

Experts in FD Matters

By Debra S. Weisberg, Esq. and Sandra H. Starr, Esq.

In McCain v. Schultz, plaintiff-mother filed a non-dissolution (FD) proceeding seeking, among other requests, primary residential custody, a parenting time schedule and child support on May 13, 2009. Defendant-father filed a counterclaim for custody on June 9, 2009. At the preliminary hearing on July 16, 2009, the Court entered an Order setting forth a temporary parenting time schedule and directed the parties to participate in mediation as to parenting time.

At the second hearing on August 12, 2009, the parties reported that their parenting time dispute was not resolved in mediation. The Court ordered the parties to participate in a parenting time evaluation by the Bergen Family Center to be completed by the October 30, 2009 hearing with the cost to be equally split. The court-appointed expert did not complete the evaluation until November 16, 2009. The hearing was rescheduled for December 9, 2009.

By letter dated November 25, 2009, nine days after the Court-ordered evaluation was issued, defendant-father's counsel requested an adjournment of the December 9, 2009 hearing date. The adjournment was based upon his request to retain his own expert as he disagreed with the Bergen Family Center recommendations. Plaintiff's counsel objected in writing to any additional postponement beyond December 9 based on the age of the case. The Court denied the adjournment request and simultaneously dismissed defendant-father's pleadings without prejudice.

At the date of the hearing, defendant-father objected to the dismissal of his counterclaim. The trial Court read into the record his attorney's request for an adjournment. The Judge further added that the "rules" mandated the dismissal. (The Appellate Court determined that the "rules" the trial Court referred to was a reference to the New Jersey Judiciary Court Management case processing time frame goal for FD cases. That goal is 3 months from the filing to final disposition).

Defendant-father argued that pursuant to the Rules of Court, he was entitled to retain his own expert if he disagreed with the Court-appointed expert. The trial Court disagreed and advised those rules only applied to FM cases. The hearing ended and the Court entered an Order that dismissed defendant-father's counterclaim without prejudice and left in place the custody order which initially was intended to be only temporary. The trial Court stated that the dismissal would not disadvantage defendant-father in any way as his pleadings were dismissed without prejudice.

On appeal, defendant-father contended that he was entitled to proceed on the counterclaim and to obtain an adjournment for the purpose of obtaining his own expert report as to custody pursuant to Rule 5:3-3(d) and Rule 5:3-3(h). He claimed that the dismissal prejudicially deprived him of the opportunity to litigate custody.

The Appellate Court agreed with defendant-father's claim. The Court ruled on a number of issues, but relevant to FD cases:

1. The trial Court was wrong to rely upon a time-goal for the completion of FD cases as a "rule" justifying decision to dismiss the case and continue a temporary custody order that was entered without a plenary hearing.
 - **Rule 5:8-6:** Provides for a hearing on a custody dispute to be scheduled no later than 6 months after the filing of the last responsive pleading.
 - The Appellate Court found that the hearing in this case was scheduled within the specified time. Rule 5:8-6 does not require or authorize dismissal of a case as a remedy to be invoked when a case is not adjudicated within that time. Instead, the Rule must be construed to "secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Even if the Rule required a dismissal, it is a Rule that can be relaxed when adherence would result in an injustice.
2. Defendant-father correctly argued that he was not bound by recommendation of the Court-appointed expert and could obtain expert on his own.
 - **Rule 5:3-3(d) Selection of Experts.** Experts appointed hereunder may be selected by the mutual agreement of the parties or independently by the Court. The Court shall establish the scope of the expert's assignment in the order of appointment. Neither party shall be bound by the report of the expert so appointed.
 - **Rule 5:3-3(h):** Nothing in this rule shall be construed to preclude the parties from retaining their own experts, either before or after the appointment of an expert by the court, on the same or similar issues.
 - The Appellate Court noted that there may be a case in which a last minute adjournment requires following inexplicable delay may be denied in reference to R. 5:6-8. However, the trial Court did not even consider those issues.
3. The trial Court erred in assessing the consequences of the Court's order dismissing the matter without prejudice.
 - With respect to custody and parenting time, defendant-father would have to refile the counterclaim as a complaint and initiate further proceedings in that matter. No purpose was served by the Court requiring him to do so, particularly in light of the uncertainties as to how prior orders and the evaluation would be viewed and whether the court would require

defendant-father to repeat mediation or obtain an updated report from Court-appointed expert.

- The Appellate Court found that the course of action chosen further delayed the resolution of the parental dispute and thereby defeated the goal the judge attempted to further.

In summary, the Appellate Division concluded that the Order of dismissal without prejudice was a product of a patently mistaken exercise of discretion. The Appellate Division vacated the order, reinstated the pleadings and remanded the case.