BREAKING UP IS HARD TO DO: ALIMONY, CHILD SUPPORT, CUSTODY AND PARENTING TIME

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PART ONE: ALIMONY

It is long-standing law in New Jersey that divorcing parties are entitled to maintain a standard of living reasonably comparable to that enjoyed during the marriage. Innes v. Innes, 117 N.J. 496, 503 (1990); Crews v. Crews, 164 N.J. 11, 16 (2000). This often requires the earning spouse (or the higher-earning spouse) to provide support, or "alimony," to the dependent spouse. The amount and duration of the alimony obligation is highly fact-sensitive and depends on factors like the disparity in incomes, the length of the marriage, the ability of the dependent spouse to improve his or her earning capacity, the age of the parties' children, and any other special circumstances unique to that marriage. The alimony statute can be found within N.J.S.A. 2A:34-23.

a. **Factors:** An award of alimony is extremely fact-sensitive. Subsection (b) of the statute discusses the factors that the Court considers in determining the type, length and amount of alimony. The factors are as follows:

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

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

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

(4) The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living;

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

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

(7) The parental responsibilities for the children;

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

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

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

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

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

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

b. **The Four Types of Alimony**: Four types of alimony can be awarded by a Court or agreed upon by the parties to a divorce. Discussed at length in subsections (c), (d) and (e) of the alimony statute, they are as follows.

1. Permanent alimony: Permanent alimony is reserved for marriages of long duration where economic need is demonstrated. Gordon v. Rozenwald, 380 N.J. Super. 55 (App. Div. 2005). If an award for permanent alimony is found to be not

warranted, then the Court must state the basis for its findings, and may thereafter consider whether any of the other three types of alimony are appropriate. Permanent alimony will be awarded only if the marriage is long-term. Neither our case law nor statutes define what length makes a long-term marriage. Cases decided prior to the formal recognition of limited duration alimony deemed that a 10 to 13 year marriage was long-term (see Hughes v. Hughes, 311 N.J. Super. 15 (App. Div. 1998)), though the current trend is that a marriage would need to be longer than 14 years to warrant permanent alimony. Cases where the parties were married between 12 and 14 years are really "on the cusp." In these cases, the Court must look closely at the facts of the case to determine whether permanent or limited duration alimony is appropriate.

2. Limited duration alimony: Like permanent alimony, limited duration alimony is awarded when one spouse demonstrates an economic need in order reasonably to maintain the marital standard of living. The only difference between limited duration alimony and permanent alimony is the length of the marriage. Limited duration alimony was formally recognized by our legislature and incorporated into the alimony statute in 1999. The legislative intent behind creating limited duration alimony was to ensure that the dependent spouse in a marital relationship of less than substantial length was compensated for his or her contribution to the marital partnership. See Gordon v. Rozenwald, 380 N.J. Super. 55 (App. Div. 2005). The Appellate Division in Gordon noted that "limited duration alimony is available to a dependent spouse who made

'contributions to a relatively short-term marriage that…demonstrated the attributes of a 'marital partnership' and has the skills and education necessary to return to the workforce." Id. at 65-66, *citing to* Cox v. Cox, 335 N.J. Super. 465, 483 (App. Div. 2000).

The alimony statute directs Courts to award limited duration alimony for "the length of time it would reasonably take for the recipient to improve his or her earning capacity to a level where limited duration alimony is no longer appropriate." N.J.S.A. 2A:34-23(c). Unfortunately, this does not give litigants much direction and it is difficult to predict what the term of alimony is going to be in a marriage that is not long-term. Litigants and Courts alike can try to tie in the end date of limited duration alimony with the occurrence of a particular future event. For example, in the unreported but oft-cited case of Dubois v. Brodeur, the wife sought a term that coincided with the anticipated college graduation of the parties' youngest child in 2024, while the husband sought a term that coincided with the anticipated end-date of his career as a professional hockey player in 2012. DuBois v. Brodeur, 2009 WL 701998, *1 (App. Div. March 19, 2009). The trial court instead held that Brodeur's alimony obligation should terminate in 2020, when the parties' youngest child would complete her secondary education and Ms. DuBois would no longer be the children's full-time caretaker. Id. It should be noted, however, that an award of 1.4 years of alimony for each year of marriage, as in the case of Dubois v. Brodeur, is rare and was dictated largely by the parties' high standard of living.

In recent years, the trend for the length of a limited duration alimony award is closer to half a year to one year of alimony for every year of marriage, or less. *See* Weishaus v. Weishaus, 180 N.J. 131, 135 (2004) (three-year term after 15-year marriage); Newell v. Hudson, 376 N.J. Super. 29, 31 (App. Div. 2005) (four-year term after nine-year marriage); Tarantino v. Tarantino, 2006 WL 572197, *3-4 (App. Div. March 10, 2006) (limited duration alimony for five years after a five-year marriage); Whitesell v. Whitesell, 2006 WL 1302407, *4 (App. Div. May 12, 2006) (one year limited duration alimony appropriate in 2.5-year marriage "to permit child to gain in age and the wife to re-enter the employment market"); E.I v. L.I., 2006 WL 1764473, *8 (App. Div. June 29, 2006) (limited duration alimony of only three years after a 10-year marriage to enable wife to "live the same modest lifestyle the parties had acquired while living together"); Finne v. Finne, 2008 WL 2078504 (App. Div. May 19, 2008) (nine-year limited duration alimony award after a marriage of 10 years).

3. Rehabilitative alimony: This is a short-term award of alimony that is specifically intended to enable one spouse to complete the preparation necessary for economic self-sufficiency, or to "rehabilitate" himself or herself. This type of alimony is commonly awarded when one spouse gave up his or her education or career in order to support the household while the other spouse continued in his or her education or career. Cox v. Cox, 335 N.J. Super. 465, 475 (App. Div. 2000). In order to determine the length of rehabilitative alimony, the supported spouse should set forth a plan that includes the steps he or she will take to become self-

sufficient. For example, a litigant can show that he has enrolled in nursing school, that he intends to graduate in two years, and that he will need to be employed for one year in order to become self-sufficient. Rehabilitative alimony can be awarded in addition to permanent or limited-duration alimony. This results in a higher alimony award toward the beginning of the alimony period. Alimony would then be reduced when the "rehabilitation" period is over. Rehabilitative alimony can be modified upon a showing of changed circumstances or upon the non-occurrence of the event that the Court determined would make the supported spouse self-sufficient.

4. Reimbursement alimony: This is a short-term award of alimony meant to eliminate the injustice that occurs when one spouse supported the other spouse so he or she could obtain an education, but then does not get to reap the benefits of that education due to the impending divorce. For example, a reimbursement situation would arise if one spouse paid the other spouse's medical school expenses and then the parties divorced shortly after the medical school graduation. This type of alimony is limited to "monetary contributions made with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits." Id., citing to Mahoney v. Mahoney, 91 N.J. 488 (1982). Like rehabilitative alimony, reimbursement alimony can be awarded in addition to permanent or limited duration alimony.

c. **Imputing Income**: The first factor in the alimony statute is the "actual need and ability of the parties to pay." One way to measure a party's need for alimony

or ability to pay alimony is by looking at his or her income during the marriage, through tax returns, W-2s, profit and loss statements, and Case Information Statements. However, in many cases, one spouse is not working or never worked, though he or she has the *ability* to work. In other cases, one spouse works, but not to his or her full potential, or has income that is not reported on W-2s or tax returns. In such situations, a Court may choose to impute income to that party. In other words, the Court will treat that party as though he or she earns or can earn a particular amount regardless of whether he or she actually earns that amount.

Imputation of income is a discretionary matter not capable of precise or exact determination, but rather requires a judge to realistically appraise capacity to earn and job availability. Storey v. Storey, 373 N.J. Super. 464, 473 (App. Div. 2004). When one party is unemployed or underemployed, one or both of the parties have the option of hiring an employability or vocational expert to opine as to the party's earning capacity. The expert can also opine as to job availability in the fields in which the party would be suited for employment.

Paragraph 12 of Appendix IX-A to the New Jersey Court Rules discusses the imputation of income to parents, stating that "[i]f the court finds that either party is, without just cause, voluntarily underemployed or unemployed, it shall impute income to that parent according to the following priorities:

1. Impute income based on potential employment and earning capacity using the parent's work history, occupational qualifications, educational background, and prevailing job opportunities in the region. The court may impute income

based on the parent's former income at that person's usual or former occupation or the average earnings for that occupation as reported by the New Jersey Department of Labor ("NJDOL") (see http://lwd.dol.state.nj.us/labor/lpa/employ/oeswage/oeswage_index.html);

2. If potential earnings cannot be determined, impute income based on the parent's most recent wage or benefit record (a minimum of two calendar quarters) on file with the NJDOL; or

3. If a NJDOL wage or benefit record is not available, impute income based on full-time employment (40 hours) at the New Jersey minimum wage ($7.15 per hour)."

Pursuant to the same paragraph, in determining whether to impute income to a parent and if so, how much, the court should consider:

1. What the employment status and earning capacity of that parent would have been if the family had remained intact or would have formed;
2. The reason and intent for the voluntary underemployment or unemployment;
3. The availability of other assets that may be used to pay support; and
4. The ages of any children in the parent's household and child-care alternatives.

Imputation is not mandated in every case. The Storey court specifically pointed out that the need to care for a child, the lack of work in one's field, a health condition and the loss of a professional license are all considerations that may weigh against the

imputation of income. Storey, 373 N.J. Super. at 471. Courts apply a level of common sense when it comes to the imputation of income. In Khalaf v. Khalaf, 58 N.J. 63, 69-70 (1971), the Supreme Court did not impute income to a wife who had never worked during the 26-year marriage and had no substantial employment experience. The Court emphasized that had this been a marriage of short duration where the wife had not spent so many years as a housewife, then the result may have been different. Id. at 70.

d. **Modifying or Terminating Alimony**: In general, an alimony award is subject to modification or termination upon a showing of substantial and permanent changed circumstances. The Court in Lepis v. Lepis, 83 N.J. 139, 157 (1980) instructs that a moving party must demonstrate a *prima facie* showing of changed circumstances. Temporary circumstances are an insufficient basis for modification. Innes v. Innes, 117 N.J. 496 (1990) (citing Bonanno v. Bonanno, 4 N.J. 268, 275 (1950)). Courts have consistently rejected requests for modification based on circumstances that are only temporary or that are expected but have not occurred. Lepis, 83 N.J. at 157 (citing Bonanno, 4 N.J. at 275). Payor spouses constantly ask practitioners to file applications to modify alimony as soon as they become unemployed. If applications are hastily filed right after a period of unemployment, they will be denied. The Court will require a substantial period of unemployment, including proof of search for a replacement job, before finding an actual change in circumstances. Similarly, circumstances that are expected, but have not yet occurred, are not changed circumstances. For example, rumors of a layoff would not be enough to constitute changed circumstances. On the other hand, if the payor spouse whose employment required extensive physical labor

suddenly becomes completely disabled, then that may be a substantial and permanent change in circumstances.

The party seeking modification of a support award has to demonstrate *prima facie* changed circumstances before the motion can proceed to discovery and the taking of proofs. Weishaus v. Weishaus, 180 N.J. 131, 141 (2004); Crews v. Crews, 164 N.J. 11, 28 (2000); Lepis v. Lepis, 83 N.J. 139, 146 (1980); Larbig v. Larbig, 384 N.J. Super. 17, 23 (App. Div. 2006). The Court will then examine whether the supporting spouse has the ability to continue paying the alimony previously ordered by the Court. Lepis, 83 N.J. at 157; Crews, 164 N.J. at 24.

i. Case Information Statements on an Application for Modification of Alimony or Child Support: Pursuant to R. 5:5-4, the party moving for a modification of alimony or child support must include a copy of all prior Case Information Statements as well as a current Case Information Statement. While the opposing party must also include a copy of all prior Case Information Statements, he or she does not need to provide a current Case Information Statement until the Court finds a *prima facie* showing of changed circumstances.

ii. Cohabitation as a Ground for Modification/Termination of Alimony: New Jersey utilizes a two part test to determine whether cohabitation constitutes changed circumstances justifying a downward modification of alimony. First, the payor spouse must make a *prima facie* showing that the dependent spouse is cohabitating. Ozolins v. Ozolins, 308 N.J. Super. 243, 245 (App. Div. 1998). Proof of cohabitation includes, but is not limited to, joint bank accounts, shared living

expenses and household chores, holding themselves out as a social "couple" and sharing common meals. Konzelman v. Konzelman, 158 N.J. 185, 202 (1999). If the payor spouse can prove *prima facie* cohabitation, the burden then shifts to the dependent spouse to show that there is no economic dependency between the couple, and therefore the dependent spouse has a continuing need for support. Gayet v. Gayet, 92 N.J. 149, 154 (1980). This is often referred to as the "economic benefits test." An economic benefit will be found, and alimony reduced accordingly, if (1) the cohabitant contributes to the dependent spouse's support, or (2) the cohabitant resides in the dependent spouse's home without contributing anything toward household expenses (meaning the dependent spouse contributes to the cohabitant's support, even indirectly). Id. at 153.

iii. Retirement as a Ground for Modification/Termination of Alimony: Under Silvan v. Silvan, 267 N.J. Super. 578, 581 (App. Div. 1993), a payor spouse's good faith retirement at age 65 automatically warrants a plenary hearing to determine whether a reduction or termination of alimony is appropriate. The Court will examine (1) the age of the parties; (2) whether at the time of the initial alimony award any attention was given by the parties to the possibility of future retirement; (3) whether the retirement occurred earlier than the parties previously anticipated; (4) the financial impact of the retirement on the parties' respective financial positions; and (5) whether the motivation to retire was reasonable or based primarily on a desire to reduce alimony. Id.

It is more difficult to modify or terminate alimony based on a payor spouse's voluntary early retirement. Under Dilger v. Dilger, 242 N.J. Super. 380 (Ch. Div. 1990), the Court will examine whether the retirement was reasonable and in good faith. The Court will pay particular attention to the retiree's (1) age, (2) health, (3) motives in retiring, (4) timing of retirement, (5) ability to pay maintenance after retirement, and (6) ability of the supported spouse to provide for himself or herself. Also significant are the parties' reasonable expectations regarding the payor spouse's retirement at the time of the original alimony award. For example, if the parties anticipated that the payor spouse would not retire until five (5) years after the payor makes his application, then the dependent spouse may not have had enough time to prepare to live on the reduced support. This would weigh against a finding of sufficient changed circumstances to modify the alimony award.

e. **Enforcing an Alimony or Child Support Award:** What are the options when the payor spouse has not satisfied his or her alimony or child support obligations? The first thing the payee spouse should do is file an application "to enforce litigant's rights." This is a fancy way of asking the Court to enforce something that has already been ordered. The Court Rules even provide for specific remedies for the violation of an alimony or child support order under R. 5:3-7(b), which include:

i. Fixing the amount of arrears and entering a judgment upon which interest accrues;

ii. Requiring payment of arrears on a periodic basis;

iii. Suspension of an occupational or driver's license;

iv. Economic sanctions;

v. Participation in an approved community service program;

vi. Incarceration, with or without work release;

vii. Issuance of a warrant to be executed upon further violation of the judgment or order.

One way to avoid violations of child support or alimony orders is to have child support and alimony paid through the county probation department (in accordance with R. 5:7-7) via income withholding, wherein the support is automatically deducted from the payor's paycheck. Once a payor accrues substantial arrears, the probation department can institute enforcement proceedings itself. This is an additional remedy to the payee spouse.

PART TWO: CHILD SUPPORT AND THE CHILD SUPPORT GUIDELINES

The philosophy behind child support and the development of the child support guidelines is best expressed in paragraph one of Appendix IX-A of the N.J. Court Rules. Pursuant to paragraph one, (1) child support is a continuous duty of both parents; (2) children are entitled to share in the current income of both parents; and (3) children should not be the economic victims of divorce or out-of-wedlock birth.

Parties cannot waive child support because unlike alimony, child support is a right that belongs to the child, not the parties. Martinetti v. Hickman, 261 N.J. Super. 508 (App. Div. 1993). The amount of support that is to be paid from one parent to the other on behalf of the child is based on the parties' income and assets as well as their

physical and social conditions. Child support is generally more predictable than alimony because child support is calculated using the Child Support Guidelines ("Guidelines"). New Jersey Court Rule 5:6A instructs the Court to use the Guidelines whenever it considers an application to establish or modify child support. The Rule points out that the guidelines must be used as a rebuttable presumption to establish and modify child support orders, meaning that the guidelines-based award is assumed to be the correct amount of child support unless a party proves to the court that circumstances exist that make a guidelines-based award inappropriate.

Most family law practitioners and virtually all courtrooms have computer software that calculates child support. In most cases, the only information the law clerk needs to establish child support is (1) the parties' incomes, (2) the amount of alimony (if any) being paid by one party and received by the other, (3) the amount of annual overnights the non-custodial parent exercises with the children, (4) the cost of health insurance on behalf of the children, and (5) the cost of day care.

The drafters of the Guidelines recognized that expenditures are higher than average for teenaged children and lower than average for preteen children. To account for this reality, child support under the Guidelines is slightly higher for children 12 years of age or older. It is therefore important to input into the Guidelines how many children are 12 or older. If a child turns 12 after a child support award has already issued, it is not considered a change in circumstances. This is because child support awards are based on child-rearing expenditures averaged across the entire age range (0 – 17 years old). This means that awards for younger children are slightly overstated. If

an award was entered when the child was under 12 years old, it is assumed that the net effect from the time the award was entered to the time the child is emancipated would be negligible. For a more detailed explanation, see Appendix IX-A paragraph 17 of the N.J. Court Rules.

a. **What Child Support Covers**: Appendix IX-A paragraph 8 of the N.J. Court Rules states that child support awards include the child's share of housing, food, clothing, transportation, entertainment, unreimbursed health care of up to $250 per child per year and miscellaneous items. While many parties agree to divide extracurricular activities outside of child support, the Court Rules instruct that such expenses actually fall under "entertainment" expenses. The Rules specifically state that entertainment expenses include "fees, memberships and admissions to sports, recreational or social events, lessons or instructions…hobbies…and recreational exercise or sports equipment."

b. **What Child Support Does Not Cover**: Child support does not include child-care expenses, the cost of adding a child to a health insurance premium, or unreimbursed health care expenses over $250 per year per child. Child-care and health insurance expenses can be added into the Guidelines so that the child support award will increase accordingly. As for unreimbursed health care expenses over $250 per year per child, these should be divided between the parties in proportion to their relative incomes. Line 6 of the Guidelines shows the parties' respective percentages of income so parties may choose to defer to line 6 to define how they will divide unreimbursed health care expenses.

c. **Sole Parenting Worksheet versus Shared Parenting Worksheet**: There are two worksheets that can be used to set child support. While both worksheets require the same information, a sole worksheet must be used if the non-custodial parent exercises an average of less than two overnights per week with the children. In a sole worksheet situation, the parties are referred to as "custodial parent" and "non-custodial parent." A shared worksheet is used only when the non-custodial parent exercises two or more overnights per week with the children. In a shared worksheet situation, the parties are referred to as "parent of primary residence" and "parent of alternate residence." For purposes of calculating child support, the number of overnights exercised by the non-custodial parent or parent of alternate residence does not include extended periods of overnights exercised over vacations or summers. Instead, it is the predictable weekly parenting time that counts under the Guidelines. See Appendix IX-A Paragraph 13(b) of the N.J. Court Rules.

d. **True Shared Parenting**: When parties share true 50/50 custody, it is necessary to deviate from or adjust the Guidelines-based award in order to achieve fairness. The Guidelines assume that the parent of primary residence is the only parent who incurs "controlled expenses" on behalf of the child like clothing, personal care, entertainment and other miscellaneous expenses. These "controlled expenses" represent 25% of the child support award. Accordingly, when the parties have a true 50/50 custody arrangement, one parent cannot be assumed to be the parent of primary residence, as that would result in an unfair windfall of child support to that parent. Pursuant to Benisch v. Benisch, 347 N.J. Super. 393, 400-01 (App. Div. 2002), courts

must make "adjustments to correct what otherwise would seem to be an injustice in applying the Guidelines without accounting for the unusual fact of the equal custody time between the two parents." The Appellate Division in Benisch instructed the trial court to "vary the method of applying the Guidelines" in order to "effect substantial justice between the parties." Id. at 401.

e. **Split Parenting:** "Split parenting" describes a situation when there are multiple children of the relationship and each parent has physical custody of at least one child. Appendix IX-A Paragraph 15 of the N.J. Court Rules. To determine the net support obligation owed to one parent by the other, two sole worksheets must be run, each considering one of the parents as the non-custodial parent and accounting for the parenting time awarded to the non-custodial parent. Instead of transferring the calculated awards between parents, the two awards are subtracted. The difference is paid by the parent obligated to pay the higher child support award.

f. **"Above the Guidelines" Child Support**: Pursuant to Appendix IX-A Paragraph 20 of the N.J. Court Rules, if the parents' combined annual net incomes exceed $187,200, the court applies the Guidelines up to $187,200 and then supplements that award with a discretionary amount based on the remaining family income (i.e. income in excess of $187,200) and the factors under N.J.S.A. 2A:34-23. The child support software will alert a user when the parties' combined incomes exceed $187,200 and instruct the user to add a discretionary amount to the guidelines award. The most relevant factors of N.J.S.A. 2A:34-23 to calculate "supplemental" child support are:

i. The needs of the children: The easiest way to determine the children's needs is to make a chart of those needs, being sure to distinguish between the needs attributable to the children and the needs attributable to the custodial parent. Especially in high income cases, "needs" may include extracurricular activities, lessons, tutors, private school tuition, clothing, food, transportation (if a child can drive, then include gas, car payment, car insurance, car maintenance and repairs), entertainment, camps, study abroad, college savings, and even funds needed to make the custodial parent's home look more presentable.

ii. The standard of living and economic circumstances of the parties: Provide the Court with a snapshot of the marital standard of living via Case Information Statements, certifications and testimony. For example, demonstrate that during the marriage the children took horseback riding lessons, went on vacations to Europe, skied every winter, or wore clothing from Saks Fifth Avenue.

iii. Parties' sources of income: Do not forget that many people receive income from sources other than routine "wages, fees, tips, and commissions." Such other sources include interest and dividends, rents, bonuses, personal injury awards, interests in estates and trusts, worker's compensation, unemployment benefits, severance pay, gambling winnings, unreported cash payments and imputed

income. Parties can also receive in-kind income through their employment in the form of vehicles, free housing, meals, vacations, etc. The value of that in-kind income should be included as income for purposes of child support.

iv. Ages of the children: There are many age-specific expenses that courts consider when awarding supplemental child support. While young children may need private preschool, kindergarten, babysitters or nannies. Older children may need tutors, music instruction, vehicles, and money to go on Spring Break.

In 1991, the Appellate Division described a two-part analysis to be applied to high income cases: (1) the reality-based component dictated by the custodial parent's own income; and (2) the added projections that will allow the children to share in the other parent's financial gain. Walton v. Visgil, 248 N.J. Super. 642, 650-51 (App. Div. 1991).

The case of Strahan v. Strahan, 402 N.J. Super. 298 (App. Div. 2008) established reasonable parameters to this two-part analysis. In Strahan, the Appellate Division faulted the trial court for failing to discuss what portion of certain child-related expenses were actually for the children's benefit and what portion were for the benefit of the children's mother (i.e. mortgage, taxes, utilities and car expenses). Id. at 310. The court must be careful not to make the custodial parent the primary beneficiary of these child support payments. Id. (citing Loro v. Del Colliano, 354 N.J. Super. 212, 225-26 (App. Div. 2002)). The Appellate Division also found that the trial court failed to make

an analysis of the reasonableness of the "needs" claimed by the mother on behalf of the twin toddlers. Id. According to Accardi v. Accardi, 369 N.J. Super. 75, 88 (App. Div. 2004), the custodial parent bears the burden of establishing the reasonableness of these expenses." The Strahan court found expenses like (1) a vacation to Jamaica for the children's nanny, (2) $27,000 per year in clothing, (3) $30,000 per year in landscaping, (4) $3,000 per year in "audio visual" expenses, and (5) $36,000 per year for equipment and furnishings, to be unreasonable and not includable in the calculation of child support absent a valid explanation. Id. at 311.

g. **Emancipation**. When a child is emancipated, neither party has an obligation to provide support for him or her. In many states, a child is automatically emancipated at 18 years old. That is not the case in New Jersey. In New Jersey, there is no automatic age for emancipation. It is instead a fact-specific inquiry. Generally, emancipation occurs when the "child has moved beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status of his/her own." Dolce v. Dolce, 383 N.J. Super. 11, 17-18 (App. Div. 2006). Depending on the circumstances, emancipation may occur when:

i. The child reaches the age of majority (18 years old)

ii. The child graduates from high school

iii. The child goes into the armed forces

iv. The child marries

v. The child graduates from college or graduate school (note that a brief and reasonable hiatus from college normally will not cause a child to become emancipated)

vi. The child experiences an event that makes him or her self-supporting

If a child suffers from a severe mental or physical disability, he or she may never be considered emancipated.

h. **Children in College**: The Guidelines were intended to apply only to children under 18 unless the children are still attending high school or a similar secondary educational institution. Accordingly, when a child is in college, the courts are not to apply the guidelines to that child and are instead to consider the factors in N.J.S.A. 2A:34-23(a) to arrive at a child support award for that child. However, Appendix IX-A to the Court Rules directs that the Guidelines *may* be applied to students over 18 years old who commute to college from the custodial parent's home, the rationale being that the custodial parent continues to incur the same expenses on behalf of that child as he or she did when the child was in high school.

The relatively recent case of Jacoby v. Jacoby, 427 N.J. Super. 109 (App. Div. 2012) discusses the reasons why we do not apply the Guidelines to children in college. The Court first noted that child support usually cannot be eliminated altogether when a child is in college, acknowledging the parent's "possible continued need to maintain a local residence for a child who returns home from college during school breaks and vacations." Id. at 121 (citing Hudson v. Hudson, 315 N.J. Super. 577, 585 (App. Div.

1998)). The Court next recognized the child support expenses that remain even when a child is away at college. These expenses include transportation (car maintenance and payments, gasoline, parking, public transportation); furniture (dorm set-up, small appliances); clothing; linens and bedding; luggage; haircuts; telephone; supplies (paper, pens, calculators); sundries (cleaning supplies, laundry detergent); toiletries (soap, shampoo, personal hygiene products); insurance (car insurance, health insurance, possible renter's or personal property insurance); entertainment for events; and spending money. Id. at 121-22. While some of the above expenses are included in the Guidelines, many are not, which further justifies a child support award that is based not on the Guidelines, but on the child support statute. Id.

The Court noted that there are also expenses for which a child may be or should be solely responsible while in college. The trial judge should consider whether and to what extent, under the circumstances, a child should be responsible for some of his or her own expenses using summer wages, work-study payments or part-time employment. Id. Finally, the Court opined that "It also may be more appropriate for a parent to provide direct payments to the student for some of the child's support needs rather than to the other parent. The fact sensitive nature of each of these determinations explains why the Guidelines are ill-suited to make such a support calculation." Id.

Jacoby also affirmed that a parent's payment of a child's college expenses may constitute changed circumstances warranting a modification of child support. "The computation of child support cannot be made in a vacuum as there is a close relationship between college cost and support: the higher the child support order the

less money remains available to contribute to college expenses." Id. The Jacoby court found that defendant-father demonstrated a significant change in circumstances warranting a review of his child support not only because his income had allegedly been reduced by one-third, but also because the parties' children were living away at college. Id. at 118.

i. **Contribution to College and other Institutions of Higher Education**: In New Jersey, divorcing or divorced parents may be compelled to contribute to their children's post high-school educations. Many parties include in their settlement agreements exactly how college contributions will be handled. However, when the children are very young at the time of divorce or when the parties are still divorcing at the time a child enters college, the issue of college contribution can be more complicated. Whether parents will be compelled to contribute and to what extent is governed by the factors set forth in Newburgh v. Arrigo, 88 N.J. 529 (1982). They are as follows:

i. Whether the parent, if still living with the child, would have contributed to the costs of the requested higher education;

ii. The effect of the background, values and goals of the parents on the reasonableness of the expectation of the child for higher education;

iii. The amount of the contribution sought by the child for the cost of higher education;

iv. The ability of the parent to pay that cost;

v. The relationship of the requested contribution to the kind of school or course of study sought by the child;

vi. The financial resources of both parents;

vii. The commitment to and aptitude of the child for the requested education;

viii. The financial resources of the child (i.e. assets owned individually or held in custodianship or trust);

ix. The ability of the child to earn income during the school year or on vacation;

x. The availability of financial aid in the form of college grants and loans;

xi. The child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and

xii. The relationship of the education requested to any prior training and to the overall long-range goals of the child.

In New Jersey, the duty to pay for a child's college expenses may extend beyond undergraduate college to graduate or other professional schools, depending on the specific circumstances of the case. In Ross v. Ross, 167 N.J. Super. 441 (Ch. Div. 1979), the trial court found that a 23-year-old daughter was not emancipated until she graduated from law school. The Ross decision was followed only three years later by the Newburgh decision, which authorized a court to make an award for the higher education of children of divorcing or divorced parents. Read together with Ross, the Newburgh decision applies not only to college expenses, but may apply to graduate college or professional school expenses as well.

PART THREE: CUSTODY AND PARENTING TIME

a. **Legal Custody versus Physical Custody**: There are two components to custody in New Jersey. Legal custody is the ability to make major decisions regarding the child's heath, education and general welfare. Except in extreme circumstances, most parties in New Jersey share legal custody, meaning they share the authority and responsibility to make major decisions regarding the welfare of the child. Beck v. Beck, 86 N.J. 480 (1981). A parent may be awarded sole legal custody when the other parent has been neglectful of the child or otherwise absent from the child's life; or where the parents are unable to agree, communicate or cooperate in matters relating to the health, safety and welfare of their child, regardless of liberal time-sharing of the child. Nufrio v. Nufrio, 341 N.J. Super. 548 (App. Div. 2001). Even when the parties share joint legal custody, the parent of primary residence is still charged with making the routine day-to-day decisions on behalf of the child. Beck, 86 N.J. at 596. The Court in Beck listed several factors to be considered when deciding the practicability of a joint custodial arrangement. The factors include:

1. Whether the children have established such relationships with both parents that they would benefit from joint custody;
2. Whether both parents are fit; i.e. physically and psychologically capable of fulfilling the role of parent;
3. Whether both parents exhibit a potential for cooperation in the best interests of the child;
4. The financial status of the parents;

5. The geographical proximity of their respective homes;
6. Parental employment;
7. The ages and number of children;
8. The preferences of the children, if they are of sufficient age and capacity to express meaningful preference.

Id. at 499-500.

Practitioners suggest and Courts order joint legal custody in a majority of cases, assuming it is in the best interests of the child, as well as the most fair to the parties. Joint legal custody is, without doubt, what is "in fashion." But is it really the best arrangement in all of these cases? What happens when the parties have reached an impasse on a particular issue? When joint legal custody is awarded, there is an underlying assumption that the parties will be able to reach a decision on matters of importance to the child. Unfortunately, case law following Beck proves that many parties cannot even agree on the most basic decisions, making the effectiveness of joint legal custody questionable.

In Brzozowski v. Brzozowski, 265 N.J. Super. 141 (Ch. Div. 1993), the parents of an eight-year-old child could not agree on whether their child should undergo surgery to correct a slight obstruction of her nose. The Court deemed that the custodial parent's position would be the "tie breaker," holding that the custodial parent has more authority to make medical decisions in the event of a disagreement between the parties, despite a joint legal custody arrangement. Id. at 147.

The Appellate Division upheld this notion in the context of a child's religion in Feldman v. Feldman, 378 N.J. Super. 83 (App. Div. 2005). Like the Brzozowskis, the Feldmans shared joint legal custody of their three children. The father, who was Jewish, was the custodial parent. The mother was Catholic. Post-divorce, the children were raised in both faiths, but the mother sought to compel the father to enroll one of the children in religious classes that would take up the child's entire Sunday each week. Not only would this impart much more Catholicism into the child's life than before, but it would also interrupt the father's every-other-Sunday parenting time. Id. The Court held that it was the primary caretaker's right to raise and educate his children in his chosen religion and restrain others from educating the child in a different religion. Id. at 96.

While joint legal custody seems the most "fair" on its face, it is the unfortunate reality that such arrangements can wreak emotional havoc on a child, as the parties are forced to communicate with each other and reach decisions jointly (something that many parties were not even able to do during marriage, let alone after a divorce). It may actually be in the best interests of a child not to award joint legal custody in a high conflict divorce matter. Alternatively, it may be worth explaining to the non-custodial parent that, despite a joint legal custody arrangement, his or her decision-making abilities are not really equal to those of the custodial parent.

Physical custody is just that: actual custody of the child. Normally, one parent has primary physical custody of the child (has the child for a majority of the time), with the other parent having parenting time with the children (i.e. every other weekend). It

is becoming more common, however, for parents to share physical custody, meaning they divide time with the child relatively equally.

b. **Best Interests of the Child:** Pursuant to N.J.S.A. 9:2-4, custody arrangements are fashioned in the "best interests of the child." Barring extreme circumstances, our legislature believes that it is in the best interests of the child to maintain frequent contact with both parents. The level of contact that the child should maintain with each parent is dictated by the following factors under the statute:

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

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

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

d. the history of domestic violence, if any;

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

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

g. the needs of the child;

h. the stability of the home environment offered;

i. the quality and continuity of the child's education;

j. the fitness of the parents;

k. the geographical proximity of the parents' homes;

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

m. the parents' employment responsibilities;

n. and the age and number of the children.

c. **High Conflict Custody Matters and the Use of Experts:** What happens when parties simply cannot agree on custody or parenting time? Perhaps one party believes the other should not have any contact with the child at all. Maybe the Husband believes he should have 50/50 custody, but the Wife believes the Husband should have only alternate weekends with the child. In these instances where the parties have dug in their heels and cannot reach a compromise, we may need to turn to expert testimony to render an opinion as to the child's best interests. A Court may appoint an expert, the parties may retain a joint expert, or each party can retain his or her own expert. The expert can be a physician, psychiatrist, psychologist or other mental health professional. The expert cannot be a professional who is already providing therapy to a member of the family at issue. State Board of Psychological Examiners Regulation 13:42-12.3.

i. What does the expert do? In rendering an opinion about what custody arrangement is in the child's best interests, the expert can interview the parties, children and collateral contacts (grandparents, family friends, teachers); investigate the parties' homes; review medical records; conduct observations of the parties

interacting with the children; and perform clinical testing on the parties.

ii. What is the scope of the expert's opinion? The parties or the Court define what the scope of the expert's opinion will be. If the parties cannot agree on anything at all, the expert may be charged with defining what custody and parenting time arrangement is in the child's best interests. The scope can also be more focused, like "how much overnight parenting time should the non-custodial parent have?" or "is one party alienating the children from the other party?"

iii. Expert report: An expert will usually render a report prior to trial. Hopefully, the parties' review of the report will help to settle the matter. If it does not, then the expert will testify to the report at trial. The report itself is hearsay, though courts usually relax the New Jersey Rules of Evidence and admit reports into evidence because they tend to be very useful and the protection of a child's best interests is so important.

d. **Removal of a Child out of New Jersey:** During or after the parties' divorce proceeding, the custodial parent may desire to relocate outside of New Jersey. Common reasons include, but are not limited, job opportunities, remarriage, and a lower cost of living. Without the express consent of the non-custodial parent, the custodial parent must get permission from the Court before he or she relocates out of

state with the child. N.J.S.A. 9:2-2. If the parties share true 50/50 custody with the child, then the ability of the parent to relocate turns on what is in the best interest of the child. When the parties share less than 50/50 custody, then the ability of the parent to relocate is governed by the factors set forth in Baures v. Lewis, 167 N.J. 91 (2001). Under Baures, the party seeking to move must first prove (1) a good faith reason for the move, and (2) that the move will not be inimical to the child's interests. If the custodial parent cannot meet this initial burden, then the removal application will be denied.

If the custodial parent does meet the initial burden, then the burden shifts to the non-custodial parent to produce evidence that the move is either not in the child's best interests or is inimical to the child's interests. In determining all of the above, the Court considers the following factors:

i. The reason for the move;

ii. The reasons given for the opposition;

iii. The past history of dealings between the parties;

iv. Whether the child will receive educational, health and leisure opportunities at least equal to the current location of the child;

v. Any special needs or talents of the child;

vi. Whether a visitation or communication schedule can be developed with the non-custodial parent;

vii. The likelihood of the custodial parent fostering that relationship;

viii. Effect of the move on extended family relationships;

ix. If the child is of an age to make a reasoned decision;

x. Whether the child is entering his senior year in high school in which case removal should not be granted against the child's wishes;

xi. Whether the non-custodial parent has the ability to relocate;

xii. Any other factor bearing on the children's interests.

Pursuant to Schulze v. Morris, 361 N.J. Super. 419, 426 (App. Div. 2003), a parent seeking to move *within* the state of New Jersey with the child does not need to seek permission from the Court before moving. However, the relocation may constitute a change of circumstances warranting modification of the custodial and parenting time arrangement. Schulze, supra, 361 N.J. Super. at 426. The Court will consider the factors set forth in Baures v. Lewis, 167 N.J. 91, 117 (2001) in determining whether a modification of the custodial and parenting time arrangement is warranted. Id.

e. **Enforcing a Custody or Parenting Time Order or Judgment:** Like the enforcement of alimony or child support, if a party violates a custody or parenting time order, the non-violating party can file an application to enforce the order and hold the violating party "in violation of litigant's rights." For example, one party may refuse to bring the children to the "drop-off" site to the other party can exercise his or her parenting time. Conversely, one party may not show up for his or her parenting time at all, causing the custodial parent to incur costs to find child care for the children. The Court Rules provide for specific remedies for the violation of a custody or parenting time order under R. 5:3-7(a), which include:

i. Compensatory time with the children;

ii. Economic sanctions, including but not limited to, the award of monetary compensation for the costs resulting from a parent's failure to appear for scheduled parenting time or visitation such as child care expenses incurred by the other parent;

iii. Modification of transportation arrangements;

iv. Pick-up and return of the children in a public place;

v. Counseling for the children or parents or any of them at the expense of the parent in violation of the order;

vi. Temporary or permanent modification of the custodial arrangement provided such relief is in the best interest of the children;

vii. Participation by the parent in violation of the order in an approved community service program;

viii. Incarceration, with or without work release;

ix. Issuance of a warrant to be executed upon the further violation of the judgment or order; and

x. Any other appropriate equitable remedy.