NEW JERSEY STATE BAR ASSOCIATION

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January 12, 2023

Honorable Glenn A. Grant
Administrative Director of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Re: Follow-Up to Comments on Report and Recommendations of the Judiciary Special Committee on the Non-Dissolution Docket

Dear Judge Grant:

In its recent comments on the Report and Recommendations of the Judiciary Special Committee on the Non-Dissolution Docket, the New Jersey State Bar Association noted that it is critical to ensure procedural fairness for litigants regardless of the docket on which their matter is filed. We supported most of the Special Committee's recommendations, with the goal of eliminating the differences between matters filed on the FD and FM dockets, and suggested consideration be given to reserving the FD docket solely for summary matters.

The attached article that appeared in the December 2022 issue of the New Jersey Family Lawyer, a publication of the NJSBA's Family Law Section, provides further background for the Judiciary's consideration of that suggestion. The article notes that (1) the issues addressed in an FD matter are often identical to those in an FM matter; and (2) although the streamlined procedures in the FD docket are meant to benefit self-represented litigants by limiting procedural roadblocks, they often result in more harm than help. Rather than presuming that FD cases should be treated summarily because of the docket in which they are filed, the authors argue that the Court should assume that FD matters, and the litigants involved, are deserving of the same due process and procedural safeguards as are available in FM matters. Most importantly, the article notes that having a separate docket for unwed couples has a disproportionate impact on children of unwed parents and, in many instances, members of the LGBTQ community.

The NJSBA once again renews its suggestion that the Judiciary consider reserving the FD docket solely for summary matters, such as name changes for minors, special immigrant juvenile custody cases, transfer of custody on consent, and establishment of paternity. All other matters, especially those involving more complex issues such as custody disputes, visitation and psychological parentage issues, should be handled in one docket, regardless of the marital status of the litigants.

Thank you for your consideration.

Respectfully,

Jeralyn L. Lawrence, Esq.
President

cc: Angela C. Scheck, NJSBA Executive Director
Steven D. Bonville, Chief of Staff, Administrative Office of the Courts

Should the FD Docket be Eliminated for All but Summary and Consent Proceedings?

By Charles F. Vuotto, Jr., Jeralyn Lawrence, Jeffrey M. Fiorello, Carmen Diaz and Debra E. Guston

This column will address the Supreme Court *Report and Recommendations on the Judiciary Special Committee on the Non-Dissolution Docket.*[1] In its 2021 Action Plan for Ensuring Equal Justice, the Court committed to critically reexamine the Family Non-Dissolution docket. This docket type involves cases concerning children, family relationships and responsibilities where there is no divorce filed. The committee was specifically charged with reviewing operation, procedures, and protocols to enhance procedural fairness and eliminate the potential for systemic disparities in outcomes.

There is no question that significant work went into the preparation of this report. The members of the bench and bar who served on this committee should be commended for their efforts. This column will first outline the major recommendations made within the report and then address whether there is a more expedient and simpler approach to making FD practice consistent with the due process protections found in FM rules and the Constitution of the State of New Jersey.

The major recommendations contained within the Supreme Court committee's report are detailed below:

Recommendation One

Amend Rule 5:4-4, to require the court to: (a) serve all non-dissolution documents filed by the initiating party on the non-filing party, and (b) serve any responsive documents on the initiating party. In addition, provide an option for the parties to use "Email Service" for the exchange of documentation beyond initial service.

Recommendation Two

Non-Dissolution materials and forms should be available in all high demand languages the Judiciary currently provides as well as Hindi.

Recommendation Three

Provide educational materials for non-dissolution litigants that inform them of court processes and expectations (i.e., burden of proof regarding best interest factors, change of circumstances, complex track, legal custody vs. physical custody, intra-state and removal considerations, and sample parenting time/culturally inclusive holiday schedules). This information should be available to the public in all available formats including educational seminars in the Offices of the Ombudsman and on the Judiciary website.

Recommendation Four

Develop non-dissolution educational materials for judges such as a bench card with factors to be considered when determining whether a case is complex. The information on bench cards should be the same as the information offered to litigants.

Recommendation Five

Develop sample custody and parenting time/visitation interrogatories that would be available (not mandatory) to the public and modifiable for individual use.

Recommendation Six

Amend Rule 5:8 to require non-dissolution litigants to participate in the Non-Dissolution Education Program and a subsequent consent conference prior to their first hearing before a judge as set forth in Directive #2-20, Family – Non-Dissolution (FD) Education Program (EP), January 3, 2020.

Recommendation Seven

Amend Rule 5:4-3(b) to allow the non-filing party to file a responsive pleading. Create a timeframe to file a responsive pleading and a timeframe to reply to the responsive pleading. Develop sample forms.

Recommendation Eight

Revise the Non-Dissolution Complex Case

Management Order form to reflect that:

1. the FD Case Management Order ("FD CMO") was entered at the initial hearing,
2. the reason(s) the court has deemed the case complex,
3. the appointment of a Guardian ad litem for the child(ren), if necessary, and
4. the appointment of counsel the child(ren), if necessary.

Recommendation Nine

Cases designated as complex should be relieved of the 90-day resolution expectation.

Recommendation Ten

Amend Rule 5:6A and Appendix IX-A, paragraph 28, to require that the child support guidelines worksheet be included/distributed with all child support orders/Uniform Summary Support Orders (USSO).

Recommendation Eleven

Review the Financial Statement for Summary Support Actions to require the information on each line item of the Child Support Guidelines Worksheets."

Recommendation Twelve

Amend Rule 5:5-3 to create a process comparable to the dissolution process outlined in Rule 5:5-4(a)(4), where a party seeking a modification of support must file a current Family Part Case Information Statement along with the prior Family Part Case Information Statement to enable the judge to determine whether there is a substantial change in circumstances warranting a modification of support.

Recommendation Thirteen

Add the following three questions to the Non-Dissolution Verified Complaint form.

1. Is there a history of domestic violence between you and the other party named in this complaint?
2. Have you ever filed for a temporary restraining order and/or filed a domestic violence criminal complaint against the other person named in the complaint?
3. Do you have an existing/active temporary or final restraining order against the other person named in this complaint?[2]

Discussion

The authors question why we continue to have a significantly different set of rules, procedures and forms for FD matters as compared to those handled by the FM docket. In fact, it is our understanding that in other states there is no such other docket.

As the report indicates, the issues that are addressed in an FD matter can be identical (and very often are) to those that are raised in an FM matter other than the dissolution of a marriage. The report states, *"[T]he welfare of children is paramount whether the parents are married, divorced or never-married." J.G. v. J.H., 457 N.J. Super. 365 368 (App. Div. 2019). While practically speaking the FD docket focuses on the named parties in matters, the fact is that children are at the center of FD actions."* The report also states, ""*The recommendations presented in this report include systemic and operational enhancements. They seek to resolve inequities between similarly situated couples in the FD and FM dockets where the only material difference in most cases is the marital status of the parties. Considering the fundamentals of both procedural and substantive due process, the suggested rule amendments contained in this report support the expediency of summary proceedings while ensuring a more comprehensive approach for more complex questions presented to the court."*[3]

It is acknowledged that the vast majority of the cases that fall within the scope of the FD docket involve self-represented litigants who are unfamiliar with not only the law but the procedural mechanisms of the legal process. In an effort to ensure that these self-represented litigants were given open access to a judicial system which they could effectively navigate, a separate set of streamlined rules, procedures and forms were created, (i.e. the FD Docket). These streamlined procedures sought to benefit self-represented litigants by proactively limiting procedural roadblocks or anticipated impediments to their access to the courts. The objective of the FD Docket was noble. Unfortunately, this streamlined FD process has, in practice, often resulted in more harm than help to these self-represented litigants.

At the root of this evil is the fundamental misconception that just because a population of litigants may benefit logistically from a less complicated route to the judicial system that their legal issues are therefore necessarily less complicated. We as practitioners, know that this is not true. The legal issues regularly litigated within the FD docket are just as complex, if not sometimes more complex, than those presented within the FM docket. In fact, many of the most complex, fact-sensitive and diverse

case types, such as paternity establishment, psychological parentage, Special Immigrant Juvenile (SIJ), and grandparent cases, which may necessitate extensive discovery, expert evaluations, and complex tracking, arise more frequently under the FD docket than the FM docket simply because the matter does not involve the simultaneous dissolution of a marriage.

Why, then, do we have a legal system which permits one set of rules for the FD docket and another set of rules for the FM docket if the issues before both dockets are substantially the same? There is no logical or rational basis why the issue of custody or child support should be approached differently in an FD matter than an FM matter. The net effect of the FD streamlined process is the assumption that every matter than comes before the court should be handled summarily without the need for the "additional" steps and procedures which take place regularly in the FM Docket. However, if these "additional" steps and procedure did not have a value or a purpose, they would not exist in the first place. For example, the Court rules require updated Case Information Statements for child support modification applications in all FM matters. This requirement exists not because we believe that married litigants need to do more work, but rather, because the information in the statement aids the Court in making a proper and just determination which ensures the child of the marriage is adequately supported. When we eliminate this "additional" step in FD matters so that we can make the litigation process easier for self-represented litigants, we simultaneously deprive the court of all the information needed to make a proper and just decision. Who is harmed in this scenario...the FD child who, because they had the "misfortune" of being born of two unmarried parents, may now not benefit from a proper support order all in the name of an easier process.

Again, while noble in its intent, the FD docket has created a dual system of justice which not only affords self-represented litigants (ironically, the population of litigants in intended to protect) with a lesser system of due process but a functionally more confusing system, especially where lawyers are involved. [4]

While it is acknowledged that the Court rules do allow for deviations from the FD summary process for "good cause is shown," we must remember, that these self-represented litigants, for whom the streamlined process was created, are likely not aware of these Court rules. They do not know they have the ability to request discovery in a support application beyond the mandatory last three paystubs. They do not know they can ask for guardian ad litem or a best interest evaluation in a custody dispute. The resulting evil is two very separate and very unequal systems of justice which disproportionately effects self-represented litigants, most of which are minorities or those of lower economic means. Rather than assume that FD matters are simple matters than can be afforded the additional legal procedures and measure if it is warranted, the Court should assume that FD matters are deserving of and require the same due process procedural safeguards afforded to FM matter.

It is acknowledged that some cases are truly summary and should be resolved expeditiously. However, the goal of "expediency" in FD matters is no lesser or greater than those presented in the FM docket. That reason, assuming it is a valid one, should not be basis to continue with a flawed system. Ease of access to the courts should not be at the expense of people's constitutional rights to due process. Further, it must be acknowledged that that the entire process is antiquated. It's not just economically challenged people who fall into FD type cases. The FD process also disproportionately impacts the LGBTQ community, and quite frankly, more and more people are growing their families (having children) and not getting married. Most significantly, while the courts and Legislature have made it clear that children of unwed parents are not to be treated differently than those born into marriages, the FD docket continues to treat children of unwed parents disparately in this flawed legal process. The report makes recommendations, which for the most part, seek to modify the FD practice to recognize the due process and other considerations that are already reflected in the FM procedures. However, instead of taking a flawed system and trying to tinker with it to make it consistent with a system that works better in terms of procedural due process, why not simply apply the FM rules to FD matters or, better yet, eliminate the dual docket altogether? Matters such as custody disputes between parents and child support establishment and modification, should be treated in a similar manner to those issues that arise in the FM docket. The unique aspects of the FD docket, those that are truly summary in nature could be maintained there. These include name changes for minors, SIJ custody cases, transfer of custody on consent and establishment of paternity. Those cases currently handled in the FD docket that are considered "complex" and which have been traditionally given short shrift could be moved to the FM docket to allow for the due process often lacking under the long history of the FD

docket. Grandparent visitation disputes and psychological parent claims are also among those cases that deserve the time, structure, and attention the FM docket affords to married parties. The docketing system also needs revision. At present, if a matter is filed concerning a particular child, it appears that *any* future application must be filed under that same docket number, whether the parties or issues differ. This can lead to case initiations being rejected, as there may not be knowledge of the prior filings by a new party seeking relief in respect to a child.

It should also be noted that some of the recommendations would also benefit cases in the FM docket. However, there are no mirror provisions that these writers are aware of. Instead of trying to modify two dueling systems, why not create a truly summary docket under the FD and combine all contested FD cases with the FM docket and apply the best recommendations to the combined docket?

Conclusion

Therefore, it is the authors' view that the disparate and separate FD procedures should be eliminated for all but summary and consent matters. The FD part arose when this aspect of our society was substantially different than it is today. The number of unwed couples and parents in our society has grown exponentially since the FD part was created. It is no longer a small minority of our society. Many of the contested issues currently relegated to the FD docket, other than the dissolution of a marriage, are identical. The procedures, rules, forms, and other aspects of FD practice should be identical to the FM practice and procedures and only modified where necessary to address the specific issues before the court. This can be done most efficiently at a Case Management Conference, not by having a wholly separate set of rules and procedures, which to a large degree deprive litigants of basic due process rights.

The FD part should be eliminated for all but summary and consent proceedings currently docketed there and disputed cases combined with the FM docket. The authors are in favor of overhauling the entire FM and FD system and creating a system – like in other states – where all litigants are afforded the same process, time, and consideration of the court. Indeed, there are FM cases that are much simpler than FDs. If a total restructuring of the FD and FM dockets is not practical, then, at the very least, FD matters should follow the same rules, procedures and forms as the FM docket except where some modification is required due to the limited issues involved in a particular case. ■

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Endnotes

1. See Notice to the Bar issued by Hon. Glen A. Grant, Administrator Director of the Courts dated September 30, 2022 at https://www.njcourts.gov/notices/notice-family-report-and-recommendations-judiciary-special-committee-non-dissolution-fd
2. See https://www.njcourts.gov/notices/notice-family-report-and-recommendations-judiciary-special-committee-non-dissolution-fd
3. Ibid.
4. Lawyers are made to file additional forms in FD matters simply because they are representing a client. For example, rather than allow the caption and an attorney's certification of the pleading being filed to report an attorney involvement in a matter, a separate appearance is required, generating a fee, while the actual filing is at no charge to the litigant. Additionally, as the form complaint or request for modification of an order often does not have sufficient space or format to allow for a serious and detailed complaint, lawyers often draft their own complaint. When this is done, the form complaint is still required to be filed, creating a duplication of effort. Another issue is that the fields in the forms are too small. It is impossible to name more than one plaintiff or defendant on the form complaints and other captioned document. There is also an issue for Hispanic litigants whose full legal names often exceed the letter count in the fields allowed. This often result in additional filings or materials to advise the court of the actual legal names of the parties. Further, these forms do not allow for addresses of persons in other countries, again causing additional documents to be submitted to supplement the record.