

Separate And Unequal:
Are children of unmarried parents disadvantaged by Summary Procedures in Non-Dissolution Actions?

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The New Jersey Family Court system has a stellar reputation throughout the United States for its progressive approach to many issues that plague families in this state. Our Court system has established many different case types to deal with family matters, though many of the case types handle the same issues. For instance, families can litigate custody in a divorce action (handled under the “FM” docket) or in a non-dissolution action (handled under the “FD” docket). Child support and spousal support can also be handled under either docket type.

Though the issues are the same no matter which docket type is used, the policies and procedures in these two case types are quite different. Perhaps the different policies stem from the need for efficiency in the administration of justice. Or, perhaps, the historical difference in treatment of children going through a divorce (“FM” cases), verses children going through a non-divorce family dissolution (i.e., children of non-married persons or children whose parents are married, but not yet going through a divorce – “FD” cases) warranted different policies and procedures.

Whatever the reason for the differential treatment, one must question if the children involved in these two types of family actions are receiving equal treatment as now required by law. To understand where we are with this problem, one should have a historical overview of the different treatment of children of divorce verses children of non-married persons. This article provides that overview, together with a brief discussion of some of the ways the differential treatment renders these children separate and unequal.

Bastardy Proceedings: History of Illegitimates in New Jersey

At common law, a child born in wedlock was presumed to be the legitimate offspring of the husband and wifeⁱ. That principle has deep roots in New Jersey, dating back to 1907ⁱⁱ. A distinction in English common law arose in respect of a child born of unmarried parentsⁱⁱⁱ. At common law, an illegitimate child was *filius nullius*, the son of no one, or *filius populi*, the son of the people^{iv}. The child had no mother or father recognized by law, and therefore had no legal rights. Because the child could not inherit property, the impetus to bear the paternal surname was diminished. “[C]ustom did not dictate the name by which an illegitimate child would be known; the child bore the name gained by reputation in the community.”^v

A man presumed to be the father of a child born out of wedlock (known as the “putative” father) was under no obligation to maintain his illegitimate offspring^{vi}. The duty of support came by statute: first, on the motion of the overseer of the poor or other local representative to exonerate the municipality, and then at the instance of the mother

or other interested person on behalf of the child itself, the latter a measure of relief conforming with others of the same pattern to a more enlightened concept of social justice as against the harsh medieval doctrine of *nullius filius* that, for the moral sin of the parents, set the unfortunate and innocent victim adrift with no standing whatsoever before the law^{vii}. Such “illegitimate” children were referred to as “bastards” and had few rights.

The mother of illegitimate children was granted exclusive custody and control of the child and retained the power to consent or withhold consent to access for the putative father^{viii}. This protocol was based upon the ancient common law concept that a bastard is *nullius filius*, the child of no one^{ix}. The putative father was not then obligated to support his illegitimate child and the rights of inheritance by or from such a child were severely restricted^x.

The harsh common law doctrine that an illegitimate child was *nullius filius*, and inherited from neither mother nor putative father, has been abrogated in New Jersey^{xi}. This was first accomplished by the New Jersey Parentage Act, which became effective May 20, 1983^{xii}. The Parentage Act established the principle that the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents^{xiii}. Under the provisions of the statute adopted in 1929, the mother now has a right to seek support from the natural father for her illegitimate child^{xiv}. Prior to that enactment the father could have been compelled to support only if the ‘child would otherwise be a public charge^{xv}. Since the enactment of the statute, there has been a discernible trend in the decisional law in this State and other jurisdictions toward recognition of the rights and obligations of a putative father more comparable to those of a natural father than under old common law concepts.

Given these changes in the law, one would expect that the litigation procedures governing the children of non-marrieds would mirror or at least approximate the litigation procedures governing the children of divorce. Unfortunately, that has not been the case. Litigation involving the children of non-marrieds is governed by the New Jersey Judiciary Family Division Non-Dissolution Operations Manual released by the Administrative Office of the Courts^{xvi}. This Manual provides for various procedures that differ greatly from those set forth in the New Jersey Court Rules. Many of the procedures create efficiency and streamline the process for non-married persons to access the Courts... but, at what cost?

How FD’s are treated differently than FM’s

One principle difference in the treatment of children in FD cases verse FM cases is in the area of Child Support. In FM cases, an applicant for child support must supply a Case Information Statement(CIS)^{xvii}. If modification of support is sought, both the previously filed CIS and an updated CIS is required^{xviii}. By contrast, in FD cases, for either the initial establishment of child support or the modification of a prior support Order, a Summary of income and assets is allowed^{xix}. Both case types require some financial disclosure, but FM cases require significantly more information.

The asset and liability disclosure required by the Family Part CIS often leads to a fairer result when establishing and/or modifying support. New Jersey case law allows for imputation of income to an obligor based upon his or her investments in income-producing equities^{xx}. When a spouse with underearning investments has the ability to generate additional earnings-without risk of loss or depletion of principal-but fails to do so, a court may impute a more reasonable rate of return to the underearning assets, comparable to a prudent use of investment capital^{xxi}. That principle applies equally to spousal support and to child support^{xxii}. Inquiry into assets and liabilities is commonplace in FM cases, though rare in FD cases. As society has evolved, more and more couples are choosing to have children together without entering marriages. These couples often have significant assets, which should be considered when child support is being addressed.

The very initiation of litigation in FD cases varies from FM cases. In FM cases, a party properly served with a Complaint must file an Answer or general appearance within 35 days or risk being defaulted^{xxiii}. Conversely, in FD cases, the Manual provides that a counterclaim *may be* filed before a hearing has already been held on the original complaint^{xxiv}. Further, the Court Rules also provide that in such cases, no Answer is required^{xxv}. If a party to an FD case chooses to file a Counterclaim, no time period is specified for the filing of the counter claim. Clearly, having full, timely notice of what relief is being sought and what defenses are being raised to an action increases the ability of the trial Court to make the fairest determination based upon all of the facts and circumstances of the parties and of the children involved. By dispensing with such notice in FD cases, allowing a party to simply appear in Court to address an application filed by the adverse party, the possibility of a party being surprised in Court is great. How fair can the result be when an opportunity to be heard does not carry with it fair notice of that which is to be addressed?

A significant difference also exists between FM and FD cases when dealing with the issue of custody. In FM cases, parties are mandated to attend a parent education Seminar^{xxvi}. The purpose of the program is “to promote cooperation between the parties and to assist parents in resolving issues which may arise during the divorce or separation process, including, but not limited to:

- (1) Understanding the legal process and cost of divorce or separation, including arbitration and mediation;
- (2) Understanding the financial responsibilities for the children;
- (3) Understanding the interaction between parent and child, the family relationship and any other areas of adjustment and concern during the process of divorce or separation;
- (4) Understanding how children react to divorce or separation, how to spot problems, what to tell them about divorce or separation, how to keep communication open and how to answer questions and concerns the children may have about the process;

(5) Understanding how parents can help their children during the divorce or separation, specific strategies, ideas, tools, and resources for assistance;

(6) Understanding how parents can help children after the divorce or separation and how to deal with new family structures and different sets of rules; and

(7) Understanding that cooperation may sometimes be inappropriate in cases of domestic violence^{xxvii}.

These laudable goals should not be a mandatory component of custody matters for *only* divorcing parents. These should apply equally to parents of non-married person; however, they do not. In FD cases, the Court *may* require “any person involved in a custody or visitation dispute to attend a parent education seminar. Family Division staff should be guided by the availability of this service in their county and follow established county procedures when referring parties to a parent education seminar”.^{xxviii} Though referrals may be made to the Parent Education Seminar in FD cases, same is not required. Disintegration of an intact family does not harm a child any less because the parents are ending a relationship rather than ending a marriage. Yet, the Non-dissolution Manual makes attending this Course optional for non-married parents, thereby providing their children less protection than the children of divorcing parents.

Procedures for accessing the Courts in emergent situations also differ between FM cases and FD cases. When the Division of Youth and Family Services (DYFS) refers a parent to the Family Court system to file an Order to Show Cause, the standard for the Court to determine if a genuine emergency exists is governed by the seminal case of *Crowe v. DeGoia*^{xxix}. *Crowe* establishes a four-part test for the entry of an interim restraint; the movant bears the burden of demonstrating that: (1) irreparable harm is likely if the relief is denied; (2) the applicable underlying law is well settled; (3) the material facts are not substantially disputed, and there exists a reasonable probability of ultimate success on the merits; and (4) the balance of the hardship to the parties favors the issuance of the requested relief. Each of these factors must be clearly and convincingly demonstrated^{xxx}.

This case does not differentiate between interim relief sought for children of divorcing parents verses children of non-marrieds. Nevertheless, the Manual provides that if someone comes in to court and DYFS refers them, application is “not treated as an emergent matter, unless extenuating circumstances are satisfactorily presented to the Court”.^{xxxi} This different standard in FD cases seems to create a presumption against entering an Order to Show Cause, whereas if presented in an FM – whether DYFS refers the party or not – the *Crowe* standard applies and the application would be governed by R. 4:52-1 or, if restraint is sought, R. 4:67.

The New Jersey Judiciary prides itself on its accessibility to the public. However, this accessibility does not apply equally for litigants in FD cases and FM cases. If a party files a motion in an FM case, that application is scheduled to be heard in less than a month.^{xxxii} If the matter is adjourned, it is typically rescheduled to be heard in two weeks. However, scheduling of FD cases varies from county to county. In most counties,

matters are scheduled in 6-8 weeks or longer. If a matter is adjourned, it is typically not rescheduled to be heard for another 6-8 weeks. Thus, children of non-married parents must wait significantly longer to receive support and have their custodial status determined.

Many differences exist by rule in FM and FD cases. However, in many circumstances, the rules may be equally applicable in FM and FD cases, though applied differently in each forum. For instance, this practitioner has seen significant differences in the treatment of expert reports in FM cases versus FD cases. Court Rule provides that expert reports may be submitted into evidence, *in a manner consistent with the Rules of Evidence*.^{xxxiii} In FM cases, typically it is by consent of both attorneys that all expert reports come into evidence, but this is permissible because both attorneys will have an opportunity to cross examine the adverse expert as to his/her report. In FD cases, however, how often are reports relied upon without the opportunity for cross examination? If the Court order DYFS to investigate allegations of child abuse or neglect, how often are those reports then handed to the Court and relied upon without ever having the professional who penned the report in to give testimony?

Expert reports may be submitted into evidence, but only in a manner consistent with the Rules of Evidence. In FM cases, to test the scientific reliability of expert analysis, it is not uncommon to have Frye hearings.^{xxxiv} Further, an expert must be qualified as an expert (though this usually is not an issue, it could be). In FD cases, Frye hearings are rare. "Expert" credentials are often not questioned and conclusions in expert reports often form the basis of the Court's decision on critical issues such as custody with no opportunity for cross examination. Such procedural deficits many promote efficiency, but they are a far cry from equal treatment as between children of divorcing parents verses children of non-married parents.

The Impact of Differential Treatment

Some might argue that these differences do not create an inequality between the children of divorcing parents verse children of non-married parents. After all, the governing standard in any custody case is "Best Interests of the Child", which must be applied in any custody case. And, if a party raises a concern about the adverse party's assets, the trial Court certainly has the authority to require a party to file a CIS, in lieu of the Summary Support form. The problem of differential treatment does not lie in the trial Court's refusal to follow the applicable case law governing child-related issues, but rather in the party's requirement to raise the issue in the first instance. Most litigants in FD cases are self represented. While the New Jersey Court Rules require that a self represented litigant know the law and the Rules, the reality is that they seldom do. Consequently, in an FD case, a parent's lack of knowledge may result in custody or support Orders that fail to protect the best interests of the child solely as a result of the procedures enacted for that very purpose. In the view of this practitioner, uniformity of practice and procedures in FM and FD cases would go a long way toward achieving the goal of the Parentage Act that "the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents".^{xxxv}

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ⁱ Sarte v. Pidoto, 129 N.J.Super. 405, 410 (App.Div.1974).

ⁱⁱ Wallace v. Wallace, 73 N.J. Eq. 403, 67 A. 612 (E. & A.1907).

ⁱⁱⁱ Gubernat v. Deremer, 140 N.J. 120, 131 (1995).

^{iv} Id., citing D.R.S. v. R.S.H., 412 N.E.2d 1257, 1261 (Ind.Ct.App.1980).

^v Id. See also, Secretary of Commonwealth v. City Clerk of Lowell, 373 Mass. 178 (1977) (“It has been reported that under English law an illegitimate child acquired no name at birth, and could only acquire a surname by reputation”); and M.D. v. A.S.L., 275 N.J.Super. 530, 533 (Ch.Div.1994)(“He acquired the name of neither mother nor father and only assumed a surname later in life based on some factor other than lineage.”).

^{vi} Kowalski v. Wojtkowski, 19 N.J. 247 (1955).

^{vii} Id. at 254.

^{viii} M. v. M., 112 N.J.Super. 540 (Ch. Div.1970).

^{ix} Id. at 542.

^x 10 Am.Jur.2d, Bastards, s 8.

^{xi} Matter of Estate of Calloway, 206 N.J.Super. 377, 380 (App.Div.1986).

^{xii} N.J.S.A. 9:17-38, *et seq.*, replaced N.J.S.A. 9:16-2 in 1983.

^{xiii} Id.

^{xiv} N.J.S.A. 9:16-2, *et seq.*

^{xv} Ousset v. Euvrard, 52 A. 1110 (Ch. 1902).

^{xvi} See, Family Division's Non-Dissolution Operations Manual, Revised Edition issued January 5, 2004.

^{xvii} R. 5:5-2(a).

^{xviii} Id.

^{xix} Family Division's Non-Dissolution Operations Manual, Section 1202. See also, R. 5:5-3.

^{xx} Miller v. Miller, 160 N.J. 408, 423-25 (1999).

^{xxi} Overbay v. Overbay, 376 N.J.Super. 99, 108 (App.Div.2005).

^{xxii} Connell v. Connell, 313 N.J.Super. 426, 434 (App.Div.1998).

^{xxiii} R. 5:4-3(a). See also, R. 4:5-3 setting forth the requirements for an Answer or General Appearance.

^{xxiv} Family Division's Non-Dissolution Operations Manual, 1112 Counterclaim (New Cases).

^{xxv} R. 5:4-3(b).

^{xxvi} See, N.J.S.A. 2A:34-12.1 – 12.8 (if custody, visitation or child support is listed in a Complaint/Counterclaim for divorce, client must attend the workshop).

^{xxvii} N.J.S.A. 2A:34-12.3(c).

^{xxviii} Family Division's Non-Dissolution Operations Manual, Section 1608 (Parent Education Seminar).

^{xxix} 90 N.J. 126, 132-134 (1982).

^{xxx} McKensie v. Corzine, 396 N.J. Super. 405, 413 (App. Div 2007)

^{xxxi} Family Division's Non-Dissolution Operations Manual, Section 1106 (DYFS Referrals).

^{xxxii} See, R. 5:5-4 Motion Practice.

^{xxxiii} R. 5:3-3(g).

^{xxxiv} See, N.J.R.E. 702.

^{xxxv} N.J.S.A. 9:17-38.