

New Jersey Law Journal

VOL. 209 NO. 10

MONDAY, SEPTEMBER 3, 2012

An ALM Publication

Family Law

Where Matrimonial Law and the Law of Trusts Overlap

By Edward S. Snyder

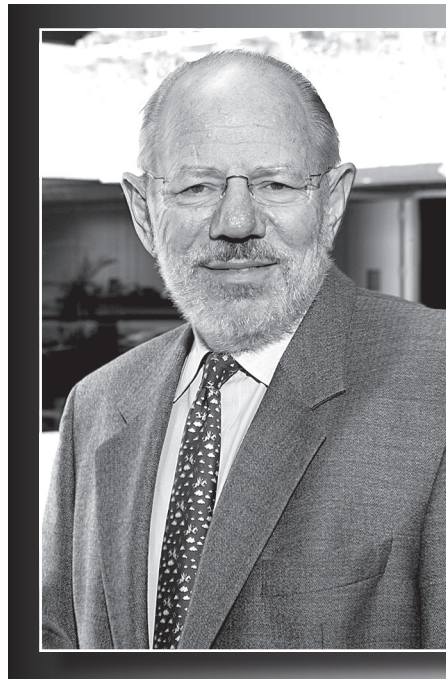
The Supreme Court's term included three notable cases in the area of family law. One case, *Tannen v. Tannen*, 208 N.J. 409 (2011), involved the overlap between family law and the laws of trusts. Another case, *N.J. Div. of Youth and Family Servs. v. R.D.*, 207 N.J. 88 (2011), dealt with collateral estoppel in a termination of parental rights case. The third case, *Segal v. Lynch*, 207 N.J. 190 (2012), addressed the issue of what an attorney who was appointed as a parenting coordinator could actually bill for.

Intersection of Trusts and Family Law

In a per curiam opinion, the Court in *Tannen* affirmed the Appellate Division. Unfortunately, the Supreme Court did not write anything new but simply adopted the ruling of the Appellate Division based on the reasons expressed in Judge Messano's opinion at 416 N.J. Super. 248 (App. Div. 2010). The Supreme Court failed to write an opinion notwithstanding an invitation by Judge Messano to do so:

As a court of intermediate appellate jurisdiction, we do not presume to adopt the Restatement (Third) of Trusts as the law of this state and apply its provisions to the facts of this case. Given the significance of its principles in the context of N.J.S.A. 2A:34-23(b)(11), such determination would be more appropriately made by our Supreme Court.

In *Tannen*, the parties were married for almost 18 years. During the marriage, the wife's parents settled an irrevocable, discretionary trust, with the wife as sole beneficiary, and the wife and her parents



the husband's alimony obligation.

The alimony statute, N.J.S.A. 2A:34-23, outlines the factors which a court may consider in making an alimony award. One of those factors is "the income available to either party through investment of any assets held by that party." The husband argued that the wife's interest in the trust was essentially access to an asset which she failed to properly utilize for her own support. The trial court agreed

Snyder, a partner at Snyder & Sarno LLC in Roseland, is a past president of the N.J. chapter of the American Academy of Matrimonial Lawyers and a past chairman of the N.J. State Bar Association, Family Law Section. He represented the plaintiff-husband in the Tannen case discussed in this article. Snyder gratefully acknowledges Ashley Vallillo, an associate of the firm, for her assistance in the preparation of this article.

as co-trustees. The trial court, after ordering the husband's attorney to join the trust as a third-party defendant, determined that it must consider the trust benefits to the wife before computing alimony, and imputed income to the wife from the trust. The Appellate Division reversed and held that the wife's beneficial interest in the trust was not an asset held by her for purpose of the alimony statute, and therefore could not be considered when determining

and, in applying the *Restatement (Third) of Trusts*, held that the terms of the trust required the trustees to disperse such sums as are necessary to maintain the lifestyle of the beneficiary. In applying this rationale, the trial court imputed \$4,000 per month in income to the wife from the trust. After considering this as the wife's income, the trial court set the husband's alimony obligation at \$4,500 per month.

The Appellate Division, in examining

Family Law

the language of the trust, noted that the trust provided that:

[T]he trustees shall pay over or apply for the benefit of the beneficiary's health, support, maintenance, education and general welfare ... any or all of the principal thereof as the trustees shall determine to be in the beneficiary's best interests, after taking into account the other financial resources available to the beneficiary.

The trust further provided that it was "the express intention of the Grantors in creating this Trust that the beneficiary shall not be permitted, under any circumstances, to compel distributions of income and/or principal prior to the time of final distribution." The Appellate Division, in reviewing the record below, noted the wife's father's testimony that it was his intention in settling the trust that the wife would not be able to compel distributions, and on some occasions, when the wife asked for funds from the trust for vacations, the distribution was not allowed. Relying on the *Restatement (Second) of Trusts*, the Appellate Division stated that: (1) the extent of the interest of the beneficiary of a trust depends upon the manifestation of intention of the settler; (2) a discretionary trust exists when by the terms of the trust, the trustee shall pay to a beneficiary only so much as the trustee in his discretion sees fit to pay; and (3) in a discretionary trust, the beneficiary cannot compel payment to himself.

It is important to note that the Appellate Division examined the trial court's reliance on the *Restatement (Third) of Trusts*, and remarked that the *Restatement (Third) of Trusts* adopted significant changes regarding the rights of a beneficiary of a discretionary trust. Further, the Appellate Division noted that, in New Jersey, only the Tax Court specifically acknowledged the use of the *Restatement (Third) of Trusts*, and very little authority from other jurisdictions cited to it.

In further examining the laws of other jurisdictions, the Appellate Division noted that several sister states concluded it was not appropriate to consider a party's ben-

eficial interest in a discretionary trust as an asset for purposes of alimony or child support, because the spouse has no current right to the fund. Based on the explicit language of the trust and the circumstances surrounding its execution, and applying the existing law of the state, the Appellate Division held that the wife's beneficial interest in the trust was not an asset held by her for the purpose of calculating the husband's alimony obligation. Further, the Appellate Division concluded that the trial court had no power to compel the trust to make any payments to the wife. The Appellate Division remanded the matter for the purpose of fixing an appropriate alimony and child support award.

The Appellate Division did, however, give some solace to the husband when it added that in determining the wife's actual needs to maintain her lifestyle postdivorce, the remand judge must consider the historical record of payments made by the trust on the wife's behalf. In *Tannen*, it was undisputed that for years prior to the divorce, the trust permitted the parties to live in the Saddle River home without paying rent, and that the trust owned the property and paid the real estate taxes, made improvements on the property, and paid for one-half of the housekeeper's salary. The Appellate Division concluded: "In deciding the 'actual need[s]' of [the Wife] for which she was entitled to support from [the Husband], the judge should not turn a blind eye to this reality. To do so would clearly result in a windfall to [the Wife] and be entirely inequitable to [the Husband]."

Many matrimonial and estate attorneys anxiously awaited guidance from the Supreme Court on this very important issue. Those attorneys were greatly disappointed. In the opinion of this writer, the court missed a golden opportunity to provide clarity to the bar as to the issues discussed herein. It reminded us of an old proverb: "The mountain wanted to give birth and made a great clamour, there was enormous expectation: and it gave birth to a mouse."

Termination of Parental Rights

In *N.J. Div. of Youth and Family Servs. v. R.D.*, the court addressed the issue of whether determinations made in the adju-

dication of an abuse or neglect proceeding under Title 9, N.J.S.A. 9:6-8.21 to -8.73, can be given collateral estoppel effect in a later termination of parental rights proceeding under Title 30, N.J.S.A. 30:4C-11 to-15.4. The court held that unless the parties are on notice that Title 9 abuse or neglect proceedings are to be conducted under the clear and convincing evidence standard constitutionally required for Title 30 guardianship/termination of parental rights proceedings, and appropriate accommodations are made for the fundamentally different natures of these proceedings, Title 9 determinations cannot be given preclusive effect in later Title 30 proceedings.

Title 9 provides for the immediate protection of children from further injury, while Title 30 addresses the permanent termination of parental rights. In this case, the defendant appealed from the Title 30 proceedings, which terminated his parental rights to his two youngest children. After the defendant's stepdaughter reported that the defendant was sexually molesting one of her stepsisters, DYFS conducted an investigation which resulted in the emergency removal and temporary foster care placement of the children.

DYFS filed a complaint under Title 9, and the court scheduled a fact-finding hearing to determine whether continued removal was necessary to avoid an ongoing risk to the children. At the fact-finding hearing, the trial court explained that under Title 9, the state must prove abuse or neglect by a preponderance of the evidence, but the court *may* apply the higher standard of clear and convincing evidence. After the Title 9 hearing, the court issued a comprehensive written statement of its findings of fact and conclusions of law. In its opinion, the court elected to apply the higher clear and convincing evidence standard, which theoretically would benefit the defendant. In applying this standard, the court found that the defendant did engage in an inappropriate sexual relationship with his daughter. Therefore, the court determined it would not be safe to return the children to the home.

DYFS subsequently filed a Title 30 application for guardianship, seeking to terminate the defendant's parental rights. Under Title 30, the court determines

Family Law

whether the child's safety, health or development has been or will be endangered by the parental relationship. At the Title 30 hearing, DYFS sought collateral estoppel effect for the Title 9 court's finding that the abuse or neglect had been proved by clear and convincing evidence. The trial court agreed with DYFS and barred relitigation of the sexual abuse of the child, concluding that the findings made by the Title 9 court would have collateral estoppel effect. On appeal, the Appellate Division affirmed, holding that because the Title 9 court used the higher standard to determine that defendant sexually abused the child, the Title 30 court properly used this finding to support the "best interests of the child" test, and ultimately the decision to terminate the defendant's parental rights.

The Supreme Court reversed the Appellate Division, determining that unless the parties are on notice that Title 9 proceedings are conducted under the clear and convincing evidence standard, Title 9 determinations cannot be given preclusive effect in later Title 30 proceedings. The court, while agreeing with the Appellate Division that the collateral estoppel test was satisfied, determined that it was not the appropriate test to be applied. The court noted the differences between the two proceedings. The goal of Title 9 proceedings is immediate relief, and they are conducted at a fast pace, while Title 30

proceedings are more complex and have a permanent effect. The court opined that, in light of public policy, the Title 9 court's "passing reference" that the standard could be preponderance of the evidence *or* clear and convincing did not give the defendant fair notice of the potential for the findings to be used in later proceedings. Finally, the court determined that, in the future, Title 9 findings could be adopted in Title 30 proceedings if litigants receive proper notice and a meaningful opportunity to be heard at the onset.

Fees for Parenting Coordinator

In *Segal*, a case that's been hanging around for a long time, the court held that an attorney appointed as a parenting coordinator can bill for time spent answering the grievances of an angry parent but not for time spent defending herself in court. In this case, the parties were litigating for joint custody and parenting time of their two children. The court appointed a parenting coordinator, who subsequently entered into a retainer agreement with each party. The court order also included guidelines from the Parenting Coordinator Pilot Program, which included the procedure to be used when a party had a grievance against the parenting coordinator. The plaintiff and the coordinator had numerous disputes regarding whether the coordinator was entitled to fees, specifically fees for: (1) her work

as coordinator; (2) time spent compiling responses to the plaintiff's grievances; (3) work connected to the plaintiff's request that she appear and participate in discovery; and (4) her involvement in a dispute about the plaintiff's attempt to depose other members of her law firm. These disputes were sorted out through four different orders in the trial court, all of which ordered the plaintiff to pay the coordinator's fees. The Appellate Division affirmed the orders awarding fees to the coordinator.

The Supreme Court, while affirming the coordinator's fees for her work as parenting coordinator and for her work in responding to the plaintiff's grievances, reversed the lower courts' orders for fees for the coordinator's time in court. The court noted that the coordinator could not be treated any more "indulgently" than any other pro se litigant who is not compensated for the value of his or her time spent seeking justice. The court determined that the coordinator could not be reimbursed for the time she spent appearing on her own behalf, and that, similarly, the coordinator could not be compensated for her work on behalf of the other lawyers in her firm. However, the court held that the coordinator's fees for the time she spent attending her own deposition were well within the scope of the retainer agreement, and they were related to her time responding to grievances. ■