

FINAL REPORT OF THE CUSTODY AND PARENTING SUBCOMITTEE

On March 3, 2003, Judge Serpentelli referred to our Subcommittee a proposal by the New Jersey Chapter of the Association of Family and Conciliation Courts, for a Rule amendment, which would empower courts to designate a parenting coordinator/monitor for mid and high conflict custody situations. The Association's Subcommittee dealing with this issue includes Judith Greif, Mathias Hagovsky, Sharon Ryan Montgomery, David Brozinsky, Edwin Rosenberg, Ron Silikovitz, and Marcy Pasternak.

The Subcommittee notes that the designation of parenting coordinator/monitors occur in many counties, even though there is no Rule approving it. One term of art that has come into play in recent years is "therapeutic mediator." It is our experience that some judges who have designated "therapeutic mediators" believe such a designation excuses compliance with confidentiality required by *R. 1:40-8*.

More recently, it is our experience in different counties that the term therapeutic mediator has been replaced by therapeutic monitor and that such appointees are charged with making non-confidential recommendations to the parties and to the Court if they are unable to assist the litigants in resolving the case.

Our Subcommittee has reviewed the submission from the New Jersey Chapter of the Association of Family and Conciliation Courts and discussed the concept and the Rule proposed by the New Jersey Chapter. Although we uniformly agree that the Court should have formal authority to designate therapeutic parenting monitors, we do not agree with the specifics of the Rule that has been proposed by the Association.

We have communicated with and had a dialogue with the Association. A copy of our communication to the Chair of the New Jersey chapter, which summarized our concerns about the Chapter's initial proposed Rule recommendation, is attached hereto as **Exhibit A.**

We attempted to coordinate with that body a specific Rule amendment with which both that Association and our Subcommittee would be in accord. Our efforts in this regard were not fully successful. The Chapter labels the person to be designated as a "parenting coordinator." We prefer the term "parenting monitor." We have used the word "monitor" instead of "facilitator" or "coordinator" because we believe it more accurately describes the function of the appointee, namely, to monitor and make recommendations, which either parent may bring to the Court's attention on application, pursuant to the Rules. We also omitted from the proposed Rule the word "therapeutic." We believe that word might cause participants to believe that their communications were privileged and confidential.

Both our Subcommittee and the Chapter are unequivocally clear that the parenting monitor shall have no authority to make binding decisions. He or she shall have authority only to make recommendations, which may be brought by either party to the Court for its approval or rejection. We further agree with the Chapter that any person so designated must be qualified by experience or training and that the Rules should so provide.

Following further dialogue between Chapter representatives, it became clear they were not in favor of precluding the Court from appointing attorneys to fill the position, even if there was no consent, so long as they were qualified by training or experience.

The Subcommittee is divided on whether attorneys licensed to practice in New Jersey should be able to be designated as parenting monitors. Our Subcommittee no longer has five active participants, since one of the judges assigned has been reassigned out of the Family Part and does not participate. At our July meeting, two of our participants believed that attorneys should be able to be designated to serve as parenting monitors. One other member of our Subcommittee felt that the appointment of such attorneys should be allowed, providing the litigants consented to the use of an attorney admitted in New Jersey, rather than a mental health professional. One member felt that attorneys should not be able to be designated to serve as parenting monitors because they are not mental health experts and, by and large, do not have the training or experience to deal with such disputes.

We believe the parenting monitor concept is important. If the parties are left only to mediation, then the insights gained into the family dynamic during an unsuccessful mediation are lost to those in the system who must make decisions in the absence of the parties' ability to mold a resolution.

A parenting monitor will not be a mediator. The information obtained from the parenting monitor process may be considered by judges in making decisions. Of course, the parties involved will be aware of the non-confidential nature of their communications with the monitor, as the Rule specifically references the non-confidential nature of these communications. We feel that the use of such a monitor, will diminish the need for extensive psychiatric evaluations, although full evaluations will still be available.

We also specifically have not attempted to catalogue the kinds of disputes or issues that may be considered by a parenting monitor. We have also not attempted to

draft a proposed Order to be used when designating a parenting monitor. We understand the Chapter is considering adopting a boiler plate general Order of Appointment. We do not believe it appropriate to catalogue in great detail the myriad of issues that a parenting monitor may consider. We believe this is best tailored to the individual facts of a particular case, both by the Court and the parties. An Order appointing a monitor should be tailored to the needs of each case.

We think designation of a parenting monitor now occurs frequently as a matter of *de facto* practice. We believe the adoption of a Rule will help create uniformity for this practice.

COURT EXPERT REPORTS SUBMITTED TO THE COURT

Pursuant to R. 5:3-3(e), reports of Court appointed experts are to be provided to the Court and the parties “upon completion.”

A Court appointed expert’s opinion is entitled to no greater weight or preference than any other expert’s opinion. It seems inappropriate in the extreme for a Judge to have access to one expert’s report without having access to all experts’ reports. We all concurred that although reports are hearsay, it is customary as a matter of convenience for the Court to have copies of all experts’ reports, as testimony proceeds. The current Rule, which has been in place for many years, allows the Court to have its experts’ reports before trial, not just at the time testimony is commencing.

The judges on our Subcommittee felt the availability of such reports was helpful to them during the *pendente lite* phase of the case, particularly if there are issues or allegations that may have to be acted upon before trial. Logically, and as a matter of fundamental fairness and due process, if the Court’s experts’ report is going to be

available to it before trial, then all experts' reports should be available to the Court, *pendente lite*, since the Rule is clear that the Court is not to entertain "any presumption in favor of its expert's findings."

RECOMMENDATIONS FROM EXPERTS

Our Subcommittee has discussed the Supreme Court's reference back to the Practice Committee of its proposed amendment to R. 5:3-3 pertaining to disputes between parenting experts. In its referral back to the Practice Committee on July 24, 2002, the Court's representative noted:

The Court did not approve the proposed amendment to Rule 5:3-3, relating to experts in custody/parenting disputes. After considering the Committee's recommendation, the Court elected to refer the matter back to the Practice Committee for further consideration of its proposal that experts in these matters be required to confer with each other when they differ in their conclusions. (emphasis supplied)

See **Exhibit B** annexed hereto.

The Subcommittee notes that the proposed Rule amendment approved last term by the Practice Committee did not require experts to confer with each other if they reached different conclusions. The proposed Rule amendment only gave the trial court the power to require such conferences. It did not require the Court to do so.

Nevertheless, the Subcommittee considered the referral back in the context of discussions before this full Committee last term and further in the context of the Bar Association's opposition to the proposed Rule amendment last term.

Before discussing that portion of the proposed Rule that was referred back by the Court, we reiterate our approval of two sections of last term's proposed Rule amendment to R. 5:3-3 that were never in dispute. You will recall that the first sentence of the proposed Rule directed mental health experts to "conduct strictly nonpartisan evaluation

to arrive at their view of the child's best interests, regardless of by whom they were engaged." That proposed amendment emanated from last term's Subcommittee research and investigation into the standards and protocols used by all of the mental health organizations whose members perform parenting evaluations. Last term's Subcommittee presented in its report to the full Committee, copies of all the protocols of mental health groups to demonstrate that the standard of each group required experts to perform investigations and give opinions based solely upon what they perceived to be the child's best interests, regardless of who engaged them. Copies of these protocols are again annexed hereto again as **Exhibit C**. Therefore, our Subcommittee believes that this sentence of the Rule amendment should be reiterated without modification. There was no opposition to that section of the Rule amendment in the Subcommittee or the full Committee and the Bar Association did not oppose that section of the proposed amendment.

Moreover, we note that there was no opposition to that section of the proposed Rule amendment that directed mental health experts performing evaluations "to consider and include reference to criteria set forth in *N.J.S.A. 9:2-4*, as well as any other information or factors they believe pertinent to each case." Since no one could reasonably dispute a Rule direction to experts to consider statutory custody criteria, as well as other information they believe pertinent, we recommend again adoption of that section of the proposed Rule amendment. It is important that this be noted specifically because it is our experience that expert reports frequently do not comment on the statutory custody criteria.

Finally, we fully discussed that portion of the Rule amendment this Subcommittee accepted last term, which was referred back by the Supreme Court. The Subcommittee still believes that the ability of the courts to ask experts to confer to determine if a common recommendation is possible, is an important tool of which courts should not be deprived. However, the Subcommittee also agrees that the proposed Rule needs to be revised to assure, that in the event the experts either do make a common recommendation, which is not accepted by a litigant, or do not make a common recommendation, neither the unacceptable common recommendation, nor the identity of the party rejecting the recommendation, nor the experts' communications about these issues, can be evidential in any subsequent trial, except with respect to the issue of counsel fees. In other words, in these scenarios, we believe that all such discussions should remain confidential, until the Court has made a substantive parenting determination and is then considering counsel fee applications.

We have carefully reviewed the reasons that have been articulated for opposition to the Rule amendment accepted by the Family Practice Committee last term. They are:

1. Such an amendment would cause the Judiciary "to transfer its decision making authority to experts, against the wishes of the litigants or their attorneys."
2. A common recommendation made by the experts would be communicated to the court as substantive evidence thereby discrediting the experts' reports submitted in anticipation of trial and the common recommendation would be used as fodder to discredit an expert on cross examination if one or both of the parties did not agree to the common recommendation."

3. Attorneys would be placed in “an ethics bind, as it frustrates the attorney’s duty to their client.”
4. In any event “a Court expert could be appointed during the proceedings to reconcile the opinions of the experts.”

See **Exhibit D** attached hereto.

The Rule we propose would not transfer authority to experts. Experts do not make decisions. Judges still make decisions and clients still have the right to oppose any opinion given by experts, even if the experts agree. Neither the common recommendation, nor the identity of the litigant who rejected the recommendation would be known to the Court until after its determination. Discussions between the experts also would not be evidential.

Second, we do not believe that our proposed Rule would create an ethics bind for attorneys and frustrate their duty to their client, since their obligation would be to represent their client’s interests and to implement the client’s perspective. If clients did not wish to accept the common recommendation, they would have a right to present their case for trial and they would have the right to ask a judge to make a decision. Their lawyers would be required to do so. The identity of the rejecting party would not be revealed before determination of parenting issues.

Third, we do not believe the role of Court experts is to reconcile conflicting opinions of private experts. Such efforts and negotiations would open everyone up for impeachment, if either expert changed from the position set forth in their report. We believe a Court should appoint an expert if it needs assistance with respect to guidance about the issues involved. The Court expert should not have extra judicial authority to

reconcile the opinions of private experts. Moreover, a Court expert's opinion is entitled to no greater weight than any other expert's opinion, unless substantiated and accepted by a judge after rationally reviewing at trial the evidence that supports the opinion.

Our proposed Rule recognizes a problem articulated by the Bar, regarding the impeachment of an expert, who changed his opinion following consultation with the other expert. Certainly, if the Court knew that a common recommendation had been made, and the matter did not conclude and was tried to conclusion, an expert who changed his initial recommendation, could be discredited on cross examination or otherwise impeached.

The Subcommittee discussed whether or not this concern could be addressed in the context of a proposed Rule amendment that nevertheless, gave the Court the discretion to direct the experts to confer in an attempt to reach such a recommendation. We believe the solution to this problem was not to "throw out the baby with the bath water."

We believe it is unwise to disregard a vehicle, which could be very helpful in managing conflict, reducing the number of cases that are tried to conclusion, and increasing the number of cases that are able to be harmonized by agreement. We believe that the vast majority of litigants, if faced with a common recommendation from two experts, probably would be positively impacted to the point of substantially increasing the chances for resolution. But we agree that if the consultation does not result in resolution, and either or both litigants wish to reject a common recommendation, that they should have the right to do so, without the Court learning of either the

recommendation, the identity of the rejecting party or of the discussions between the experts.

We believe the solution to this dilemma is to attempt to craft a Rule that enables the Court to ask the experts who make disparate recommendations to confer to determine whether a common recommendation is possible. However, if the experts do reach a common recommendation and a litigant does not accept it, or the experts cannot reach a common recommendation, then the Court is not to be made aware of that recommendation, or of any discussions between the experts, or of the identity of the rejecting litigant, until after the parenting determination has been made. The Court should not learn of these events until the counsel fee phase of the case, after the Court has made a parenting determination. In these circumstances, the common recommendation should be placed in a sealed envelope, along with the position of each client, with respect to its acceptance or rejection, and should be reviewed by the Court post-judgment following decision, in connection with the issue of counsel fees.

Our propose Rule amendment to *R. 5:3-3*, which adds a new section (b), is as follows:

(b) Custody/Parenting Disputes: Mental health experts who perform parenting/custody evaluations shall conduct strictly non-partisan evaluations to arrive at their view of the child's best interests, regardless of by whom by they are engaged. They should consider and include reference to criteria set forth in N.J.S.A. 9:2-4, as well as any other information or factors they believe pertinent to each case. If the mental health professionals reach different opinions concerning the parenting/custody arrangements that are in the best interests of the children, the Court may direct them to confer in an attempt either to reach a resolution of all or a portion of the outstanding issues, or to make a common recommendation. Neither the refusal of either party to accept any common recommendation by the mental health professionals, nor the discussions of the experts shall be communicated to the Court in any fashion, and shall not be introduced into evidence, except as otherwise set

forth herein. In the event the mental health professionals reach a common recommendation concerning any parenting issue, and either litigant does not accept that recommendation, then that recommendation, along with the position of each litigant, with respect to its acceptance or rejection, shall be placed in a sealed envelope and submitted to the Court during the trial and reviewed by the Court only in connection with its decision concerning counsel fees. The Court shall not review the recommendations or the litigants' positions concerning the recommendation, until it has made its final determination with respect to all parenting issues.

TIME PERIODS FOR MEDIATION, EVALUATION AND TRIAL

A reference was made to our Subcommittee at the March 31, 2003 Family Practice Committee meeting, based upon a recommendation from the General Procedures and Rules Subcommittee.

The Family Law Section addressed this issue to the General Procedures and Rules Subcommittee at its meeting on February 26, 2003. The Bar noted that a referral to mediation, by virtue of *R. 5:8-1*, in effect, stays the commencement of parenting evaluations for a sixty (60) day period of mediation, unless the parties otherwise agree.

The Bar's concern is that mediation does not usually commence until thirty days after issue is joined because it is at that point that a Case Management Conference has been scheduled and a determination has been made whether custody or parenting is a genuine and substantial dispute. If evaluations are stayed for 60 more days, then, in effect, three months of the sixth month period after which custody trials are supposed to commence pursuant to *R. 5:8-6* has expired, without forensic investigation. There was concern expressed that evaluators, therefore, would not have sufficient time to perform their investigations and complete their reports in accordance with these time tables and the requirement that a trial occur in six months.

Last term, our Subcommittee met with mental health professionals who had similar concerns for different reasons. The mental health professionals we met with believed that it was a disservice to litigants in parenting disputes to rush them through the litigation process because the family needs time to grieve its death. The mental health professionals advised the Subcommittee that pushing parenting disputes through the system would only polarize the parties because emotions in most cases would still be too frayed. They suggested mediation proceed for six months before evaluations commenced. They uniformly expressed the view that compelling litigants to conclude custody cases within six months was contrary to the families and children's best interests.

Our Subcommittee discussed the timetables for mediation and evaluation and the clear emphasis by mental health professionals that litigants and children were not served by compelling them to rush to a decision about parenting issues in the midst of heightened emotions at the commencement of the case.

Moreover, the Subcommittee firmly believes that respect for our system is undermined by having in place a Rule that cannot be complied with because there simply is not sufficient time to accomplish the work that is necessary to be done.

We believe the system is better served by allowing more flexibility for completion of evaluations and scheduling of custody/parenting trial dates. This is best done by the judge assigned to the case, who can control its course, through periodic Case Management Orders. In other words, the Subcommittee concludes that setting mandatory trial dates for custody disputes, within six months of issue being joined, simply creates a false expectation that most often cannot be implemented. Moreover, the attempt to do so and to push litigants to process these disputes when their emotions are most frayed, only

results in their increased polarization, which is contrary to the best interests of their children.

Therefore, the Subcommittee agrees with the Bar that trial judges should not mandate and inflexibly schedule and commence trials on parenting disputes, six months after issue is joined. The current Rule has a safety valve with respect to the period of mediation and allows the Court, on good cause, to extend the mediation period for longer than two months. The current Rule requires the conclusion of mediation periods to be set forth in Case Management Orders that are entered. The Subcommittee believes similar flexibility is required with respect to completion of evaluations and fixing of firm trial dates, all of which must be tracked in Case Management Orders that are reviewed from time to time.

We have drafted an amendment to R. 5:8-6, which allows the Court, on good cause shown, to extend the time period for commencement of a custody trial, as necessary to accommodate reasonably the needs of parenting evaluators to commence and complete forensic investigations, so that proper presentation can occur at trial. The proposed Rule amendment as follows:

Where the Court finds that the custody of children and parenting time/visitation are genuine and substantial issues, the court may schedule a hearing date six months after the completion of mediation contemplated by R. 5:8-1, or six months after the first Case Management Conference, if there is no mediation. The court may, in order to protect the best interests of the children, conduct the hearing in a family action prior to a final hearing of the entire family action. As part of the hearing, the court may on its own motion or at the request of a litigant conduct an in camera interview with the child(ren). In the absence of good cause, the decision to conduct an interview, it shall place its reasons on the record. If the court elects to conduct an interview, it shall afford counsel the opportunity to submit questions for the court's use during the interview and shall place on the record its reasons for not asking any question thus submitted. A stenographic or recorded record shall be made of each interview in its entirety. Transcripts thereof shall be provided to counsel and the parties upon request and payment for

the cost. However, neither parent shall discuss nor reveal the contents of the interview with the children or third parties without permission of the court. Counsel shall have the right to provide the transcript or its contents to any expert retained on the issue of custody. Any judgment or order pursuant to this hearing shall be treated as a final judgment or order for custody. Hearings on pendente lite disputes about custody and parenting time/visitation plans will occur only if the Court deems them necessary.

If the parties engage in mediation, then the Court may extend reasonably the time period for commencement of trial to allow completion of necessary forensic evaluations. Ordinarily, unless good cause is shown to the contrary, the time period for mediation and evaluation should not be longer than six months from the first Case Management Conference. If there is no mediation, then unless good cause is shown to the contrary, the time period for contemplation of forensic evaluations should be no longer than four months from the first Case Management Conference. All Case Management Orders will identify scheduled completion dates for mediation and forensic evaluations.

R. 5:8-1 is amended as necessary to reflect these R. 5:8-6 changes.

TECHNICAL CORRECTIONS TO R. 5:8-1 and 5:8-6

R. 5:8-5 references the need to prepare “custody and parenting time/visitation plans when there is a custody dispute.” R. 5:8(A) and R. 5:8(B) discusses appointment of counsel for children and Guardian Ad Litem, “where custody or parenting time/visitation is an issue.”

However, neither R. 5:8-1 nor R. 5:8-6 have the same reference. The reference in those Rules is simply to custody disputes, not to “custody and parenting time/visitation disputes.”

The Subcommittee proposes amending the first sentence of R. 5:8-1, to add after the word “custody” the language “and parenting time/visitation disputes.” It further proposes amending R. 5:8-6, by inserting the same language after the word custody on the first line of that Rule. The Subcommittee also believes that R. 5:8-6 should be amended to make clear that a trial court need not conduct a full hearing, pendente lite, on

a parenting dispute. These changes are contained in the proposed Rule amendment referenced, *supra*, pages 13-14.

R. 5:8-1 - INVESTIGATION BY FAMILY DIVISION - - CLARIFYING THE RULE
OF PROBATION DEPARTMENTS

A hold over issue from last term was consideration of that provision of R. 5:8-1, which directed, when issues of custody are genuine and substantial, that investigation of the character and fitness of the parties be conducted by the Probation Department of the county of venue. *See* Rules of Court, 2002. The Court is not required to do this, but it has the discretion to do so. Rules 5:8-2 through 5:8-4 related to the filing of such reports with the Court and the ability to issue periodic reports and to continue the investigation after an award of custody is made.

This issue was reserved because members of our Subcommittee last year believed it inappropriate for Probation Officers to be conducting best interests evaluations, which is what the phrase “character and fitness of the parties” connotes.

Since the reservation of that issue in our last report, the Rule was amended to direct that such investigations were to be “made by the Family Division.” *See* R. 5:8-1, Rules of Court, 2003. The factors to be considered - - the character and fitness of the parties - - were the same, but the investigation was to be under the auspices of the Family Division.

However, although the new Rule directs that the investigation be conducted by the Family Division, the last sentence still sets forth that probation should conduct the investigation. That sentence provides:

Such investigation of the parties shall be conducted by the Probation Office of the County of the home state of the child, notwithstanding that one of the parties may live in another country or state.

Moreover, provisions of *R. 5:8-2* through *R.5:8-4* continue to refer to the Probation Department, directing them to make periodic reports to the Court as to the status of custody (*See R. 5:8-2*). Thus, the Probation Department appears to continue to be involved in connection with investigation of the character and fitness of the parties.

The Subcommittee unanimously believes that Probation Departments are inappropriate vehicles to conduct best interest evaluations or to make recommendations concerning the best interests of children. Probation Departments are aptly suited to report on physical evidence pertaining to home surroundings and housing. We do not believe they are qualified to make best interest recommendations.

Many of us have had experiences where Probation Departments have conducted such investigations and at the same time, mental health professionals have performed an evaluation of the same family. The results sometimes are in conflict. In one case, as Probation Department basically went along with a child's wishes who was a teenager, despite serious allegations of inappropriate parental alienation. The mental health professional's recommendation, instead of proposing that custody go with the father, suggested that all contact between the father and the child should be suspended because of the father's inappropriate behavior and malicious motives.

We understand that the Administrative Office has issued a directive that Probation Offices are not to do best interest evaluations or make such reports to the Court. We do not believe the Rule is sufficiently clear with respect to this issue, since even the new

Rule, which requires investigations to be made by the Family Division, seems to leave implementation of that function to the Probation Department.

Therefore, we believe that the Rule must be specifically amended to make clear that best interest investigations are to be performed only by appropriately trained mental health professionals. Probation Departments have the capacity to report on physical evidence pertaining to home surroundings and housing, but not to conduct forensic psychological evaluations. The proposed amendment to *R. 5:8-1* is as follows: We simply propose adding one sentence as follows:

Probation Officers not qualified as mental health professionals by licensure, experience or training, should not make best interest recommendations to the Court regarding the character and fitness of the parties.

That sentence should be added as the last sentence to *R. 5:8-1*. In addition, the first sentence of *R. 5:8-2* should have added to it the phrase: "Subject to the provisions of *R. 5:8-1* regarding best interests evaluations."

ISSUES RESERVED

CRITERIA FOR DIFFERENTIATING BETWEEN THE DUTIES OF ATTORNEYS AND GUARDIANS FOR CHILDREN

Our Subcommittee is concerned about the absence of clear criteria for defining and distinguishing between the functions to be performed by counsel for children and Guardian Ad Litem. Although *R. 5:8(B)* does catalogue the functions of a Guardian Ad Litem, *R. 5:8(A)* is not nearly as defined.

Ivette Alvarez has prepared an insightful preliminary report about this issue. It is attached as **Exhibit E**. The conclusion of the report is that further refinement and study

is necessary. Many questions need to be answered. For example, the New Jersey Rules make no distinction between an impaired and unimpaired child, and do not require that counsel for the child or the law guardian make a determination on this issue. Most notably, the AAML takes the position that counsel for the unimpaired child is to follow the “child client’s instructions whether in his or her own best interest . . .” In contrast the New Jersey Rule calls for the child’s counsel to act as an independent legal advocate for the best interest of the child. This statement is problematic and goes to the very heart of the matter. Is the role of counsel for the child in New Jersey a client centered one as required by the ethics and professional practice rules, or somewhat lesser hybrid of the role of the traditional advocate and the role of the guardian ad litem? Are the appointments interchangeable and therefore a duplication of services?

Our Subcommittee simply has not had time to carefully discuss these issues sufficiently to be able to propose an appropriate Rule amendment. We believe guidance with respect to the use of attorneys for children is required, but we reserve for next term and more recommendations concerning this issue.

We similarly believe the issue of use of audio and video taping during evaluations should be further investigated. We were unable to do so this term.