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APPELLATE ACTIVISM: USING THE APPELLATE DIVISION'S ORIGINAL JURISDICTION TO REDUCE THE TIME AND MONEY SPENT ON FAMILY MATTERS IN NEW JERSEY

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Although precedent suggests that New Jersey's appellate judges must be cautious when encroaching into areas best left to the expertise of the family court,[1] there are often times on appeal when a sufficient factual record exists for the Appellate Division to decide any lingering questions without the need for a further remand.[2] The objective of this article is to show that by invoking its original jurisdiction authority, the Appellate Division can reduce the time and resources spent on family-related litigation. Indeed, the appellate court should not hesitate to invoke original jurisdiction when deciding contentious family matters that have been the subject of prolonged litigation. Part I of this article discusses the financial and emotional burden that litigation places on families, while Part II addresses the basis of the Appellate Division's original jurisdiction authority and the benefits of its use. Part III analyzes recent family cases where the Appellate Division used its original jurisdiction power, providing practitioners with concrete examples of when the authority can be properly invoked to bring about a timely end to litigation. Finally, Part IV assesses how to prevent the appellate court from overreaching into areas best left to the Family Part.

I. FAMILY-RELATED LITIGATION PLACES A FINANCIAL AND EMOTIONAL STRAIN ON THE PARTIES

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[1] Cesare v. Cesare, 713 A.2d 390, 413 (N.J. 1998) ("[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding[]").

[2] In New Jersey, family-related actions are first heard in the Chancery Division's Family Part, and appealed to the Superior Court's Appellate Division.

For the average person, heading to court is an expensive proposition. Indeed, the high cost of family-related litigation has led many litigants to proceed without the assistance of counsel.[3] One article, nearly a decade old, discussed a California study which found that the average cost of a litigated child custody case in Orange County was "'approximately $10,000 in attorneys fees, and $ 4,000 in forensic fees'" and that the average expenses associated with a non-child custody case was about $6000.[4] These high costs, which continue to increase, have led New Jersey's courts to recognize that the burdens created by litigation are not in the best interests of the families involved, as "[t]he economic and emotional cost of litigation can represent an enormous intrusion into a family's life."[5] The tremendous financial and emotional strain a family court proceeding can have on its litigants is further amplified when the case advances to the Appellate Division, where it is often remanded to the Family Part for further hearings. Changing this dynamic by ending litigation at the appellate level without ordering further trial court proceedings can help save the parties substantial amounts of time and money and reduce the emotional toll that litigation has on a family.

II. ORIGINAL JURISDICTION AND ITS BENEFITS

Under New Jersey Court Rule 2:10-5, "[t]he appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." That rule derives its authority from the New Jersey Constitution, which states: "The Supreme Court and the Appellate Division of the Superior Court may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review."[6] Despite this broad grant of authority, "it is clear that resort thereto by the appellate court is ordinarily inappropriate where further fact-finding is necessary in order to resolve the matter."[7] But, where further fact-finding is unnecessary, "[t]he exercise of original jurisdiction is . . . particularly appropriate to terminate lengthy, burdensome, and unnecessary further litigation."[8] Often times, family actions that advance to the Appellate Division will involve highly charged emotional issues that have resulted in lengthy lower court proceedings. In those circumstances, the Appellate Division may be able to invoke its original jurisdiction to terminate any questions that are lingering before the court, thereby avoiding the necessity of a remand and providing the litigants with a measure of finality.

As for the benefits of utilizing original jurisdiction, first and foremost it saves the parties the expense of a remand on that particular issue. This reduces total attorneys' fees, along with other associated costs. Second, although some former spouses will continue to litigate marital issues in perpetuity, for others, when the court uses its original jurisdiction to achieve finality in a matter, it provides the litigants with a sense of relief and allows the parties to move forward without the dark cloud of litigation hanging over their daily lives. And third, New Jersey's family courts face an

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[3] Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 117 (2001).
[4] *Id.*
[5] Daniels v. Daniels, 885 A.2d 524, 528–29 (N.J. Super. Ct. App. Div. 2005); *see* Accardi v. Accardi, 848 A.2d 44, 54 (N.J. Super. Ct. App. Div. 2004) ("The financial drain of . . . continual litigation takes resources away from the families. Monies spent on counsel fees certainly would be better spent on the children of both parties . . . ."); *see also* Wilde v. Wilde, 775 A.2d 535, 540 (N.J. Super. Ct. App. Div. 2001) ("'If a single parent who is struggling to raise a child is faced with visitation demands from a third party, the attorney's fees alone might destroy her hopes and plans for the child's future'") (quoting Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) (approved by the plurality at 530 U.S. at 73).
[6] N.J. CONST. art. V, § 5, para. 3.
[7] Sylvia B. Pressler, RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY 702 (Gann Law Books 2010).
[8] *Id.* at 703.

increasing backlog of cases.[9] Indeed, the total number of backlogged Family Part cases increased by approximately sixty-four percent from June 2008 to June 2009.[10] By deciding an issue without ordering further lower court proceedings on the matter, the Appellate Division can help reduce the Family Part's case load.

III. A SURVEY OF THE APPELLATE DIVISION'S RECENT USE OF ORIGINAL JURISDICTION IN FAMILY-RELATED LITIGATION

Historically, the Appellate Division has invoked its original jurisdiction authority in a variety of circumstances arising in family court cases. This includes modifying counsel[11] and expert witness[12] fee awards, ordering the Family Part to devise a better means of adjusting a support award to avoid "perpetual litigation,"[13] exercising original jurisdiction to end prolonged visitation litigation where a parent's due process rights were violated,[14] deciding custody matters,[15] modifying an order changing a child's name,[16] and reinstating a domestic violence order.[17] Despite its varied use, such invocation is only proper when the evidential record before the court is complete, and matters of credibility are not at issue.[18]

The Appellate Division's use of original jurisdiction in recently decided family cases provides us with insight into the court's current approach to this judicial tool, examples of when it can be properly invoked, and how it could be used in future family litigation to end matters without the need for further remand. Although these cases do not represent an exhaustive list of when original jurisdiction may be utilized, they do show that the appellate court's original jurisdiction authority is a powerful means for bringing finality to burdensome and lengthy litigation.[19]

A. COUNSEL FEES

Family matters are one of the rare areas in New Jersey where litigants are often successful in petitioning the court for counsel fees.[20] For example, *Lester v. Lester*[21] reached the Appellate Division

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[9] As of June 2009, the Family Part had 3186 backlogged cases. NEW JERSEY COURTS, ANNUAL REPORT 2008-2009, at 29 (2009).

[10] *Id.*

[11] Defendant's success on this appeal requires a modification of the [counsel fee] award . . . . Ordinarily we would remand for reconsideration of the order in light of the results on appeal. In this case, however, the record is adequate to permit us to exercise original jurisdiction "in order to conclude this litigation" without further expense to the litigants. Diehl v. Diehl, 913 A.2d 803, 809 (N.J. Super. Ct. App. Div. 2006); *see* Chestone v. Chestone, 730 A.2d 890, 895 (N.J. Super. Ct. App. Div. 1999).

[12] Platt v. Platt, 894 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 2006).

[13] Accardi v. Accardi, 848 A.2d 44, 54–55 (N.J. Super. Ct. App. Div. 2004).

[14] Wilde v. Wilde, 775 A.2d 535, 540 (N.J. Super. Ct. App. Div. 2001).

[15] V.C. v. M.J.B., 725 A.2d 13, 21 (N.J. Super. Ct. App. Div. 1999).

[16] Staradumsky v. Romanowski, 693 A.2d 556, 558 (N.J. Super. Ct. App. Div. 1997).

[17] A.B. v. L.M., 672 A.2d 1296, 1299 (N.J. Super. Ct. App. Div. 1996).

[18] State In re J.D.H., 765 A.2d 1084, 1092–93 (N.J. Super. Ct. App. Div. 2001), *rev'd on other grounds*, 795 A.2d 851 (N.J. 2002).

[19] Although the cases cited below are unpublished, and thus are not binding precedent, N.J. Ct. R. 1:36-3, they are representative of the court's most recent stance toward invoking original jurisdiction in family cases, and are instructive of when the court perceives such use as proper. And "[a]lthough an unpublished opinion does not have precedential authority, it may nevertheless constitute secondary authority." Pressler, *supra* note 7, at 411.

[20] Under N.J. Stat. Ann. § 2A:34-23 (West 2010), a court may award a party to a matrimonial action counsel fees after taking into account the financial circumstances of the parties, the parties respective good or bad faith, and the factors set

after a long series of court disputes between former spouses. The Family Part had awarded the plaintiff counsel fees, including fees related to an earlier appeal.[22] The earlier litigation had involved both matrimonial and contractual issues, but fees were only recoverable for the attorneys' work related to the matrimonial matter.[23] Nevertheless, the affidavits of services and schedules of fees presented by the plaintiff's counsel requested an award for all fees related to the previous appellate litigation, "with no further breakdown apportioning fees between contract and matrimonial fee issues."[24] In challenging the fee award, the defendant contended that the plaintiff had failed to allocate the counsel fees between those deriving from the contractual issues, which were non-recoverable, and those expended solely on the matrimonial matters.[25]

The appellate panel found that the documentation provided by the plaintiff's counsel failed to properly allocate the fees between time spent on contractual issues, and time on matrimonial issues.[26] The court, exercising its original jurisdiction authority, opted to "modify the award in an amount [it] deem[ed] a fair and reasonable recovery for that portion of the appellate expenses associated with strictly matrimonial matters."[27] The court "appreciate[d] the difficulty at times of isolating and distinguishing charges for services related to a single, mixed work product," but nevertheless did "not view the task at hand as incapable of completion."[28] The court held:

> Given its prior litigation history, we are reluctant to remand this matter once again for a re-determination of appellate counsel fees. Indeed, it appears at this point that the efforts of counsel to recreate from billing records an informed basis on which to identify a specific number of hours devoted to the matrimonial claim would be less than fruitful. Instead, in the interests of judicial economy and fairness, and because the matter of appellate fees resides with us in the first instance, Rule 2:11-4, we opt to exercise our original jurisdiction, Rule 2:10-5, and render a final determination on the issue. The method we choose to use is to reduce the full appellate fee award . . . by a factor of one-third . . . . We view the one-third reduction as fair and equitable, reflective of both the prominence of, and level of effort related to, the family matters.[29]

This case provides an excellent example of how the Appellate Division's use of its original jurisdiction authority can advance the interests of the litigants by preventing the expenditure of further attorneys' fees on an unnecessary remand hearing, while also promoting the interests of the court by fostering judicial economy. In counsel fee situations like *Lester*, where a remand for further

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forth by court rule. New Jersey Court Rule 4:42-9(a)(1) states that "[i]n a family action, "a fee allowance both pedente lite and on final determination may be made pursuant to R. 5:3-5(c)." Rule 5:3-5(c) allows the court to, in its discretion, make an allowance for legal fees in a matrimonial action after considering a multitude of factors. But, Rule 4:42-9(a)(1) prohibits an allowance of fees for a non-matrimonial cause of action joined with matrimonial causes. Pressler, *supra* note 7, at 1984.

[21] No. A-2024-08T2, slip. op. at 1–4 (N.J. Super. Ct. App. Div. Nov. 24, 2009).

[22] *Id.* at 4.

[23] *Id.* at 13–14; *see* N.J. Ct. R. 4:42-9(a)(1).

[24] *Lester*, No. A-2024-08T2, slip op. at 4.

[25] *Id.* at 12–13.

[26] *Id.* at 13.

[27] *Id.*

[28] *Id.* at 20.

[29] *Id.* at 22.

factual findings would prove "less than fruitful,"[30] the Appellate Division should make liberal use of its original jurisdiction powers to set a proper fee and end the case.

B. ALIMONY BUDGET CALCULATION

In *Overbay v. Overbay*,[31] an appellate panel was faced with two former spouses who had spent years battling each other in court. Here, in fashioning an alimony award for the defendant-wife, the Family Part found that her "monthly budget was 'inflated[,]'" and after full explanation of its factual reasoning, reduced the budget from $13,687.92 per month to $8000 per month.[32] Nevertheless, the plaintiff-husband sought to reduce his former wife's monthly budget even further and prepared an itemized spreadsheet for the trial court's review that purported to show that the defendant's actual budget was $6905 per month.[33] Based solely on plaintiff's spreadsheet, the Family Part again reduced the defendant's monthly budget from $8000 to $7000.[34]

On appeal, the appellate panel found that the Family Part had failed to "set forth adequate findings to substantiate the reduction of defendant's monthly budget from $8000 to $7000," and opined that the judge "erred by merely adopting the budget reductions proposed by plaintiff . . . ."[35] The court thus held that because the Family Part's factual findings "as to defendant's budget are inadequate to substantiate the reduction from $8000 to $7000, we reinstate the $8000 amount. R. 2:10-5. On remand, the court must use defendant's $8000 monthly budget and redetermine alimony . . . ."[36]

Here, again, the Appellate Division invoked its original jurisdiction to save the parties time and expense, and to move the process along. Rather than ordering another full factual hearing on defendant's proper monthly budget amount, the court relied on the rich factual record that had been set forth by the Family Part in its original decision, and simply reinstated the $8000 budget. This decision likely made the remand proceeding much swifter and less costly. When the factual record is complete, there is no reason that the Appellate Division cannot solve, as this panel did here, a simple budgetary dispute.

C. GROUNDS FOR TERMINATION

In *Miken v. Hind*,[37] the parties filed cross-appeals from a final judgment that terminated their partnership under New Jersey's Domestic Partnership Act (DPA).[38] During the trial, the Family Part judge suggested that the plaintiff amend her complaint to assert a cause of action for termination based on irreconcilable differences, rather than extreme cruelty, which she had failed to prove.[39] The plaintiff's counsel acquiesced, and the trial judge terminated the partnership based on

[30] *Lester*, No. A-2024-08T2, slip op. at 22.
[31] No. A-5989-05T1, slip. op. at 1–2 (N.J. Super. Ct. App. Div. July 21, 2009).
[32] *Id.* at 6.
[33] *Id.* at 7.
[34] *Id.* at 8.
[35] *Id.* at 11.
[36] *Id.* at 11–12.
[37] Miken v. Hind, No. A-2768-07T2 (N.J. Super. Ct. App. Div. June 18, 2009).
[38] N.J. Stat. Ann. § 26:8A-10-13 (2010).
[39] *Miken*, No. A-2768-07T2, slip. op. at 4.

irreconcilable differences.[40] On appeal, the defendant asserted that irreconcilable differences were not grounds for divorce under the DPA.[41] At oral argument, the panel noted that although irreconcilable differences were not an express ground for termination under the statute, it was undisputed that the parties had been separated for more than eighteen months without reasonable prospect of reconciliation, which is a separate basis for dissolution,[42] and that even if the court vacated the Family Part's termination, it would nevertheless remand to the lower court to proceed with the termination on the separate ground of the eighteen month separation period.[43] Based on this reasoning:

> The court inquired whether it would make sense, to avoid delay and additional legal fees, for this court to exercise its original jurisdiction . . . and affirm the termination on the ground of eighteen months' separation. The parties agreed to this procedure. Accordingly, we affirm the termination of the parties' domestic partnership on the ground of eighteen months' separation without considering their arguments regarding irreconcilable differences . . . .[44]

This resolution embodies New Jersey's courts at their best, finding creative measures to assist the parties in arriving at a practical solution to their disagreement, while avoiding further costs that would be associated with otherwise unnecessary litigation over a moot issue. As this case exemplifies, if the appellate panel perceives a way to resolve a dispute in a factually-supported manner, such as suggesting and imposing an alternative ground for divorce where one is clearly present, they should not hesitate to do so.

D. NAME CHANGE

In *A.K. v. D.O.*,[45] the plaintiff-mother appealed from an order of the Family Part directing her to change her daughter's name from H.R.K. to H.R.O., to reflect the surname of her daughter's father. After establishing the child's paternity, the defendant-father moved before the Family Part to change the child's name.[46] After being ordered to change the child's name to H.R.O., the plaintiff asked the Family Part to vacate its order, or in the alternative, to change the child's name to H.R.O-K to reflect both parents' last names.[47] The court refused to do so.[48]

On appeal, plaintiff claimed that the Family Part erred in refusing to allow the child's name to reflect that of both parents.[49] Based on the factual record, the appellate panel found that defendant had not voiced "any significant objection to the use of a hyphenated surname" during the Family Part proceedings.[50] Invoking its original jurisdiction authority, the court held that:

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[40] *Id.*
[41] *Id.* at 4–5.
[42] *Id.*; *See also* N.J. Stat. Ann. § 26:8A-10(a)(2)(d) (2010).
[43] *Miken*, *supra* note 39, at 4-5.
[44] *Id.*
[45] No. A-4326-07T1, slip. op. at 1 (N.J. Super. Ct. App. Div. April 2, 2009).
[46] *Id.* at 2.
[47] *Id.* at 4–5.
[48] *Id.* at 5.
[49] *Id.*
[50] *Id.* at 9.

> Given the absence of any apparent objection on the part of defendant to the use of a hyphenated surname for the parties' daughter, we exercise original jurisdiction to dispose of that issue both for the sake of completeness and because the record provides ample basis for disposition without further fact-finding. . . . We find plaintiff's proposal to use both surnames reasonable and in the best interests of the minor child. Therefore, we vacate that part of the [Family Part's] order designating the minor child's name as H.R.O. and remand to the trial court for the entry of judgment directing the filing of an amended birth certificate changing H.R.O.'s name to H.R.O-K.[51]

Here, once again, the court properly intervened to reach a factually supported and practical solution to the problem presented on appeal. At times, after facing the everyday onslaught of cases that a Family Part judge presides over, he or she may reach a decision that is clearly ill-advised. This is when the appellate court, with its ability to view a problem from a more detached setting, can invoke its original jurisdiction to remedy a problem that is easily solved rather than remand for further acrimonious proceedings. Here, it was logical, and supported by both the factual record and prior precedent, for the mother to hyphenate her child's last name. The appellate panel saw this and resolved the issue itself, saving the parties time and expense.

What these recent cases show is that there are times, when the factual record is clear, that an appellate panel can properly invoke its original jurisdiction to resolve a lingering issue, rather than remand the case to the Family Part for unnecessary proceedings. Under circumstances similar to those presented above, an appellate panel should make liberal use of its original jurisdiction authority.

IV. HOW TO PREVENT THE APPELLATE COURT FROM OVERREACHING?

Although there are significant benefits to the Appellate Division utilizing its original jurisdiction authority to resolve a burdensome aspect of a particular case, the court must avoid overreaching and should not trample into areas best left to the Family Part. Accordingly, as a matter of practice, the Appellate Division should only invoke its original jurisdiction when there is a reliable and complete factual record before it on the issue,[52] such that a further remand is unnecessary.[53] The matter also must be one particularly suited to appellate determination, such as the counsel fee dispute discussed in *Lester v. Lester*.[54] Additionally, the use of original jurisdiction is especially appropriate where the matter is one of repeated litigation, such as when a litigant is simply using the court proceeding as a bludgeon against the other party. But, where the factual record is not thorough enough for the appellate judges to rely on, a remand will be necessary.

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[51] A.K. v. D.O., No. A-4326-07T1, slip. op. at 9, 12.

[52] "The majority of New Jersey cases applying Rule 2:10-5 represent instances in which appellate courts, despite the absence of trial court findings, had an adequate factual basis in the record to resolve questions that were essential to the determination of the issues before them." Jones v. Holvey, 29 F.3d 828, 832 (3rd Cir. 1994).

[53] As stated in Tomaino v. Burman, 834 A.2d 1095, 1102 (N.J. Super. Ct. App. Div. 2003), *certif. denied*, 845 A.2d 135 (N.J. 2004), the Appellate Division's "original factfinding authority must be exercised only 'with great frugality and in none but a clear case free of doubt.'"

[54] *See also* Chestone v. Chestone, 730 A.2d 890, 895 (N.J. Super. Ct. App. Div. 1999) "This matter is before us for the second time challenging an award of counsel fees. We will not remand for a hearing on counsel fees so that the parties can spend more money in attorneys' fees to determine what those fees should have been in the first place."

V. CONCLUSION

In sum, the Appellate Division's original jurisdiction authority is an effective tool in family proceedings. Counsel and judges alike should consider, before reflexively asking for or ordering a remand, whether there is a sufficient factual basis present for the appellate court to resolve the remaining issues. When properly invoked, Rule 2:10-5 provides an appellate panel with a powerful basis from which to promote judicial economy, and save litigants both time and expense. Although such savings will not undo the emotional and financial toll an acrimonious family court proceeding will have on litigants, it can provide a measure of finality for the parties, and allow them to move on with their lives.