County Bar Association Family Law Section and a member of the Pennsylvania Bar Association Family Law Section.*

Jonathan C. Noble is a solo practitioner in Lafayette Hill, PA. His practice is dedicated to family law matters. He is licensed to practice law in Pennsylvania and New Jersey. Mr. Noble is an active member of the Montgomery Bar Association Family Law Section, where he serves on the Child Custody Subcommittee. He also serves as a facilitator for the innovative PFA Friend of the Court program in Montgomery County. Mr. Noble can be reached at 610-256-4843.

CASE NOTES
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L.D. having overnight visits with father on alternating weekends. The order also outlined a defined custody schedule for L.D.'s academic breaks, holidays and summer vacations.

On April 8, 2015, mother filed a motion for reconsideration and a motion for special relief. Mother's motion for reconsideration noted that the trial court had not established a custody schedule in the event she relocated to Florida without her son. The trial court granted mother's motion to reconsider, reopened the record and scheduled an evidentiary hearing. Upon the re-opening of the record, father submitted a motion to amend his original petition to modify custody to address mother's recent acceptance of employment in Florida. Thereafter, mother filed an amended notice of relocation proposing to relocate to Treasure Island, Florida, with L.D.

Father again opposed L.D.'s proposed relocation to Florida with mother.

On July 1, 2015, the Allegheny County Family Division trial court (Ward, J.) heard a third day of testimony to address mother's amended relocation petition and father's amended motion for a custody modification. On Aug. 3, 2015, the trial court issued amended findings of fact and entered a custody order, doing a volte-face and granting mother's request to relocate to Florida with L.D. Father filed a timely appeal.

On June 15, 2016, in an in-depth analysis of Pennsylvania Child Custody law and the relocation factors, a three judge panel of the Pennsylvania Superior Court reversed the trial court's July 2015 order permitting mother's relocation to Florida with D.L. Mother filed a motion for reargument, which the Superior Court denied on July 28, 2016.

SUPERIOR COURT'S ANALYSIS

Writing for the Superior Court, Judge Bowes provided a thorough analysis of the record facts as applied to the relocation factors a trial court must consider under Pennsylvania law. The Superior Court opinion exposed mother's distorted evidence that relocating to Florida would inure to the benefit of L.D.

The Superior Court's detailed opinion concentrates on the second, third, fifth, sixth, and seventh relocation factors identified in 23 Pa.C.S. §5337(h). These five relocation factors eventually tipped the balance (in the trial court), in favor of mother relocating to Florida with L.D. However, upon further (appellate) review, the Superior Court stopped L.D. from relocating to Florida with his mother.

The Superior Court's analysis unmasked the fact that L.D.'s move to Florida was of benefit to mother, not necessarily of benefit to L.D. The Superior Court opinion methodically chips away at mother's evidence, exposing distortions in mother's story, and gaps in mother's logic.

The Superior Court found the trial court's characterization of the benefits that would inure to mother as a result of her proposed relocation incongruent with the evidence mother presented at trial. Further, the Superior Court closely examined how father's relationship with L.D. would be impacted by mother's proposed move to Florida with L.D. Mother's established pattern of conduct to thwart the growth of L.D.'s relationship with his father was one key factor in the Superior Court's reversal.

Father raised five issues on appeal. However, the Superior Court focused on one key issue that changed the course of the entire case. As the petitioner, requesting relocation, mother bears the burden of establishing that relocation is in her son's best interests. See 23 Pa.C.S. §5337(i). Based on the in-depth, fact-intensive Superior Court analysis, mother failed to meet her burden, and as a consequence, she was not permitted to relocate to Florida with L.D.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS

This case is notable because the trial court initially denied mother's petition to relocate, then on reconsideration, the trial court reversed itself by granting mother's petition to relocate. On appeal, the Superior Court reversed the trial court and stopped L.D.'s relocation to Florida. This was clearly a hard-fought custody/relocation case.

This practitioner believes that counsel for father must have done an excellent job making the trial court record comprehensive enough to successfully pursue an appeal. The Superior Court analysis of the record below is both broad and fact intensive. The level of analysis showcased in the Superior Court opinion could never be accomplished with an under-developed record at the trial level.

Finally, and perhaps most importantly, in any custody related matter, the best interests of the child must be the polestar consideration when petitioning a court to modify custody or request relocation. In this case, the Superior Court fleshed out mother's motives and focused on D.L.'s needs.

A link to the
SUPERIOR COURT OF PENNSYLVANIA MEMORANDUM DECISION DATABASE

- Go to PBA Family Law Section website, www.pabar.org/public/sections/fam05/
- Login as a PBA Family Law Section member (top right corner)
- Click on the "Superior Court of Pa. Memorandum Decision Database" tab
- Follow the instructions provided

GRANDPARENTS STANDING TO SEEK CUSTODY, BASED SOLELY UPON SEPARATION OF PARENTS FOR AT LEAST SIX MONTHS, VIOLATES DUE PROCESS AND EQUAL PROTECTION

BY MEREDITH ALLIE, ESQ.

D.P. and B.P. v. G.J.P. and A.P., 146 A.3d 204 (Pa. 2016)

In its Sept. 9, 2016, decision, the Supreme Court of Pennsylvania (Saylor, C.J., Baer, Todd, Donohue, Dougherty, Wecht, JJ; Opinion by Chief Justice Saylor) affirmed the trial court's order dismissing plaintiff grandparents' (G.J.P and A.P., hereinafter "grandparents") complaint, filed in October 2014, which named parents, D.P. and B.P., (hereinafter "parents") as defendants. This was a direct appeal to the PA Supreme Court.

Grandparent's complaint sought partial physical custody of their three grandchildren based upon Pa.C.S.§5325, more specifically §5325(2), which states:

"In addition to situations set forth in section 5324 (relating to standing for any form of physical custody or legal custody), grandparents and great-grandparents may file an action under this chapter for partial physical custody or supervised physical custody in the following situations:

(1) where the parent of the child is deceased, a parent or grandparent of the deceased parent may file an action under this section;

(2) where the parents of the child have been separated for a period of at least six months or have commenced and continued a proceeding to dissolve their marriage; or

(3) when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home."

23 Pa.C.S. §5325 (emphasis added)

The trial court (Westmoreland County Judge Smail) focused attention on §5325(2), more specifically on the first portion of §5325(2), whereby grandparents and great-grandparents are afforded standing to seek partial physical custody or supervised physical custody of their grandchildren so long as the parents have been separated for a period of at least six months.

Ultimately, the Supreme Court affirmed the decision of the trial court and concluded that the first portion of §5325(2) violates the due process and equal protection rights of those parents who are merely separated and not subject to dissolution proceedings and is unconstitutional. The court also briefly addresses the second section of §5325(2) relating to divorcing parents, but acknowledges that the circumstances presented in this matter were only regarding separated parents; as such, their ruling could only focus on same.

It is important to note that this opinion did not provide detail as to why parents decided that the contact should be discontinued or the extent of the relationship/contact between the children and grandparents prior to discontinuing same. While such facts and detail are necessary for a merit based argument, focusing on the factors set forth in §5328(c), rationale of the parents and history of the family were not necessary for the trial court nor for the Supreme Court to issue the resulting opinion.

The procedural and factual background of the matter is as follows: Parents had separated in October 2012 and had not filed any proceedings for dissolution. Parents had mutually agreed upon custody matters and had never sought court intervention regarding their children. In December 2012, parents mutually agreed, despite living separately, that all contact between the children and their paternal grandparents should be discontinued. Grandparents filed a complaint seeking partial physical custody of their grandchildren in October 2014.

The trial court issued an interim custody order, in November 2014, whereby parents were granted shared legal custody and directed that grandparents continue to not have contact with the children. Parents then filed a motion to dismiss grandparents' complaint and alleged that the §5325(2), relating to parents separated for six months or more, violated their Fourteenth Amendment rights to due process and equal protection.

After briefs and oral argument, the trial court issued an order granting parents' motion to dismiss grandparents' complaint. The court agreed with parents that the first portion of §5325(2) did, in fact, violate their constitutional rights. "The court recognized, initially, that parents have a fundamental liberty interest in raising their children as they see fit. See D.P. v. G.J.P., No. 1750 of 2014-D, slip op. at 2 (C.P. Westmoreland Sept. 8, 2015) (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000) (plurality)). Accordingly, the court reasoned, because Section 5325(2) substantially burdens that interest, it can only be upheld if it survives strict scrutiny—meaning it must be narrowly tailored to further a compelling government interest. See id. at 4."

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The court went on to generally suggest that there is no legitimate basis to disturb the decisions of parents regarding their children as there is an "ordinary presumption, credited by the United States Supreme Court, that fit parents act in their children's best interests." It should follow that parents, regardless of their separated status, would also be fit unless proven otherwise. Allowing grandparents to establish standing and then intrude and disregard the joint decision of separated parents regarding their children's associations would create an irrefutable presumption that separated parents are not fit to act in the best interest of their children. See D.P., No. 1750 of 2014-D, slip op. at 9 (quoting *Troxel*, 530 U.S. at 68, 120 S. Ct. at 2061)

The court examined matters wherein grandparents attempted to seek custody of children still residing in an intact family; *Herron v. Seizak*, 321 Pa. Super. 466, 468 A.2d 803 (1983), and *Helsel v. Puricelli*, 927 A.2d 252 (Pa. Super. 2007). Both matters involved "married parents who agreed that grandparents should not be given visitation or custody. See D.P., No. 1750 of 2014-D, slip op. at 9-10. Although *Herron* and *Helsel* dealt with intact families, the county court interpreted the opinions as primarily establishing that courts should not upset a unified decision of the child's parents at the behest of a third party. See id. at 10."

The court "ultimately held that, inasmuch as the law presumes married parents living together are able to co-parent their children without judicial interference, there was no constitutionally sound basis to support a classification whereby married parents who are separated should be treated differently."

The court also examined and distinguished *Hiller v. Fausey,* 588 Pa. 342, 904 A.2d 875 (2006), which permitted grandparent standing where a parent is deceased, and *Schmehl v. Wegelin,* 592 Pa. 581, 927 A.2d 183 (2007), which permitted grandparent standing where the parents were divorced and disagreed regarding contact with grandparents .

Following review of *Herron, Helsel, Hiller,* and *Schmehl,* the court focused on the equal protection argument made by parents. The court "ultimately held that, inasmuch as the law presumes married parents living together are able to co-parent their children without judicial interference, there was no constitutionally sound basis to support a classification whereby married parents who are separated should be treated differently. See id. at 10-11. In this regard, the court indicated that the statute reflects an inappropriate 'implicit presumption of unfitness' attaching to separated parents solely on account of their separated status. Id. at 11."

The trial court went on to apply strict scrutiny and found that the first portion of §5325(2) is not narrowly tailored and thus cannot survive. More specifically, the court recognized that the state has "a compelling interest, exercised through its parens patriae powers, in protecting the welfare of children who are at risk of harm. In the court's view, however, Section 5325(2) does not embody a narrowly-tailored means of serving that interest because it improperly assumes, based solely on the parents' separated status, that their joint decisions regarding the raising of their children are infected by a degree of unfitness. See id. at 6 & n.3. By contrast, the court pointed to paragraphs (1) and (3) as reflecting more persuasive circumstances to allow for grandparent standing. See id. at 5."

Grandparents took direct appeal to the Supreme Court. Grandparents agreed that parents have a "fundamental right to direct the care, custody, and control of their children, thus triggering strict scrutiny under the Due Process Clause." It was also agreed that the "state interest presently implicated, protecting children's health and emotional wellbeing is a compelling one. Grandparents contended, however, that the statute is narrowly drawn to advance that interest because it favors relationships specifically with grandparents and only when the parents have been separated for six months. Grandparents maintained that this materially distinguishes the statute from the one deemed constitutionally problematic in *Troxel*—which allowed standing in favor of any person at any time, see WASH. REV. CODE §26.10.160(3)—particularly in view of the elevated importance extended-family ties have assumed in recent years due to the breakdown of the nuclear family."

Grandparents analyzed the *Hiller* matter and the importance that case places on the former §5311's underlying intent to promote grandparents continuing contact with grandchildren when a parent is deceased or the parents are divorced or separated. Grandparents implied in their pleadings that the court should approve standing on the same principles applied in *Hiller* as well as make analysis of factors such as potential interference in the parent-child bond, the bond between the grandparent(s) and child, and the child's best interest in general.

Grandparents then focused their attention on the *Schmehl* matter. Grandparents relied heavily on the court's rejection of an equal protection challenge to standing for grandparents under §5312, and urged the court to apply the same principles to their facts. Grandparents pointed out that the *Schmehl* matter has overlapping analysis of equal protection and due process regarding protection of the health and welfare of children. Grandparents referred to the decision of the General Assembly permitting petitions for custody when parents are separated and "refer to the breakdown of the nuclear family as an important factor" for that decision.

"Parents' argument largely tracked the common pleas court's analysis with regard to both the due process and equal protection inquiries. Briefly, they note it is established law that, because their parental rights are fundamental, the Due Process Clause accords those rights heightened protection. Parents countered grandparents' position that the statute is narrowly tailored, arguing: (a) there is no factual basis to presume based solely on a couple's

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separation that their children are at greater risk of harm; and (b) when presumptively fit parents agree that their children should not develop relationships with specific third parties, simply pointing to the "blood relationship" of those third parties is insufficient to justify an invocation of the state's parens patriae interest. Brief for Appellees at 28."

Parents went on to further address grandparents' argument that the statute is narrowly tailored and specifically review the issue of potential harm to the children. Parents stated that in cases pre-*Hiller*, the state's exercise of parens patriae was as a result of situations when the fitness of a parent was in question due to neglect, abuse, or the inability or failure to perform parental duties. Parents recognized that *Hiller* addressed the death of a parent and the harmful impact same would have on a child. Parents agreed that the potential for further harm exists if there is a loss of a positive and well-established relationship with the parents of the deceased. However, parents easily distinguished the issues in *Hiller* and argued that there is no abuse, neglect, or inability or refusal to perform parental duties that would cause harm to the child simply because the parents have separated.

Parents then turned to the equal protection arguments offered by grandparents and agreed that *Schmehl's* facts can be closely compared with the facts of this matter; parents, however, stated that *Schmehl* is distinguishable. Parents distinguished the holding and facts in *Schmehl* as the parents were already divorced, subject to a custody order, and did not agree regarding the relationships of the children with grandparents .Here, none of the scenarios in *Schmehl* were present, other than grandparents seeking custody. Parents contended that "no reason has been alleged why they are less capable than non-separated parents of making appropriate decisions about their child's welfare," thus, by permitting grandparents' action, they were not afforded the same equal protection standards enjoyed by parents who remain married or who live together.

Parents asserted that §5325(2) is arbitrary, and because of the assumption of unfitness created by that section merely based upon parental separation, there was no advancement of the state's inherent interest in protecting children. Parents supported their argument and suggested that "many couples who live together lead dysfunctional homes and make poor parenting decisions," and while those parents may be unfit, the statute protects them from attack simply because they live under the same roof. "Finally, parents drew support for their position from a responsive expression in *Schmehl* in which former Chief Justice Cappy opined that separation and divorce are not valid proxies for ascertaining which parents might cause harm to their children. See id. at 36-37 (citing *Schmehl*, 592 Pa. at 596-97, 927 A.2d at 192 (Cappy, C.J., dissenting))."

As the rights of parents regarding the care and custody of their children are fundamental, they are protected by the due process and equal protection guarantees afforded by the Fourteenth Amendment "In light of these factors, there is also no disagreement that, to survive a due process or equal protection challenge, Section 5325 must satisfy the constitutional standard of strict scrutiny. The basic features of strict scrutiny, relating to whether the governmental action is narrowly tailored to a compelling state interest, see *Hiller,* 588 Pa. at 359, 904 A.2d at 885-86, are well established. As expressed in *Schmehl*, the inquiries per the Due Process and Equal Protection Clauses are distinct but overlapping: pursuant to the former, the government's infringement on fundamental rights must be necessary to advance a compelling state interest, whereas under the latter it is the classification inherent in the statute which must be necessary to achieve that interest. See *Schmehl*, 592 Pa. at 589, 927 A.2d at 187.8"

The court addressed the action of the state, pursuant to its parens patriae, as one that is promoting a compelling interest to protect children from various harms and to ensure their well-be-

Former Chief Justice Cappy opined that separation and divorce are not valid proxies for ascertaining which parents might cause harm to their children

ing. Here, the state interest which is implicated is "its interest in ensuring that children are not deprived of beneficial relationships with their grandparents." The *Schmehl* and *Hiller* matters differ from this matter when viewing them from the compelling interest of protection perspective. Here, the parents were living and while they were separated, they agreed that paternal grandparents should not have contact with their children. Even though a concern was raised that grandparents would be excluded from the children's lives, it was the unified decision of the separated parents that was paramount.

Hiller and *Schmehl*, while distinguishable, do significantly inform this court regarding the threshold that must be met for grandparents to establish standing. *Hiller* determined that the common pleas courts must apply a presumption that "parents act in their children's best interests, and that such presumption applies regardless of whether the statute facially necessitates it." The court in *Schmehl* further characterized *Hiller's* holding as "narrowly tailored…because it extend[ed] standing to a limited, defined subset of grandparents " *Schmehl,* 592 Pa. at 588, 927 A.2d at187.

As the court was able to parse out the issues based upon the precedential cases cited by the parties, their only remaining analysis was "whether §5325's conferral of standing to grandparents to prosecute a complaint can withstand strict scrutiny." As established in this matter, absent a showing of abuse, parents are assumed to be fit as well as capable of making appropriate decisions for their children, even when separated for a period of at least six months, thus greatly diminishing the state interest in

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allowing a third party to intrude in the family sphere. Because the state interest was so greatly diminished based upon these principles, this court determined that the first section of §5325(2) is not narrowly tailored to compelling governmental interest, cannot survive strict scrutiny "*and, as such, it violates the fundamental rights of parents safeguarded by the due process clause.*" (emphasis added)

Finally, the court notes that this determination does not apply to the entirety of §5325(2). Because parents can commence divorce proceedings before they are separated for six months, only the first section of §5325(2) is unconstitutional. This court applies the Statutory Construction Act and its general policies to sever the first section of §5325(2) and leaves the remainder, as well as §5325(1) and (3).

CASE NOTE AUTHOR'S EDITORIAL COMMENTS

In this author's opinion, the Supreme Court's affirmation of the trial court's decision was appropriate. Allowing grandparents to file an action for custody under the first section of §5325(2), thereby intruding upon the nuclear family unit, permits total disregard of the parents' unified decision to not allow contact. The parents have made the decision, and to override that decision because the parents have chosen to separate is a violation of their very basic rights. The separated parents are no less capable of making decisions for their children than parents in an intact family.

This case creates a question as to the remaining section of 5325(2). Can that section withstand strict scrutiny when the divorcing or divorced parents remain unified regarding the relationships their children should or should not have with grandparents? Why would we allow the decisions made by presumably fit parents who are divorcing or have divorced to be disturbed?

This decision opens the door for other situations with parents who are not separated, divorcing or divorced. What do we do with grandparents whose own children disagree with their continuing contact with the child if the other parent is not involved in the child's life? Does the "participating" parent have the only say? Do we have to determine the opinion or decision of the "non-participating" parent? What if the parties were never in a relationship and the "non-participating" parent, whose rights haven't been terminated, isn't aware of the child's existence? Who then gets to make the decision regarding contact with grandparents?

Grandparents have increasingly become an integral part of many children's lives, and there are so many benefits that come from their relationships. In many families, intact or not, the grandparents provide care in all forms. Grandparents are often helping to raise their grandchildren, and while this is a wonderful relationship in most cases, there are scenarios when that relationship needs to be severed. Absent abuse, neglect and abandonment scenarios, when the parents decide jointly that the relationship with grandparents is no longer appropriate, their decision needs to be respected.

USE CAUTION WHEN ASSESSING POTENTIAL CONFLICT ISSUES
BY ALEXIS K. SIPE, ESQ.

E.R. v. J.N.B., 129 A.3d 521 (Pa. Super. 2015).

SUMMARY

Lower court decisions shall not be disturbed upon appeal provided that the lower court competently addressed all factors relating to custody and assessed credibility determinations of the parties and evidence; due process requirement of a fair trial necessitates disqualification of counsel upon showing that prior representation of the opposing party creates a risk of cross contamination of confidential information which may prove detrimental to the former client.

In this decision, the Superior Court of Pennsylvania (Lazarus, and Wecht, JJ; Opinion by Strassburger, J) affirmed the trial court's order granting J.N.B.'s (hereinafter referred to as "mother") petition for modification of custody and disqualifying counsel of E.R. (hereinafter referred to as "father"). The Superior Court concluded that a trial court's findings of fact and determinations regarding credibility and weight of evidence will not be disturbed when supported by competent evidence within the record. The Superior Court also concluded that when circumstances exist whereby an attorney's prior representation of a now opposing party creates a substantial risk that confidential information may be used in the current client's favor in present litigation, disqualification is necessary to ensure the former client receives the fair trial required by due process.

In this case, the parties are the natural parents of the subject minor child born on June 12, 2010. Father commenced the underlying action on April 12, 2011, by filing a complaint for custody. The parties agreed to settle the matter as follows: the parties shared legal custody with mother exercising primary physical custody and father exercising partial physical custody. Father's custodial periods consisted of alternate weekends and one overnight visit during the week following his custodial weekend.

On June 27, 2011, father filed a petition for contempt and modification, which he subsequently withdrew. On Feb, 12, 2012, father again filed a petition for contempt and modification. On March 5, 2012, following a custody conference, the parties agreed to an interim order that expanded father's partial physical custody period to Sunday evening through Tuesday evening of each week. The interim order was adopted by the parties as a final order on Aug. 1, 2012.

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On April 14, 2013, father petitioned to modify custody seeking shared physical custody of the child. On May 14, 2013, Attorney Maher entered his appearance on behalf of father. On June 25, 2013, a status conference was held, at which time father withdrew his petition for modification. On the same day, mother petitioned for the disqualification of Attorney Maher on the basis that he had represented mother on two prior unrelated matters, and as a result, possessed confidential knowledge of her finances and personal life that were relevant to the parties' ongoing custody and support disputes. On June 27, 2013, the trial court granted mother's petition for disqualification and precluded Attorney Maher from representing father.

From July 10, 2013 to Dec. 2, 2013, Attorney Maher disputed the disqualification and preclusion ruling. A motion for reconsideration was filed with the trial court and was denied. A notice of appeal to the Superior Court was filed and quashed as interlocutory. A motion for reconsideration was subsequently filed with the Superior Court and denied. Attorney Maher ultimately filed a petition for allowance of appeal with the Pennsylvania Supreme Court, which was also denied.

Following the status conference on June 25, 2013, mother filed a petition for modification. Father responded by filing an emergency petition for special relief on July 15, 2013. Mother filed a petition for contempt on July 16, 2013, alleging that Attorney Maher had violated the court's June 27, 2013, order by filing motions on father's behalf as well as contacting mother's counsel with a proposed settlement agreement. On Aug. 28, 2013, mother filed an amended petition for contempt, to which Attorney Maher filed a response.

On Sept. 6, 2013, a hearing was held on mother's contempt petitions and the response thereto. On Sept. 18, 2013, the case proceeded to a pretrial conference on mother's petition for modification. By order dated Sept. 26, 2013, the court directed mother and father to submit to psychological evaluations, with which mother alone complied. The trial court, by order dated Sept. 27, 2013, held Attorney Maher in contempt and ordered him to pay a fine of $250 plus attorney's fees.

The party's custody trial commenced on Dec. 3, 2013. Mother appeared represented by counsel while father proceeded pro se. At trial, the lower court heard testimony from mother, father, and father's mother. On Dec. 4, 2013, Lehigh County Judge Edward D. Reibman entered an order granting primary physical custody to mother and partial physical custody to father.

On Jan. 3, 2014, father, through Attorney Maher, filed a timely appeal raising the following issues:

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1.Whether the trial court committed an error of law and/or an abuse of discretion in precluding father's counsel from representing him in this matter due to an alleged conflict pursuant to Pa.R.P.C. §1.9.

2. Whether the trial court committed an error of law and/or an abuse of discretion by granting mother's petition for modification of custody.

In reviewing the issue of disqualification of counsel, the Superior Court noted:

> When reviewing a trial court's order on disqualification of counsel, we employ a plenary standard of review. Courts may disqualify attorneys for violating ethical rules. On the other hand, courts should not lightly interfere with the right to counsel of one's choice. Thus, disqualification is appropriate only when both another remedy for the violation is not available and it is essential to ensure that the party seeking disqualification receives the fair trial that due process requires.
> *Webster v. Lancaster Newspapers, Inc*., 878 A.2d 63, 80 (Pa. Super. 2005) (citations omitted).

The trial court found that that an actual conflict of interest existed in this case due to Attorney Maher's violation of Rule of Professional Conduct 1.9(a), which provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." The trial court explained its determination as follows:

The Explanatory Comment to [Rule of Professional Conduct 1.9(a)] states in pertinent part as follows:

- After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule.
- Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.

Mother testified before the trial court and indicated that, during he course of Attorney Maher's representation of her in a PFA action against father, as well as in an unemployment compensation matter, he learned of her emotional background and limitations as well as her financial background, all of which would be relevant in her custody and support actions against father. Mother indicated she felt that Attorney Maher's representation of father was a breach of her trust and she had not consented to said representation.

The Superior Court agreed with the trial court's analysis and went on to state that "under these circumstances, Attorney Maher's prior representation of mother poses a substantial risk that confidential information may be used in father's favor in the present litigation. Disqualification of Attorney Maher was necessary to ensure that mother received the fair trial that due process requires. *Weber, supra*."

In moving on to review the issue regarding the granting of mother's petition for modification of custody, the Superior Court noted that the well-settled standard of review is as follows:

In reviewing a custody order, our scope is of the broadest type and our standard is abuse of discretion. We must accept findings of the trial court that are supported by competent evidence of record, as our role does not include making independent factual determinations. In addition, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge who viewed and assessed the witnesses first hand. However, we are not bound by the trial court's deductions or inferences from its factual findings. Ultimately, the test is whether the trial court's conclusions are unreasonable as shown by the evidence of record. We may reject the conclusions of the trial court only if they involve an error of law, or are unreasonable in light of the sustainable findings of the trial court.

Under these circumstances, Attorney Maher's prior representation of mother poses a substantial risk that confidential information may be used in father's favor in the present litigation.

The court further stated, "When a trial court orders a form of custody, the best interest of the child is paramount." S.*W.D. v. S.A.R.*, 96 A.3d 396 (Pa. Super. Ct.) (citation omitted). The factors to be considered by a court when awarding custody are set forth at 23 Pa.C.S. §5328(a).

The trial court, in its analysis, determined none of the factors to be in favor of father. Conversely, the court found that a number of factors, specifically 3, 4, 10, 12 and 16, weighed against father. With respect to those factors, the trial court explained that father had only been involved peripherally in performing parental duties on behalf of the child, due in large part to the partial custody schedule; however, the court determined that there was no indication that father had participated in the child's therapy sessions for her physical disability, or that "he has the desire, ability, or

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would be appropriate to care for [child] for any length of time." Supplemental Trial Court Opinion, 3/20/2015, at 3. In weighing the factors against father, the trial court took both father's admitted mental health issues, as well as his refusal to comply with a court order for a psychological evaluation, into consideration. *Id.*

Finally, the trial court found that father was "less than forthcoming" regarding his sources of income and "offered no evidence that he had adequate financial resources to care for the child." *Id. at 5.*

By contrast, the trial court determined that the majority of factors, 1, 2, 3, 4, 5, 9, 10, 12, and 15, weighed in favor of mother. The court found that mother was gainfully employed and had demonstrated a consistent ability and sincere willingness to care for the child's daily needs, including her physical therapy. Id. at 3, 4. Further, the court found that despite the high level of conflict and allegations of abuse between the parties, mother was more likely to encourage a positive relationship between the child and father. Id. at 5. The trial court also favorably noted mother's willingness to follow the court's orders. *Id*.

In concluding its analysis, the trial court determined that the remaining factors were either inapplicable or did not weigh in favor of either parent. Further, with respect to factor 13, the trial court noted that there was a high level of conflict between the parties.

Relying upon the stated standard of review, the factors to be considered by the court, as well as the trial court's record, the Superior Court of Pennsylvania affirmed the trial court's order granting mother's petition for modification. The Superior Court determined that the trial court's findings and determinations regarding credibility and weight in applying the custody factors were supported by competent evidence in the record and should therefore not be disturbed.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS

The Superior Court reached a logical and appropriate conclusion in this matter. When a trial court has clearly and thoughtfully taken all custody factors into consideration based upon thorough assessment of credibility of witnesses and evidence presented and has apportioned the appropriate weight upon the same, a higher court should not disturb the ultimate conclusion reached. To do so would allow a higher court to ineffectively step into the role of the fact finder due to lack of first-hand observation and assessment of witnesses and evidence. Such a result would commence a slippery slope of disgruntled litigants seeking out a second opinion that may very well be unwarranted. Said result could be synonymously illustrated as a child running away to a grandparents' home when the child doesn't get his or her way at home.

This case also serves as a good reminder of the caution required when assessing potential conflict issues. Due to the high bar of standards set for our profession, coupled with the importance of the matters we handle, it is best to err on the side of caution when a possible conflict arises. Not only could a misstep harm a client, opposing party, or a child or other individual at the heart of the litigated matter, we could also subject ourselves to disciplinary action and scrutiny, all of which could prove to be incurable. There is no case, retainer, or client that justifies the potential risks associated with the mishandling of conflicts.

ALWAYS APPLY THE BEST-INTERESTS STANDARD
BY ASHLEY P. MURPHY.

In re K.D., 144 A.3d 145 (Pa. Super. 2016).

SUMMARY

The Superior Court of Pennsylvania (Dubow, Mundy, and Strassburger, JJ.) vacated the Court of Common Pleas of Lackawanna County's (Wright, J.) decision to grant grandmother's adoption petition and remanded to the trial court with instructions to grant the pre-adoptive parent's adoption petition. The Superior Court determined that it was in the child's best interests for pre-adoptive parents to adopt the child as (1) there was undisputed evidence that the child was traumatized by her visits with grandmother; (2) Grandmother consistently showed poor judgment when attempting to meet the child's needs; and (3) the child was bonded to and doing very well in the care of pre-adoptive parents, having lived with them for most of her life.

FACTUAL AND PROCEDURAL HISTORY

When the infant child was approximately 3 months old, Youth and Family Services (the agency) removed the child from her home as she had suffered severe chemical burns resulting in legal blindness while in her mother's care. The child had multiple eye surgeries and extensive post-operative care, including multiple eye drops a day and various eye patches. At the time of her injury, the child was living with her mother, and her grandmother, E.D. (grandmother). After an investigation, the agency determined that the eye injury was "non-accidental" and determined the mother and grandmother to be "indicated" perpetrators of the child abuse.

The child was adjudicated dependent and placed with a family member. The family member asked the agency to remove the child from her care as she found it too stressful to care for the child and have to communicate with the child's mother. The child was ultimately placed with D.S. and L.S. (pre-adoptive parents), who were trained to care for medically fragile children. The child remained with pre-adoptive parents for three and a half years who provided high-quality medical care and a loving home for the child.

The child's mother voluntarily relinquished her parental rights, and the trial court terminated the parental rights of the child's father, resulting in a permanency goal of adoption of the child. Grandmother was provided with a two-hour supervised visit each week with the child. She appealed her child abuse "indicated" status, and the finding was expunged. Grandmother was then permitted to have four-hour visits each week with the child, but the length of said visits was never extended due to concerns expressed in visitation reports.

Pre-adoptive parents filed a report of intention to adopt the child pursuant to 23 Pa.C.S. §§2530 and §2531(c) and filed a petition for adoption approximately one month later. The agency filed a Petition to Intervene, which the court granted. Grandmother filed a response to pre-adoptive parents' adoption petition and a counterclaim for adoption. Both the agency and pre-adoptive parents filed preliminary objections asserting that grandmother had not intervened properly. Grandmother subsequently filed her own petition for adoption and a petition to intervene. The trial court denied the preliminary objections but never issued an order permitting grandmother to intervene or held a hearing on her petition to intervene.

At an evidentiary hearing on both petitions to adopt, pre-adoptive parents presented the testimony of the pre-adoptive mother, former and present agency caseworkers, and an in-home nurse. Grandmother presented the testimony of the relative with whom the child was initially placed as well as her own testimony. The child's guardian ad litem testified that it was in the child's best interest to stay in the pre-adoptive parent's home. The trial court ultimately granted grandmother's petition to adopt indicating that although the child was more attached to her pre-adoptive parents than anyone, grandmother was a blood relative which was "a major issue." Pre-adoptive parents and the agency filed timely appeals.

ANALYSIS

Pre-adoptive parents raised four issues on appeal:

(1) Did the trial court err as a matter of law in denying pre-adoptive parents' petition for adoption when the court did not analyze the child's best interests, did not consider her special medical needs or emotional needs, and issued a decision contrary to the evidence and recommendations of the agency and guardian ad litem and the child's court-appointed special advocates?

(2) Did the trial court err as a matter of law in overemphasizing grandmother's status as a blood relative by making it the controlling factor?

(3) Did the trial court err as a matter of law in permitting grandmother to participate in the adoption proceedings when she was not granted leave of court to intervene in the adoption proceedings and lacked standing to adopt the child?

(4) Did the trial court err as a matter of law in failing to

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consider whether the statements in grandmother's adoption petition were true, whether the child's welfare and needs would be promoted by grandmother's adoption, and whether grandmother met the requirements of the Adoption Act when Section 2902 of the Adoption Act requires a court to make said findings in permitting an adoption?

The agency raised six issues on appeal:

(1) Whether the trial court erred by permitting grandmother to participate in the adoption proceedings without a hearing or order permitting intervention, by not dismissing grandmother's counter-petition for adoption and by not dismissing grandmother's petition for adoption for failure to have the required attachments;

(2) Whether the trial court erred by not performing a best interests of the child analysis and by not determining if the three requirements of Section 2902 were met;

(3) Whether the trial court erred by not considering the concerns about grandmother raised by the agency and the child's special advocates;

(4) Whether the trial court erred by concluding the agency did not increase visitation when the evidence showed that the child was dependent and all aspects of visitation were subject to the three months permanency review hearings of the juvenile court;

(5) Whether the trial court erred by determining that grandmother as an eligible foster parent was on "equal footing" to pre-adoptive parents when it makes clear that the foster parents have a subordinate and temporary status;

(6) Whether the trial court erred by stating that but for the indicated status, grandmother would have been considered for foster care and the child placed with her when undisputed evidence shows that grandmother's home would not be approved for placement when the child's mother, who was and still is indicated, was a member of the household.

The Superior Court began by stating that it had the broadest discretion in reviewing appeals from adoption decrees and thus, where the trial court has abused its discretion and the record is sufficient, the Superior Court may, rather than remand the case, substitute its judgment for that of the trial court and decide the merits of the case. The Superior Court cited *In re B.L.L.*, 787 A.2d 1007, 1015 (Pa. Super. 2001) when noting that the proceedings in an adoption hearing are unique as compared to custody hearings as they involve parties, experts, investigators, and non-parties to a greater extent, but ultimately said proceedings are subject to the best interest of the child standard.

The Superior Court first addressed pre-adoptive parents' third issue and the agency's first issue together as they both challenged the trial court's consideration of grandmother's adoption petition without first holding a hearing regarding grandmother's intervention. The Superior Court noted that after pre-adoptive parents filed their adoption petition, grandmother responded with an answer and counterclaim petition for adoption. Pre-adoptive parents and the agency filed preliminary objections to the counterclaim and petition for adoption arguing that grandmother was not a party, had not filed a petition to intervene, and had not attached the required documentation to the adoption petition. Grandmother subsequently filed a petition to intervene and a separate adoption petition. The trial court never entered an order granting grandmother's petition to intervene but ultimately stated that it had granted said request. The Superior Court, citing *In re J.E.F.,* 902 A.2d 402 (Pa. 2006), concluded that because grandmother filed a separate petition for adoption, the trial court's consideration in one proceeding of all of the parties' requests for relief was proper and in the interest of judicial economy as anything else would only further delay the child's adoption.

The Superior Court then addressed pre-adoptive parents' and agency's remaining issues together. The Superior Court noted that both Pennsylvania's Adoption Act and case law require a court deciding a petition for adoption to base its decision on the "physical, mental, and emotional needs and welfare of the child." Section 2724(b); *In re Adoption of A.S.H.*, 674 A.2d 698, 700 (Pa. Super. 1996). Stated another way, the court must make its decision on a case-by-case basis after consideration of "all factors that bear on the child's physical, emotional, intellectual, moral and spiritual well-being," and the "best interest of the child." *Id.* While the preservation of the family is the desired goal in custody matters, it should not be elevated above other factors when considering the best interests of children but weighed in conjunction with other factors. See *In re Adoption G.R.L.*, 26 A.3d 1124, 1127 (Pa. Super. 2011). Moreover, the trial court must consider statements and opinions of the guardian ad litem when determining the best interests of the child. *Adoption of D.M.H.*, 682 A.2d 315, 322 (Pa. Super. 1996).

In the instant matter, the trial court focused on the fact that grandmother was a "blood relative" and the alleged inaction of the agency to facilitate increased visitation with grandmother and the child. However, the trial court ignored the following un-rebutted evidence that established it was not in the child's best interest for grandmother's petition for adoption to be granted:

(1) Numerous witnesses testified that visits with grandmother traumatized the child;

(2) Grandmother's inability to provide for the child's basic medical care and to address the child's other needs;

(3) Grandmother's self-centered view of her role in the child's life;

(4) Grandmother's difficulties raising the child's mother;

(5) Pre-adoptive parents' close relationship with the child;

(6) The recommendation from the guardian ad litem and CASA workers that pre-adoptive parents should be permitted to adopt the child.

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CASE NOTES
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Based on the undisputed testimony and complete record, the Superior Court reversed the trial court's grant of grandmother's petition to adopt and order that the trial court grant the pre-adoptive parent's petition to adopt. Thus, the court vacated and remanded.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS

The Superior Court noted that even in a proceeding where a biological relative is available to adopt a child, the best interests standard should always be applied. While preserving the family unit is the ultimate goal in custody proceedings, said goal has to be considered in conjunction with the best interests factors of the child. The takeaway of this case is the fact that a party is a biological relative should not be given weighted consideration in the analysis of the best interests of the child, let alone be the sole consideration. In the instant case, there was substantial undisputed evidence that it was in the best interest of the child, who had special medical needs, to be adopted by her pre-adoptive parents.

Family Law Section Winter Meeting Jan. 13-15, 2017, in Philadelphia

The PBA Family Law Section Winter Meeting is Jan. 13-15, 2017, at the Loews Philadelphia Hotel. It features the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers inaugural Albert Momjian Memorial Lecture Series, "Identifying and Dealing with Personality Disorders with Opposing Counsel, Clients and Judges in the Family Court" with speaker Deborah O. Day, Psy.D. She is a renowned author, forensic psychologist, and frequent lecturer who will share her perception of how family lawyers in daily practice can best address those who exhibit personality disorders.

The AAML will provide refreshments immediately following the session, and the section council will meet beginning at 3:30 p.m. The opening reception will be held in the hotel beginning at 7 p.m. with entertainment provided by the Untouchables Band.

Case-law update will be Saturday morning, followed by a judges' round-table. During lunch, the Eric David Turner Award will be presented to *Pennsylvania Family Lawyer* editor-in-chief, David S. Pollock., and keynote speaker will be Stacey Pratt McDermott, Ph.D., University of Illinois Springfield, who will talk about Abraham Lincoln's experience trying divorce cases in Illinois.

Saturday afternoon will feature workshop sessions on ethics, custody evaluations, determining the worth of small and family businesses, and the ever-evolving changes in how support is established and collected by the various domestic-relations sections that form part of the Pennsylvania Child Support Enforcement System. The Saturday reception will be cocktails and hors d'oeuvres so participants can venture out to enjoy the variety of restaurants. Return after dinner for a nightcap on the 33rd floor overlooking the city.

On Sunday, the closing plenary session on ways to sharpen trial skills from a procedural and evidentiary viewpoint is based on a program presented to widespread acclaim by judges in the civil division of the Philadelphia Court of Common Pleas.

CLE materials for the meeting are offered three ways: a memory stick version for $10; traditional printed materials for $50, both available at registration; or, for no charge, a URL secure link emailed prior to the meeting for downloading and printing course materials.

This brochure has more information. Register by Dec. 23.

BIBLIOGRAPHY OF DIVORCE ARTICLES IN *AM. JUR. PROOF OF FACTS, AM. JUR. TRIALS,* AND *CAUSES OF ACTION*

COMPILED BY JOEL FISHMAN, PH.D., M.L.S., fishman@duq.edu

This is a second bibliography to bring to the reader's attention practice-oriented materials that are sometimes overlooked in conducting legal research (see 38 *Pennsylvania Family Lawyer* Issue 122 (Issue no. 2, June 2016) for the first bibliography). The three titles that are sources for the bibliography are published by West/ Thomson Reuters and available in Westlaw and kept up with supplements. The date in parenthesis is when the article was originally published. *Am. Jur. Proof of Facts 1st-3d* is an ongoing serial publication of multiple volumes a year produced now in the third series. *Proof of Facts* provides checklists and questions/ answers for discovery. *Am Jur Trials* provides information on specific topics for trial practice from pre-trial to post-trial activities. Some of the articles can be as much as 400+ pages on a specific topic. *Causes of Action* 1st and 2nd series provides information on bringing a tort action into court providing background information for both plaintiff and defendant as well as giving sample cases and sample complaints. The complaints are very useful for those who can find a COA topic.

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Upcoming PBA Famly Law Section Meetings

2017 Winter Meeting • Jan. 13-15, 2017
Loews Philadelphia Hotel

2017 Summer Meeting • July 13-16, 2017
Omni Richmond, Richmond, Va.

2018 Winter Meeting • Jan. 11-14, 2018
The Roosevelt New Orleans, New Orleans, La.

2018 Summer Meeting • July 12-15, 2018
Hotel Hershey