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View From the Chair

Our Family Law Compass: Where Kindness and Advocacy Meet

By Christine Fitzgerald



Becoming Chair of the Family Law Executive Committee was one of the greatest highlights of my life. This section welcomed me with open arms like a warm hug and filled me with pride that you have entrusted me in this role. One of my first tasks as Chair was to attend the New Jersey State Bar Association's Chair Training. I again was filled with pride as the State Bar highlighted our sections' accomplishments and successes in every category – social events, advocacy, fundraising, seminars, and publications – and our strength in our community. I was even more elated when another Chair mentioned that he was recently tangentially involved in a divorce matter and he was so impressed with the professionalism, hard work, and collegiality between the family lawyers in that case. This is who we are at our core, and it comes from the extraordinary line of Chairs — mentors, colleagues, and now friends — that came before me and shaped what our Section stands for.

From my earliest days on FLEC, I understood that this work matters. We handle cases for real people and real families. We work on important legislation that impacts children, families and our colleagues. Some of our accomplishments are alimony reform, changes to the law on elective share, and, through the Putting Lawyers First Task Force, bringing attorney wellness into the center of our collective focus. Every one of those achievements came from members who believed, as I do, that we can improve the law and the way we practice it at the same time. That is the spirit I hope to bring to this year.

The Custody Statute Remains Our Priority

No issue demands more of our attention right now than the new custody statute. While its case-by-case analysis has some value, the heightened burden it imposes effectively eliminates

reunification therapy, makes even basic therapy harder for children to access, and forces children into impossible positions between their parents. That is unacceptable, and our Section will not be quiet about it.

Building on the foundation laid by the Custody Task Force, we will carry this work forward through advocacy, proposed rule changes, and legislative engagement. We continue to work on educating each other on the amendments and how it affects our everyday practice while also continuing to strategize on how we can make the law better for children. At the center of everything we do is a simple truth: the children are the reason we do this work, and we owe it to them to get this right.

Continuing and Expanding Our Committee Work

This year we will continue to advance the initiatives that have long defined our Section's ambition: the ADR Task Force, our Elective Share and Fundamental Right to Remarry committees, and a strengthened county liaison program that keeps us connected to practitioners across New Jersey. We remain committed to being a voice in Trenton, with our Legislative and Advocacy Committees continuing their important work on the issues that matter most to families and the lawyers who serve them.

We have also launched two new committees this year. The first is a Probation Committee, created because we all know the frustrations that dealing with Probation can bring. This committee will work directly with Probation to streamline communication and make the system more workable for practitioners and families alike.

The second is a Best Practices Committee, tasked with examining our rules on time goals and case management and identifying where they can be improved. Most immediately, this committee has been asked to issue interim recommendations on the "blitz" programs being rolled out county by county, with an eye toward ensuring that attorney wellness and access to justice remain at the forefront of those policies — not an afterthought.

How We Practice Matters as Much as What We Practice

Beyond substantive law and policy, I want this year to reflect kindness, professionalism, and inclusion. We all carry demanding, busy lives, and it is easy to let that pressure define how we treat one another. I am asking every member of this Section to extend a little more grace this year — a phone call instead of an email, a kind word before a deadline, a pause before responding when frustration creeps in. These small choices define our profession as much as any statute or rule ever will.

I also want to make this a year of open doors, especially for the younger generation of family lawyers. Being part of this community made me a better lawyer — more confident, more connected, and more inspired to do this work well. I want that same experience available to every young attorney entering our field, and I encourage you to get involved through our Young Lawyers Subcommittee. The future of this Section depends on bringing new voices into the room, and I want us all to show them why this is such a wonderful profession and Section to be part of.

Save the Dates

Mark your calendars for our Annual Family Law Symposium on Jan. 22 to 23, where, continuing this year's Back to Basics theme, we will dig into the issues our members handle every day and the nuances that come with them. And this March, we return to Puerto Rico for our Family Law Retreat, March 17 through 21, at La Concha — four days of substantive programming, camaraderie, and, yes, some fun in the sun.

This Section shaped me into the lawyer I am today, and it is my hope that this year we continue to shape one another — through shared knowledge, mutual support, and a shared commitment to why we chose this profession in the first place. My door is always open, and I look forward to another year of doing this important work alongside all of you. ■

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The opinions of the various authors contained within this issue should not be viewed as those of the New Jersey Family Lawyer or the New Jersey State Bar Association.

Meet the 2026–2027 Family Law Section Executive Committee Officers

Christine C. Fitzgerald – Chair



Christine C. Fitzgerald is a partner at SeidenFreed, LLC. She is certified by the Supreme Court of New Jersey as a Matrimonial Law Attorney and is a Fellow of the American Academy of Matrimonial Lawyers. Christine serves as Chair of the Family Law Executive Committee of the New Jersey State Bar Association and President of the Hudson County Bar Association.

Christine earned her undergraduate degree from Seton Hall University and her Juris Doctor from New York Law School. She served as a judicial law clerk to the Hon. Thomas P. Zampino, J.S.C. (ret.), in Essex County. She is admitted to practice in New Jersey, New York, the U.S. District Court of New Jersey, and the Supreme Court of the United States.

Christine has served on the Family Law Executive Committee since 2011, including as Co-Chair of the Legislative Committee and Hudson County Liaison. She previously served as Co-Chair of the Hudson County Bar Association's Family Law Committee and was named the HCBA's 2018 Family Lawyer of the Year. She is a former Chair of the Supreme Court of New Jersey's District VI Ethics Committee and serves as an Early Settlement Panelist for Bergen County.

She has been appointed by the President of the NJSBA to serve on the Ethics Diversionary Program Committee and Amicus Committee. She previously served on the Putting Lawyers First Task Force and as General Counsel of the NJSBA. Christine regularly lectures and writes on family law topics and has written articles published in *New Jersey Family Lawyer.*

Robert A. Epstein – Chair-Elect



Bobby Epstein is a partner with Manzi Epstein Lomurro & DeCataldo, LLC, which has offices in Montclair and Hoboken. He has been an active member of the Family Law Executive Committee for several years and serves as Chair-Elect for the 2026–2027 term.

A frequent speaker and writer on family law topics, Bobby has presented and moderated at the Family Law Symposium, State Bar Convention, Hot Tips, and other State Bar and ICLE seminars. He has contributed numerous articles to *New Jersey Family Lawyer* and has been involved in published and unpublished Appellate Division matters.

Cassie Murphy – Vice Chair



Cassie Murphy is a partner at Paone, Zaleski & Murphy, with offices in Red Bank and Woodbridge. She is a Certified Matrimonial Law Attorney, a Fellow of the American Academy of Matrimonial Lawyers, and is admitted to practice in New Jersey, New York, and the District of Columbia.

Cassie is a long-standing voting member of the Family Law Executive Committee of the New Jersey State Bar Association and serves as Vice Chair for the 2026–2027 term. She is an appointed member of the NJSBA Amicus Committee and was appointed by the Supreme Court of New Jersey to the Matrimonial Law Certification Committee, which evaluates applications for certification. She also is serving a three-year term as an appointed member of the Monmouth County Family Law Committee.

Cassie was selected as one of the Top 50 Women Super Lawyers in New Jersey in 2025 and 2026. She is an associate editor of *New Jersey Family Lawyer* and a regular speaker at seminars on family law. She is a member of the Middlesex County, Monmouth County, and New Jersey State Bar associations.

Rita M. Aquilio – Treasurer

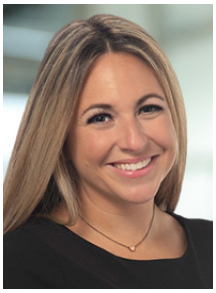


Rita M. Aquilio is Treasurer of the Family Law Executive Committee for the 2026–2027 term and a member at Lawrence Law LLC, with offices in Watchung and Red Bank. She was admitted to the New Jersey State Bar in 1999. Rita is Immediate Past President of the Somerset County Bar Association and Immediate Past Chair of the District XIII Ethics Committee.

Rita serves as an Early Settlement Panelist in Somerset County and as a member of the Somerset County Family Practice Committee and the NJSBA Appellate Practice Committee. She has lectured extensively for the New Jersey Institute of Continuing Legal Education. Rita is a court-approved R. 1:40 Economic Mediator, was trained as a divorce arbitrator through the American Academy of Matrimonial Lawyers, and is a collaboratively trained divorce attorney. She has been selected to the New Jersey Super Lawyers list annually, including for 2026.

Rita served for several years as Co-Chair of the American Bar Association's Family Law Litigation Committee and also served as Co-Chair of the ABA Section of Alternative Dispute Resolution. She is an ABA Presidential Nominee to serve as a Section Advisor to the ABA Drafting Committee on updates to the Uniform Transfers to Minors Act. She also has served on the Board of Editors for the ABA Section of Litigation *Appellate Practice Journal* since its Spring 2018 edition.

Jenna N. Shapiro – Secretary



Jenna N. Shapiro is a partner with Szaferman, Lakind, Blumstein & Blader, with offices in Lawrenceville, Trenton, and Summit. She earned her bachelor's degree from The George Washington University and her Juris Doctor from the Catholic University of America, Columbus School of Law. Jenna was admitted to the New Jersey and Maryland bars and the U.S. District Court for the State of New Jersey in 2010. She is a certified and trained mediator, is certified in Collaborative Law, and is a trained Parenting Coordinator. She is a member of the Monmouth Bar Association and the Middlesex County and Mercer County Bar associations.

Jenna has been an active member of the Family Law Executive Committee since 2014. She previously served as Young Lawyers Chair and Chair of the Legislative Committee before becoming Secretary for the 2026–2027 term. Jenna frequently lectures on family law topics and has lectured and moderated at the Family Law Symposium, State Bar Convention, Hot Tips, ICLE seminars, and Inns of Court presentations. She has been selected to the New Jersey Super Lawyers list as a Rising Star or Super Lawyer annually since 2011, including for 2026.

Cheryl E. Connors – Immediate Past Chair



Cheryl E. Connors is a partner with Tonneman & Connors, LLC in Little Silver and serves as Immediate Past Chair of the Family Law Section for the 2026–2027 term. She is a member of the Solo and Small-Firm Section of the New Jersey State Bar Association and has served on the New Jersey Supreme Court Family Practice Committee since 2017. In 2016, Cheryl appeared before the New Jersey Supreme Court on behalf of the NJSBA in *In re Adoption of a Child by J.E.V.*

Cheryl is a member of the Monmouth Bar Association, Middlesex County Bar Association, and Collaborative Divorce Professionals of New Jersey. She serves as a Matrimonial Early Settlement Panelist in Middlesex County and an Intensive Settlement Panelist in Monmouth County and is a frequent author and lecturer on family law topics.

Cheryl was selected for inclusion in the New Jersey Super Lawyers® Rising Stars list from 2011–2019, the New Jersey Super Lawyers® list from 2020–2026, and the Best Lawyers in

America® list in 2025 and 2026. She received the Martin S. Goldin Family Law Award from the Middlesex County Bar Association in 2013. From 2005–2006, she served as a judicial clerk to the Honorable Barry T. Albin, Associate Justice of the Supreme Court of New Jersey.

She earned her Bachelor of Arts from Cornell University, with distinction in all subjects, and her Juris Doctor from Seton Hall University School of Law, *magna cum laude*.

Editor-in-Chief's Column

S4510: Not so Fine in Theory and Certainly Not so Fine in Practice

By Ronald G. Lieberman

By now, everyone practicing in this area has read S4510, which dramatically amended R. 9:2-4. They've talked about it and probably argued about it at least once. The intent behind the statute is easy enough to agree with. Child safety matters. Children's voices matter. Courts should be careful about the kinds of therapeutic interventions they order. None of that is controversial.

The difficulty is not what the statute says in the abstract. The difficulty is what it looks like when you are actually sitting in your office with a client trying to make decisions in a real case. Take something as basic as whether a child should speak to the court. That used to be a relatively rare situation, handled cautiously and usually only when there was no other way to get reliable information. Now, with the emphasis the statute places on the child's voice, it feels like it is going to come up far more often.

Clients are already asking the question: Should my child talk to the judge? There isn't a clean answer. If you say yes, you are potentially placing that child directly into the middle of the litigation in a way that cannot be undone. If you say no, you run the risk that the court may later view that decision as limiting relevant information. The statute tells us that the child's perspective matters, but it does not tell us how to navigate that decision with any precision.

The same problem shows up with therapy. For years, when a case became particularly difficult, especially where there was strain in a parent-child relationship, the default was to try to get the family into some form of therapy. It was not a perfect solution, but it was often the only practical one.

Now the statute introduces a different framework. Courts are directed not to order therapy unless there is some showing that it is supported by generally accepted and scientifically valid principles. That sounds sensible at a policy level. In practice, it raises more questions than it answers.

What therapy meets that standard? Who is going to testify about that? Are we realistically expecting Family Part judges to evaluate competing claims about therapeutic methodologies? There is also the practical reality that, in certain situations, one parent can effectively prevent that kind of intervention from happening at all. Anyone who has handled a high-conflict case knows exactly how that is likely to play out.

Another issue that is going to become more complicated is the role of treating therapists. The statute contemplates input from mental health professionals, which on its face makes sense. But in actual litigation, that tends to blur the line between treatment and forensic evaluation.

A therapist who is working with a child is not acting as a neutral evaluator. Yet once their opinions become part of the record, they are often treated that way by one side and attacked as biased by the other. That dynamic is not new, but the statute arguably invites it more directly.

Domestic violence is another area where the statute's emphasis is entirely appropriate, but its practical effect needs to be acknowledged. Once domestic violence is part of the case, whether through allegations or findings, it tends to shape everything that follows. That was true before, and it will likely be even more pronounced now. For practitioners, that raises familiar but difficult questions about when and how those issues are raised, and how they will affect the trajectory of the case once they are.

Reunification-type issues are not eliminated by the statute, but they are certainly more complicated. What used to be, at least in some cases, a collaborative effort to repair a relationship is now more likely to be litigated from the outset. Before you even get to the question of what should be done, there is a threshold fight about

whether anything can or should be done at all.

None of this is to say the statute is misguided. It reflects legitimate concerns and tries to address real problems. But it also assumes a level of clarity and predictability that simply does not exist in these cases.

Custody disputes are fact-sensitive, emotionally charged, and often fluid. They do not lend themselves to rigid frameworks or easy answers. Adding additional layers of analysis—particularly where the standards are not yet well-defined—does not necessarily make those cases easier to resolve. Which brings things back to the practical question practitioners are now facing.

What Do We Tell Clients?

Because at the end of the day, that is where all of this lands. A parent sitting across from you wants to know what to do. Do we tell them to push for therapy, to involve the child, to seek a law guardian or guardian ad litem, and how do we explain to our client what happens if the other parent refuses to cooperate?

Right now, the honest answer is that we are still figuring it out. Trial courts will develop patterns. Appellate decisions will provide guidance. Over time, there will be more clarity about how these provisions are applied.

For the moment, we are in a familiar position, even if the framework has changed: making judgment calls with imperfect information, trying to protect our clients and their children, and understanding that the stakes in these decisions remain very high.

The Treatment of RSUs and Stock Options for Child Support Purposes in New Jersey

By Hon. Marcia L. Silva (Ret.)

Compensation today looks markedly different than it did a generation ago. For many professionals, a paycheck represents only a portion of total remuneration. Instead, equity awards—particularly Restricted Stock Units (RSUs) and stock options—often comprise a substantial component of annual compensation. This shift raises an increasingly common question in child support litigation: when does equity compensation constitute "income" for purposes of support? Is it at grant, vesting, exercise, sale, or tax recognition?

New Jersey's Child Support Guidelines provide the governing framework.[1] Appendix IX-B of the New Jersey Child Support Guidelines defines gross income as "earned and unearned income that is recurring or will increase the income available to the recipient over an extended period of time."[2] While stocks and bonds themselves are generally excluded as assets unless acquired to avoid support, realized capital gains and earnings are included.[3] Courts retain discretion to deviate from the guidelines upon a showing of good cause.[4]

The foundational authority addressing stock options is *Heller-Loren v. Apuzzio*, 371 *N.J. Super.* 518 (App. Div. 2004). There, the Appellate Division held that the mere vesting of stock options does not constitute income.[5] Instead, income arises when the obligor realizes an economic benefit—typically upon exercise at a gain or upon profitable sale.[6] Until realization occurs, the value remains theoretical. The court emphasized that child support calculations must reflect income actually available to the parent, not speculative appreciation.

Subsequent decisions reinforce this realization-based approach. In *Bunkers v. Snyder,*[7] the court reiterated that exercised stock options generating profit may be included as income, particularly where such awards are recurring and integral to compensation. Likewise, *Stewart v. Thomas*[8] affirmed the inclusion of vested RSUs as income where the vested RSUs functioned as earned compensation and materially increased available resources.

RSUs differ structurally from stock options. Unlike options, RSUs typically transfer shares automatically upon vesting without requiring affirmative exercise or payment of an option price. This structural distinction bears directly on realization analysis. If vesting results in immediate transfer of nonforfeitable value, the economic benefit may be deemed realized at vesting—even if the obligor elects to retain the shares rather than liquidate them.

Equally significant are *Forrestall v. Forrestall*[9] and *M.G. v. S.M.*[10] *Forrestall* instructs courts to distinguish between the equitable distribution of a marital asset and postjudgment realization of income derived from continued employment.[11] Meanwhile, *M.G.* emphasizes that courts must determine whether stock-based compensation represents postjudgment earned income or deferred compensation already distributed as property.[12] These cases guard against double counting while ensuring that postdivorce earnings are appropriately considered.

Statutory authority aligns with this framework. New Jersey statute requires courts to consider "all sources of income and assets of each parent" in setting child support.[13] The statute's broad mandate reflects a substance-over-form philosophy: compensation structured in noncash form cannot be excluded merely because it is labeled equity.

From these authorities, several guiding principles emerge. First, unrealized stock options are not income; realization occurs upon exercise at a gain or sale.[14] Second, exercised options producing profit may be included where recurring.[15] Third, vested RSUs may constitute income upon vesting when value is transferred automatically and becomes nonforfeitable.[16] Fourth, courts must distinguish between property distribution and postjudgment earnings to avoid double counting.[17]

A coherent framework thus emerges: stock-based compensation constitutes income for child support purposes when it compensates postjudgment labor and produces realized, measurable economic benefit that is recurring or materially increases available financial

resources. Conversely, a mere grant or unvested awards are not income. Realization and availability remain the touchstones.

New Jersey's approach reflects a balanced and practical doctrine. By focusing on economic reality rather than compensation labels, courts preserve fairness to obligors while ensuring children benefit from the full measure of a parent's actual earning capacity. As equity-based compensation becomes increasingly prevalent, adherence to these principles provides both predictability and doctrinal coherence in the evolving landscape of family law. ■

Hon. Marcia L. Silva served as a Superior Court judge in the Chancery Division-Family Part in Middlesex County from 2014 to 2021, handling dissolution, non-dissolution, adoption, domestic violence and juvenile delinquency matters. Prior to her appointment, she was a solo practitioner, municipal public defender and assistant prosecutor with the Middlesex County Prosecutor's Office, and she has argued before the New Jersey Supreme Court and Appellate Division. Judge Silva is a frequent NJSBA panelist on family law issues and is active in the NJSBA, Middlesex County Bar Association, Hispanic Bar Association of New Jersey and Aldona E. Appleton Inn of Court, of which she is a founding member.

Endnotes

1. *See* N.J. Ct. R. 5:6A.
2. Pressler & Verniero, Current N.J. Court Rules, Appendix IX-B to R. 5:6A ¶ 5(a) (2026).
3. *Id.* ¶ 5(b).
4. *R.* 5:6A.
5. *Id*. at 532–34.
6. *Id*. at 533.
7. No. A174510T4, 2011 N.J. Super. Unpub. LEXIS 2686, at *9–12 (App. Div. Oct. 27, 2011).
8. No. A082414T1, 2015 N.J. Super. Unpub. LEXIS 2442, at *13–18 (App. Div. Oct. 26, 2015).
9. 348 *N.J. Super.* 485 (App. Div. 2002).
10. 457 N.J. Super. 286 (App. Div. 2018).
11. *Id.* at 485–87.
12. 457 *N.J. Super.* at 302–05.
13. *N.J.S.A.* 2A:34-23(a).
14. *Heller-Loren*, 371 *N.J. Super.* at 532–34.
15. *Bunkers*, 2011 N.J. Super. Unpub. LEXIS 2686, at *9–12.
16. *Stewart*, 2015 N.J. Super. Unpub. LEXIS 2442, at *13–18.
17. *Forrestall*, 348 *N.J. Super.* at 485–87; *M.G.*, 457 *N.J. Super.* at 302–05.

Analysis

Implementing New Jersey's Custody Amendments: Guardians ad Litem as a Critical Resource

By Lynn B. Norcia and Jill Roth-Gutman

Giving Children a Voice Without Adding Pressure

The new amendments to New Jersey's custody statute, N.J.S.A. 9:2-4, significantly increase the voice of the child in custody disputes. The legislation's public policy statement clearly states that decisions concerning child custody and parenting time must consider "the expressed preferences of the child." Throughout the new statute, references are made to incorporate the child's voice into the court's decisions. If the child is determined to be "of sufficient age, capacity, and maturity," to express their reasons, and requests to speak to the court, the child "shall be granted an audience off the record and in private chambers" with the judge. If a court reaches a decision contrary to the child's stated preferences (regardless of the age or maturity of the child), the court must "specifically place on the record the factors which justify … the court's decision to disregard the child's expressed preferences."

With these new statutory mandates in place, overburdened judges will be spending an inordinate amount of time interviewing children; more than they had prior to the amendments. Though, some judges throughout the state might welcome more children attending court. Those judges may have experience working directly with children, may have practiced family law, or may want to meet the subject of the custody dispute playing out in their courtroom. However, it will still put pressure on their overflowing, backlogged dockets to bring children into court.

Giving children a voice in cases which impact their lives is a worthy objective.[1] Children should only have to voice their opinions directly to a judge when they wish to do so. In those instances, we suggest the court and family law practitioners proceed with caution before scheduling a child interview. These authors' mutual experiences of having served as law guardians, representing children in Division of Child Protection and Permanency litigation, has given us insight into the effect judicial interviews can have on children. Throughout the years and based on many cases, we have observed some children feeling empowered by the concept of speaking with a judge. These children fully embraced the opportunity to speak directly to a judge to express exactly what they wanted.[2] Conversely, this is not the case with all children. Some children feel overwhelmed, pressured by a parent or family member, or even intimidated by the process. As previous law guardians, we have witnessed the extreme negative reactions a child can have when meeting with a judge, without the child's consent and desire.

As an example, in one memorable case, the parents' attorneys demanded the child (D.D.) attend court to speak to the judge. Even after prepping D.D. thoroughly, she came into the conference room, right outside the courtroom, and hid under a table crying. She was 13 years old, neurotypical, the oldest of four children, and living with relatives. D.D. knew she needed to tell the judge the truth, and she knew the outcome would not only affect her, but also her entire immediate and extended family. The pressure was enormous. It took over an hour to calm her down to speak to the judge. Even with a personable, well-seasoned judge, with her law guardian by her side, D.D. reluctantly answered only a few questions and refused to answer the rest.

One solution to the dilemma of increasing the voice of the child while not overburdening the courts or possibly negatively impacting the child is to increase the use of guardians ad litem (GALs) pursuant to Rule 5:8B, or alternatively, the appointment of counsel for the child, pursuant to Rule 5:8A. As these two roles are often confused, it is important for litigants and the court to be mindful of the differences between them. An attorney for the child represents the child's wishes, just as law guardians within the Office of the Public Defender,

appointed pursuant to N.J.S.A. 9:6-8.23a, represent the children involved in DCPP cases.[3] By comparison, a GAL serves the court "on behalf of the child" and "act as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child."[4] Although a GAL is not the child's attorney, in the GAL's role serving the court, the GAL is able to communicate the child's preferences and concerns to the court, often obviating the necessity of a judicial interview. In cases marked by intense conflict, competing allegations, and significant emotional strain for a child, a GAL can serve a vital role. A GAL can assist the court in evaluating a child's developmental and emotional needs, and whether a child would feel empowered or stressed by the opportunity to speak to the court.

A Resource for Resolving Child-Centered Disputes

A GAL can also assist the court in deciding, in conformance with the recent amendments, whether there is "good cause" for ordering mental health therapy; and whether the child is "of sufficient age, capacity, and maturity" to engage in "scientifically valid therapy."[5] A GAL can speak to therapists, teachers, and medical professionals on behalf of the court. When parents disagree about whether their child needs special education or mental health services, a GAL can objectively reach out to teachers, child study teams, and guidance counselors to find out what services, if any, are needed and recommended. The court can then use this information in its decision making to assist the child.

A GAL can also aid the court in making determinations when a parent is refusing medically necessary therapies such as occupational, physical, or mental health therapy, mental health medication, medication compliance, family therapy, psychiatric evaluations, truancy issues, or educational accommodations which could be implemented in an Individualized Education Program or 504 plan. Some parents want services that are not needed, while others are resistant to accepting services for their child or communicating with much-needed providers and the school. Evidentiary support in either direction might be revealed through an in-depth GAL interview. A seasoned GAL can reveal either the necessity or nonessential nature of these services. Synthesizing this information from an objective viewpoint can determine the child's needs and bridge the gaps between a child, the parents, and the child's service providers and professionals.

Judges who appoint GALs use their investigative reports to sift through the noise of competing narratives and inform the court's decisions regarding custody, parenting time, and appropriate services. A GAL's investigation usually involves an in-depth look into a child's life. They may involve interviewing other relatives, guidance counselors, therapists, and teachers. GALs often conduct a home visit to each parent's home and report their findings to the court in an objective manner. A thorough investigation may include documentary evidence, such as DCPP files, medical and mental health reports, professional evaluations, school records, etc.

A qualified GAL can express the wishes of the child, while also considering whether there are adult influences on the child, masking the child's true wishes. A GAL investigation includes interviews of the child and parties as well as other people possessing personal or relevant firsthand knowledge.

If the child has made the decision to meet with the judge, an experienced GAL can walk a child through the process of what happens when they attend court, in developmentally appropriate terms, to minimize some of their anxiety about the process. Bringing a balanced and compassionate perspective on these sensitive cases is essential especially when it comes to interacting with a child.

Why GAL Appointments are a Practical Solution

Cost can play a major role in whether a GAL is appointed in a case. We urge the court and our colleagues to consider the long-term benefits of requesting the appointment of a GAL. A GAL can assist in shaping custody and parenting time long term and might result in a family returning to court less often. If both parents have limited financial means, a court can ask the GAL for an issue-focused evaluation, rather than a full assessment.

An attorney with family law experience who is appointed as a GAL understands the long-term legal complexities, challenges, and stress placed on the court and families. A credible, empathic GAL with an understanding of trauma and family systems can provide a case assessment to support the court.

Ensuring Quality and Consistency in GAL Appointments: Time for a Qualified GAL Roster

When appointing a GAL, the court should select someone with extensive family law experience, as well as

experience interviewing children (if an attorney); or someone with experience in family forensic matters (if a mental health professional). Regardless of whether an attorney or a mental health professional, these candidates should have experience in high conflict custody cases. Currently, there is no existing roster of qualified GALs in New Jersey, nor are there any requirements set forth by statute, court rule, or the Administrative Office of the Courts qualifying who can serve as a GAL. There is only an official comment under Rule 5:8B stating: "The GAL can be an attorney, a social worker, a mental health professional or other appropriate person. If the primary function of the GAL is to act in the capacity of an expert, then the court should ordinarily appoint a GAL from the appropriate area of expertise." As "the eyes and ears" of the court, a GAL should be knowledgeable about topics including, but not limited to, how to properly interview children in a developmentally appropriate manner, New Jersey family law with a focus on child custody statutes and case law, high conflict family dynamics, child abuse and DCPP policies, substance abuse, domestic violence (including coercive control dynamics), psychiatric medication for children, special education, LGBTQIA+ youth, and mental health issues (including common personality disorders), etc.

In 2021 the Executive Committee of the Family Law Section of the New Jersey State Bar Association established a task force on GAL assignments, to address concerns that GAL assignments are not consistent and uniform throughout the state.[6] At the conclusion of two years' research and discussion, in May 2024, the NJSBA submitted a comprehensive report to the AOC, with recommendations for amendments to R.5:8B supported by detailed rationale. The report made recommendations that addressed a myriad of issues, such as the need to clarify the scope of a GAL assignment, the role of the GAL, access to relevant factual information by the GAL, protecting the confidentiality of the GAL report, providing the GAL with immunity from civil liability for acts performed within the scope of their duties, qualification and training requirements for GALs, and the establishment of a court roster for those who have met the requisite criteria.[7]

The task force explained the rationale for the recommendations in the report stating:

> Currently, there are no requirements to serve as a GAL in New Jersey, despite the gravity of the assignments and the breadth of custody and parenting time recommendations GALs are often called upon to make . . . Whether serving in a purely investigative role or in a hybrid investigative/evaluative role, the conclusions and recommendations of the GAL can be far-reaching and have a significant and permanent impact on the lives of children and the functioning of families. . . . GALs are called upon to exercise judgment and make viable recommendations as to what custody and parenting time is deemed to be in a child's best interests. Sound, reliable judgment about parental functioning and a child's future requires skills that are acquired through practice and experience, as well as specialized training. The importance of experience cannot be overemphasized.[8]

Regrettably, the Court declined to adopt the task force's proposed amendments or to establish a roster of qualified GALs. In the absence of the establishment of a Court-approved roster of qualified GALs, courts should be mindful of the task force's edict, "the importance of experience cannot be overemphasized." The selection of a GAL by the court is critically important.

Although the Court declined to adopt the amendments recommended by the task force, the Court did adopt a proposed "Order Appointing Guardian *Ad Litem* for Minor(s) Pursuant to R.5:8B" which has proven to be very helpful in defining the scope of individual GAL assignments.[9] The Court also adopted a Protective Order for Guardian *ad Litem* Reports.[10]

The authors urge the Court to revisit the comprehensive report and recommendations made in 2024 by the Task Force on Guardian *ad Litem* Assignments. The recent amendments to New Jersey's custody statute have given increased importance to the Task Force's recommendations. The court's ability to move cases efficiently while complying with the edicts of the new amendments will be difficult. A GAL can assist the court in addressing the statute's requirements, while taking best interest considerations into account. This avoids forcing a child to "participate" in an adversarial proceeding if that child does not wish to meet with the judge while conserving limited court resources. Appointing a GAL can be a practical tool to protect a child and to promote judicial efficiency.

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Endnotes

1. The 1989 United Nations Convention on the Rights of the Child, provides that a "child who is capable of forming his or her own views [shall have] the right to express those views in all matters affecting the child . . . [and] the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly, or through a representative . . . in accordance with the age and maturity of the child." Notably, every member of the United Nations has ratified the convention except for the United States. United Nations (1989) *Convention on the Rights of the Child*. Adopted by the General Assembly of the United Nations on 20 November 1989. (Treaty Series, vol. 1577). New York: United Nations.
2. In *New Jersey Div. of Youth and Family Services v. E.P.*, the Supreme Court held that in DCPP litigation courts would benefit from hearing the wishes of a child, who has reached a level of maturity that allows the child to form and express an intelligent opinion. 196 N.J. 88,114 (2008). Furthermore, when "a child on his or her own initiative requests the opportunity to express an opinion, the court should allow the child to do so because each case will bring to bear particular factors that relate to the psychological well-being of a child." *Id.*
3. *See Matter of M.R.*, 135 N.J. 155,174 (1994). The authors of this article have each worked in the child welfare field for a significant period of time and have each served in the role of a law guardian within the Office of the Public Defender, representing children in DCPP cases, as well as serving as guardians ad litem, in private custody matters.
4. R.5:8B (official comment).
5. The amendments to N.J.S.A. 9:2-4 reference the age and maturity of the child in several different sections, which refer to slightly different determinations which must be made by the court. For example, in one portion of the statute it refers to determining whether the child is "of sufficient age" when determining whether the court may order *any* kind of therapy. N.J.S.A. 9:2-4(3)(1) and later the law describes the question of whether the child is "of sufficient age, capacity, and maturity to express a preference, to engage in scientifically valid therapy." N.J.S.A. 9:2-4(3)(1)(D); See also, N.J.S.A. 9:2-4(3)(1)(B). The amendments also refer to the question of whether the child is of "sufficient age, capacity, and maturity to express the child's reasons [for continuing to be separated from one parent]". N.J.S.A. 9:2-4(3)(1)(A).
6. The task force was chaired by Amy Wechsler and included a retired family court judge, as well as attorneys, mental health professionals, and dual degree professional (law and mental health) with substantial experience serving as guardians *ad litem* throughout the state and representing clients in matters involving GALs. The task force report can be found at: njsba.com/wp-content/uploads/2025/02/NJSBA-Letter-re-Guardian-ad-Litem-Task-Force-Report-2024.5.14-002.pdf.
7. Since there are attorneys and other appropriate professionals with extensive experience who have been serving as GALs for several years, it is important to also allow a path for those individuals to qualify for the GAL roster, at least initially, based on experience rather than a strict training pathway.
8. Task Force Report at pp. 7-8.
9. 13322_order_appoint_gal (njcourts.gov).
10. "Protective Order for Guardian ad Litem Report." 13323_protective_order_gal_rpt (njcourts.gov).

Representing Persons Falsely Accused of Domestic Violence

Series I: A Primer on Restraining Orders and Scope of the New Jersey Prevention of Domestic Violence Act

By John P. Paone, Jr. & John P. Paone, III

Domestic violence remains a serious problem in our society. Each year tens of thousands of new domestic violence complaints are filed which result in the entry of thousands of new final restraining orders (FRO).[1] While most domestic violence complaints are *bona fide*, there are many instances where defendants (men and women alike) are falsely accused. The New Jersey Supreme Court has recognized that some litigants attempt to use the Prevention of Domestic Violence Act (PDVA) as a "sword" rather than a "shield."[2] As has been observed by the appellate division, applying the act against persons who have not committed domestic violence "diminishes the suffering of true victims of domestic violence and misuse[s] the legislative vehicle which was developed to protect them."[3] For the practitioner representing a defendant who is accused of domestic violence, it is imperative to understand the wide-ranging legal ramifications and procedural implications of restraining orders before preparing a successful defense at trial.

Impact of a Restraining Order on the Accused

People accused of domestic violence face severe legal consequences. Not only may the issuance of a restraining order result in the defendant being evicted from their residence,[4] but it can lead to the assessment of money damages, statutory fines and penalties, counsel fees, and other economic repercussions.[5] Child custody,[6] support, use of marital assets, and other forms of emergent relief are regularly addressed in these proceedings. The entry of a final restraining order also prohibits defendants from owning, possessing, or using firearms.[7] If an FRO is entered, a defendant shall be fingerprinted by law enforcement and their name shall be added to the domestic violence central registry.[8] Courts have broad discretion to impose other consequences on defendants found to have committed domestic violence, including risk assessments, anger management, psychological evaluations, drug and alcohol counseling, and substance abuse testing or screening.

The entry of a restraining order is discoverable by employers and can have an adverse effect on defendants who seek to maintain their employment or secure new employment. Defendants who have occupations in law enforcement, security, healthcare, or education may face suspension without pay or termination. A defendant can be disqualified from employment that requires handling of firearms or security clearances due to the firearm prohibition associated with an FRO.

There are also serious immigration consequences that can arise for defendants who do not have citizenship status in the United States. Although restraining orders are civil orders, they can be considered in immigration proceedings, which may result in defendants being denied visa renewals and green card applications. They may also lead to deportation proceedings, especially in circumstances where a defendant violates the restraining order or faces criminal charges.

Attorneys who are accused of domestic violence can face ethical consequences and can be suspended from the practice of law.[9] Once a restraining order is entered, the violation of that order carries the imposition of criminal penalties and the potential for incarceration.[10] Finally, unlike other states that provide for automatic expiration dates, or sunset provisions, of final restraining orders, FROs in New Jersey do not automatically expire, and can only be dissolved "upon good cause shown."[11] Therefore, because the stakes are so high and the implications vast, attorneys must be adequately prepared to defend persons falsely accused of domestic violence.

The Exigent Nature of Restraining Orders

Temporary restraining orders (TRO) are obtained through an *ex parte* court proceeding.[12] As a result, the defendant's attorney usually receives a copy of the TRO from the client some time after the initial hearing has taken place. In obtaining a TRO, the plaintiff must make a *prima facie* showing that the defendant committed an act of domestic violence and the plaintiff's life, health, or well-being is in danger.[13] The *prima facie* standard of a TRO is a much lower bar for the plaintiff to meet as compared to obtaining an FRO at a final hearing, in which the plaintiff must prove by a preponderance of the evidence not only that the defendant committed an act of domestic violence, but that there is a need for an FRO in order to prevent future harm or abuse to the plaintiff.[14]

Because final hearings must be held within 10 days of the entry of a TRO, the attorney is immediately under time constraints when defending a person accused of domestic violence.[15] In cases where jurisdiction is lacking or where the alleged act of domestic violence can easily be disproved, the defense attorney should consider taking emergent action to dissolve the TRO. Any TRO is immediately appealable for a plenary hearing *de novo* not on the record.[16]

Where the allegations are more complex or more difficult to disprove, counsel must consider obtaining an adjournment so as to properly prepare for trial.[17] Yet, because an adjournment will require the continuation of the temporary restraints until final hearing, the decision to seek an adjournment is often problematic. In most instances, the TRO enjoins the defendant from returning to their place of residence. After a long period of separation, the court may conclude that it is unnecessary and undesirable to reunite the parties in the same home. In cases involving custody, temporary restraints prohibiting parenting time or restricting contact could serve to attenuate a defendant's relationship with their children. Therefore, at the outset, counsel must weigh the benefits of additional preparation time resulting from an adjournment, versus the prejudicial impact that the delay will cause the defendant.

As there are many adverse consequences which may ensue from the entry of an FRO, courts must make every effort to ensure that defendants are not deprived of due process in a domestic violence matter.[18] Most essential to a defendant's due process rights is the opportunity to retain counsel and be informed on the record by the domestic violence judge in advance of trial of the serious risks and consequences that may result if an FRO is granted.[19] It must be underscored that while all defendants in domestic violence actions have the right to retain counsel, they are not entitled to appointed counsel in cases where they may be unable to afford legal representation.[20] The trial court must also provide the defendant with reasonable time after they are served with the domestic violence complaint to be able to prepare a defense and respond to the allegations in the complaint.[21]

The Jurisdictional Requirements of the PDVA

Subject matter jurisdiction requires that the plaintiff fall within the category of people protected by the act. The statute defines a victim of domestic violence as any person who is 18 years of age or older or an emancipated minor who has been subjected to domestic violence by a spouse, former spouse, or any present or former household member.[22] A victim of domestic violence also includes any person, regardless of age, who has a child in common or anticipates having a child with the abuser.[23] Finally, a victim also includes any person, regardless of age, who has had a dating relationship with the person charged with domestic violence.[24]

The appellate division has held that "jurisdictional scrutiny is necessary to insure that the Act is not trivialized, and the Superior Court is not overrun with disorderly persons cases properly allocable to the municipal courts."[25] Practitioners should be aware of the body of case law which has developed defining who qualifies as a victim of domestic violence.[26] Especially where the victim claims to be a "former household member"[27] or where a past "dating relationship"[28] is alleged, practitioners should ensure that there is proper jurisdiction for the entry of an FRO.[29]

New Jersey has been at the forefront of broadening the PDVA in order to protect individuals who would not otherwise be entitled to protection by way of a restraining order. There have been a litany of reported decisions in New Jersey which have addressed the jurisdictional issue of which individuals qualify as "household members" under the PDVA. The following hereinbelow includes a brief list of those individuals found to fall within the breadth of the PDVA as household members:

- Temporary guest who resided in the plaintiff's home for seven months[30]
- Adult brothers who resided together during their childhood years[31]

- Half-siblings who never resided together but shared meaningful, regular time with each other in the same household[32]
- Adult siblings who had not resided together in more than 50 years[33]
- Boarders who resided together in a rooming house, sharing a bathroom, kitchen, and communal appliances[34]
- Live-in nanny who resided in the same house as the plaintiff[35]

Likewise, New Jersey courts have liberally construed the term "dating relationship" where parties may not have had a traditional dating relationship in the sense of either physical contact or face-to-face interaction. The catalyst for this change was brought about in primary part by the COVID-19 pandemic in which dating couples were forced to have relationships primarily through electronic means (i.e. text, email, etc.), social media (i.e. Facebook, Snapchat, Instagram, etc.), or online dating applications (i.e. Tinder, OkCupid, etc.) rather than going out on actual in-person dates. In short, electronic dating relationships can be afforded the same protections from domestic violence under the PDVA as traditional, in-person relationships.[36]

A couple also does not need to be in an exclusive dating relationship that is recognized by the public or known to other individuals in order to qualify as dating partners under the PDVA.[37] It is understood that a person who is in a secret intimate or sexual relationship with an abusive partner may be just as vulnerable, if not more so, than a person who is engaged in a traditional dating relationship. This expansive definition of "dating relationship" departs from traditional definitions which in the past have required courts to engage in an extremely detailed and fact-sensitive analysis in order to determine whether a "dating relationship" exists.[38] Nevertheless, if the plaintiff is not among the class of people protected by the act, serious consideration should be given to making an emergent application to dissolve the TRO and to have the complaint dismissed for lack of subject matter jurisdiction.[39]

Conclusion

The law regarding domestic violence and the impact that restraining orders have on defendants in New Jersey continues to be ever-changing, based on the sheer volume of cases that work their way through the legal system each year, and the evolution of household and dating relationships in modern times. In that regard, the broad reach that the PDVA has on the everyday lives of families is more significant now than ever before. Thus, before representing an individual who is accused of domestic violence, the practitioner must make it their priority to understand the changing landscape and key foundational concepts of domestic violence law in New Jersey, so as to avoid the challenges and pitfalls that may arise along the way. ■

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Endnotes

1 Admin. Off. of the Courts, Rep. on the Prevention of Domestic Violence Act (September 2022).
2. *State v. Hoffman*, 149 N.J. 564, 586 (1997).
3. *Peranio v. Peranio*, 280 N.J. Super. 47, 56 (App. Div. 1995).

4. No temporary or final domestic violence order shall permit the victim and the defendant to occupy the same premises. The use of so-called "in-house restraints" which allows for the parties to occupy the same premises but limits the defendant's use of the premises is specifically disallowed by law. *N.J.S.A.* 2C:25-28.1; Supreme Court of New Jersey & Attorney General, New Jersey Domestic Violence Procedures Manual at IV.I. (2022). *See also Zappaunbulso v. Zappaunbulso*, 367 N.J. Super. 216, 226 (App. Div. 2004) (the court can restrain a defendant from taking up residence in the same neighborhood as the plaintiff); *Finamore v. Aronson*, 382 N.J. Super. 514, 523 (App. Div. 2006) (the Prevention of Domestic Violence Act authorizes restraints on physical proximity between a plaintiff and a defendant to extend to preventing a defendant parent from attending a child's activities if the plaintiff is present); *but see State v. S.K.,* 423 N.J. Super. 540, 545-46 (App. Div. 2012) (FRO barring defendant from "any other place where plaintiff is located" deemed invalid as overly broad).
5. *N.J.S.A.* 2C:25-29(b)(4); New Jersey Domestic Violence Procedures Manual, *supra* note 4, at IV.I. *See also Brazzel v. Brazzel*, 345 N.J. Super. 19, 23 (App. Div. 2001) (authorizing retroactive support to victims of domestic violence); *Mitchell v. Oksienik*, 380 N.J. Super. 119, 130 (App. Div. 2005) (authorizing the sale of property and division of the proceeds between unmarried parties under the legal theory of "joint venture"); *N.J.S.A.* 2C:25-29.1 (directing payment of a civil penalty by defendants against whom a final restraining order is issued).
6. *J.D. v. M.A.D.,* 429 N.J. Super. 34, 37 (App. Div. 2012) (noting the presumption of custody in favor of the non-abusive parent in domestic violence cases).
7. *N.J.S.A.* 2C:25-29(b)(16). *See also U.S. v. Rahimi*, 602 U.S. 680 (2024); *State ex rel C.L.H.'s Weapons*, 443 N.J. Super. 48, 55 (App. Div. 2015) (where a defendant's firearms are permanently confiscated, their firearms purchaser identification card cannot be returned); *In re Return of Weapons to J.W.D.,* 149 N.J. 108, 116 (1997) (the court can confiscate weapons even after dismissing a domestic violence complaint, if it finds that defendant poses a threat to public health, safety, or welfare); *In re Z.L.,* 440 N.J. Super. 351, 353 (App. Div. 2015) (denying the defendant's application for issuance of firearms permits and identification card where he was involved in a number of domestic violence disputes but never had an FRO issued against him).
8. *N.J.S.A.* 2C:25-34.
9. *In re Magid*, 139 N.J. 449 (1995); *In re Principato*, 139 N.J. 456 (1995); *In re Toronto*, 150 N.J. 191 (1997); *In re Margrabia*, 150 N.J. 198 (1997).
10. *N.J.S.A.* 2C:25-30.
11. *N.J.S.A.* 2C:25-29(d); *Carfagno v. Carfagno*, 288 NJ. Super. 424, 433 (Ch Div. 1995).
12. A TRO may be issued *ex parte* when necessary to protect the life, health, or well-being of a victim. R. 5:7A(c); *N.J.S.A.* 2C:25-28(f).
13. *N.J.S.A.* 2C:25-28(a), (f).
14. *Silver v. Silver*, 387 N.J. Super. 112, 125-27 (App. Div. 2006).
15. The act's requirement that a final hearing be held within 10 days of the filing of a complaint has been found to comport with due process requirements. *Crespo v. Crespo*, 408 N.J. Super. 25, 43-44 (App. Div. 2009), *aff'd*, 201 N.J. 207 (2010).
16. *N.J.S.A.* 2C:25-28(i).
17. An adjournment may also be necessary when a defendant is forced to defend against criminal charges in other venues which stem from the same domestic violence incident. *See, e.g. State v. Nelson*, 255 N.J. Super. 270 (L. Div. 1992). Also, an adjournment may be granted if the defendant was not served with the plaintiff's amended TRO/ complaint. New Jersey Domestic Violence Procedures Manual, *supra* note 4, at IV.F.3.
18. *See, e.g. Franklin v. Sloskey*, 385 N.J. Super. 534, 536-37 (App. Div. 2006) (finding violation of due process where defendants consented to final restraining orders without any findings being made by the court and, in the case of one defendant, in the absence of a domestic violence complaint being filed against him).
19. *A.A.R. v. J.R.C.,* 471 N.J. Super. 584 (App. Div. 2022).
20. *D.N. v. K.M.,* 429 N.J. Super. 592, 604 (App. Div. 2013).

21. See *D.M.R. v. M.K.G.,* 467 N.J. Super. 308, 319 (App. Div. 2021) (finding that the scheduling of an FRO trial less than 24 hours after being served with the domestic violence complaint violated the due process rights of the defendant).
22. *N.J.S.A.* 2C:25-19(d). *See also M.A. v. E.A.,* 388 N.J. Super. 612 (App. Div. 2006) (finding that a 15-year-old unemancipated minor who was never in a dating relationship with the defendant stepfather was not a "victim" for purposes of the Act).
23. The custodian of a child, who was not the biological parent of the child, and the defendant, the biological father of the child, have been deemed to have a "child in common," thus conferring jurisdiction on the trial court. *D.V. v. A.H.*, 394 N.J. Super. 388, 391-92 (Ch. Div. 2007).
24. N.J.S.A. 2C:25-19(d).
25. *Smith v Moore*, 298 N.J. Super. 121, 123-24 (App. Div. 1997).
26. The definition of "victim of domestic violence" has been held to include college dorm roommates. *Hamilton v. Ali*, 350 N.J. Super. 479, 480 (Ch. Div. 2001). *See also S.Z. v. M.C.,* 417 N.J. Super. 622, 625 (App. Div. 2011) (temporary guest who lived in victim's home for seven months is former household member).
27. *See Jutchenko v. Jutchenko*, 283 N.J. Super. 17, 20 (App. Div. 1995) (brothers who lived together 20 years prior were not former household members (note this case was rendered prior to statutory amendments made to the definition of "victim of domestic violence")); *Smith v. Moore*, 298 N.J. Super. 121, 126 (App. Div. 1997) (sharing of vacation living quarters on weekends during summer did not qualify as being former household members); *Sisco v. Sisco*, 296 N.J. Super. 245, 249 (Ch. Div. 1996) (adult daughter is not former household member with father with whom she has not resided for more than 15 years). *But see South v. North*, 304 N.J. Super. 104, 112 (Ch. Div. 1997) (finding that defendant was the *de facto* member of the household subjects defendant to jurisdiction); *Storch v. Sauerhoff*, 334 N.J. Super. 226, 235 (Ch. Div. 2000) (stepmother and stepdaughter who lived near each other and interacted frequently shared "substantial integrated family relationship" sufficient for jurisdiction); *Coleman v. Romano*, 388 N.J. Super. 342, 345 (Ch. Div. 2006) (mother and daughter who had not lived in the same house for almost 30 years qualified as "former household members" based upon their "continuing, entangled relationship").
28. *See Sperling v. Teplitsky*, 294 N.J. Super. 312, 316 (Ch. Div. 1996) (no jurisdiction where dating relationship ended four years before complaint); *but see Tribuzio v. Roder*, 356 N.J. Super. 590, 597 (App. Div. 2003) (jurisdiction existed where dating relationship ended three years earlier but defendant frequently initiated unwanted contact during that three-year history and the incident that warranted seeking the TRO was clearly related to prior relationship). See also *Andrews v. Rutherford*, 363 N.J. Super. 252, 260 (Ch. Div. 2003) (setting forth the factors that must be considered in determining if two people have a dating relationship and therefore meet the jurisdiction requirement under the act); *J.S. v. J.F.*, 410 N.J. Super. 611, 615 (App. Div. 2009) (dating relationship can include a person who receives a monetary benefit for engaging in the relationship).
29. To address a loophole in some cases where persons who are victims of abuse do not meet the subject matter jurisdiction requirements of "victim" under the PDVA, the Victims Assistance and Survivor Protection Act (VASPA), which became law in January 2024, expanded protections to individuals who are victims of sexual assault, stalking, cyber harassment, and lewdness but do not qualify for relief under the PDVA. *See, e.g. C.J.S. v. A.S.,* 483 N.J. Super. 522 (App. Div. 2026); *A.C. v. R.S.,* 483 N.J. Super. 47 (App. Div. 2025).
30. *S.Z. v. M.C.,* 417 N.J. Super. 622, 625 (App. Div. 2011).
31. *R.G. v. R.G.,* 449 N.J. Super. 208, 212 (App. Div. 2017).
32. *S.C. v. J.D.,* 462 N.J. Super. 452, 455 (Ch. Div. 2019).
33. *N.G. v. J.P.*, 426 N.J. Super. 398, 402 (App. Div. 2012).
34. *S.P. v. Newark Police Dep't*, 428 N.J. Super. 210, 227-28 (App. Div. 2012).
35. *E.S. v. C.D.,* 460 N.J. Super. 326, 329 (Ch. Div. 2018).
36. See *C.C. v. J.A.H.*, 463 N.J. Super. 419, 424 (App. Div. 2020) (concluding that PDVA applies despite there never being an in-person date).

37. See *T.M. v. R.M.W.*, 456 N.J. Super. 446 (Ch. Div. 2018) (finding that the couple were dating partners under the definition of the PDVA as they were in a sporadic, on-and-off-again sexual relationship for eight years, even though the relationship was not recognized in public or by others).
38. *Andrews v. Rutherford*, 363 N.J. Super. 252, 260 (Ch. Div. 2003).
39. For a discussion of *in personam* jurisdiction: *see J.N. v. D.S.*, 300 N.J. Super. 647, 651-52 (Ch. Div. 1996) (holding that the court has jurisdiction to enter a TRO in cases involving an alleged act of domestic violence that occurred in another state when the victim seeks shelter in New Jersey. The case also makes clear, however, that the court would not have jurisdiction to enter an FRO unless the out-of-state defendant chose to submit to the jurisdiction of this state). *See also State v. Reyes*, 172 N.J. 154, 157 (2002) (finding that New Jersey courts have jurisdiction to issue an FRO when a victim fled to New Jersey and the non-resident abuser followed the victim into this state).

Cohabitation Agreements in Modern Family Law Practice

By Valerie Jules McCarthy and Linda Torosian

I. Introduction

The legal institution of marriage has long served as the primary framework through which intimate partners organize their financial affairs and establish support obligations. Yet a significant and growing segment of the population now builds shared lives outside that framework. Non-marital cohabitation has risen steadily across all demographic groups, fundamentally altering family formation in New Jersey and throughout the United States. That shift demands a commensurate response from practitioners – one that extends the tools of preventive law to clients whose relationships the statutory codes were not designed to address.

The need for legal protection outside marriage has evolved significantly over the past several decades. Where cohabitation was once viewed as a marginal arrangement, it is now a permanent feature of American family life generating financial interdependence and joint property accumulation comparable to marriage. The legal framework, however, has not kept pace. New Jersey's statutory protections, from equitable distribution to intestacy rights to spousal support, remain anchored to marriage. The resulting gap between social reality and legal infrastructure makes private ordering through written agreements not merely advisable but essential for clients who build shared lives outside the marital framework.

This article examines the growing role of cohabitation agreements in New Jersey family law practice. Part II surveys the demographic and legal landscape. Part III analyzes core substantive provisions with particular attention to palimony doctrine. Part IV considers benefits and limitations from practitioner perspectives. Part V offers concrete practice guidance on counseling, drafting, and enforceability. Part VI concludes with observations on the role cohabitation agreements are likely to play in contemporary family law.

II. Changing Landscape

A. Current Statistics and Trends

The numerical case for practitioner attention is compelling. The U.S. Census Bureau reports cohabiting couples now number more than 17 million nationally, roughly triple from 1990.[1] New Jersey reflects this trend: cohabitation rates have risen across all income levels, educational backgrounds, and age groups, with particularly notable increases among adults over 50 emerging from prior marriages or widowhood.[2] The Pew Research Center found in 2019 that 59% of adults who had ever cohabited did so with a partner they did not eventually marry.[3] These numbers carry direct implications for practitioners. The pool of potential clients who need cohabitation agreements is substantial and underserved.

B. Why Couples Choose Cohabitation Over Marriage

The motivations for cohabitation are varied. Some couples treat shared residence as a trial period. Others reject marriage on philosophical grounds. A substantial number, particularly older adults and those who have experienced prior divorces prefer to preserve financial autonomy or protect assets for children from prior relationships.[4] Still others are constrained by economic considerations: marriage can affect eligibility for government benefits, particularly for those receiving disability payments.

Regardless of motivation, the legal consequence is the same: without a written agreement, these couples lack the financial and legal protections the law extends automatically to married partners.

C. Legal Vulnerabilities Without Formal Agreements

New Jersey does not recognize common-law marriages established after Dec. 1, 1939.[5] The practical consequences are significant. A couple who cohabits for 20 years, purchases a home together, raises children, and intertwines finances has no automatic right to equitable distribution upon separation. Absent a written agreement or successful legal theory, a departing partner may walk

away from decades of accumulated wealth with nothing, but what is titled in their name.

The risks extend beyond property. Unmarried partners have no statutory right to support upon separation and are not presumptive heirs under New Jersey intestacy law.[6] Hospital visitation rights, medical decision-making authority, and access to a partner's pension or retirement benefits, all of which flow automatically from marriage, must be individually arranged through separate legal instruments. The aggregate legal vulnerability of an unprotected cohabiting couple is substantial.

III. Core Elements of Cohabitation Agreements

A. Property Ownership and Asset Division

The foundational question in any cohabitation agreement is the treatment of property: what the parties own separately, what they acquire jointly, and how jointly held assets will be divided if the relationship ends. New Jersey's equitable distribution statute, *N.J.S.A.* 2A:34-23, governs marital property exclusively and does not apply to unmarried partners.[7] Cohabiting partners must rely entirely on the agreement, or on general principles of contract and property law, to sort out their claims.

The agreement should identify with precision all real property, personal property of significant value, financial accounts, retirement assets, and business interests. It should distinguish between assets brought into the relationship, assets acquired individually during cohabitation, and assets acquired jointly. For real property, the agreement must be consistent with how the deed is titled: a provision stating that property is "jointly owned" but deeded solely to one partner creates an ambiguity that invites litigation.

The New Jersey Supreme Court's decision in *Devaney v. L'Esperance* illustrates the difficulty courts face when cohabiting partners fail to document their arrangements.[8] Without a written agreement, courts must examine the parties' conduct, alleged oral promises, and patterns of financial support, to determine whether a binding obligation exists.[9] This fact-intensive inquiry is inherently uncertain, underscoring the cost and unpredictability that a well-drafted agreement is designed to avoid. The enactment of *N.J.S.A.* 25:1-5(h) subsequently imposed a statutory writing requirement for promises of support arising from nonmarital personal relationships, further reinforcing the necessity for written agreements.[10] Importantly, that statute is limited to promises of support; property-related claims may remain enforceable under theories of implied contract, constructive trust, or unjust enrichment even absent a signed writing.

B. Financial Responsibilities and Obligations

A durable cohabitation agreement addresses ongoing financial obligations with as much care as property division. The parties should specify how they will share household expenses, mortgage or rent, utilities, insurance, and maintenance, and whether contributions will be proportional to income, fixed, or subject to periodic adjustment. Debt allocation deserves equal attention: the agreement should address both existing obligations and future debt incurred during cohabitation.

Practitioners should also address the treatment of income and savings. In the absence of agreement, a partner who deposits earnings into a joint account may find those funds characterized as a gift or as jointly owned property, depending on the circumstances and the theory advanced in litigation. Clear provisions specifying the character of joint account deposits, and each partner's right to withdraw from said accounts, prevent this ambiguity.

Where one partner leaves employment or reduces career involvement to manage the household or care for children, the agreement should address how that economic sacrifice will be recognized upon separation. Contractual provisions offer far more certainty than the palimony litigation discussed below.

C. Palimony Protection and Waiver Provisions

No discussion of cohabitation agreements in New Jersey is complete without attention to palimony, the doctrine permitting unmarried cohabitants to claim support from a former partner. The doctrine traces to *Kozlowski v. Kozlowski*, in which the New Jersey Supreme Court held that promises of support between unmarried cohabitants are enforceable as contracts, provided they are not dependent on sexual services as consideration.[11] The Court grounded its holding in contract law and evolving social norms, emphasizing that agreements arising from nonmarital relationships may be enforced to vindicate the parties' reasonable expectations.[12]

The palimony landscape was fundamentally altered by the 2010 amendment to *N.J.S.A.* 25:1-5, adding subsection (h), requiring that agreements to pay support to a cohabiting partner be in writing and made with independent counsel.[13] The Appellate Division in *Maeker v Ross* construed the 2010 amendment as

barring enforcement of an alleged preamendment oral agreement.[14] The New Jersey Supreme Court reversed in *Maeker v Ross*, holding that the statute applies prospectively only and does not retroactively invalidate oral palimony agreements formed before the amendment's effective date.[15]

The practical consequence for practitioners is significant. For clients entering a cohabitation relationship, the 2010 amendment means any support obligation must be reduced to writing, making a written agreement the only legally sufficient vehicle for a palimony claim going forward. Property-related claims, by contrast, remain subject to general contract principles regardless of whether a writing exists. For clients who believe an oral palimony promise was made before 2010, *Maeker v. Ross* clarifies that such claims are not retroactively barred.

A well-drafted cohabitation agreement addresses palimony explicitly. The agreement should either establish a defined support obligation, including amount, duration, and termination conditions, or affirmatively waive any palimony claim. A waiver should be drafted with careful attention to the contract defenses New Jersey courts apply, in particular, unconscionability and duress, which are related but legally distinct.

Unconscionability in New Jersey involves both procedural and substantive considerations. Procedural unconscionability focuses on the circumstances of contract formation, including the parties' relative bargaining power and the absence of meaningful choice.[16] Substantive unconscionability examines whether the challenged terms are unreasonably one-sided or operate to undermine important rights or public interests.[17] These doctrines are distinct from duress: a contractual waiver may be invalidated as unconscionable even absent fraud or coercion, based on a fact-sensitive assessment of both formation and fairness.[18]

For palimony waivers procedural unconscionability will be most consequential: courts will scrutinize whether the waiving partner had independent counsel, full financial disclosure, and a genuine opportunity to negotiate. A waiver by a financially dependent partner, executed without these safeguards, presents a material enforceability risk.

D. Dispute Resolution Mechanisms

Dispute resolution provisions serve both practical and prophylactic functions. A mandatory mediation clause reduces costs and gives partners a structured opportunity to resolve disputes without adversarial proceedings. Many agreements then provide for binding arbitration if mediation fails, though practitioners must evaluate whether arbitration serves each client's interests: arbitration is generally final and unreviewable, which may disadvantage a partner with less economic power.

The agreement should specify governing law and the state for legal proceedings. For couples who divide time between states or may relocate, a choice-of-law clause is essential, as other states' approaches to cohabitation agreement enforceability vary considerably.

IV. Dual Perspectives: Benefits And Concerns

A. Arguments in Favor: Legal Clarity and Reduced Conflict

Proponents of cohabitation agreements emphasize the protection such agreements afford economically vulnerable partners. A dependent partner in a long-term cohabiting relationship faces considerable risk upon separation. Without a written agreement, any claim for support must satisfy the palimony doctrine's demanding requirements, while property claims are confined to constructive trust, unjust enrichment, or contract theories, each highly fact-sensitive and uncertain in outcome. A written agreement provides clarity and predictability where litigation offers only risk.

Importantly, cohabitation agreements protect both parties. For the financially stronger partner, the agreement provides protection against unfounded claims of oral promises or constructive trust theories that might otherwise require costly litigation to defend against regardless of merit. For the economically dependent partner, the agreement converts uncertain, theory-dependent claims into defined contractual rights. The agreement thus serves the mutual interest of both parties in clarity, predictability, and avoidance of protracted disputes.

The reduction in litigation costs is equally compelling. *In re Estate of Roccamonte* illustrates the alternative: the Court was required to determine the enforceability of an alleged oral promise of lifetime support, explaining that terms must be derived from the parties' conduct and surrounding circumstances.[19] This framework necessitates a searching, fact-intensive inquiry in which courts reconstruct the parties' relationship over many years.

That mode of analysis has been substantially altered by *N.J.S.A.* 25:1-5 and its writing requirement for support promises.[20] The need for courts to engage in extensive

retrospective reconstruction has been significantly curtailed in cases governed by the statute. Property-based claims, by contrast, may still be advanced under contract or equitable theories with attendant uncertainty and cost.

Beyond the parties' immediate interests, cohabitation agreements serve a systemic function by reducing ambiguity, limiting protracted litigation, and conserving judicial resources.

B. Limitations

Concerns about cohabitation agreements warrant candid acknowledgment. One significant limitation relates to access and power imbalance. Like prenuptial agreements, cohabitation agreements are most accessible to couples with financial resources and sophisticated counsel. Partners who cannot afford independent representation or who lack financial literacy, may enter arrangements that technically satisfy enforceability requirements while substantively disadvantaging them.

New Jersey courts have not been blind to this concern. *Marschall v. Marschall* demonstrates that unconscionability operates as a backstop against procedurally or substantively unfair agreements, requiring full financial disclosure and the absence of unconscionable terms as predicates to enforcement.[21] Similarly, *in DeLorean v. DeLorean*, the court upheld a prenuptial agreement only after scrutinizing the voluntariness of the waiver and the adequacy of the parties' knowledge.[22]

A second limitation involves enforceability and uncertainty. Unlike prenuptial agreements, governed by New Jersey's Uniform Premarital and Pre-Civil Union Agreement Act, cohabitation agreements operate in a purely common-law space.[23] The absence of a governing statute means courts apply general contract principles without specific procedural protections, creating ambiguity. Practitioners should not overstate the certainty a cohabitation agreement provides; it is a substantial improvement over no agreement, but not an ironclad guarantee.

Third, cohabitation agreements cannot bind courts on custody, parenting time, or child support.[24] Couples with children face a bifurcated landscape: financial affairs governed by the agreement, while children's issues are resolved under the best interests standard. This limitation should be explained clearly to clients with children or who anticipate having them.

C. A Balanced Approach for Practitioners

The appropriate practitioner response is neither uncritical advocacy for cohabitation agreements in every case nor dismissiveness about their limitations. A balanced approach requires candor with clients about what the agreement can and cannot accomplish; genuine attention to whether the process is fair; and care in drafting that avoids overreach while providing meaningful protection.

Practically, this means declining to represent both parties, insisting on full financial disclosure, and documenting the circumstances of execution. It also means knowing when to advise against a particular provision, a palimony waiver by a partner who has sacrificed career advancement may be so one-sided as to invite unconscionability challenge, and advising a more balanced agreement serves the client's long-term interests better than securing one vulnerable to invalidation.

V. Practice Tips And Considerations

A. Client Counseling Strategies

Effective counseling begins with understanding the client's goals, relationship dynamics, and financial circumstances. The practitioner should conduct a thorough intake covering the duration of cohabitation, the nature of financial interdependence, the existence of children from prior relationships, the relative financial positions of the parties, and the client's concerns about what separation would look like without an agreement.

Many clients approach cohabitation agreements with ambivalence, feeling the process implies distrust or believing their relationship is stable enough not to require documentation. The practitioner's role is to reframe the conversation: a cohabitation agreement is not evidence of anticipated failure but a product of mutual respect and honest communication. The analogy to estate planning is useful - responsible people plan for contingencies they hope will not arise.

Where power imbalances exist, the practitioner should exercise heightened vigilance. For the financially dominant client, the goal is a durable agreement that will not be invalidated on unconscionability grounds. For the dependent partner, the goal is meaningful protection. In either case, the practitioner serves the client by insisting on process integrity, not by securing whatever terms the client initially demands.

B. Drafting Best Practices and Common Pitfalls

The most common drafting failure is lack of specificity. Provisions stating that parties will "share expenses equally" or property will be divided "fairly" are invitations to litigation. Every substantive provision should be

defined with precision: what property is covered, how it will be valued, what timeline governs, and what happens if the parties cannot agree. Where valuation is required, the agreement should specify the methodology and mechanism for resolving disputes.

Practitioners should avoid replicating through contract rights that are exclusively statutory. A provision purporting to grant inheritance rights identical to a surviving spouse's will not be enforced - New Jersey's intestacy and elective share provisions do not yield to private contract.[25] What the agreement can do is commit each party to execute a will, trust, or beneficiary designation in favor of the other, with a specific time frame and enforcement mechanism.

The integration clause and no-oral-modification provision deserve careful attention. New Jersey contract law permits modification or waiver of written agreements through subsequent oral agreement or conduct.[26] A robust integration clause, stating the agreement constitutes the entire understanding and may be modified only by signed written instrument, substantially reduces this risk. Attorneys should advise parties that their subsequent conduct must be consistent with the agreement's terms.

Every cohabitation agreement should include a severability clause and a governing law provision. Where either party has significant assets in another state, or where relocation is anticipated, the practitioner should research the target state's approach to cohabitation agreements before advising on a choice-of-law clause.

Beyond these drafting best practices, practitioners should be alert to common pitfalls. First, failing to update asset schedules as exhibits renders otherwise well-drafted provisions unenforceable due to inadequate disclosure. Second, overly broad waivers, particularly palimony waivers offering no consideration to the waiving party, invite unconscionability challenges. Third, neglecting to address consequences of one partner's death leaves a critical gap; the agreement should coordinate with estate planning instruments. Fourth, using generic templates without tailoring to the parties' circumstances creates ambiguity undermining the agreement's purpose. Fifth, omitting provisions for jointly titled property when only one party contributed to its acquisition creates confusion about intent.

C. Ensuring Enforceability

The enforceability of a cohabitation agreement in New Jersey is governed by traditional principles of contract and equity rather than a statutory checklist. Courts have recognized that agreements between unmarried partners are enforceable where they satisfy basic contract requirements and are not the product of unfairness or coercion.[27] Modern cases apply a fact-sensitive analysis emphasizing formation circumstances and fairness of terms.[28] Within that framework, voluntariness, financial disclosure, access to counsel, and substantive fairness consistently bear on enforceability, though no single factor is dispositive.[29]

Practitioners should document the timeline: when the draft was first provided, when executed, and whether there was adequate time for review. An agreement presented and signed the same day or signed under threat that the relationship will end, presents a classic voluntariness problem. Practitioners should also bear in mind that N.J.S.A. 25:1-5(h) bars unwritten support claims, while property-related claims remain governed by general contract and equitable principles.[30]

Full disclosure requires each party to provide a complete and honest account of their assets, liabilities, and income before signing. Practitioners should prepare detailed financial disclosure statements as exhibits. The disclosure need not be exhaustive to the penny, but it must be honest and sufficiently comprehensive to allow the other party and their counsel to assess the implications of what they are signing.

Independent counsel is not a formal requirement for cohabitation agreements in New Jersey as it is for palimony agreements under the amended *N.J.S.A.* 25:1-5(h).[31] Nevertheless, the absence of independent counsel is a significant red flag in any subsequent challenge: a party who signed without counsel, and who can credibly claim they did not understand the terms presents a substantial enforceability risk. Practitioners should require independent counsel for both parties as a matter of practice and document their efforts to ensure access to representation.

D. Updates or Revisions

A cohabitation agreement executed at the beginning of a relationship may be inadequate a decade later. Significant life changes - birth of children, acquisition of a business, a substantial inheritance, a major income shift, or an extended period where one partner leaves the workforce - alter the financial landscape in ways the original agreement may not contemplate. Practitioners should advise clients to revisit the agreement every three to five years and after any major financial or family change.

The revision process requires the same procedural care as the original: independent counsel, updated financial disclosure, adequate time for review, and voluntary execution. A perfunctory amendment executed without these elements may undermine not only the amendment but, in some cases, the enforceability of the original agreement.

VI. Conclusion

Cohabitation agreements occupy an increasingly important position in the New Jersey family law practitioner's toolkit. As non-marital cohabitation continues to grow, the gap between legal protections available to married couples and those available to cohabiting partners will only widen. A well-drafted cohabitation agreement converts litigation uncertainty into a defined, enforceable framework — and, following the 2010 amendment to N.J.S.A. 25:1-5 and *Maeker v. Ross*, it is the only reliable vehicle for support rights upon separation. Practitioners who draft these agreements with adequate disclosure, independent counsel, precise provisions, and honest counseling about both their protections and limits, will serve their clients, the courts, and the profession well. ■

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Endnotes

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