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## Chair's Column

# The Complications Associated with Mediation in 2023

*By Derek M. Freed*

Mediation is, at its heart, a voluntary process designed to facilitate the resolution of any areas of disagreement between parties. The Uniform Mediation Act, as adopted by New Jersey, defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[1] Despite the voluntary nature of mediation, in family law-related cases in New Jersey we have at least two "compulsory" mediation events, but even these events are limited in nature.

First, we have mandatory custody and parenting time mediation. *R.* 5:8-1 states, "in family actions in which the court finds that either the custody of children or parenting time issues, or both, are a genuine and substantial issue, the court shall refer the case to mediation in accordance with the provisions of *R.* 1:40-5." Second, *R.* 5:5-6(b) indicates that parties on the FM docket must attend post-ESP economic mediation. This process is limited to (a) economic issues and (b) shall occur for "no more than two hours" unless the parties jointly agree to continue the process.[2]

In both custody/parenting time mediation, as well as economic mediation, while each party's attendance is mandatory (except in the event of the case involving domestic violence), the parties are *not* required to reach an agreement. This fact confirms that both custody/parenting time mediation, as well as economic mediation, are voluntary in nature.

We have likely all been witness (directly or indirectly) to cases where one or both of the parties attends the mediation and uses their share of the allotted time to reiterate their position, while refusing to consider the other party's position and/or reasoning. In the context of the economic mediation, these parties are very cognizant of the two-hour participation

requirement and are watching the clock very closely. They are not present to attempt to resolve the dispute. Instead, they are attending mediation because they were required to be there — they are looking to "check the box" that indicates that they attended mediation, and it was not successful.

A question can be raised as to whether the litigant who attends mediation simply to "check the box" has truly participated in the mediation, as they were not open to resolution and made no real effort toward settlement. However, a secondary question can also be raised that revolves around compelling a party who does not wish to attend mediation to participate in a voluntary process like mediation. Forcing a party to attend mediation feels analogous to requiring someone to attend psychotherapy against their wishes — the chances of success are extremely limited regardless of the efforts of the therapist and/or mediator.

Some litigants explain to the mediator that they want "their day in court" and will not resolve their case until they can "talk to the judge." However, these same litigants have often been told that a trial date is far off in the horizon, or that there are no trial dates in their county. Thus, they often arrive at mediation expressing feelings of extreme frustration, hopelessness, and/or hostility.

Mediating cases where one or both parties does not wish to be present and where there is no real opportunity for judicial resolution in the near—or distant—future can be complicated. However, a resolution may still be possible. This article will discuss possible strategies and approaches, from the perspective of the mediator, to increase the likelihood of resolution.

First, in these cases, patience is often likely to be necessary. If a party is expressing their desire to tell the judge their story, it may be, in part, because that party feels their story has not yet been "heard." Allowing the party to explain their story, and *why* they feel as they do, may help the matter move ahead. Providing the litigant some time to speak freely and uninterrupted may prove helpful. Patience will likely be necessary, especially if the litigant is veering off into the discussion of facts that a court/counsel would likely find irrelevant. However, if the litigant feels rushed, dismissed, or that they haven't had the chance to discuss their case, the odds of resolving the case in mediation will remain low. In these instances, it may be helpful to have a mediation with a staggered start time (e.g., party one arrives at 9 a.m. while party two arrives at 10 a.m.). This would allow for party one to talk at length without party two "waiting" to be heard. When party two arrives, the mediator can excuse party one and their counsel for a break, so as to afford party two the same opportunity to speak without the pressure of the other party "waiting." Depending on the complexity of the issues, it may also be helpful to meet with the parties on separate days prior to there being a joint mediation session.

Additionally, not all mediations can be resolved in a single session, or even a handful of sessions. Certain cases require multiple mediation sessions. The mediator should be focused on moving the matter ahead, but should also consider whether multiple, shorter mediation sessions are warranted. Videoconferencing software can be particularly helpful, as it allows for the scheduling of shorter mediation sessions in a cost-effective manner. Each case is different and there is no "one size fits all" method for the duration and frequency of mediation sessions.

Second, acknowledging the party's frustration may prove helpful. If a party comes to mediation frustrated because they cannot "have their day in court," they are likely to remain unsatisfied (and therefore unable to move forward) if the mediator simply tells them "that's the way it is." Litigants do not usually want to hear that the system is imperfect, nor do they usually want to be told of the reasons for the judicial vacancies. What they likely want is for someone (i.e., the mediator) to understand their feelings of frustration. Thus, acknowledging the feelings of the frustrated party may be crucial to moving the mediation forward.

Third, it may be helpful for the mediator to explain that a trial is not the panacea for all family disagreements. For example, many litigants believe that trials occur over a day/several consecutive days, and that decisions are rendered by the court immediately following the testimony. Litigants do not understand that many courts require written/oral summations after a trial is concluded. They also do not understand that the court needs actual time to write the decision for their case, which can take weeks to months depending on the issues. Litigants also do not understand that *their* testimony (i.e., their time to speak their mind) may be a minor part of the trial. Expert testimony may be the bulk of the trial, depending on the circumstances. Finally, litigants may need to hear that even if they testify perfectly and speak their mind, the judge may disagree with them. Stated differently, litigants need to know that at a trial, no outcome is guaranteed. If a litigant understands the reali-

ties of trial and the trial process is demystified, they may cease to see trials as the ideal outcome.

A mediator can contrast the realities of trial with the benefits of mediation. Mediation can involve self-determination. It can involve what is best for the specific family, as opposed to what is best for most families. Mediation can allow for the focus to be on the parties. An agreement can be promptly drafted after a resolution is reached in mediation. Indeed, you can have a mediation session with the parties and counsel wherein the agreement is revised based on the preferences of the parties. If the litigant understands the benefits of the mediation process, that party may, as a result, become more desirous of resolving the issues via mediation, as opposed to trial.

Next, a mediator should evaluate whether all the actual decision-makers are present for the mediation. For example, if the words of a party's parent or sibling seems to arise at the start of every meeting, does it make sense to invite that parent or sibling to a mediation session and hear from them directly? Sometimes there is a disconnect between what is being reported to/from the third party, which can be resolved via direct communication, as long as everyone agrees with such an approach. As a mediator, one should not hesitate to invite those who are seen as *necessary* into the mediation, as long as that concept is discussed and agreed upon in advance.

Additionally, the mediator should have clear and open lines of communication with counsel for each of the parties. If the parties are attending mediation with counsel, the mediator should speak with counsel at the beginning, middle, and end of the mediation session to understand the mindset of the parties, as well as how each party feels the case is progressing. If the mediator is working with the parties alone, checking in with counsel in between sessions can provide helpful information. Clear feedback can help guide the mediator's approach during sessions. In mediation, more feedback provides a clearer understanding of the personalities, as well as the positions of the parties. The mediator can then use their understanding, which is refined over time, to help the process move forward.

This list is not meant to be mandatory or exhaustive. Each mediator brings with them skills developed over the entirety of their career. Ideally, the attorneys and parties can work together to find a mediator who possesses the tools and traits that may be helpful toward securing a fair, equitable, and voluntary resolution of the issues in dispute in that particular case. There are many excellent mediators throughout New Jersey and, especially in instances where the mediation is going to occur via videoconferencing, the parties and counsel have a great deal of flexibility in securing the most appropriate mediator for their case. As mediators, we should survey the case, evaluate whether we can provide assistance, and assess whether we can connect with the parties and counsel such that we can be as effective as possible.

Ultimately, the goal is for the parties, counsel, and the mediator to work together to attain a voluntary resolution that is fair and equitable under the circumstances. We all need to approach the family and the mediation doing our best to understand *how* to work together, especially given the present backdrop regarding the lack of an opportunity for a judicial resolution of the case, on a short-term, or potentially even a longer-term basis. ■

## Endnotes

1. *N.J.S.A.* 2A:23C-2.
2. *See R.* 5:5-6(b).

# Inside this issue

Executive Editor's Column

# Is the Prevention of Domestic Violence Act Susceptible to Legal Challenges?

*By Ronald Lieberman*

New Jersey's Prevention of Domestic Violence Act[1] (PDVA) embodies a strong public policy against domestic violence.[2] Because the act is remedial in nature, it has been liberally construed for the protection of victims of domestic violence.[3] Across the country, an average of three women are killed each day by a current or former partner.[4] When a male abuser has access to a firearm, the risk he will shoot and kill a female victim increases 1000%.[5] Perhaps in response to those chilling statistics, a provision of the PDVA allows for the seizure of weapons and firearm permits from a domestic abuser.[6] That seizure supports the PDVA's policy to protect domestic violence victims.[7] The state files a petition for a hearing in the Family Part to obtain title to the weapons and to revoke the permits "on the grounds that the owner is unfit or that the owner poses a threat to the public in general or a person or persons in particular."[8] The state's burden of proof is "by a preponderance of the evidence, that forfeiture is legally warranted."[9] So, even if the TRO has been dismissed, weapons and firearms permits can still be forfeited if the court determines the owner is unfit under N.J.S.A. 2C:58-3(c).[10]

It appears from a February 2, 2023, decision by the United States Court of Appeals for the Fifth Circuit[11] that a statutory obligation of seizing weapons from a domestic violence abuser may be unconstitutional. In the case of *United States v. Rahimi*,[12] the question raised was whether the federal prohibition on domestic abusers possessing weapons was constitutional in light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*.[13] There was a federal law (18 U.S.C. sec. 9222 (g)(8)) prohibiting a person under a domestic violence restraining order from possessing a firearm.[14] Rahimi had been involved in five shootings in Texas and he later agreed to the entry of a civil protective order against him after he allegedly assaulted an ex-girlfriend.[15] That order prohibited him from possessing a firearm and he was later convicted for possession of a firearm under section 922(g)(8).[16]

The Fifth Circuit Court of Appeals ruled the *Bruen* case would make section 922(g)(8) unconstitutional.[17] The ruling was premised upon the decision in *Bruen* that all members of a "political community" are subject to the protections of the Second Amendment to the United States Constitution.[18] Although Rahimi was "hardly a model citizen,"[19] his possession of a firearm fell within the Second Amendment[20] so the right to keep and bear arms would be limited only by "historical tradition…."[21] The *Rahimi* court could not find any "historical traditions of firearm regulation" that would support section 922(g)(8)'s ban on firearms.[22] Thus, the statute was declared unconstitutional and Rahimi's conviction was vacated.[23]

Given that restraining orders are handed out in civil proceedings which do not require the defendant to have committed a crime, let alone have committed an act beyond a reasonable doubt, the protections for victims of domestic violence are in question when it comes to prohibiting a defendant from possessing a firearm. Thus, it appears reasonable to assume it is only a matter of time before a defendant faced with the forfeiture of weapons under PDVA challenges the prohibition, citing *Bruen*, and perhaps now *Rahimi*. ■

## Endnotes

1. *N.J.S.A.* 2C:25-17 to -35.
2. *Cesare v. Cesare*, 154 N.J. 394, 400 (1998).
3. *Ibid.*

4. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Intimate Partner Violence: Attributes of Victimization, 1993-2011* (November 2013).
5. Spencer, Chelsea and Stith, Sandra, *Risk Factors for Male Perpetration and Female Victimization for Intimate Partner Homicide: A Meta-Analysis*, Trauma, Violence & Abuse, p.9 (2018).
6. *N.J.S.A.* 2C:25-21 (d).
7. *State v. Cassidy*, 179 N.J. 150, 163-64 (2004).
8. *N.J.S.A.* 2C:25-21(d)(3).
9. *State v. Cordoma*, 372 N.J. Super. 524, 533 (App. Div. 2004).
10. *N.J.S.A.* 2C:25-21(d)(3).
11. The Fifth Circuit governs Louisiana, Mississippi, and Texas.
12. Case No. 21-11001.
13. 142 S.Ct. 2111 (2022).
14. 18 U.S.C. sec. 9222 (g)(8).
15. *Rahimi*, slip op. at p. 2.
16. *Rahimi*, slip op. at p. 3.
17. *Rahimi*, slip op. at p. 4.
18. *Rahimi*, slip op. at p. 7.
19. *Rahimi*, slip op. at p. 9.
20. *Rahimi*, slip op. at p. 12.
21. *Rahimi*, slip op. at p. 12.
22. *Rahimi*, slip op. at p. 22.
23. *Rahimi*, slip op. at p. 22.

# A Final Goodbye to My Friend Edward Snyder (1940-2023)

*By Angelo Sarno*

I knew Ed Snyder and had the luck to work with him for some 25 years. Sadly, on Feb. 3, 2023, Ed — my friend, my partner, my confidant — passed away. As I told many of our colleagues and friends, even though he was a mentor and a constant anchor for me in the daily chaos that is the practice of family law, I will never think of Ed for the lawyer who he was. He did all the things in his legal career lawyers weigh as important, like Supreme Court experiences, books published, reported decisions, awards, and committee positions. None of that ever mattered to me. I will always remember instead and tell others about the decent, kind, empathetic, sincere, genuine person whom he was. He was a person in whom I confided and trusted, in every sense of the words. I wish everyone could be as fortunate as I was to have such a special person in their life at some point, and I encourage everyone who knew him to remember Ed as the person he was to them.

For me, Ed was one of the most sensitive, understanding individuals I ever met. He was truly a calming force in my life. It was easy to open up to him. He was not always that way. He certainly mellowed with age. There were days throughout the years I would stress about running a firm, about cases, about judges, about lawyers, about life, and he was always there to sit down and talk. Never once did he say he was unavailable. Ever. Never once did he say he did not have time to speak with me day or night. Never once did he say he had something more important to do. He was there, always. He was more than just being present; he was genuinely listening, and he genuinely cared. He always had the right words to say for the problem. He was not a man of many words with his advice, but he was always sharp and to the point.

I cannot convey the significance and priceless-ness of having someone in your life who can just make everything sound OK no matter how bad it may seem. That ability comes from experience. Ed had immense experience. He had talent, education, skill, and cache. He walked into a room, and you saw him immediately. It is called swag these days, I guess. I am grateful I had Ed as a mentor in the law and in life.

He left behind his wife Gail, his sons Bill and Bob, his daughter Gaby, his grandson Graeme, his nine partners, associates, staff, and friends who will always identify and cherish the person he was. I was lucky in December 2022 to spend a significant amount of time with my friend. His favorite thing to do, at least with me, was to spend the day in New York City. His favorite restaurant was Marea. After going there, we would often walk around the city and just talk. As a way of honoring that incredible experience he gave me over the last 13 years, my partners and I decided to partake in that same experience in his honor on March 23. We will continue doing so each year to keep our memories of him alive.

Ed was an icon and a truly inspirational person. If he let you into his inner circle, it transformed your life. In many ways Ed was a father figure to everyone at his law firm. He was young at heart and in many ways a child trapped in a man's body. I never saw him as my partner. He was so much more, and I tried to present that in this article. I will always remember him as more. The loss is immeasurable. We all miss you and love you Ed. ■

**A memorial celebrating Ed's life will be held on**

**April 23**
2-4 p.m.
Hanover Marriott Hotel
1401 Rt. 10 East, Whippany, NJ

If you are unable to attend, you can log in on **Zoom**:

https://us02web.zoom.us/j/5998531887?pwd=RzhiaHNuSlZCZHBwTTJ0ZEZXMllmZz09

Meeting ID: 599 853 1887
Passcode: 2023

# The Case for Plea Bargaining in Domestic Violence Matters

*By Alix Claps*

As family law practitioners, we are all too familiar with being "settlement-minded" regarding the resolution of our cases. We practice in a court of equity, after all, and so the "right" outcome is usually one where neither party is 100% satisfied.

Settlements, deals, and bargains are also present in the courts of law, however. Like divorces, most civil part matters settle before trial. Criminal cases at the Superior Court and municipal levels are also "settled" by way of plea bargain more often than not. This includes criminal cases involving the exact same disorderly persons offenses that form the basis of predicate acts of domestic violence.

Plea bargaining truly began to take hold in our justice system between the mid-19th and early 20th century.[1] Ninety-seven percent of federal convictions, and 94% of state convictions, are the result of guilty pleas.[2] In New Jersey, even traffic violations can be pleaded to avoid points on one's driving record – this principle is not limited to offenses that could lead to jail terms. Decisions on admissions and punishments are decided between prosecutors and defendants – not, it must be noted, between victims and defendants.

Why, then, are civil restraints currently the only settlement option available in the "FV" docket, where the worlds of criminal and family law collide? There are many attorneys who would argue that plea bargains negotiated between prosecutors and defendants would be more appropriate, as the victims of domestic violence have already suffered as a result of the controlling actions of the perpetrator. There are reasons why we do not permit crime victims to be in charge of the prosecution of their criminal matters. Would those same reasons not also apply in the quasi-criminal context of domestic violence?

When the domestic violence calendar is called, the judge hearing matters that day gives a speech to all present for the calendar call. We have all heard it dozens of times. Among the information provided is a litany of the risks to a defendant with proceeding to trial – the entry of the final restraining order is only one of those risks. Additionally, unlike in criminal courts where the burden of proof is "beyond a reasonable doubt," domestic violence trials are decided on the preponderance of the evidence standard, increasing the likelihood that a finding will go against a defendant.

Along with the entry of a final restraining order, a domestic violence defendant faces additional penalties such as fines, financial damages to the victim, confiscation of firearms, potential immigration and international travel issues, and being listed on the national domestic violence registry, which can have a significant and lasting impact on employability. Many of these punishments are outside of any judicial discretion. This makes trial an all-or-nothing proposition for both victims and defendants. What, however, if there were a middle ground?

Recently, this author had two domestic violence matters which may have benefited from such a middle-ground solution. One that would keep the victims safe while also limiting the unnecessary use of our already scarce judicial resources. In one matter, this author represented the defendant – a man in his mid-20s who works as a coach for children, grades elementary through high school. After a non-violent argument with his girlfriend, a temporary restraining order was entered against him, with the predicate acts of harassment and stalking being alleged. Unwisely, while the temporary restraining order was in place, the couple reconciled and began communicating. None of those communications was in any way objectionable on its face. However, the girlfriend had another change of sentiment and reported them as violations of the temporary restraining order, amounting to contempt.

Although the defendant was more than willing to enter into any reasonable civil restraint terms the victim wanted, she was unwilling to entertain any discussion. My client knew that the entry of a final restraining order would jeopardize his employment, so he had no choice but to go to trial. The trial court determined that there was no harassment and no stalking. However, it entered

a final restraining order anyway because the defendant had, undeniably, been communicating with the plaintiff while the temporary restraining order was in place. (What would have happened on appeal will remain a mystery, as the plaintiff has since dismissed the final restraining order.)

In the other matter, this author represented the victim. This victim was the subject of voluminous harassing messages from his ex-wife, including hundreds in the span of only a few hours, clearly intended to alarm or seriously annoy him. However, he only applied for a temporary restraining order following a physical assault by her in front of their child. While civil restraints were discussed and considered, the ex-wife's failure to follow numerous orders entered under the "FM" docket made it clear that in order to be protected, the victim needed an order with more than civil enforceability. After a trial, the court found the predicate acts of harassment and assault and entered a final restraining order. The ex-wife was subsequently laid off from her job and claims to have had difficulty in her job search as a result of the restraining order, as she works in finance and is therefore subject to a pre-employment background check.

If there had been something akin to a plea deal available in either of these situations, the trials and subsequent complications could have been avoided. With the more than 85% rise in pending domestic violence cases and the backlog that has increased by a factor of nine since 2020,[3] the judicial resources that are being dedicated to cases that could be resolved through bargaining are significant.

For example, in the case of the defendant-client described above, he may have consented to the entry of a final restraining order if he could have done so without ending up on the domestic violence registry. In his case, there is absolutely nothing to indicate that he poses any actual danger to anyone, including the plaintiff. He has no history of domestic violence allegations with any previous partner and the allegations on the underlying temporary restraining order were entirely non-violent – the plaintiff testified the defendant was calm throughout their argument and that he never even raised his voice.

In the case of the plaintiff-client, he did not want to create additional difficulties for his ex-wife. He is not helped by her inability to secure employment in her field. If the option had existed to have a final restraining order entered through a negotiated bargain, he would have not objected at all if she had been left off the domestic violence registry.

In the context of criminal prosecution, a guilty plea may be voluntarily entered into by a defendant, in return for the reduction or dismissal of certain charges and recommendations concerning the sentence.[4] Ultimately, however, the sentence imposed by the court is a matter of judicial discretion. Though plea bargaining in the criminal context is not without flaws, many of those flaws (overcharging and leveraging the allegations for use in other contexts) already exist in a domestic violence context.

Family part judges make much harder decisions each day than those this author is proposing they be empowered to make. The Prevention of Domestic Violence Act should permit judicial discretion regarding the appropriateness of the various repercussions to each individual situation. This is no more latitude than prosecutors and judges are given in criminal matters. If a restraining order is, in fact, supposed to be a shield, and not a sword, it should also not be a bazooka in the face of a gadfly. ■

*Alix Claps is a partner at Heymann & Fletcher, Esqs. in Mt. Freedom.*

## Endnotes

1. Jenia Turner, PLEA BARGAINING ACROSS BORDERS (New York: Wolters Kluwer/Aspen, 2009)
2. *Missouri v. Frye*, 132 S.Ct. 1399 (2012)
3. nj.com/politics/2022/04/thousands-await-justice-as-nj-courts-grapple-with-record-number-of-judicial-vacancies.html
4. *State v. Davis*, 175 N.J. Super. 130 (App.Div. 1980)

# How to Obtain Personal Jurisdiction Over Defendants in Interstate Flight Domestic Violence Matters

*By Sarah Mahony Eaton*

All states have legislation authorizing courts to grant a restraining order or civil protection order (CPO) to a victim of domestic violence.[1] In New Jersey, most domestic violence matters will involve parties who reside in New Jersey, where personal jurisdiction issues will not arise. However, an attorney may, at some point, be asked to represent a litigant in an interstate flight domestic violence case. These cases refer to a matter in which an alleged domestic violence victim is abused in one state, flees to a second, and files for a restraining order in that second state. The defendant remains in the original state and has no contact or attempted contact with the victim in the second state that would enable the second state to assume personal jurisdiction over the defendant. Imagine a scenario where an interstate flight domestic violence victim is terrified and understandably fearful to return to the original state. The original state may well be where the victim is employed and has friends and/or family who can be part of his/her/their support system. The victim comes to a law firm in the second state seeking help. An attorney recognizes that the court in the second state will be faced with the question of whether it has personal jurisdiction over the defendant for purposes of granting a restraining order to the victim.

Personal jurisdiction addresses the power of a court to enter a binding judgment over parties to a dispute. The judgment of a court lacking personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment.[2] Due process requires a state have personal jurisdiction over a defendant in order to enter "a valid judgment imposing a personal obligation or duty in favor of the plaintiff."[3] Think back to your first semester of law school when you learned that the U. S. Supreme Court articulated the constitutional standard for determining whether a state has personal jurisdiction over a nonresident defendant in *International Shoe Co. v. Washington*.[4] In that case, the Court stated, as a prerequisite to personal jurisdiction, a defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[5] "The 'minimum contacts' requirement is satisfied so long as the contacts resulted from the defendant's purposeful conduct and not the unilateral activities of the plaintiff."[6] The evaluation of whether a defendant has the requisite minimum contacts with a state is done on a case-by-case basis.[7]

One way of obtaining personal jurisdiction over an out-of-state defendant in domestic violence cases is consent. Specifically, the defendant may agree to submit to the jurisdiction of the court hearing the case. When a plaintiff flees to a neighboring state and the defendant suffers relatively minor inconvenience from the fact that they must appear in court in another state, the defendant may not object to the court having personal jurisdiction over them.

Alternatively, personal jurisdiction may be established over a nonresident defendant on the basis of the defendant's minimum contacts with the state that meet one of the grounds for personal jurisdiction under that state's long-arm statute. Most states' long-arm statutes permit courts to exercise jurisdiction over a nonresident defendant who commits a tortious or criminal act in the state. For example, the plaintiff may allege commission of an act of domestic violence by the defendant in the forum state. The act may be one committed by the defendant while temporarily in the state. In other cases, a plaintiff may seek protection on the basis of a communication crossing state lines which the victim alleges is harassing or threatening. For instance, a defendant often will attempt to contact a victim via telephone calls, text messages, email, social networking, or traditional mail. Thus, even if the defendant has not committed any act in the forum state, the plaintiff may argue that they suffer, while living in the forum state, from the effects of an out-of-state act of domestic violence by the defendant. This is known as the "effects test."[8] The U. S.s Supreme Court applied the "effects test" in the case of *Calder v. Jones* and provided a

court could exercise personal jurisdiction over an out-of-state defendant who had allegedly committed an intentional tort that caused an injury in the forum state.

However, in many cases, ambiguities exist complicating the analysis of whether a court has personal jurisdiction over a nonresident defendant. In particular, the explosion of communication via technology leads to interesting issues concerning the creation of a basis for personal jurisdiction. First, the defendant may claim they did not realize the plaintiff was in the forum state. Second, the defendant may argue there was no intent for the communication in question to reach the plaintiff at all. Again, in a world dominated by communications via technology, determining whether a defendant intended to communicate with a victim in particular, as opposed to other individuals, is likely to be challenging.

An attorney can help their client overcome such a challenge by asking the court to closely scrutinize the extent and nature of any communications by a defendant to a plaintiff in light of any history of abuse, while keeping in mind the dynamics of domestic violence. In doing so, judges will better discern the intent and meaning of perhaps ambiguous comments by a defendant. An example of this approach is set forth in the New Jersey Appellate Division's holding in the case of *A.R. v. M.R.* There, the defendant's telephone calls to New Jersey in an effort to locate the plaintiff constituted grounds for personal jurisdiction in the domestic violence case based on the history of physical abuse and threats between the parties.[9] Although the content of the telephone calls in that case could not be categorized as violations of the Prevention of Domestic Violence Act, in the context of the relationship between these parties, the Appellate Division found that the calls could not have been placed without the defendant's full awareness of their frightening effect on the plaintiff in New Jersey.[10]

In the majority of states, including New Jersey, the courts do not recognize the "effects test." In these states, cases with no criminal/tortious contact by a defendant with a victim in the new home state create the greatest tension between protecting the due process rights of defendants and protecting domestic violence victims.[11] In those cases, some courts have been asked to adopt what is known as a "status exception," where a court finds it has the power to determine a person's legal "status" even though that determination may result in an order affecting a nonresident party over whom the court cannot exercise personal jurisdiction.[12] In the context of domestic violence matters, some courts have interpreted the status exception to permit the issuance of a restraining order against a nonresident abuser when personal jurisdiction does not exist, adopting the view that the court is only determining the plaintiff's status as a protected person under the state domestic violence statutes.[13] To date, however, the U. S. Supreme Court has not defined status jurisdiction or explicitly recognized its application to any case other than divorce matters.

In one of the earliest decisions in this area, the New Jersey Supreme Court took a unique approach in the 2005 case of *Shah v. Shah*.[14] The *Shah* Court held that since the court lacked personal jurisdiction over the defendant, it lacked the authority to enter a *final* restraining against him. However, the Court concluded that it could, consistent with due process principles, continue the *temporary* restraining order only with prohibitory relief against the defendant.[15] The Court indicated that prohibitory relief included the provisions of ordering the defendant not to commit acts of domestic violence against the plaintiff and not to contact her.[16] In dicta, the court stated that it would have struck as affirmative relief the provision of the temporary restraining order requiring the defendant to return to plaintiff her personal papers.[17]

In drawing this distinction between affirmative and prohibitory orders, the Court reasoned that a prohibitory order "prohibits the defendant from engaging in behavior already specifically outlawed" and "does not implicate any of defendant's substantive rights."[18] In the prior case of *J.N. v. D.S.*, the Chancery Division of the Superior Court of New Jersey employed similar logic in entering a temporary restraining order against a defendant in the absence of personal jurisdiction reasoning, "what harm would the alleged abuser suffer?"[19]

The *Shah* Court specifically rejected the argument by an *amicus* to apply the status exception. In doing so, the Court noted that the *amicus* argument in favor of the status exception cited cases involving exclusively child custody and termination of parental rights.[20] The Court further reasoned that a final restraining order limited to prohibitory relief only was not an option without personal jurisdiction because "[a] final restraining order must, by statutory definition, include affirmative relief."[21] For example, the court noted that in New Jersey, a defendant faces payment of a civil penalty and surcharge, listing in a central domestic violence registry, and surrender of firearms and related permits.[22] The Court correctly pointed out one of the fundamental flaws in this approach, and

it is commendable that the justices sought to protect victims while recognizing the automatic infringement on a defendant's rights flowing from the entry of a final restraining order. Arguably, however, the *Shah* Court failed to recognize the ways in which its own solution was also problematic. Specifically, if we accept the *Shah* Court's reasoning, in order to obtain a final restraining order against his or her abuser, the victim can either wait, in fear, for the alleged abuser to commit an additional act of domestic violence in the victim's new home state, or flee to the abuser's home state and apply for a final restraining order from the court in that state.[23] Neither of these options seems reasonable.

Most recently, the state Appellate Division was asked to determine whether the trial court had personal jurisdiction to enter a final restraining order against the defendant in the 2019 unpublished case of *L.D.L. v. D.J.L.*[24] In that case, the parties lived in Virginia during their short-term marriage. The parties eventually separated, and the plaintiff/wife moved out of the marital home and in with her father in New Jersey. At one point, the plaintiff returned to the home to retrieve her personal belongings and the defendant arrived at the home as the plaintiff was leaving. The defendant then pursued the plaintiff in his car and, while stopped at a traffic light, repeatedly bumped the back of the plaintiff's car with his car. The defendant further threatened to "kill" the plaintiff and stated to her "revenge is mine." The plaintiff later testified that the defendant followed her for approximately 20-to-30 minutes and for about 20 miles before finally giving up the pursuit. The defendant later texted the plaintiff and left her a voicemail. Although the plaintiff then called the defendant at the defendant's request, the plaintiff eventually ceased all communication with the defendant. The defendant subsequently attempted to contact the plaintiff by phone and left several voicemail messages over the course of the next couple of days.[25]

After a final restraining order hearing and the court's entry of a final restraining order against the defendant, in favor of the plaintiff, the defendant filed an appeal, contending that the trial court lacked personal jurisdiction to enter the final restraining order. The New Jersey Appellate Division held, in part, that even if the defendant did not knowingly waive the lack-of-personal-jurisdiction defense, and even if he had never set foot in New Jersey, there still would be an independent basis for finding personal jurisdiction. Specifically, the Appellate Division found that the defendant's multiple phone calls to the plaintiff after she had returned to New Jersey and after she told him she did not want to communicate with him constituted:

> …purposeful conduct directed at a person who defendant knew or reasonably should have known was residing in New Jersey. Those purposeful actions satisfy minimum contacts with [New Jersey] necessary to vest the trial court with jurisdiction to consider plaintiff's terroristic threat and harassment complaint under the [Prevention of Domestic Violence Act].[26]

As a result, the Appellate Division concluded that the trial court had personal jurisdiction over the defendant and properly granted the final restraining order.[27]

The question of whether personal jurisdiction in a domestic violence case can be established by a defendant's contact, or attempted contact, with a victim across state lines after the victim has fled to a new state is by no means easily answered in all cases. In fact, most states have not addressed the particular question of interstate flight domestic violence cases through their statutes or case law. Among the minority of states that have reported decisions on this issue, courts have generally taken one of two approaches: Either they have found jurisdiction to exist and entered final restraining orders against defendants who may have had no realistic opportunity to appear in the case, or they have determined that jurisdiction does not exist and denied all relief, thereby leaving alleged victims without protection in that state from a credible threat of abuse.[28]

Lack of clarity in this area of law is highly problematic as it deters victims from seeking protection from their alleged abusers and leads to inconsistent results in the cases that are filed. There are also corresponding concerns about the significant direct and indirect consequences for the defendants who have a final restraining order entered against them in a foreign state. In these cases, states must balance the alleged victim's constitutional right to bodily integrity (an aspect of the right to privacy) and the state's own interest in protecting domestic violence victims against the constitutional due process rights of nonresident defendants.

The strong public policy consensus across the United States to enhance the safety of victims of domestic violence and their children through restraining orders

and CPOs demands that courts and legislators address jurisdictional issues in interstate flight cases in a manner designed to define a court's authority to provide protection as broadly as possible. However, states must also be mindful of a defendant's due process rights, since a defendant is less likely to comply with orders entered in a state where they do not reside. Judges and legislators concerned about the potentially serious collateral consequences of restraining orders or CPOs may be reluctant to adopt an approach that does not reflect consideration of the constitutional rights of both victims and defendants.

As the United States Supreme Court stated in *Estin v. Estin*, in defining the limits and compromises inherent in the status determination in the divorce context:

> [T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests.[29]

Although status determination jurisdiction remains something of an elusive and evolving concept, it arguably represents the best possible means of providing relief to domestic violence victims in the more difficult to resolve interstate flight cases, while still recognizing defendants' due process rights.

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## Endnotes

1. *See, e.g.,* ABA Comm'n on Domestic & Sexual Violence, Statutory Summary Charts, *Domestic Violence Civil Protection Orders (CPOs)* (2020), *available at* americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/charts/cpo2020.pdf.
2. *Pennoyer v. Neff*, 95 U.S. 714 (1877).
3. *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
4. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
5. *Id.* at 316.
6. *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323 (1989) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)).
7. *Shah v. Shah*, 184 N.J. 125, 138 (2005).
8. *See Calder v. Jones*, 465 U.S. 783 (1984).
9. *A.R. v. M.R.*, 351 N.J. Super. 512 (App. Div. 2002).
10. *Id.* at 513.
11. In *Shah*, 184 N.J. 125 (2005), the court briefly mentioned the "effects test" argument for personal jurisdiction, raised by an amicus, but failed to specifically address this argument on the merits; however, it implicitly rejected the reasoning in determining that New Jersey did not have personal jurisdiction over the defendant.
12. *See generally* Cody J. Jacobs, *The Stream of Violence: A New Approach to Domestic Violence Personal Jurisdiction*, 64 UCLA L. Rev. 684, 688-93 (2017) (discussing the status exception's historical origins, justifications, and limitations).
13. *See e.g. Bartsch v. Bartsch*, 636 N.W.2d 3, 6 (Iowa 2001) (finding the nonresident husband has insufficient contacts with Iowa to establish personal jurisdiction but concluding that "personal jurisdiction over a nonresident abuser is not required for a court to enter an order preserving the protected status of Iowa residents" under the sate Domestic Abuse Act).
14. *Shah*, 184 N.J. 125 (2005).
15. *Id.*
16. *Id.*

17. *Id*. (finding the issue was moot because the defendant returned said papers, which included the plaintiff's social security card, work permit, immigration documents, and mail).
18. *Id*. at 138.
19. *J.N. v. D.S.*, 300 N.J. Super. 647 (Ch. Div. 1996).
20. *Shah*, 184 N.J. at 140.
21. *Id*.
22. *Id*.
23. *J.N. v. D.S.*, 300 N.J. Super. 647 (Ch. Div. 1996).
24. *L.D.L. v. D.J.L.*, Docket No. A-5390-17T3, 2019 WL 2451048, at *1 (App. Div. June 12, 2019).
25. *Id*.
26. *Id*. at *4. *See also A.R.*, 351 N.J. Super. at 519-29 (holding that defendant's placement of telephone calls to the plaintiff in this State gave New Jersey jurisdiction over the defendant, even though the defendant placed the calls while he was in Mississippi and even though the content of those calls could not be characterized as violations of the PDVA).
27. *L.D.L.*, 2019 WL 2451048 at *5.
28. *Compare Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001), *and Spencer v. Spencer*, 191 S.W.3d 14 (Ky. Ct. App. 2006), *and Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008), *and Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010), *with Becker v. Johnson*, 937 So. 2d 1128 (Fla. Dist. Ct. App. 2006), *and Anderson v. Deas*, 632 S.E.2d 682 (Ga. Ct. App. 2006).
29. *Estin v. Estin*, 334 U.S. 541, 545 (1948).

# The Battle between Jewish Law and Secular Courts — How to Protect a Client's Fundamental Right to Marry

*By Sheryl J. Seiden and Shelby Arenson*

In the Jewish religion, though parties may be civilly married, they are not considered married in the eyes of Jewish law without the issuance of a Ketubah, which is a Jewish marriage certificate. Nevertheless, a Jewish marriage has similarities to a civil marriage as a marriage is not just a spiritual union but a contractual union as well. It is important to note that not all people who identify as Jewish adhere to all Jewish laws. This article, however, focuses on parties who do adhere to Jewish laws.

Parties to a religious marriage enter into a binding contractual commitment, which is outlined in a Ketubah. The Ketubah details the fundamental responsibilities of a husband as stated in the Torah[1], which includes, but is not limited to, providing his wife with shelter. The Ketubah, however, does not include the wife's fundamental responsibilities to her husband. Rather, the Ketubah signifies the wife's agreement to enter into marriage with her husband. Therefore, the Ketubah sets forth a woman's rights in marriage.

Just as a civil marriage must be dissolved with a judgment of divorce, a Jewish marriage must be dissolved with a religious divorce, which is known as a Get. Accordingly, for parties who adhere to Jewish laws, a civil divorce is not sufficient to divorce them under Jewish law. Just as Jewish law does not accept a civil marriage ceremony, it does not accept a civil divorce. Therefore, even if parties are civilly divorced, in the eyes of Jewish law, they will still be considered married.[2] To obtain a religious divorce, parties must participate in a divorce proceeding in front of a Beis Din, which is a rabbinical court comprised of three rabbis. During this proceeding, the husband provides the wife with a Get, which is a dated and witnessed document wherein the husband expresses his intention to divorce his wife in the presence of the rabbis from Beis Din, who serve as witnesses. A scribe writes the document. Thereafter, the husband must deliver the Get to the wife by "handing it her" or hiring a shliach, or messenger, to deliver the Get to his wife on his behalf. Ibid. It is important to note that only the husband can deliver or arrange for the delivery of the Get to the wife. Under Jewish law, the wife does not have the authority to deliver the Get. She must merely accept the Get from the husband.

The concept of a Get is outlined in the Torah in Deuteronomy 24:1-2, which when translated states:

> *When a man takes a wife and is intimate with her, and it happens that she does not find favor in his eyes because he discovers in her an unseemly matter, and he writes for her a document of severance, gives it into her hand, and sends her away from his house. She leaves his house and goes and marries another man.*

In the overwhelming majority of cases, Jewish parties are divorced both civilly and religiously without any problems and the husband willingly and many times eagerly, provides the Get to his wife.[3] There are, however, instances where the husband refuses to provide a Get. When a husband refuses to provide his wife with a Get, the woman is referred to as an agunah. The translation for agunah is chained, thereby, signifying how the woman is chained to a dead marriage.[4] Not only is the woman chained to a dead marriage, but she is prevented from remarrying because pursuant to halacha or Jewish law, a woman may not remarry unless there is clear evidence that her husband has died, or she has a Get. Therefore, an agunah cannot get remarried, which essentially prevents her from pursuing any romantic relationships or having children under Jewish law.[5] This causes social, emotional, and psychological trauma and in worst-case scenarios, empowers the husband to engage in coercive controlling behaviors, including but not limited to, complete financial control and physical and/or sexual abuse.

Not only does the husband have to provide the Get,

but the wife must accept the Get. While it is very rare, a woman may refuse to accept the Get while the civil divorce is pending to ensure the husband acts reasonably in the civil divorce proceedings. Though rare, there is a potential remedy for husbands to remarry even if their wife refuses to accept a Get. The prohibition against bigamy was instituted by rabbanim, or a host of prominent rabbis, and not the Torah. Therefore, a man whose wife refuses to accept a Get may petition a Beis Din to issue a heter meah rabbanim, wherein, the Beis Din receives the consent of 100 rabbis, from three countries, to allow the husband to remarry even though his wife has refused to accept a Get.[6] The issuance of a heter meah rabbanim is extremely rare. Nevertheless, this remedy is not available to a woman because, according to the Torah, a woman may not be married to more than one man. Therefore, in extremely rare circumstances, a husband may be able to remarry without his wife accepting a Get, which is a remedy simply not available to women.

In recent years, prominent Jewish organizations, such as the Beth Din of America, have recognized the disproportionate number of women who are agunahs. In an effort to combat the agunah crisis, the Beth Din of America, in consultation with prominent religious leaders, developed a halachic prenuptial agreement, which empowers the Beis Din to determine when a Get should be issued and provides the Beis Din with tools to ensure that its ruling is followed. Like a prenuptial agreement, parties who enter into a halachic prenuptial agreement sign the document prior to entering into marriage. Under the halachic prenuptial agreement, the husband is forced to pay his wife a daily monetary penalty, which usually equates to about $150 per day, for each day that he refuses to provide his wife a Get.[7] Though the halachic prenuptial agreement is a step in the right direction it, unfortunately, has not been adopted by all sects of the Jewish community.

The issue of obtaining a Get in a case where Jewish parties are getting a divorce has plagued the New Jersey court system for years. Unfortunately, many Jewish women remain trapped in their religious marriages even after the civil courts grant a divorce from the bonds of civil marriage. To avoid the situation where a religious woman cannot remarry, it is imperative that the woman's husband agree to provide them with a Get as part of any marital settlement agreement entered by the parties. It is important to note that the court does not have the authority to order a husband to provide a Get to his wife upon resolution of the matter. In the matter of *Minkin v. Minkin*, the plaintiff-wife sought an order that would require the defendant-husband to give her a Get. [8]The *Minkin* Court conducted a plenary hearing, during which time, a rabbi testified that the issuance of a Get is not a religious act, but rather, the severance of the contractual relationship between the parties. Several other rabbis testified during the plenary hearing and further testified that the issuance of a Get is civil and not religious in nature.[9] The *Minkin* Court found the testimony of the rabbis to be credible and the judge held that a Get is not a religious act and therefore, entered an order compelling the defendant-husband to provide the plaintiff-wife with a Get. The Court stated the act of providing the Get would "have the clear secular purpose of completing a dissolution of the marriage."[10] The Court specifically held that compelling the husband to provide the Get was not a violation of his constitutional rights.

The *Minkin* Court set precedent for the matter of *Burns v. Burns*.[11] In that case, the defendant-wife sought to get remarried, but first needed the plaintiff-husband to provide her a Get. The plaintiff-husband, however, refused to provide the defendant-wife a Get unless she invested $25,000 in an irrevocable trust for their daughter.[12] Defendant-wife, believing that the plaintiff-husband was seeking to hold the Get hostage for financial purposes filed an application with the Court. The *Burns* Court held that the plaintiff-husband's refusal to provide the defendant-wife a Get was not based on his religious beliefs, but rather, was purely "an issue of monetary gain."[13] The judge subsequently reviewed the laws of Moses and Israel and determined that "there are various circumstances which would require the husband to secure a get from his wife" and ordered the plaintiff-husband to appear before Beis Din and "release the defendant from the [marriage] and put an end to the relationship."[14]

About 10 years later, in the matter of *Aflalo v. Aflalo*, the precedent set forth in *Minkin* was disrupted.[15] In this matter, plaintiff-wife filed for divorce and defendant-husband asserted that no matter what occurred in the civil divorce action, he would refuse to consent to provide plaintiff-wife with a Get.[16] The *Aflalo* Court held that the *Minkin* Court erred when considering the issue of providing a Get against the backdrop of the Establishment Clause rather than the Free Exercise Clause of the First Amendment.[17] The *Aflalo* Court also held that the *Minkin* Court erred when it stated that requiring a husband to provide a Get is not a religious act.[18] There-

fore, the judge in *Aflalo* found that compelling a party to provide a Get is not solely concerned with civil issues and compelling a party to obtain a Get would not have the desired effect on the wife because pursuant to Jewish law, the husband must provide a Get willingly.[19] The judge then concluded that the court had no authority to determine for the parties "which aspects of their religion may be embraced, and which must be rejected."[20]

Historically, New Jersey trial courts have differed on the issue of whether a civil court has the authority to compel a husband to provide a Get. Therefore, in the matter of *Mayer-Kolker v. Kolker*, wherein, the plaintiff-wife sought that the court order the defendant-husband to cooperate in obtaining a Get, the court had to consider the decisions determined by the *Minkin, Burns* and *Aflalo* courts.[21] The *Kolker* Court entered a dual judgment of divorce and determined that it did not have the authority to compel the defendant-husband to provide plaintiff-wife a Get. The plaintiff-wife subsequently appealed.

On appeal, the Appellate Division acknowledged that the parties entered into a Ketubah. Plaintiff-wife argued that the act of executing a Ketubah made the parties' marriage subject to Jewish law.[22] Defendant-husband, however, asserted that the Ketubah that the parties signed did not automatically convey the parties' adherence to Jewish law, lacked the requisite specificity for enforcement and was silent on the issue of whether a Get would be granted in the event the parties divorced.[23] The *Kolker* Court did not determine the limits of judicial authority with regard to compelling a husband to provide a Get, but rather, focused on whether the Ketubah the parties signed compelled the parties to adhere to Jewish law.

The *Kolker* Court determined that though the parties provided a copy of their Ketubah, there were not sufficient translations, as the Ketubah signed by the parties was in two languages; the parties did not provide evidence regarding the effects of a Ketubah; and the parties failed to present expert testimony about what Jewish law would require.[24] The *Kolker* Court then affirmed the trial court's denial of plaintiff-wife's request that the court compel defendant-husband to provide a Get. The Court reasoned the plaintiff-wife failed to establish the effect of the Ketubah that the parties entered into and failed to establish the Ketubah's mandate of Jewish law with regard to enforcement.[25] While the *Kolker* Court did not address whether New Jersey courts have the power to compel a party to provide a Get, recent decisions by New Jersey courts have interpreted the law to deny any request to compel the issuance of a Get.

New Jersey is not alone in its lack of consistency in decisions regarding whether a Ketubah can and should be enforced. Throughout the United States, "courts have gone both ways on whether the agreements violate the First Amendment and whether such agreement is specific enough to enforce."[26] For example, in the Illinois case of *In re Marriage of Goldman*, the Appellate Court disagreed with petitioner-husband's argument that enforcing the parties' Ketubah and ordering him to provide respondent-wife with a Get would violate his constitutional rights under the Establishment and Free Exercise Clauses.[27] However, in the matter of *Victor v. Victor*, petitioner-wife appealed the trial court's refusal to order respondent-husband to provide her a Get.[28] Petitioner-wife sought specific performance as a remedy to respondent-husband failing to provide her a Get pursuant to the parties' Ketubah. The Appellate Court denied petitioner-wife's appeal.

As set forth above, New Jersey courts, like other states throughout the country, have been hesitant to order parties to provide their spouse a Get due to concerns as to infringement of a husband's First Amendment right. New Jersey courts, however, have failed to address that the right to marriage is recognized as a fundamental right by both the Federal and State Constitutions.[29] Therefore, by New Jersey courts focusing only on First Amendment concerns, they are inadvertently denying their citizens their fundamental right to marry. There is no doubt that the citizens who choose to abide by Jewish laws continue to struggle with this issue in some cases. However, in looking at New York, it is clear that there are secular means of ensuring that all persons, regardless of their religious beliefs, can exercise their fundamental right to marriage.

New York enacted Domestic Relations Law 253 Removal of Barriers to Remarriage in 1983.[30] Pursuant to paragraph 2:

> any party to a marriage … who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii)

that the defendant has waived in writing the requirements of this subdivision.

The enactment of similar law in New Jersey will not eradicate the issue of some husbands refusing to provide their wives with Gets, especially, when the only repercussion is the lack of a civil divorce. However, it should be the goal of New Jersey courts to ensure that all its citizens are entitled to a divorce pursuant to the laws of the state and no longer sit idle, which may empower some men to gain an unfair advantage throughout divorce proceedings. Enacting a similar law in New Jersey will not only help its citizens but will display how New Jersey is leading the way on the issue, as outside of New York, no such law exists.[31] The time has come to bring awareness to the challenges that agunahs face and to work toward ensuring that all people are able to exercise their fundamental right to life, liberty, and the pursuit of happiness. ■

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## Endnotes

1. The Torah is comprised of the Five Books of Moses, the entire Hebrew Bible and the entirety of all written texts of Jewish religious knowledge.
2. Jewish Divorce Basics: What is a 'Get'? *Chabad.org.* Retrieved from: chabad.org/library/article_cdo/aid/557906/jewish/Jewish-Divorce-Basics-What-Is-a-Get.htm.
3. In circumstances wherein divorce is the only option, it is a mitzvah, or good deed, for a husband to provide his wife a Get.
4. Silberberg, Naftali. The Agunah. *Chabad.org.* Retrieved from: chabad.org/library/article_cdo/aid/613084/jewish/The-Agunah.htm.
5. If a Jewish woman has a child with another man while she is still married, that child will be considered a mamzer. Though the child will be considered Jewish, there are certain restrictions placed upon a mamzer, such as who they may marry. See What is a "Mamzer"? *Chabad.org.* Retrieved from: chabad.org/library/article_cdo/aid/4007896/jewish/What-Is-a-Mamzer.htm.
6. Eisen, Yosef. Major Ashkenazi Rishonim. *Chabad.org.* Retrieved from: chabad.org/library/article_cdo/aid/2617025/jewish/Major-Ashkenazi-Rishonim.htm.
7. Weissmann, Rabbi Shlomo. Ending the Agunah Problem as We Know It. *The Orthodox Union.* Retrieved from: ou.org/life/rekationships/ending-agunah-problem-as-we-know-it-shlomo-weissmann/.
8. 180 N.J. Super. 260, 261 (Ch. Div. 1981).
9. *Id.* at 265.
10. *Ibid.*
11. 223 N.J. Super. 219 (Ch. Div. 1987).
12. *Id.* at 222.
13. *Id.* at 223.
14. *Id.* at 226.
15. 295 N.J. Super. 527 (Ch. Div. 1996).
16. *Id.* at 530-31.
17. *Id.* at 537.
18. *Id.* at 538.

19. It is worth noting that according to Jewish law, it is permissible and encouraged to condemn an individual who takes advantage of another, such as a husband refusing to provide his wife a Get, which includes, but is not limited to, publicly denouncing the individual and exposing the individual by protesting outside of their home and/or place of business.
20. 295 N.J. Super. at 542.
21. 359 N.J. Super. 98 (App. Div. 2003).
22. *Id.* at 100-03.
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Comment, Enforceability of Agreements to Obtain a Religious Divorce*, Kimberly Scheuerman, Journal of the American Academy of Matrimonial Lawyers, Vol 23, No. 2 (2010).
27. 554 N.E.2d 1016 (III. App. 1990).
28. 866 P.2d 899 (Ariz. Ct. App. 1993).
29. *U.S.C.A. Const. Amend. 14; N.J.S.A. Const. Art. 1, par. 1.*
30. Domestic Relations Law 253 was drafted by Nathan Lewin, Esq., who has extensive experience advocating for First Amendment rights and civil liberties.
31. In 2007, Florida tried to pass similar legislation as New York with the proposal of HB 1469, Dissolution of Marriage. This proposal was not successful. Similarly, in 2020, Maryland tried to pass similar legislation with the proposal of HB833, Divorce and Annulment – Removal of Barriers to Remarriage. This proposal was also not successful.

# Top 8 Deposition Tips for Young Lawyers

*By Barry S. Sobel*

With great power comes great responsibility. No – I am not talking about Spider-Man. I am talking about taking depositions. In fact, I would argue taking depositions is the single most important part of the discovery process, because it is the only time lawyers can explore in real time information gathering from a witness under oath before trial. It provides lawyers (and clients) the opportunity to pursue areas of inquiry virtually unchallenged (as objections are limited) and obtain information we can then use to better formulate our strategy and arguments and pursue claims on behalf of clients at trial. A deposition, however, is only as effective as the lawyer taking it. As a result, lawyers – especially young lawyers – must be aware of this significant responsibility so they can be properly prepared and conduct the deposition in a successful manner. This article is intended to provide eight helpful tips for young lawyers in conducting and defending depositions.

1. **Be prepared.** There is neither a substitute nor a time limit for proper preparation. Make sure to review all important documents so that you are not only familiar with the intricate details of those documents/assertions, but so that you are also aware of potential follow-up inquiries based on the answer proffered by the deponent. Listen to the answers given. Often, lawyers stick to their outline and, after a deponent answers a question, either asks another question or switches topic and does not follow up on the initial answer. Decide on the order of depositions. Is it more advantageous to take the deposition of the other party first, or their expert? Has the expert submitted a report? How fact-sensitive is the inquiry? For fact witnesses, focus on the source of their knowledge. Be aware of – and do not feel uncomfortable exploring – potential bias. For expert witnesses, ask about prior work with the law firm/client hiring them in your case. When you get a good answer, move onto another topic and do not permit for potential clarification or subsequent modification.
2. **Prepare your client.** Often, clients send information or documentation they are sure will help them win their deposition. Depositions, however, are not won – only lost. It only takes one answer to destroy credibility. Proper preparation not only includes reviewing documents (i.e., certifications and other court submissions), but counseling clients on *how* to answer questions. A deposition is not a conversation – it is a response-based inquiry. A properly prepared witness only answers the question posed and does not volunteer anything additional. For example, in response to an inquiry as to whether the witness knows the time, the correct response is "yes" – not "yes, it is noon." Remind clients that not remembering is an acceptable answer (so long as it is truthful) and questions should only be answered based on that client's personal knowledge. A properly prepared witness also controls the timing – both with regard to answering specific questions and overall.
3. **Be conversational.** In contravention to a properly coached witness, an attorney taking a deposition should be conversational, not argumentative – that time is for trial – and try to facilitate opportunities to enable the witness to talk. A successful deposition casts a wide net. One of the best ways to accomplish this is to ask open-ended questions, such as, "What happened next?" Lawyers should get a full chronology of events and ask about others who may have been present (and their respective involvement/knowledge).
4. **Close the loop:** The purpose of a deposition is to obtain information – all information. Too often, lawyers forget to close the loop – which then allows an opportunity for a witness to modify/add to their prior deposition testimony at trial. Lawyers must close the loop, so they are not surprised at trial with additional information. In response to an inquiry, ask the witness whether they can recall anything else. Keep asking/repeating until the witness confirms that they cannot recall anything else. Is there anything that would help the witness recall? If so, what? If the witness modifies their testimony at trial, attack their credibility on cross-examination. Inquire why they failed to provide the information at the

time of deposition. If the witness recalls something they were previously unable to recall, what changed?

5. **No notetaking:** The deposition is already recorded – either via written transcript, video, or both. Therefore, there is no need to write down the answers to your questions. That is not to say that no notes should never be taken at a deposition. For example, and with specific regard to the previously listed item, notes are beneficial in the context of helping lawyers keep track of items and close the loop. Rather than scribing the answers, pay attention to the answers given, as it may spur additional inquiry not previously contemplated. If you want to hear a specific answer again, ask the reporter to repeat it.
6. **Adapt to technology:** Fortunately (or unfortunately) the presence of COVID-19 forced the practice of law to (somewhat) advance into the 20th century. Depositions now occur (mostly) by Zoom. Although the benefits of (potentially) wearing shorts is enticing, it has also created new issues that young lawyers must be keen to master. The first is getting familiar with Zoom – and/or other video-based deposition platforms. That includes getting familiar with all provided features to make the experience is as close to in-person as possible. This is especially true if you are presenting the witness with documents/exhibits, as you do not want to waste time having to repeatedly break the deposition to email the documents. As you are not present, you must always remember to protect yourself and be mindful to ask the witness to confirm that no other individuals are present in the room. If you have doubts, ask the witness to scan the room and confirm.
7. **Follow up:** At deposition, lawyers may request documents in response to an answer from the witness. That request, however, must be followed up by a formal written request. Too often, young lawyers forget to close the loop and follow up on their request for documents. Moreover, although commonly miscategorized as written discovery requests, requests for admissions are a useful tool to use after information is uncovered at a deposition. There is no limit, and the requests may not only narrow the issues, but force certain issues to the forefront – issues that may either facilitate or make futile future settlement negotiations.
8. **Objections:** Be prepared to deal with objections – specifically improper objections. Pursuant to R. 4:14-3(c), the only objections permitted during a deposition are to form, to assert a privilege, or to assert a right of confidentiality or limitation pursuant to a previously entered court order. As we all know, however, lawyers repeatedly make objections that exceed this limitation – often with the specific intention to clue the deponent's response. For example, an improper objection asserting that a question was already asked and answered is presumably intended to clue the deponent to recall prior deposition testimony and/or conditionalize their response by referring to said prior testimony. Therefore, when taking a deposition and your adversary makes an improper objection, put it on the record, explaining why the objection was improper (citing R. 4:1403(c)), instruct them to avoid making subsequent improper objections, and inform them that if additional improper objections are made, you are permitted to (and likely will) pause the deposition and contact the court to obtain assistance in dealing with the improper objections. Do not get bullied – especially by "seasoned" attorneys – into accepting improper objections that seek to either limit the scope of the deposition or clue/inform the deponent into giving a desired response. Remember, YOU control the deposition. ■

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# Vaccine Mandates and COVID-19: When Can a Court Compel a Parent to Vaccinate a Child Over Objection?

*By Amy L. Miller and Michelle A. Wortmann*

While the issue of a parent's choice to decide whether to vaccinate their children against any disease or illness has always been polarizing (and in recent years it has also been politicized), the conversation has been heightened since the start of the COVID-19 pandemic almost three years ago, and even more so since the development of the COVID-19 vaccine. Opinions vary between those who believe that COVID-19 vaccinations should be mandatory for all (including children) and those who believe individuals should be able to make that choice for themselves, and parents should be able to make that choice for their children. When parents who are separated or divorced fundamentally disagree on the issue of vaccinations for their child, whether the disagreement is as to all pediatric vaccines, or just one pediatric vaccine such as the COVID-19 vaccine, this question is left to the courts to decide for the family, and, specifically for the children, whether they should be vaccinated. When presented to the court, the question posed often requires the court to strike a balance between mainstream medical science, which recommends vaccines at certain points in time of a child's life, and a parent's legal right to decide the medical care and treatment for their own children. At times, the argument by a parent in support of the decision not to vaccinate their child rests upon religious reasons or beliefs. In those cases, courts are often left to decide whether to infringe upon a parent's constitutional right to freedom of religion and the related constitutional right not to vaccinate, which is supported by the New Jersey Legislature, and the other parent's request to vaccinate, which is often based upon the credible recommendations of medical professionals.

## History of COVID-19

The COVID-19 pandemic, particularly at its inception, presented an incredible threat to the world globally, due to its rate of transmission and contagiousness. In the United States alone, the number of cases grew exponentially in the first several weeks, from 182 reported cases on March 4, 2020, to 222,783 by April 1, 2020.[1] By April 1, 2020, the United States had also experienced 6,360 deaths due to COVID-19.[2] As of Dec. 14, 2022, the United States had experienced 99,705,095[3] cases in total, and 1,083,279 deaths.[4] COVID-19 cases have notably ebbed and flowed since the first reported cases in early 2020, with spikes in January 2021 and January 2022.[5] Although there have been these fluctuations, the COVID-19 pandemic continues, and without any end in sight.

In an effort to curb the overwhelming effects of the COVID-19 virus, various pharmaceutical companies developed vaccinations against COVID-19. On Dec. 11, 2020, the U.S. Food and Drug Administration (FDA) issued the first emergency use authorization for the first COVID-19 vaccine.[6] Over time, additional vaccines were manufactured and authorized for use by the FDA. Since their creation and use, the vaccines against COVID-19, although somewhat different, have all proven to be effective against the virus. In the case of the first vaccines, they proved effective at limiting the spread of the virus. As the virus has mutated, the vaccines have also proven effective at limiting the severity of viral symptoms.[7] This change in the "efficacy" of the vaccine against virus mutations has added to the argument over whether to receive the vaccines themselves. Since the vaccine was approved by the FDA for emergency use authorization in children in early November 2021, parents have been faced with the question of whether to vaccinate their children.[8] As a result, the issue has become one of importance to our family courts. The decision has been guided by legal precedence dealing with vaccinations, as well as the court's overarching concern when dealing with children: what is in their best interest.

## History of Vaccines in the United States

The issue of mandatory vaccinations has deep roots in our nation's history, and the practice has been deemed constitutional for more than 115 years. In a matter heard in 1905, at the height of a smallpox outbreak, the U.S. Supreme Court held that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state."[9] As recently as 2011, the Supreme Court praised this stance, stating that "the elimination of communicable diseases through vaccination became one of the greatest achievements of public health in the 20th century."[10] Accordingly, the Supreme Court has held that mandatory vaccinations do not violate any rights of the people, and in fact, in an effort to protect the population, "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[11]

It is thus common practice that state legislatures mandate certain vaccinations, which is often done in the context of education, with legislatures requiring children to be vaccinated in order to attend school.[12] However, as with most rules, there are always exceptions, and in New Jersey, individuals can be excused from mandatory vaccinations in schools for medical and religious exemptions. Medical exemptions are those in which a person is advised against receiving a vaccination because of their predisposed medical condition, which makes it unsafe or not recommended for them to be vaccinated. Essentially, potential risks associated with receiving the vaccination outweigh the potential benefits of getting vaccinated. A religious exemption is defined as "the ground that the…immunization interferes with the free exercise of the pupil's religious rights."[13] However, this exemption is not absolute, and can be "suspended by the State Commissioner of Health during the existence of an emergency determined by the State Commissioner of Health."[14] Absent any medical or religious exemption, the New Jersey Department of Health's Vaccine Preventable Disease Program requires that a child receive certain immunizations in order to be permitted to enroll in and attend a New Jersey child care or preschool.[15] However, as noted, "NJ also accepts valid medical and religious exemptions (reasons for not showing proof of immunizations) as per the NJ Immunization of Pupils in School regulations, (N.J.A.C. 8:57-4)." Further, if a parent claims a religious exemption to the vaccination requirement, "... [t]he request does not need to identify membership in a recognized church or religious denomination or describe how the administration of immunizing agents conflicts with the student's religious beliefs in order for the request to be granted."[16] In seeking exemption for mandatory vaccinations in order to attend school, only one parent, not both, need claim such religious exemption, and that parent is not required to explain their belief, the reasoning behind the belief, or even have that belief be part of any organized religion to qualify as a religious exemption. It is enough for a parent to merely advise that they had a religious objection to vaccinating the child, which would fall within the Legislature's intent and requirements in constituting a religious exemption.

On the other hand, in enacting the relevant statutes, the Legislature expressly contemplated children with medical or religious exemptions nevertheless attending daycare, preschool, and school in New Jersey, and determined that children who are not vaccinated can be kept from school during a "vaccine-preventable disease outbreak or threatened outbreak."[17] Clearly, then, the Legislature weighed the risks and benefits of permitting religious exemptions under the statute and found that a parent or guardian's right to religious freedom should be preserved, except under the circumstances outlined, i.e. an outbreak or threatened outbreak. Based on this statutory law, it can be argued that the Legislature has already conducted the research and concluded, as a matter of law, that so long as a child's vaccine status is lawful, there is no issue for the court to determine. A child is either vaccinated as required, or there is a valid exemption for which they qualify. As stated, only one parent needs to seek an exemption for it to be valid, as the exemption statutes both reference "parent or guardian" in the singular, and not "parents or guardians" in the plural.[18]

The U.S. Supreme Court has even supported the idea of religious exemptions in certain circumstances. In one Supreme Court case, the petitioner was convicted of refusing to submit to induction into the Armed Forces and was sentenced to prison.[19] The petitioner appealed based upon a conscientious objection exemption, which encompasses exemptions based upon religious beliefs, as permitted by the *Universal Military Training and Service Act*. The Appellate Division affirmed the conviction after relying, in part, on the petitioner's denial that his views were religious. The Supreme Court, however, reversed, noting that the "sincere and meaningful beliefs that prompt the [] objection…need not be confined in either

source or content to traditional or parochial concepts of religious." The Supreme Court further held the exemption language of the statute "does not distinguish between externally and internally derived beliefs… and intensely personal convictions which some might find incomprehensible or incorrect come within the meaning of 'religious belief' in the Act."[20] The Supreme Court found that, "[w]hen a registrant states that his objections…are 'religious,' that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word 'religious' as used in [subsection] 6(j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption."[21] Accordingly, any attempt to undermine a person's deeply held personal religious beliefs because those beliefs cannot be boxed into one category or one religion, or do not comport with traditional religious views, does not *ipso facto* preclude that person's right to a religious exemption.

In New Jersey, courts have held that Rutgers University could not deny a religious exemption on the ground that a pupil did not belong to a recognized religious group.[22] Specifically, it was stated that "[t]here is no right on the part of a [state or an instrumentality thereof] to take discriminate action against a person in reference to [their] religious views. Membership in a recognized religious group cannot be required as a condition of exemption from vaccination under statute and constitutional law."[23] Indeed, neither *N.J.A.C.* 8:57-4.4 nor *N.J.S.A.* 26:1A-9.1 requires membership in a recognized religious sect or faith in order to qualify for a religious exemption.

## Applying the Law to Cases Dealing with Pediatric Vaccines and the COVID-19 Vaccine

In instances where both parents agree not to vaccinate, then absent some extreme circumstance where an outside party or institution becomes involved and challenges that issue in court, the parents are permitted under our state and federal laws to make that decision for their child. The courts have made clear that they will support the parents' rights to choose for their child. Our New Jersey Supreme Court has stated, "our law recognizes the family as a bastion of autonomous privacy in which parents, presumed to act in the best interests of their children, are afforded self-determination over how those children are raised."[24] A parent's right to parental autonomy is recognized as "a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution" that is "rooted in the right to privacy."[25] "Deference to parental autonomy means that the State does not second-guess parental decision making or interfere with the shared opinion of parents regarding how a child should be raised. Nor does it impose its own notion of a child's best interests on a family. Rather, the State permits to stand unchallenged parental judgments that it might not have made or that could be characterized as unwise. That is because parental autonomy includes the 'freedom to decide wrongly.'"[26]

In those cases where parents agree, we as practitioners are not involved, and those families make those autonomous decisions without the courts deciding otherwise for their family and their children. On the other hand, where parents disagree and decide to litigate, and of course presuming those parents share joint legal custody, the courts are tasked with deciding, one way or another, how that child is best protected and thus what is in that child's best interests. Is the child protected by receiving the vaccine(s), or is the child protected by remaining unvaccinated for the vaccine(s)? In making that decision, the court will look to each parent, and their attorney representative, to present both sides of the argument, the risks posed on each side, and the rights posed on each side.

Under the circumstances of one parent objecting to their child being vaccinated for any of the child-mandated vaccines, it can be argued that the Legislature previously determined the best interests of all children in this state concerning the management and control of infectious disease by enacting a combination of vaccine mandates and exemptions that, taken together, are presumed, as a matter of law, to be in every child's best interests. The Legislature created these laws regarding mandatory vaccination for enrollment of children in school, or the allowance for medical or religious exemptions, with the assistance and guidance of our state's health department, which has knowledge and expertise regarding vaccines and any risks related to being unvaccinated. In theory, courts can take judicial notice of the fact that there is no mandatory requirement to vaccinate in any other capacity for children except as related to school enrollment. These laws were not arbitrary, nor were they absent an understanding of and knowledge about whether allowing children to remain unvaccinated due to a medical or religious exemption will pose risk.

Clearly, if the Legislature and our state's health department believed allowing such exemptions posed a true risk, those laws would not exist. Considering same, it can be argued that requiring a vaccination over a religious objection would create a new precedent, specifically that a parent's religious objection is subordinate to the other parent's wish for a child to be vaccinated. In essence, this would trivialize the Legislature's decision to enact such a religious exemption and nullify the parent's statutorily protected right to an exemption under the law.

Taking that argument a step further, the child-mandated vaccinations, such as the MMR vaccine, polio, etc., are vaccines that are mandated for school enrollment or registration in a child care facility, but are not actually based on a current health outbreak of the viruses for which those vaccines seek to protect. At present, there is no polio, rubella, mumps or other communicable disease outbreak which would otherwise be protected by these vaccines. Therefore, when addressing a dispute between a parent seeking to vaccinate a child for these child-mandated vaccines without any present outbreak, danger or imminent risk or harm and a parent seeking not to vaccinate due to religious beliefs, our New Jersey courts must determine what is in the child's best interests by balancing the risks and potential risks posed to the child before it. In sum, do you administer mandated vaccines to protect a child against viruses that are not present, but for which vaccines are recommended by scientific experts through the New Jersey Department of Health, the American Academy of Pediatrics, the CDC, etc.? Or, do you not administer those mandated vaccines because doing so would violate the other parent's religious freedom because such vaccine is against that parent's (and thus by extension that child's) religious beliefs?

When faced with a case involving the COVID-19 vaccine, however, the analysis is somewhat different. The COVID-19 vaccine's development and approval for use by children occurred during a global health crisis and pandemic. The COVID-19 vaccine was for the purpose of preventing infection and limiting the effects and symptoms of the virus if a child were to contract it. Thus, the analysis that the court must conduct is different. A balance must be stricken between administering the vaccine to protect against a known risk of the COVID-19 virus that is currently part of a global health crisis and not providing the vaccine due to religious beliefs and thus exposing that child to a known and present risk.

When examining this issue on a national level, we have seen that our federal courts have refused to enjoin a university's mandatory vaccination program, because doing so would be harmful to the public.[27] The rationale was that doing so would put the health and safety of members of the community, both inside and outside of the university, at risk.[28] The court further stated that there is no absolute right to "refuse unwanted medical treatment" and that it is up to the Legislature to determine what methods of protection would be effective against COVID-19.[29]

In New Jersey however, the COVID-19 vaccine is not included among the vaccines currently required by the New Jersey Department of Health & Mental Hygiene to register a child in a child care facility or enter public school. Further, while the COVID-19 vaccines have generally proven to be effective against COVID-19, the issue becomes complicated when there are minor children involved, as they are incapable of making a choice on their own. It becomes even more complicated when parents are divorced or separated and disagree over whether to have their child vaccinated. In these instances, the court is often called upon to make the decision for the family.

For the parent seeking not to vaccine their child, whether for religious reasons or even other reasons, when this issue is presented to the Family Part in New Jersey, it can be argued that the Legislature previously determined the issue. Some would say the Legislature decided the best interests of all children in this state concerning the management and control of infectious disease by enacting a combination of vaccine mandates and exemptions that, taken together, are arguably presumed, as a matter of law, to be in every child's best interests. The Legislature created these laws regarding mandatory vaccination for enrollment of children in school, or the allowance for medical or religious exemptions, with the assistance and guidance of our state's health department which has knowledge and expertise regarding vaccines and any risks related to being unvaccinated. Though we are now three years into COVID-19 impacting our country, to date our state's health department has still not mandated COVID-19 for a child's enrollment in school. In theory, courts can take judicial notice of the fact that there is no mandatory requirement to vaccinate children in any other capacity except as related to school enrollment. These laws were not arbitrary, nor were they absent an understanding of and knowledge about whether allowing children to remain unvaccinated due to a medical or religious exemption will pose risk. Clearly, if the Legisla-

ture and our state's health department believed allowing such exemptions posed a true risk, those laws would not exist. In light of same, it can be argued that requiring a vaccination over a religious objection would create a new precedent, specifically that a parent's religious objection is subordinate to the other parent's wish for a child to be vaccinated. In essence, this would trivialize the Legislature's decision to enact such a religious exemption and nullify the parent's statutorily protected right to an exemption under the law.

While it seemingly should be as simple as a parent asserting to the Family Part that the New Jersey Department of Health is tasked with protecting all children, and therefore protecting that parent's child, by determining whether to mandate certain vaccines, our courts are often viewing the issue differently. When these cases are presented to the court, the parties are often litigating one of two things – the science behind the vaccine (and the parties' belief or disbelief in same), or the religious exemption claim of one party (and the parties' belief or disbelief in the good faith basis for same). Courts have historically been cautioned against opining on issues of religion, and the family courts in our state are an unlikely forum to debate science. However, this is exactly what is occurring, and parties need to be prepared to defend their religious beliefs as well as their opinions on the science of the vaccines, the latter likely with the use of experts. Unfortunately, despite the Legislature's intent that claims for religious exemptions do not have to be claimed with any specificity, courts may require same in assessing a parent's good faith basis for this claim.

Although parents have a legally protected right to a religious exemption regarding vaccinating their children under New Jersey school law, our law also acknowledges that a parent's constitutional right to this decision, along with the right to direct the upbringing of their children, is not absolute. There are situations when the court can exercise its *parens patriae* authority to protect children from harm, over the objection of a parent.[30] Certainly, it would then mean that if a court decided that a child was at risk of harm, the court could order a child to be vaccinated even over one parent's objection. Typically, this occurs in situations where a child is facing imminent harm.[31] In those situations, the court would be obligated to look to the "best interest of the child standard" in order to decide what to do in that specific instance.[32] This legal standard was echoed by the United States Supreme Court, which has stated that if a religious freedom is going to be infringed upon, there must be "clear and present danger" to the child.[33]

Regarding the COVID-19 pandemic, the courts must first decide whether the virus poses an imminent risk. This, in and of itself, is a question that is difficult to answer. On one hand, the sheer number of cases and deaths due to COVID-19 can be identified to argue there is a clear imminent risk of the virus. Although there have been fluctuations in prevalence, COVID-19 has been an ever-present risk since its inception.[34] On the other hand, it can also be argued that the risk of harm to the child is purely hypothetical because there is no guarantee that a child will contract the virus, or that the outcome if contracted would be dire or cause any irreversible damage. Arguably, the harm and imminent risk has also changed during the three-plus years of this pandemic, as viral mutations have lessened the effect of the virus over time. Of importance, the various restrictions imposed by the government in our state regarding masks, quarantining, etc. have also changed during the pandemic, and have been lifted for some time now. And, for the entire duration of the pandemic through and including the present, there has been no mandate to vaccinate children or their treatment for the virus once infected.

Notwithstanding, once a court determines that there is a risk posed to the child by the fact that there is an ongoing pandemic, the court must then determine whether the benefit of the vaccine outweighs the risk, or, whether the opposite is true for that specific child in question. To do so, the court must consider the best interest of the child, which is the paramount consideration in all matters custody-related.[35] In conducting this analysis, the court must decide whether the best interests of the child require vaccination, and, if so, whether giving effect to that decision will require sole custody being granted to one parent for that limited purpose, or "any other arrangement the court determines is in the best interests of the child." In all circumstances, the court is required to make the decision that it feels is in the child's welfare and best interests.[36]

Of the factors a court must consider under the custody statute, many are inapplicable to the issue of vaccinations. This includes the parents' willingness to accept custody, the history of domestic violence, the safety of the child from physical abuse, or the geographical proximity of the parents' homes. In cases limited solely to the issue of whether to vaccinate, the most important factors have been factors one (parents' ability to agree, communicate

and cooperate), two (parents' willingness to accept custody), seven (the needs of the child), nine (the continuity of the child's education), and 10 (the fitness of the parents). Of these, arguably the most important are the needs of the child and the continuity of the child's education. As to the needs of the child, the courts will not only look to the child's prior history, which will include whether the child was routinely vaccinated against other illnesses and diseases, but also whether the child has any special needs or medical issues that would impact the determination of whether the child should be vaccinated against COVID-19. As to the issue of continuity of education, the courts will consider whether remaining unvaccinated will present a higher likelihood that a child will have interruptions to their education, including virtual learning, a quarantine period, repeated testing, or other limitations that would disrupt the child's education and bonds with teachers and peers. While it remains true that a child can contract COVID-19 and be subject to these restrictions whether vaccinated or not, the courts must also consider the efficacy of the vaccine in limiting the severity of the virus, and thus the impact on the amount of time a child must remain out of school.

In addition to the statutory factors, the court must consider the overall risks and benefits of the child receiving the COVID-19 vaccine, which is often aided by expert testimony. If, after this testimony the court finds that the risks of remaining unvaccinated are not in the best interests of the specific child at issue, it can and will order that the child be vaccinated against COVID-19 over the objection of a parent.

Less than one year ago, the Family Part in Morris County considered this issue and weighed these factors in determining the best interests of the child. In *Richmond v. Natanson,*[37] the mother sought to vaccinate the child for COVID-19 while the father argued against it. The father relied on the fact that at that time the COVID-19 vaccine was only given emergency use authorization. Essentially, he claimed the vaccine was still too new to truly understand the side effects and potential reactions to it. Both parties presented expert testimony. The mother called the child's pediatrician to testify, as well as an expert in pediatric infectious disease (a doctor who was the head of the pediatric infectious disease department at Yale). The father called a different pediatrician, who had no expertise in infectious disease, immunology, or any more specific practice areas within pediatrics. Ultimately, after applying the relevant custody factors, the court found on June 24, 2022, that it was in the best interests of the child to vaccinate for COVID-19.

## Conclusion

As practitioners, we are tasked with representing the client that we have and the position that they take so long as that position is not frivolous or the like. In advocating for a parent facing a vaccination litigation, the litigator should be knowledgeable on the legislation behind vaccine mandates and use that to their advantage, or otherwise be prepared to defend against it and show why legislated mandates are not relevant to the facts of the case at hand. If the argument is one of a religious exemption, then the lawyer should be prepared to make constitutional arguments for the parent's freedom of religion and their related rights should trump the other parent's equal rights to make medical decisions for their child. If the argument is one of science, then the case presented to the court must include support for that scientific argument, and presumably the lay person litigant cannot testify to that science themself. The ultimate decision in each case is answering the question of whether vaccination is in that particular child's best interests. Regardless of which side of the argument the attorney is on, they should be prepared to thoroughly explain and support their client's claim not only with the client's own testimony, but, where the issue of science is being considered, with the testimony of experts. ■

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## Endnotes

1. Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, COVID Data Tracker, Centers for Disease Control and Prevention (December 18, 2022), covid.cdc.gov/covid-data-tracker/#trends_totalcases_select_00.
2. *Id.*

3. *Id.*
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10. *Bruesewitz v. Wyeth LLC*, 562 *U.S.* 223, 226 (2011).
11. *Jacobson v. Commonwealth of Massachusetts*, at 28.
12. See *N.J.A.C.* 8:57-4.1, requiring certain immunizations for "all children attending any public or private school, child care center, nursery school, preschool or kindergarten in New Jersey."
13. *Id. See also N.J.S.A.* 26:1A-9.1.
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15. New Jersey Department of Health (NJDOH) Vaccine Preventable Disease Program: Summary of NJ School Immunization Requirements nj.gov/health/cd/documents/imm_requirements/k12_parents.pdf
16. May 19, 2017 directive "*N.J.A.C.* 8:57-4.3 and *N.J.A.C.* 8:57-4.4, Immunization of Pupils in Schools, Medical and Religious Exemptions state.nj.us/health/cd/documents/imm_requirements/religious_exemption.pdf.
17. *N.J.A.C.* 8:57-4.4(e); *N.J.S.A.* 26:4-6.
18. *N.J.A.C.* 8:57-4.4; *N.J.S.A.* 26:1A-9.1.
19. *Welsh v. U.S.,* 398 *U.S.* 333 (1970).
20. *Id.* at 339 (*quoting U.S. v. Seeger*, 380 *U.S.* 163 (1965).
21. *Id.* at 341.
22. *Kolbeck v. Kramer, 84 N.J.Super.* 569, 572 (1964).
23. *Id.* at 576.
24. *In re D.C.,* 203 *N.J.* 545, 551 (2010).
25. *Moriarty v. Bradt*, 177 *N.J.* 84, 101 (2003).
26. *Fawzy v. Fawzy*, 199 *N.J.* 456, 473-74 (2009).
27. *Children's Health Defense, Inc. v. Rutgers, the State University of New Jersey*, 2021 *WL* 4398743 (D.N.J. Sept. 27, 2021).
28. *Id.*
29. *Id.*
30. *Moriarty v. Bradt*, 177 *N.J.* 84, 102 (2003).
31. *Fawzy v. Fawzy*, 199 *N.J.* 456, 474 (2009).
32. *Moriarty, supra*, 177 *N.J.* at 110.
33. *Prince v. Massachusetts*, 321 *U.S.* 158 (1944).
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35. *Beck v. Beck*, 86 *N.J.* 480, 497 (1981).
36. *In re J.R. Guardianship*, 174 *N.J.Super.* 211, 224 (App.Div. 1980).
37. *Richmond v. Natanson*, 2022 *N.J. Super. Unpub. LEXIS* 1237 (Ch. Div. June 24, 2022).

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