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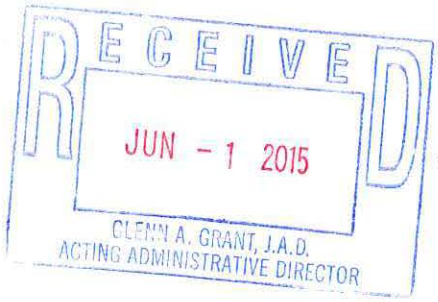
Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts



Comments on Family Arbitration Report

Hughes Justice Complex - P.O. Box 037
Trenton, New Jersey 08625-0037

Dear Judge GRANT:

Once again the committee assigned to write the rules marginalizes the holding in *Johnson v. Johnson, 204 N.J. 529 (2010).* I argued *Johnson* and prevailed. The thrust of the Supreme Court's ruling in *Johnson* recognized that parents have a fundamental constitutionally protected liberty right to fashion their own dispute resolution protocols to resolve parenting issues. *Johnson* stands for the proposition that so long as there is no "harm to the child" parents can craft their own Referrals to Arbitration and ADR without court intrusion or interference. *Johnson* clarifies *Fawzy v. Fawzy, 199 N.J. 456 (2009)* which requires a record of all documentary evidence be kept; testimony be recorded verbatim; and that an award, including findings of fact and conclusions of law, issue. Id. at 480-81. *Johnson* relaxes that standard and provides a safe harbor for informal decision making. There need not be a transcript of proceedings, or a recording of proceedings, (so long as there is no harm to children):

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> " What matters is the state of the record. Obviously, a verbatim transcript of a trial-type hearing will satisfy Fawzy, assuming the other requirements of that case are met. However, where, as here, the arbitrator creates a detailed record for review, the award can be confirmed without verbatim transcription. It goes without saying that it would behoove any arbitrator tasked with resolving a child custody or parenting-time issue to prepare a record, at least as detailed as the one we have approved today. Such preparation will avoid a judicial replay of the entire matter in the event of a substantial claim of harm." *Johnson, Section III*

The holding in *Johnson* which modifies *Fawzy* is totally absent in the draft Arbitration rule and the comment to the Rules. This is not a minor nit-picky issue. It goes to the heart of what Arbitration is about: the right of parties to fashion their own proceedings in as informal a fashion as they desire, so long as there is no harm or potential harm to the child. Contested custody litigation is no longer a viable option.

After fifty years of practice it is most disheartening to accept the reality that the trial bench simply can not reach custody cases for trial. Disputes are off-loaded to "forensic custody evaluators" at great expense to the parties. Often it takes a year or more for a custody evaluation report to be rendered. Then there are interminable delays before hearings can begin, conclude or resolved at the trial level. Appeals follows. Children are torn apart in the process because there is no finality for years. *Johnson* gives judicial approval to a simple informal process that bypasses the snarled delay of litigation.

In JOHNSON the entire Supreme Court was of the opinion that "the record" created in arbitration consists of everything filed in the proceedings: the exhibits, and the Arbitration Award. The arbitration proceedings are not invalidated simply because there is no verbatim record or transcript.

The draft rule steadfastly refuses to recognize the holding in *Johnson,* which relaxes the process mandated by *Fawzy.* The mantra established by *Fawzy* is repeated in Paragraph ¶14 of both Arbitration forms:

> " 14. In any proceedings involving custody or ***parenting time issues***, the parties shall have a record made of the proceeding as to those issues. Such record shall include: (i) a record of all documentary evidence; and (ii) ***all testimony shall be recorded verbatim.***"

There is no comment to the rejection of this key holding in *Johnson.*

As an aside there is no need for the formality of a transcript as to child support issues - that do not deviate from the Child Support Guidelines). If Child Support calculations require a Transcript, this impacts Alimony and Equitable Distribution. Thus by the back door unnecessary ***formality*** will spread throughout the entire arbitration proceedings.

RISK of HARM to the child requires clarification: Two concepts appear conflated:

a] Risk of Harm CREATED by the Arbitration Award. As example

if a parent who is actively alcoholic with drunk driving convictions is permitted to drive the children by the terms of the Arbitration Award. In such instance Justice LONG specifically states the procedure to be followed when someone attempts to confirm the Arb/Adr award. No need to repeat here.

b] The question of Risk of Harm to the CHILDREN identified as the proceedings start or during the proceedings.

Certainly in (b) there should be on-going recording once the issue comes to light. However failure to keep a transcript during the proceedings until risk of harm comes to light as an issue, should not result in the baby being thrown out with the dirty bath water.

There is a remedy here, without the necessity of family 'FM" court intervention. There is a simple SAFETY NET to take care of the unusual circumstance where a risk of harm is raised during what at first blush appears to be a simple dispute over resolving parenting time issues: Call the 800 Division of Child Protection & Permanancy (DYFS) hot line.

(DCP&P) can intervene not to decide "best interest" custody issues, but to resolve RISK of HARM. A Title 9 proceeding clearly over-rides or places on hold the arbitration proceedings on this issue till resolved. At the end of the day if one parent is found

UNFIT or likely to cause risk of harm to the child, this resolves that issue and carries over to the Arbitration proceeding.

This might seem as a petty issue but it is super serious. Parents can not afford to pay $10,000 for a court ordered forensic custody evaluation that takes more than a year - with custody scheduling issues thereafter resulting in a two to three year process that gets appealed. Kids remain in "limbo" and the family is prevented from re-forming post divorce for years.

Hopefully by highlighting this infirmity in the proposed Rules change, a few key sentences can be changed to adopt the holding in *Johnson.* Stated another way, our Supreme Court recognized that the process approved in *Fawzy* needed modification. The Court took the time to modify *Fawzy.* The Rule change seeks to over-ride the Supreme Court on this key issue.

I am prepared to speak to this point, if my testimony would prove useful.

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