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## Family Law

# The Court Addresses a Variety of Family Law Issues, and a Controversy of Its Own

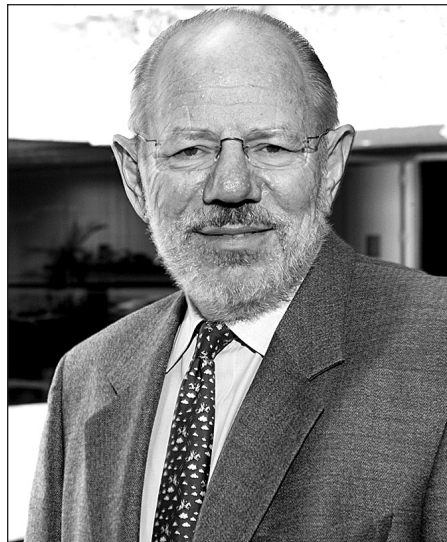
By Edward S. Snyder

The court term of 2010-11 was a busy one for the Supreme Court in the family law arena. The four cases reported here are varied, with the Court revisiting custody arbitration and interstate removal, while exploring new areas of equitable distribution and domestic violence. In addition to the controversy between the litigants, the controversy between some of the justices stood out and was of interest to many members of the bar. This controversy, the genesis of which was the political wrangling between the governor and the legislature, spilled over to the Court with Justice Rivera-Soto's abstentions in several cases, one of which was a family law matter, *Johnson v. Johnson*, 204 N.J. 529 (2010).

In *Johnson*, Justice Long identified an exception to the *Fawzy* requirement of a verbatim record of arbitration proceedings involving issues of custody and parenting time. In *Fawzy v. Fawzy*, 199 N.J. 456 (2009), the Court determined that such a verbatim record was necessary for the purpose of judicial review if required. Accordingly, in *Johnson*, the Appellate Division reversed the trial court's conformance of the arbitration award, because of the lack of a verbatim record. However, the Supreme Court reversed the Appellate Division, holding that there is no per se strict requirement of a verbatim record. All that is necessary is a complete record, and the arbitrator's "painstakingly" detailed findings in

*Johnson* met that burden.

The Court noted that "the arbitrator produced a complete record of all evidence he considered, a detailed recapitulation of every interview and observation



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he conducted, a full explanation of the underpinnings of the award and a separate opinion on reconsideration. That satisfies the spirit of *Fawzy* and constitutes an acceptable substitute for a verbatim transcript." *Johnson*, 204 N.J. at 534. In addition, the Court held that it did not matter under which procedure the arbitration is conducted. "*Fawzy* requires the existence of an arbitration record against which the claim can be tested. That is so whether the arbitration is conducted under the Arbitration Act, APDRA or under specific procedures agreed upon by the parties."

The real "action" in this case, however, resulted from the separate opinion filed by Justice Rivera-Soto, which had absolutely nothing to do with the facts of the matter. Instead, it deals exclusively with Justice Rivera-Soto's position that while he would sit for oral argument, he would not vote on any matters in protest of Chief Justice Rabner's appointment of the then-presiding Appellate Judge Stern to temporarily fill a vacant seat on the Supreme Court. The controversy within the Court stemmed from the refusal of Gov. Chris Christie to renominate Democratic appointee, Justice John Wallace Jr., and his nomination of a Republican instead. When Chief Justice Rabner made the temporary appointment, Justice Rivera-Soto disagreed vehemently, arguing that it was unconstitutional. Justice Rivera-Soto thereafter abstained from several opinions this term, including the *Johnson* decision.

The justices did come together, however, in a per curiam decision in *Sachau v. Sachau*, 206 N.J. 1 (2011). In *Sachau*, the Court upheld the case of *Pacifico v. Pacifico*, 190 N.J. 258 (2007), but stated that the *Pacifico* holding was fact specific and stands for the proposition that a marital asset should be valued at the date of a triggering event only when the asset is sold at that time.

In *Sachau*, the parties divorced in 1979. The divorce judgment provided that the former marital home, where the wife and two children resided, was to be sold upon the high school graduation of the youngest child. When the youngest child graduated from high school in 1984, the husband did nothing to enforce this provision. It was not until mid-2005, when the husband, having fallen on hard times and dependent on charity, filed a motion to compel the sale of the former marital home and for payment of his share of the equity.

As the divorce judgment was silent as to the date upon which the home should be valued for purposes of determining the husband's equity share, the Appellate Division held that the value should be established as of 1984, when the parties' youngest child completed high school. The Supreme Court reversed, holding that valuing a marital asset as of the date the "triggering" event can only be fair when the asset is actually sold at that time. *Pacifico*, while it is good law, "can only be understood on the facts of ... [that case] and in the context of a sale which actually takes place at the point of the happening of the trigger." *Sachau*, 206 N.J. at 8. In a pragmatic holding, the Court stated in *Sachau* that "[t]here is plainly no rationale for a presumption of value as of the trigger date if no sale occurs. Indeed, in the absence of an agreement between the parties to the contrary, marital property that is to be sold should be valued as of the date of the sale."

In another pragmatic decision, Justice Long writing for the Court determined in *Morgan v. Morgan*, 205 N.J. 50 (2011), that when a case is remanded to the trial court more than four years after the date of the initial plenary hearing, the facts

have likely changed such that the present circumstances must be considered when holding a new hearing.

In *Morgan*, within a year of the parties' divorce in 2005, the mother of the parties' two children and the parent of primary residence, sought to move to Massachusetts with the children, where her family and her new fiancé resided. The father objected and sought to have the trial court modify custody as he claimed the de facto custody arrangement differed from that set forth in the parties' Property Settlement Agreement. The trial court determined that there was no change in circumstances warranting a change in custody and that the *Baures* factors applied because the parties did not share joint physical custody. The trial court then ordered a plenary hearing, appointed a custody expert, and the father retained his own expert.

After the plenary hearing in 2007, the trial court entered an order denying the mother's request to move out of state with the children. This decision was contrary to the opinion of the court-appointed custody expert and in line with the father's custody expert. The father's expert, however, had based her opinion and recommendation on that of nontestifying experts in this matter, whose opinions the trial court also incorporated by reference.

Both parties appealed and in 2010, the Appellate Division reversed the trial court based in part on the fact that the trial court cited to the opinions of experts that the mother was unable to cross-examine. The Appellate Division permitted the mother to move with the children to Massachusetts and remanded to the trial court on the sole issue of determining a parenting time schedule consistent with said move.

The Supreme Court affirmed the Appellate Division, however, when they held that the scope of the remand was too narrow as four years had passed since the initial plenary hearing. The Court determined that the passage of time alone required a more extensive analysis and inquiry on remand. For example, a significant reason for the move as stated by the mother was to be with her fiancé who would be able to support her and allow her to be a stay-at-home mom. However, the

mother was no longer engaged or in a relationship with said fiancé at the time of the Appellate Division decision in 2010. Thus, on remand, the trial court was required to take into consideration the changes that occurred in the past four years as well as the children's advanced ages and the opinion of the oldest child regarding the proposed move in analyzing the "*Baures* factors in light of present-day realities." *Morgan*, 205 N.J. at 55.

At the very end of its term, the Court decided a fourth family law case, this one authored by Justice Hoens. In *J.D. v. M.D.F.*, No. 065499, 2011 N.J. LEXIS (July 28, 2011), the parties had a long-term relationship where they resided together and had two children, but were not married. Their relationship ended in 2006, and in 2008, the plaintiff filed a complaint for a temporary restraining order (TRO). She alleged that the defendant was outside her home at 1:42 a.m., taking photographs. She indicated that the defendant acted with a purpose to harass her. The plaintiff also alleged certain past acts of domestic violence, which she included in her complaint. The trial court granted the plaintiff's TRO.

At the final restraining order (FRO) hearing, the plaintiff testified to several past acts of alleged domestic violence, which were not listed in her complaint. The defendant indicated that he was not prepared to counter said acts, but the trial court allowed the testimony. In addition, although the trial court granted the defendant's request to sequester the plaintiff's boyfriend, who was home with the plaintiff at the time of the alleged act and who first noticed the defendant outside, the trial court denied the defendant the ability to question the plaintiff's boyfriend at the hearing, stating that it would have no impact on the ultimate result.

The trial court granted the FRO, stating that the mere act of driving past and taking pictures of the plaintiff's home at 1:42 a.m. constituted harassment, and that act taken into account along with the past acts testified to by the plaintiff amounted to harassment and constituted a proper basis for the granting of a FRO.

The defendant appealed and the

Appellate Division affirmed. The Supreme Court granted certification and reversed. The Court held that by not adjourning the matter, thereby permitting the defendant required notice in order to properly respond to the past acts testified to by the plaintiff, the trial court violated the due process rights of the defendant. Similarly, by not permitting the defendant to call the plaintiff's boyfriend as a witness, the defendant's due process rights were also violated.

The Court remanded the matter to the trial court for a new trial. The Court found that the trial court did not sufficiently explain, pursuant to the statute and case law, the basis for a finding of harassment as the trial court did not specify which subsection of the statute the defendant's harassment came under. "[T]here are two separate subparts of the harassment statute, each of which requires a different analysis based on the facts alleged." Moreover, the trial court failed to substantiate the reasoning for a finding that the defendant had an intent to harass the plaintiff as the defendant claimed he was taking pictures for use in a motion for a change of custody, which was filed the same date as the TRO and he

did not intend for the plaintiff to see him. Lastly, the trial court failed to go through an analysis of the second required prong before issuing an FRO, a finding that entering an FRO is necessary to prevent harm to the plaintiff.

Accordingly, despite the shortened time frames for conducting a domestic violence hearing, the Court held that "ordinary due process protections apply in the domestic violence context, ... and '[a]t a minimum, due process requires that a party in a judicial hearing receive notice defining the issues and an adequate opportunity to prepare and respond.'" (Internal citations omitted.) In guidance to the trial court judges who are confronted with these issues, the Court recommended,

[that] trial courts should use the allegations set forth in the complaint to guide their questioning of plaintiffs, avoiding the sort of questions that induced plaintiff in this appeal to abandon the history revealed in the complaint in favor of entirely new accusations. That does not mean that trial courts must limit plaintiffs to

the precise prior history revealed in a complaint, because the testimony might reveal that there are additional prior events that are significant to the court's evaluation, particularly if the events are ambiguous. Rather, the court must recognize that if it allows that history to be expanded, it has permitted an amendment to the complaint and must proceed accordingly.

Moreover, the Court cautioned that trial courts have broad discretion to reject adjournment requests that are ill founded or designed to create delay, but the courts should liberally grant those requests that are based on an expansion of the factual assertions that form the basis of the complaint. "[T]here is no risk to plaintiff based on such a procedure... [because] courts are empowered to continue temporary restraints during the pendency of an adjournment, thus fully protecting the putative victim while ensuring that defendant's due process rights are safeguarded as well." ■