“Substantive Best Practices” Best Practices in Family Law

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Biographies of Speakers

- The Honorable Michael K. Newell, Chief Judge, Family Court of the State of Delaware
- Jill Spevack Di Sciullo, Esquire, Morris James LLP
- Gretchen S. Knight, Esquire, Morris James LLP

Program Materials *

- Program Materials

* The forms included herein are samples only and may not be appropriate for any particular matter.
Biography

Michael K. Newell is the Chief Judge of the Family Court for the State of Delaware. He was confirmed as a judge on October 26, 2004. On June 10, 2015, he was unanimously confirmed as the Chief Judge of the Family Court for the State of Delaware.

Chief Judge Newell graduated from the University of Delaware with a Bachelor’s Degree in 1975 and received a Master’s Degree from Northeastern University in 1976. He received his Juris Doctor Degree from Widener University Delaware Law School in 1981.

Prior to his appointment to the bench, Chief Judge Newell was a partner with Connolly, Bove, Lodge & Hutz, LLP. Before his association with Connolly, Bove, Lodge & Hutz, LLP, he was a shareholder in The Bayard Firm. Chief Judge Newell’s private practice concentration was in family law.

Chief Judge Newell has presented at seminars and written articles on issues relating to family law practice and procedure.
Jill Spevack Di Sciullo has been practicing Family Law with Morris James since 2002. She represents clients in all aspects of Domestic Relations matters in the Family Court for the State of Delaware. She provides representation to individuals in adoption, divorce, division of marital property, child custody and visitation matters, child support and alimony or spousal support matters. Jill also provides legal services required at the beginning of marriage and negotiates premarital agreements for individuals contemplating marriage.

Jill was selected as a “Top Lawyer” by Delaware Today magazine in 2008 and 2010. She is a Melson Arsht Inn of Court member and she was on the Pro Bono Honor Roll of the Delaware Volunteer Legal Services in 2009.

Jill is an Executive Committee Member of the Delaware Bar Association, a past Chair of the Family Law Section of the Delaware Bar Association, a Committee Member of the Legislative sub-group of the Child Protection Accountability Commission, and a Guardian ad litem on behalf of abused and neglected children.

Jill earned her law degree in 1999 from Widener University School of Law after receiving her B.A. in 1994 from Virginia Tech. She is admitted to practice in Delaware, New Jersey and Pennsylvania.
BIOGRAPHY

Gretchen S. Knight is a partner with the law firm of Morris James LLP where she is a member of the Morris James LLP Family Law and Governmental Relations Practice Group. Ms. Knight was born in Wilmington, Delaware in 1965, and was admitted to the Delaware Bar in 1990. She is a graduate of the University of Delaware (B.A., 1987), and Villanova University School of Law (J.D., 1990). Ms. Knight is a 1985 Truman Scholar.

Ms. Knight is a member of the Delaware State, Federal and American Bar Associations. Within the Delaware State Bar Association, she is a former chair and current member of the Family Law Section and serves on the Family Court Rules Committee. Ms. Knight was also appointed to the Board on Professional Responsibility and the Judicial Appointments Committee of the Delaware State Bar Association. She is a member of the Melson-Arsh In of Court. Ms. Knight serves as a volunteer attorney representing children in dependency/neglect proceedings through the Office of the Child Advocate.

Ms. Knight frequently speaks and writes on topics related to the practice of family law. She co-authored a chapter in a book commissioned for the golden anniversary of the Delaware Supreme Court on seminal decisions in family law.
Family Court differs from all other Courts in this State because of the underlying emotional aspect of the subject matter and the impact of the Court’s decisions upon the lives of those affected. The sheer number of individuals who are exposed each year to the Court is significant and for many, it is their only contact with the judicial system.

We see good people at their worst times. Family law practice can be taxing but it can also be rewarding. You have to be careful along the way and there will be potential traps.

We each need to decide what kind of lawyer we want to be. Do not change and try to be a person/lawyer that you are not.

While family law may not interest all of you, hopefully some of you will have a genuine interest in practicing in our court. There is a constant need for pro bono lawyers to assist the court in domestic violence cases, Delaware Volunteer Legal Services, and Office of Child Advocate.

With this in mind, there are several critical points that must be understood and incorporated into the practice of anyone who desires to succeed in this forum.

I. Significant Overall Concepts

A. Family Court is an important court where very serious issues are heard on a daily basis. Dispel ideas or any rumors you may have heard that the Court is a relaxed, casual forum, or that you can “wing it.”

B. Good, competent, diligent representation is particularly critical in Family Court because:

1. Controversial nature of the proceedings.
2. Possibly an individual’s only exposure to lawyers and judges.
3. Importance to the client of the subject matter (children, home, etc.).
4. Tendency of dissatisfied clients to complain to other forums, including Disciplinary Counsel, News Journal, Judge’s secretaries, Governor, President, Pope, etc.

C. Increase in complex litigation related to divorce:
   2. Tax consequences.
   3. Retirement plans.
   4. Complex real estate holdings.
   5. Expert medical and psychological testimony.
   6. Vocational evaluations.

II. **Practice Pointers**

A. Client control is essential; Lawyer is the expert (See Delaware Lawyers Rules of Professional Conduct 1.2 and comment #2 to the Rule):
   1. Do not allow your client to compromise your good judgment by his or her emotional appeal.
      (a) Requirement of disclosure of all assets Rule 16(c) Financial Report which is a signed and notarized pleading;
      (b) Do not use children and/or the threat of custody to attempt to gain an advantage in other aspects of litigation;
      (c) Obligation to pursue only meritorious claims and contentions. (See Delaware Lawyers' Rules of Professional Conduct 3.1.
   2. Remain detached from the emotional aspects of the case.
      (a) Do not intensify client’s passion, feelings of ill-will, hatred, hostility, death wishes.
      (b) Do not fire off pleadings that indulge emotional state of your client.
      (c) Encourage client to relax, calm down, etc.
      (d) Avoid emotion in the courtroom except where absolutely necessary and appropriate.
   3. Successful, quality representation demands that the attorney remain dispassionate, calm, balanced.
   4. Do not intensify the client’s hostility and desire for retribution by trying the case in an emotional way.
5. From the Court’s perspective, this is one of the most important aspects of competent domestic relations advocacy.

B. Reputation for Integrity:

1. Never allow your client’s position to lead you to make untruthful statements to the Court or to misstate or exaggerate facts or law (See In the Matter of a Member of the Bar of the Supreme Court of the State of Delaware: William M. Chasanov, 2006 Del. LEXIS 92 (Del. Feb. 22, 2005); see also Schmeusser v. Schmeusser, Del. Supr., 559 A.2d 1294 (May 4, 1989).

2. Do not lie to the Court – even if it means admitting that you were neglectful.

3. Once you are caught – Judge will never be able to trust your word again.

4. Can never rehabilitate your integrity if once called into question.

5. No case or client is ever worth running the risk of injuring your own personal character or reputation as an attorney.

6. This idea carries over to all other Courts and, if nothing else, should be the single most significant admonition that you will hear over these two days.

7. Always remember the importance of being honest with the Court.

C. Reasonableness:

1. Since many Family Court cases involve the equitable distribution of marital assets, judicial decisions are generally the result of a reasonable assessment of the equities of the case and there are no clear-cut answers and no precise methods of resolving these cases.

2. Because of this equitable method of distribution, it is important that lawyers take reasonable positions. Judges do not appreciate a “scorched earth” approach to a case.

3. Disservice to client and Court to take untenable positions:
   (a) Costly;
   (b) Diminishes your own standing and respect with the Court;
   (c) Intensifies antagonism between clients;
   (d) Inhibits settlements.

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4. If client has unrealistic or unreasonable expectations, it is up to the attorney to educate him or her and to make him or her understand why the position is untenable.

5. Do not dignify client’s unreasonable ideas by make them the basis for your presentation to the Court.


7. Do not be afraid of declining the representation and have a fee agreement that is very specific as to the scope of your representation.

D. Follow procedures as outlined in Section III below.

E. Importance of Lawyer’s Role as Negotiator, Mediator, and Advocate:
   1. In the garden-variety cases, it should not be difficult for counsel to determine what would be a fair outcome. Counsel should be able to project the range of results.
   2. Encourage clients to understand and accept a settlement that is fair.
   3. Provide reasons for possible results.
   4. Do not accept client’s stubbornness or obstinacy.
   5. Do not litigate minor issues if the cost to the client exceeds what he or she stands to gain.

F. Respect for Court, Counsel, Client:
   1. Show respect for the legal process and judicial system.
   2. Show respect for opposing counsel – do not discredit or criticize opposing counsel, if it can be avoided. This does not enhance your position.
   3. Be respectful to the Court, Court personnel, and litigants. Be courteous to Judge’s secretary, bailiff, staff.
   4. Show respect for the other side. This is not a sign of weakness and can actually facilitate settlement of the case.

III. Procedure in Family Court
A. Follow Family Court Rules:
   1. Oft-repeated piece of advice.
   2. Read Rules thoroughly – refer to them before you file anything.
   3. Even if you think you can take shortcuts with a particular Judge, it is a good idea to get into the habit of always following the Rules.

B. Preparation:
   1. Know facts, law, arguments you wish to assert.
   2. Do not wait until trial to discuss settlement. Have discussions beforehand.
   3. Have exhibits in order, with copies for opposing counsel and Court.
   4. Do not come to ancillary hearing without mortgage balances, present values of stock, real estate appraisals, etc. Judge will be angry.
   5. Do not wait until immediately before trial to obtain discovery orders or orders for psychological exams, etc.
   6. Do not expect to “wing it” in Family Court, results can be disastrous.
   7. Proceedings are not always uncomplicated.
   8. Unprepared lawyer is obvious to the Court and unfair to client.
   9. Effects of lack of preparation can be devastating:
      (a) Clients frequently complain to: Disciplinary Counsel, Bar Association, or to other forums, including Judges’ secretaries.
   10. Absence of skill or expertise can be offset by proper, thorough preparation.
   11. Advise your clients to dress appropriately.

IV. What Judges Expect from Lawyers
   A. Lawyers not standing when addressing the Court or being addressed by the Court.
   B. Lack of punctuality.
   C. Not “knowing” the case.
   D. Late filings of Briefs or Memoranda.
   E. Lawyers’ unwillingness to communicate with each other prior to trial.
   F. Civility.
G. Frequently, settlement agreements are placed on the record on the day of
the hearing. Counsel are to provide the Court with the written stipulation
memorializing the settlement by a date set by the Court. If you need
extensions, you should contact the Judge’s office, preferably in writing. It
is not the duty or responsibility of the Judge’s office to follow-up to
determine when the stipulation may be filed with the Court.

V. Conclusions
A. It is inevitable that you will make mistakes along the way. Own up to your
mistakes and attempt to correct them.

B. A very simple concept was proposed by a Cumberland County attorney in
a past article in The Pennsylvania Lawyer magazine: “[K]now the law; tell
the truth; mind your manners.”

C. When you have questions or problems, do not hesitate to seek assistance
from other members of the Delaware Bar.
SUBSTANTIVE BEST PRACTICES IN FAMILY LAW

1. Be a zealous advocate but maintain civility. Show appropriate respect for all involved in the process, including Family Court personnel.

2. Exert appropriate control over your client and do not intensify your client’s hostility by your actions. Although you must abide by your client’s decisions concerning the objectives of representation, do not allow the client's emotion to drive the case. Remain dispassionate, calm and balanced but understand the importance of the subject matter to your client.

3. Always keep your reputation in focus. Never compromise your integrity.

4. Be reasonable. Do not file frivolous pleadings. Be aware of your motion practice. File appropriate, well thought out motions. Use Motions for Sanctions and Ex-Parte relief sensibly. Take reasonable, supported positions with the Court and opposing counsel/party.

5. At different points in the case, you will play different roles. You are at times an advisor, a negotiator and an advocate. Explain these to your client. Settlement should not happen on the Court House steps. Make offers/counter offers. Discuss settlement with your client early give to them time to get use to the idea. Explain the expense of trial. Encourage clients to understand and accept a settlement that is fair.

6. Know and follow the Family Court Rules, statutes and case law.

7. Prepare your case thoroughly. Prepare your case by doing appropriate discovery; have business valuations, custody evaluations, vocational evaluations and real estate appraisals completed. Know the record. Have exhibits and testimony prepared. Bring relevant case law to support your position. Preparation can take the place of inexperience in the court room.

8. Always be honest with the Court. If you make a mistake, admit it and correct it promptly.

9. Use proper Courtroom decorum.

10. Become familiar with the Court room. Observe a proceeding.
SUPREME COURT PRE-ADMISSION CONFERENCE

SEMINAL DECISIONS IN FAMILY LAW

I.  CHILD SUPPORT

A.  The Melson Formula


The father in *Dalton v. Clanton* appealed from a decision by the Family Court ordering him to pay support for his two sons pursuant to the Melson Formula. He challenged the validity of the Melson Formula arguing that it argued that the Melson Formula was inconsistent with section 514 because it shifts the focus away from the factors set forth in that section onto the court-created formula. After considering the statutory criteria the Family Court must consider in deciding support cases and the statutory directive to the Family Court to provide for uniform policies in the exercise of jurisdiction, the Supreme Court concluded that “the procedure used by the Family Court of the State of Delaware in deciding child support cases, known as the Melson Formula, and reflected in the provisions of Family Court Civil Rule 52(c) and its official forms 509p and 509, is consistent with the letter and the spirit of [sections] 504, 514 and . . . 907(5).” Of particular significance to the Court was the operation of the Melson Formula as a rebuttable presumption, providing uniformity while allowing deviation from the formula where equity so requires. The Supreme Court gave guidance for deviation from the Melson Formula, suggesting the court give reasons for a conclusion that the Melson Formula has been rebutted as well as reasons generally for the order it enters.

B.  Retroactive Application of Child Support

*Patricia M.D. v. Alexis I.D.*, 442 A.2d 952 (Del. 1982)

The Court first considered the issue of awarding child support retroactively in *Patricia M. D. v. Alexis I. D.*, where it held that inherent equitable powers relating to support allow for retroactivity of child support awards. In that case, the Supreme Court reversed a Superior Court determination that child support may only be ordered from the date the petition for support is filed. Rather, the Supreme Court concluded that the ambiguity of the child support statute on the issue of retroactivity coupled with the Family Court’s inherent equitable powers permit retroactive awards. The Court limited retroactivity on an initial petition for support, however, to a period of two years prior to the date the petition was filed. Since the prosecution of a criminal offense for the nonpayment of support would be limited by the two-year statute of limitations, the Court concluded that retroactive support in a civil proceeding should also be limited to two years prior to the date the petition for relief was filed.
The notice required to permit retroactive modification of child support was clarified by the Supreme Court in *Taylor v. Taylor*. In *Taylor* the respondent-appellant challenged the notice sent to him by registered mail. After addressing the impact of service by regular mail or certified mail on the modification of support, the Court concluded that “Delaware has provided by statute that a petitioner may receive retroactive modification of a child support order only if notice of the modification has been sent to the respondent obligor by certified or registered mail.” Where notice of given by registered or certified mail, the modification is not given by registered or certified mail, the prior order will only be effective from the date of the order.

II. TERMINATION OF PARENTAL RIGHTS

A. Due Process

*In re Frazier*, 721 A.2d 920 (Del. 1998)

A minor child filed a petition for writ of certiorari addressed to the Family Court’s denial of a petition to terminate her mother’s parental rights in *In re Frazier*. The complaint alleged procedural defects, lack of evidence representation, and lack of opportunity to be heard in the Family Court proceedings. An advocate had been appointed as guardian ad litem for the child, who responsibility was to advance the child’s wishes to the Family Court. Although apparently not appointed by the Family Court as appointed special advocate (“CASA”), who responsibility is to represent the best interests of the child, even when inconsistent with the child’s wishes, the advocate took on the role of a CASA. As a result of the extra role undertaken by the advocate, the minor child was left without a representative whose sole loyalty was to advocate for the child’s wishes. Because of this and other irregularities, the Supreme Court remanded the matter to the Family Court so that a motion to reopen the Family Court termination proceeding could be presented.


The Supreme Court held that the Family Court must advise parents of their right to seek court-appointed counsel and must determine whether to appoint counsel, if requested, in all termination of parental rights proceedings. Although the appeal in this case did not address the issue of right to counsel in a privately initiated dependency/neglect proceeding, the Supreme Court, in a footnote, stated, “Father’s appeal did not raise the issue of right to counsel in a privately initiated dependency and neglect proceeding. Thus, the fact that our holding does not address that question should not be read as an indication that this Court takes a different view of the right to counsel at that stage.”
III. CUSTODY AND VISITATION

*Rogers v. Trent*, 594 A.2d 32 (Del. 1991)

In *Rogers v. Trent*, the Supreme Court addressed the issue of whether the Family Court has the authority to grant visitation to a non-parent. Andrew had lived with the Trents, his maternal great-aunt and great-uncle, since they were granted temporary custody of him subsequent to his parents’ divorce. Approximately four years later, his father filed a petition in the Family Court seeking custody of Andrew. The Family Court granted Andrew’s father’s petition after determining he could provide an adequate home for Andrew. The court, however, gave the Trents the right to visit with Andrew one weekend each month.

Andrew’s father’s sole contention on appeal was that the statutory entitlement to visitation applies only to the legal parents of a minor child and that, therefore, the Family Court had accordingly erred in granting visitation to the Trents. The father argued that the statutory provisions governing the determination of custody and visitation are replete with references to “parents,” which act as a limitation on the Family Court’s power to grant visitation rights to a non-parent. In rejecting the father’s argument, the Supreme Court stated that it did not believe the Delaware legislature intended to so circumscribe the power of the Family Court, especially since the ultimate test for visitation is the “best interests of the child.” The Court noted that sections 727 and 728 of title 13 of the Delaware Code, providing the basis for a parent’s entitlement to visitation, do not exhaust the authority of the Family Court to grant non-parental visitation based on what is best for the child.

In Andrew’s case, the record clearly showed that he had benefited from his relationship with his great-aunt and great-uncle. The Supreme Court observed that in evaluating the evidence to determine how the welfare of the child will best be served, the trial court must be sensitive to the emotional trauma implicit in relocating children of tender years from surroundings in which they have advanced and benefited. While this normally would entail granting custody to one parent and visitation to the other, Family Court may fashion an alternative visitation scheme involving third parties if it determines it is in the best interests of the child to do so. Such a determination may be practically appropriate where the third parties have previously exercised custody under court order because of default or inability on the part of the parents.

*Smith v. Gordon*, 968 A.2d 1 (Del. 2009)

A lesbian partner (“Gordon”) of a child’s adoptive mother petitioned for custody/visitation of and with the child asserting her right as a *de facto* parent and requesting a determination of parentage under the Delaware Uniform Parentage Act (“DUPA”). The Family Court concluded that the petitioning party did not qualify as a legal parent of the child under the DUPA but determined that she was a *de facto* parent and entitled to the same status as a legal parent for purposes of the standing required to file a petition for custody. The Family Court awarded Gordon joint legal and physical...
custody of the child. The Supreme Court reversed the Family Court decision and remanded concluding that a *de facto* parent does not have standing as a parent to file a petition for custody in Delaware because the DUPA enacted by the legislature unambiguously states that it applies to determinations of parentage in Delaware, and it does not include the *de facto* parent doctrine. The Supreme Court found that where the legislature unambiguously and comprehensively enacts legislation to define the parent-child relationship as a legal relationship, modifications to the law must be by the legislature and may not be made by the judiciary as a matter of statutory construction or common law.

*Smith v. Guest*, 16 A.3d 920 (Del. 2011)

This matter arose from the a newly enacted statute SB 84, that was introduced and enacted in the wake of the Supreme Court’s 2009 decision in *Smith v. Gordon*, above. SB 84, which became 13 Del. C. § 8-201, amended the Delaware Uniform Parentage Act (“DUPA”) so that a *de facto* parent was included within the statutory definition of parent. This was done in order to expressly recognize the *de facto* parent-child relationship. The statute further provided at section 6 that “no court decision based upon a finding that Delaware does not recognize *de facto* parent status shall have collateral estoppel or *res judicata* effect.” Smith filed an appeal of the Family Court’s order granting an award of joint custody to petitioner Carol. M. Guest, claiming that SB 84, codified at 13 Del. C. § 8-201, violated both the U.S. and Delaware constitutions and that *res judicata* barred Guest’s custody petition. Smith further argued that the Family Court erroneously concluded that *res judicata* did not bar Guest’s petition and that even if SB 84 were constitutional, that the Family Court erred in applying the statute retroactively. The Supreme Court affirmed the decision of the Family Court and in doing so found that the uncodified provisions of SB 84 were to be considered in interpreting the statute; that the legislature did not violate the separation of powers doctrine in altering the statutory definition of “parent” following the Supreme Court’s prior decision in this matter; that the statute did not violate the single-subject provision of the state constitution; that the statute permitting a *de facto* parent to seek custody does not violate the due process rights of the child’s other parent; SB 84 did not constitute “special legislation” specifically directed at adoptive mother in violation of equal protection custody petition neither barred by *res judicata* nor collateral estoppel; and the trial court properly considered the evidence of events that occurred before the enactment of the statute recognizing *de facto* parent-child relationships.


The Supreme Court held that the Family Court committed legal error and violated the appellant’s due process rights when it ruled, on the basis of an *ex parte* communication with a Virginia Court, that it had subject matter jurisdiction to decide the case under the UCCJA as enacted in Delaware. The Supreme Court held that the Court’s *ex parte* communication resulted in a serious violation of appellant’s Constitutional rights to procedural due process.

In *Troxel*, the paternal grandparents sought visitation with their grandchild pursuant to a State of Washington statute permitting visitation in accordance with the best interest of the child. The biological father was deceased and the natural mother opposed visitation between her child and the material grandparents. In a plurality opinion, the U.S. Supreme Court upheld the fundamental right of parents to make decisions concerning the care, custody and control of their children. Furthermore, the Court recognized a presumption that fit parents act in the best interests of their children. In *Troxel*, there was no evidence that the natural mother was an unfit parent. Consequently, the Court held that in determining visitation with a non-parent, a court cannot rely solely on the best interests of the child; rather it must accord at least some special weight to the parent’s own determination.

**Thomas v. Nichols-Jones**, 2006 WL 2844525 (Del.)

In *Thomas*, the Delaware Supreme Court was presented a case where paternal grandparents were seeking visitation with their grandchild over the objections of the natural mother. The natural mother argued that *Troxel* applied and that Family Court failed to give her decision special weight in awarding visitation to the grandparents. Unlike *Troxel*, however, there were two living parents and the biological father consented to visitation with his parents. Despite the fact that Mother had sole custody, the Court held that Father still enjoyed his paternal rights. Accordingly, the Court found no abuse of the trial court’s discretion in weighing both parents’ wishes in accordance with the best interest factor pursuant to 13 Del. C. § 722.

10 Del. C. § 1031(7)a

The statute enabling visitation with grandparents appears to be more restrictive than the *Troxel* in certain instances. The language in the first sentence of the statute prohibits a court from awarding visitation to a grandparent over both parents’ objection in situations where the natural or adoptive parents are cohabitating as husband and wife. On its face, it would seem a court making such a determination could not even get to a 722 best interests standard or the special weight considered under *Troxel*. The second sentence of the statute requires a court to make the ultimate decision of grandparent visitation in accordance with the best interest of the child. It is unclear whether this second sentence is intended to supersede the first sentence or intended to be the standard in cases where the biological parents are either not cohabitating as husband and wife or do not agree on the issue of grandparent visitation.
IV.  DIVORCE

Roberts v. Roberts, 19 A.3d 277 (Del. 2011)

Wife appealed from the Family Court’s entry of the divorce decree granting Husband’s Petition for Divorce. Wife claimed the Family Court erred in concluding that Husband had completed the required Parent Education Program (“PEP”) required by 13 Del. C. § 1507(h). Wife alleged that husband should have been required to take the domestic violence education component prior to the entry of the divorce decree. The Family Law Section of the Delaware State Bar Association filed an amicus brief on this issue regarding the question of whether the PEP is a “condition precedent” to the issue of a divorce decree. The amicus brief argued that the PEP was neither a condition precedent nor a substantive limitation to obtaining a divorce decree. The amicus brief went on to argue that the General Assembly then left the Family Court to enforce the requirement of 1507(h) through its Rules. The Supreme Court found that the Family Court did not err in entering the final divorce decree, and that the completion of the PEP is a procedural requirement, but not a substantive bar, to the scheduling of a divorce hearing and entry of a divorce decree. Husband had no demonstrable history of domestic violence requiring him to take a PEP which included a domestic violence component, however; even if husband was required to attend a PEP with a was required to attend a PEP with a domestic violence component, the completion of that PEP was not a condition precedent to the entry of the divorce decree.

V.  ALIMONY

Eberly v. Eberly, 489 A.2d 433 (Del. 1985)

The Supreme Court found the requirements of due process were not satisfied by the manner in which the Family Court awarded interim alimony in Eberly v. Eberly. On October 1, 1981, the wife, a petitioner in a divorce proceeding, filed a motion for interim relief, requesting interim alimony. Since the husband was hospitalized, the husband’s attorney requested additional time to respond to the wife’s motion and affidavit. On October 26, 1981, an order was entered based solely on the wife’s affidavit and a teleconference with the parties’ counsel. The husband’s efforts to be heard on the interim alimony order were denied, and the interim order continued in effect for nineteen months before a hearing occurred on May 31, 1983. In an opinion dated August 31, 1983, the Family Court converted the interim order to a final order.

The Supreme Court found the denial of an evidentiary hearing contrary to the demands of due process. While recognizing the authority of the Family Court to grant interim alimony based solely on the affidavit of the moving party, it found this approach to be appropriate only when a genuine emergency exists. Further, the affidavit relied upon the Family Court in entering such an order must confirm to the rules to evidence, and a hearing must thereafter be held as soon as possible to satisfy the requirements of due process. The Supreme Court found that the Family Court failed to meet the requirements of due process when it allowed the interim alimony order to
remain in effect for twenty-two months based upon the movant’s affidavit, without an evidentiary hearing. Accordingly, the Supreme Court reversed and remanded the issue to the Family Court.

Romano v. Romano, 494 A.2d 161 (Del. 1985)

The Supreme Court disagreed with the conclusion of the Family Court in Romano v. Romano that once an award of alimony is terminated, the alimony recipient lacks standing to petition the Family Court for modification of the order when circumstances change. Rather, the Supreme Court found the issue to be whether the Family Court continued to have jurisdiction, concluding that the Family Court does have continuing jurisdiction to modify or terminate any “decree of separation order” that it has entered in a divorce proceeding.

After a marriage of more than twenty years, the wife in Romano sought alimony in the proceedings ancillary to the parties’ divorce. The Family Court found her to be dependent upon the husband because she was unemployed. Because the Family Court was not able to ascertain the wife’s future earning capacity, it awarded her nominal alimony of one dollar to preserve her application. When she again petitioned the court for alimony more than two years after the initial hearing, the Family Court found she was not entitled to alimony because her income was essentially equal to the husband’s. Approximately one month later, however, the wife was discharged from her employment and found herself in need of support from the husband. It was this petition seeking to modify the alimony awarded that the Family Court dismissed, concluding that she lacked standing because her alimony award had previously been terminated. In reversing and remanding the matter to the Family Court, the Supreme Court found that the statute provides the Family Court with continuing jurisdiction to reconsider alimony awards based upon the wife’s allegation of a real and substantial change of circumstances.

VI. ATTORNEY’S FEES


In the seminal case of Mays v. Mays, the Supreme Court addressed whether the Family Court could, in its discretion, consider an increase in litigation costs resulting from the extreme litigious position of one or both parties. The wife contended, inter alia, that the Family Court judge abused his discretion in ordering the wife to pay three thousand dollars, or twenty-nine percent, of the husband’s attorney’s fees. The trial court stated that it was giving the attorney’s award because of the wife’s posture of excessively pursuing issues of little or no merit.

The Supreme Court noted that a trial judge has broad discretion in determining whether to award attorney’s fees under section 1515 of title 13. Further, while the purpose of an award of attorney’s fees and costs to the financially disadvantaged spouse is to equalize the parties’ ability to properly litigate the divorce proceedings, the Court held that a party does not have to be totally without assets or
income to receive an award of attorney’s fees. Accordingly, where the expressly litigious conduct of one party has an adverse financial effect upon the other, it is not an abuse of discretion to ward attorney’s fees.

VII. PROPERTY DIVISION


The Supreme Court found the increase in value of a premarital home in *Albanese v. Albanese* to be marital and subject to division in divorce. The decision is distinguishable from *Lynam* because the asset, real property, had increased in value in part due to the efforts of the non-owner spouse. In particular, the wife’s role as homemaker contributed to the maintenance and appreciation of the home and allowed the husband to earn income during the marriage that went toward the payment of the mortgage.

In reversing and remanding the matter, the Supreme Court recommended to the Family Court the following three-step process:

1. fix the ratio of the nonmarital interest to the total nonmarital and marital investment
2. subject the marital portion to equitable distribution
3. in making the equitable distribution determines the monetary and nonmonetary contributions of each spouse, and the effort expended by each spouse in accumulating the marital property.

The Court found this three-step approach to be the appropriate tool for fixing spousal entitlement to property that reflects a mix of premarital and marital acquisitions.

*Campbell v. Campbell*, 522 A.2d 1253 (Del. 1987)

In *Campbell v. Campbell*, the Supreme Court reversed an order of the Family Court reopening a final property division judgment based upon changed circumstances of the husband resulting in his inability to resume his previous occupation. The Family Court property division order had assigned to the husband his law practice, assessing it to be “of incalculable value . . . in terms of providing him with a secure and substantial income in the future.” When the husband later became disabled, he moved to reopen the Family Court property division order, arguing that the change in the value of the law practice due to his disability warranted a modified order. The Supreme Court held that the Family Court may not modify a final property division judgment in favor of one party to correct the unexpected effects of post-judgment events not caused by the other party, thus establishing a bright-line rule against post-judgment modification of property division orders based upon changed circumstances not caused by the non-moving party.

The Delaware Supreme Court held that the Family Court may adjudicate only rights and claims arising between a husband and a wife. Intervention of creditors is wholly improper and the Family Court has no power to hear or determine claims of third parties against a husband and wife or their property. (See also Eberly v. Eberly, Del. Supr., 489 A.2d 433 (Jan. 25, 1985)).

Fehnel v. Fehnel, 1992 WL 435876 (Del. Fam. Ct.)

The Fehnel case provides a good example of how one judge analyzed the value of a small business in the context of a marital property division in 1992. It also contains an informative view of how a trial judge evaluates credibility of competing experts.

The Fehnels disagreed on what value to place on a small “closely held” business that was owned by Mrs. Fehnel and also was her job. The business happened to be a day care – school which had been wife’s job for approximately 5 yrs prior to the court’s decision. She had evolved from starting as an assistant to ownership of the entire enterprise earning a salary of $18,200.00. The experts were accountants who testified that wife received additional compensation in nature of other expenses being paid by the corporation. While the experts disagreed somewhat on how many of the expenses were purely personal vs. some relation to the business operations, they apparently agreed that the expenses annually totaled approximately $14,000 per year.

The case makes many points but three seem relevant and are as timely today as they were 15 years ago.

1. The court relied heavily on a particular Revenue Ruling by the IRS that dictates how closely held business should be valued for purposes of determining what estate taxes may be due. This is an example of how the court is willing to look for guidance outside of case precedence when there is no statute on point.

2. The court showed its understanding of the valuation process which may affect what weight to give different factors, such as; capitalization rates, fair market value vs. book value or liquidation value, etc. This is an example of what counsel may need to learn in order to advocate their client’s claims effectively.

3. The court’s analysis of the competing experts is a good example of why it is important to pick an expert carefully.

Ultimately, whether this case is the best example of any of these points is not the real issue. Rather, creating an awareness that a business may require specialized and experienced analysis is the issue for today’s purposes.
Forrester v. Forrester, 953 A.2d 175 (Del. 2008)

Former husband argued that the Family Court erred in awarding his former wife an interest in his pension that he contributed to and would receive “in lieu of” Social Security benefits as part of the division of the parties’ marital property incident to their divorce proceedings. Former husband argued that because Social Security benefits are not subject to equitable division incident to divorce under Federal law, his pension received “in lieu of” Social Security benefits is exempt from the marital estate and from equitable distribution. The Supreme Court affirmed the Family Court’s decision finding that pension benefits owned by a party to a marriage that operate as “substitute” for Social Security are fundamentally different from Social Security and are marital property subject to equitable division upon the dissolution of the beneficiary’s marriage. The Supreme Court further determined that the Family Court properly considered the inequities involved to avoid any imbalance that might result given that former husband would not be entitled to a portion of former Wife’s accrued Social Security benefits.

VIII. CONTRACTUAL ISSUES


Robert O. v. Ecmel A. involved an appeal from a judgment of the Family Court rescinding the parties’ separation agreement upon the wife’s petition. The Supreme Court held that (1) the trial court’s finding that the separation agreement was the product of the husband’s exertion of undue influence upon wife were not clearly erroneous; (2) the wife established the worth of the parties’ property by a preponderance of evidence for the purpose of showing that the agreement was unfair and inequitable; and (3) the wife’s delay in seeking relief did not raise the equitable defense of laches.

The parties were married in February of 1968 following the husband’s visit to Turkey, where he met his wife, a Turkish native. They moved to Delaware the next month and lived together in Delaware until their divorce in February of 1978. Three children were born of the marriage. The wife, with the husband’s agreement, was a stay-at-home mother.

In December of 1977, the husband told his wife that he wanted a divorce and refused to consider reconciliation. He consulted with an attorney for advice on an agreement to govern property division and custody of the children. The husband demanded the wife’s interest in the marital residence and custody of the oldest son. It was undisputed that the husband advised his wife to obtain a lawyer if she so desired. The Family Court found, however, that the wife was unaware of her rights under the law and felt powerless, due to her immigration status, to object to her husband’s demands. This feeling of helplessness was underscored by her financial dependence on him, thus limiting her ability, as she saw it, to retain an attorney. Furthermore, the Family Court found that the husband had threatened his wife that if she did not cooperate with him he
would make it worse for her. The wife interpreted this admonition as meaning that he would seek to have the custody of the younger twins taken from her.

The husband’s attorney prepared an agreement embodying his client’s demands, which was executed in January of 1978, as was the deed transferring the wife’s interest in the marital residence to the husband. Under the terms of the agreement, the wife could remain in the marital residence until June of 1978, when husband would pay the plane fare to Turkey for her and the younger twins. In addition, the parties would be responsible for their own debts after June 1, 1978. The agreement was silent with respect to matters normally set forth in property division agreements, such as provisions for the support of the wife and the children, for the payment of marital debts incurred during the marriage, and for the division of all personal property acquired during the marriage.

Following the parties’ divorce in February of 1978, the wife and the twins stayed in the marital home until May of 1978. They left for Turkey that month, taking clothing, little (if any) cash, and a very limited amount of personal property. The husband kept the remainder of the property acquired during the marriage, including most of the household furnishings, both cars, and the bank accounts. Though not required under the agreement, the husband paid all of the marital debts, including those that the wife incurred in preparing to return to Turkey. The wife returned to Delaware several months later and applied for public assistance. Thereafter, state authorities initiated child support proceedings against the husband and advised the wife to seek rescission of the separation agreement.

The husband argued on appeal that the wife had failed to establish by clear and convincing evidence that she signed the separation agreement because of his alleged undue influence. Relying on a presumption of undue influence that arises from a confidential relationship between husband and wife, the wife contended that the evidence supported the conclusion that undue influence was exerted.

The Supreme Court first noted that although the presence of undue influence depends on the facts of any given case, it consists of four elements: (1) a person who is subject to influence, (2) an opportunity to exert undue influence, (3) a disposition to exert such influence, and (4) a result indicating the presence of undue influence. Where no confidential or fiduciary relationship exists between the parties, the burden of proving undue influence falls upon the party who asserts its. Where, however, the parties stand in a confidential or fiduciary relationship, “equity raises a presumption against the validity of a transaction by which the superior obtains a possible benefit at the expense of the inferior, and casts upon him the burden of showing affirmatively his compliance with all equitable requisites.” Such a presumption is triggered by the marital relationship, which Delaware law views as being a confidential one involving trust concepts. Accordingly, the Supreme Court held that the Family Court properly placed the burden upon the husband of proving that the separation agreement was fair and equitable. The Supreme Court held that the trial court’s finding that the husband was the dominant party when the agreement was signed, as well as its implicit conclusion that the first three elements of undue influence were present, were the obvious product of an orderly and
logical deductive process, and, accordingly, the Court could not conclude that they were clearly erroneous.

The Court next turned to a review of the trial judge’s determination regarding the fairness of the agreement in terms of the wife’s “marital interests.” The Court rejected the husband’s description of the wife’s marital interests as returning to Turkey to seek employment and taking what property she could manage in light of shipping restrictions. The Court instead held that her marital interests must be viewed in light of the substantive rights given by the Delaware’s family law, including, but not limited to, alimony, child support, child custody, property division, and attorney’s fees.

The husband next argued that the wife inadequately proved the value of the marital property, thus failing to show that the agreement was unfair or inequitable. The value of the marital property, almost all of which the husband retained under the separation agreement, was established by the wife’s testimony. The husband presented no evidence to the contrary, apparently relying on cross-examination of the wife to create doubt and confusion on this subject. Accordingly, the Supreme Court, noting that the trial judge had the advantage of observing and hearing the wife before making findings, held that the trial judge’s conclusions about the value of the property and debts, and, by extension, the unfairness of the agreement, fully met the test of judicial review established by Wife (J.F.V.) v. Husband (O.W.V., Jr.).

Lastly, the husband argued that the wife had unreasonably delayed in seeking relief, thus raising the equitable defense of laches. To show that the delay resulted in prejudice to him, the husband introduced proof of improvements and repairs to the marital residence. The Supreme Court noted that the defense of laches depends on more than the issue of unreasonable delay in the assertions of one’s rights. It is principally a question of the inequity of permitting a claim to be enforced, this inequity being founded on some change in the condition or relations of the property or the parties. Where no one was misled to his harm in any legal sense by the delay, and the situation has not materially changed, the delay is not fatal.

While substantial improvements to property may constitute sufficient prejudice to support a finding of laches, the Court doubted that the installation of a furnace and special storm windows amounted to such significant changes. Further, the Supreme Court held that there was no indication that the husband relied on the parties’ marital status or the existence of the separation agreement when deciding to make particular improvements related to the marital residence. Accordingly, there being no prejudice to the husband, the defense of laches was unavailing.

*Solis v. Tea*, 468 A.2d 1276 (Del. 1983)

The central issue in *Solis v. Tea* was whether an obligation under a separation agreement to provide a private secondary education may be reformed upon a
showing of change in financial circumstances adversely affecting the best interest of parent and child. In this post-divorce proceeding, the husband appealed from an order of the Family Court substantially granting the wife’s petition for specific performance of the husband’s private school obligation made incident to the couple’s divorce but not incorporated in the divorce decree. The husband’s primary contention was that the Family Court committed reversible error in ruling as a matter of law that a voluntary separation agreement may not be reformed irrespective of a substantial change in the husband’s financial condition attributable largely to an unforeseen escalation in private school costs.

The parties were divorced in January of 1971; three children were born of the marriage. In 1970, after a brief separation and in anticipation of a divorce, the wife requested her husband, a member of the Delaware bar, to prepare a document setting forth the couple’s marital obligations. Accordingly, the husband drafted a contract, which the parties executed in January of 1971.

Under the terms of the agreement, the husband was to pay the private school tuition for the couple’s three children. The husband complied with the terms of the agreement in 1971. In 1972 and 1973, the husband gratuitously increased his alimony payments while continuing to meet the private school expenses of the parties’ two sons. In 1976, however, the husband experienced a decrease in his gross income, together with seven-fold increase in private school tuition that was not reasonably anticipated by either party at the contract’s inception. In 1976 the husband requested assistance from the wife with respect to the children’s private school expenditures. The wife assumed the daughter’s expenses for the 1976 through 1978 academic years.

Beginning in 1979, the wife refused to pay the daughter’s tuition and filed a petition in Family Court for specific performance of the agreement. The crux of the appeal was the Family Court’s refusal to consider the substantial and unforeseen change in the husband’s circumstances as a defense to the wife’s petition for enforcement of the parties’ separation agreement. First, the husband urged the Supreme Court to apply the modification guidelines of section 1519(a)(4) of title 13, which compel modification of a decree or order of support where the petitioning party establishes a “real and substantial change of circumstances.” Statutory modification requires a finding that enforcement of the order would result in an undue hardship to the obligor or an undue benefit to the obligee. The husband contended that a 750% increase in private school cost justified revision of the couple’s agreement under the prevailing benefit/burden test.

In rejecting the husband’s argument, the Supreme Court noted that the modification scheme of section 1519 is limited to a “decree or separate order” entered by the Family Court in a divorce or annulment proceeding. As the statutory terms “decree” and “order” are not defined, the Court construed the terms according to their “common and approved usage” and found their plain meaning to refer to declarations or directions of a court or judge. Accordingly, the Court found clear legislative intent to restrict the scope of section 1519 to the revision of support and alimony payments contained in
judicial decrees, orders, or separation agreements merged therewith. The Court declined to extend the legislative direction to include unincorporated separation contracts.

Having rejected the husband’s section 1519 argument, the parties conceded the applicability of general contract principles to the enforcement of their separation agreement. They disagreed, however, as to the Family Court’s implicit determination that contract defenses provide the exclusive basis for reformation of a separation agreement not incorporated in a divorce decree.

According to the husband, the rule of Husband B. v. Wife H. compels a court to reexamine a party’s support responsibility where the obligor establishes (1) an unforeseen downgrading of his financial station, (2) an inability to comply in good faith with the provisions of the parties’ separation agreement, and (3) an absence of need by the parties’ children for the provision sought to be enforced. The wife responded that the husband had to establish a traditional defense for contract modification: (1) unfairness of the contract at its inception, 2) unconscionability, or (3) impossibility of performance.

The rule for modification of an unmerged separation agreement was stated by the Supreme Court in C. v. A. That case involved a wife’s petition for specific performance of a separation agreement and a husband’s defense of “unforeseen changes” in his financial condition. In rejecting the husband’s argument, the Court concluded that “in the absence of a provision in a separation agreement to the contrary, an unfavorable change in financial circumstances is not a valid defense to specific performance of the agreement.” The Court’s holding was affirmed in a more recent decision, Harry M. P. v. Nina M. P. In that case, the husband sought an alimony reduction due to the wife’s improved financial status. The trial court refused to alter the contractual amount and the Supreme Court affirmed, reiterating its C. v. A. holding that “a change in the financial circumstances of either party does not give the trial court the power to rewrite the contract.”

In Solis v. Tea, however, the Supreme Court noted that Delaware courts have applied a different standard of review to child support agreements from that applied to spousal support agreements. Specifically, the Court has engrafted a superceding “best interest of child” rule onto any review of contractual child support provisions. This rule reflects the Court’s recognition of matters of child support of an overriding public concern for the protection and promotion of a child’s interests. Since the focus of the dispute in Solis v. Tea was an educational clause for the children’s benefit, the “best interest of the child” rule governed the case. Therefore, the Family Court’s reliance on C. v. A. and its progeny to enforce the couple’s 1971 separation agreement was misplaced. Those cases concerned the modification of alimony obligations and were dispositive on the reformation of a child benefit obligation.

The Supreme Court began its “best interest of the child” analysis by noting that section 501 of title 13 imposes a duty to support a minor child equally upon both parents to the extent of the child’s “minimum needs.” Settled Delaware law allows a couple to modify the statutory duty by contractually apportioning support obligations via
the execution of a separation agreement. The contracting parties may not, however, “bargain away” support responsibilities to the detriment of their minor children. A support agreement between former spouses, therefore, is binding and enforceable so long as the interests of the child are not adversely affected.

Further, in reviewing the adequacy “or excessiveness” of the support provisions in a separation agreement, the provision will be evaluated according to a “best interest of the child” criterion, with the terms of a contract being enforced only where they appear reasonable and fair. Accordingly, child support contracts demand stricter scrutiny by the courts.

Applying the stricter scrutiny standard in *Solis v. Tea*, the Supreme Court held that the Family Court may, in the exercise of its equitable powers, reform a parent’s contractual obligation for child support upon an appropriate showing. A modification downward would require proof of an unforeseen adverse change of financial condition due to factors beyond the obligor’s control, coupled with a finding that enforcement of the original commitment would not be in the child’s best interest, *i.e.*, would likely curtail a future ability of the parent to contribute to the child’s support.

The Court further set forth the criteria relevant to the question of whether parents may be compelled to meet a contractual obligation to provide a private school education for their children: (1) the financial resources of the obligated parent, (2) the availability of public schools, (3) the special needs and general welfare of the children, and (4) the station, health, and age of the children.

*Rockwell v. Rockwell*, 681 A.2d 1017 (Del. 1996)

In *Rockwell v. Rockwell*, the husband challenged the Family Court’s modification of the alimony provisions of a separation agreement incorporated into a final divorce decree, in which the Family Court applied the statutory standard of review, *i.e.*, whether the wife had demonstrated a “real and substantial change of circumstances.” The husband contended that since the original alimony award was an agreement between the parties, it could be modified only in according with contract principles. The Supreme Court agreed.

The Court found the statutory standard of “real and substantial change” for termination or modification of a court order concerning alimony found in section 1519(a)(4) of title 13 is not applicable to an agreement between the parties pursuant to section 1519(b), which becomes part of a Family Court order. Accordingly, the Supreme Court held that when the Family Court is asked to modify or terminate an alimony award set forth in a court order pursuant to an agreement between the parties, the property standards are those generally applicable to the modification, reformation, or recission of contracts.
IX. CONSTITUTIONAL PROTECTIONS

Disabatino v. Salicete, 671 A.2d 1344 (Del. 1996)

In Disabatino v. Salicete, the Supreme Court again addressed what constitutional protection must be afforded a defendant in a civil contempt proceeding. The wife filed a series of petitions for a rule to show cause, each alleging that the husband had violated prior orders of the Family Court. The Family Court conducted hearings, made findings of fact, and entered dispositions on several of the petitions. The first order at issue in the appeal was entered on November 16, 1994. It imposed sanctions upon the husband that included paying the wife $18,000 by December 1, 1994, for his two violations of the automatic restraining order. The husband filed a notice of appeal from that judgment but did not seek to have it stayed. After a hearing, the Family Court concluded that the husband was in contempt of its November 16, 1994, judgment and committed the husband to the Department of Adult Corrections until such time as he purged himself of the contempt finding by paying the wife $18,000, with interest at eight percent from December 1, 1994. The husband appealed from that judgment as well, and the husband’s two appeals were consolidated.

The Supreme Court concluded that the proceedings and the sanctions in the Family Court were criminal in nature and “serious.” After levying the initial monetary sanction, the Family Court advised the husband that the initial assessment, and each one thereafter, would be doubled for subsequent violations. The Supreme Court determined that the sanctions imposed upon the husband by the Family Court were criminal for two separate reasons: the assessments were not compensatory and the assessments were not purgable by subsequent compliance. Further, the husband was entitled to the full panoply of rights that are guaranteed in a criminal proceeding because the assessments were serious, not petty, and the origin of each of the proceedings was Disabatino’s ongoing out-of-court violations of a judicially mandated course of conduct. Because the sanctions were criminal and serious, the husband was entitled to all of the constitutional rights that are guaranteed to a defendant in a criminal proceeding, including the right to a trial by jury. Consequently, the judgments of the Family Court were reversed.

Guardianship

Tourison v. Pepper, Pepper and Little, Del. August 16, 2012

This case addressed the proper standard to apply when a fit parent petitions the Court to rescind guardianship. The Court ultimately held that a guardianship must be terminated at the request of a fit parent unless the guardian can proves, by clear and convincing evidence that the children will suffer physical or emotional harm if the guardianship was terminated. The Family Court in his matter found that the child was neither dependent nor neglected in Appellants’ custody.
In the matter below, Mother filed to rescind the guardianship held by her aunt who initially became the child’s guardian to care for the child while Mother and Father were unable due to Mother’s injury from a car accident her turbulent relationship with the child’s father. Mother followed and completed a safety plan instituted by DFS. Mother filed to rescind the guardianship and the Family Court held a two-day trial. Mother’s petition was denied. Our current statute provides that guardianships may be modified if “at any time the child is no longer dependent or neglected and it is in the child’s best interest to modify the order.” 13 Del. C. 2332(b)(2). The burden is on the parent to prove that the parent is unfit. If the child is neither dependent nor neglected then the Court may not ignore the parent’s fundamental rights and remove their child from them by finding that the best interest factors require placement of the child with the guardian rather than the parent. This is where the court below erred. Citing Troxel v. Granville 530 U.S. 57, (which was case that determined that the presumption in favor of a fit parent related to decisions about visitation rights) this Court found that presumption in favor of a fit parent applied also to termination of guardianship. The court then had to reach the issue of how the presumption would operate. The Court followed the analysis of the Georgia Supreme Court in Bodie v. Daniels and determined that the proper burden was for the guardian to prove by “clear and convincing evidence that the child will suffer physical or emotional harm if the guardianship was terminated. The definition of harm was not meant to be “merely social or economic disadvantages.” Our Court has now adopted this standard.