

The Use of Protective Orders in Matrimonial Litigation

by Christopher R. Musulin and Christina M. Fulton

Protective orders, orders designed to define the scope or use of discovery, present limitless opportunities for creative application in matrimonial litigation. Family law attorneys are not restricted to the somewhat narrow scope of Rule 5:3-2; rather, the full range of applications and relief under Rule 4:10-3 exists, including significant case law directly relevant to matrimonial practice. When used properly, a multitude of critical objectives can be achieved, including protecting children, controlling the release of proprietary or personal information and significantly defining the parameters of permissible trial evidence.

COMPETING POLICIES

Protective orders have existed in some form or another since the inception of common law.

In American jurisprudence, protective orders balance two fundamental yet competing legal traditions: the search for the truth to ensure justice (*Hickman v. Taylor*)¹ versus the protection of legitimate privacy interests (*Seattle Times Co. v. Rhinehart*).²

This dichotomy echoes an even more fundamental core American legal tradition: open versus closed judicial proceedings.

The public availability of court records has long been the policy of both state and federal courts, and it is this transparency that enhances fairness and public trust in our system of justice. Secret judicial proceedings are apparently deemed untrustworthy, and they have historically been a means for

punishing those people unacceptable to those in power. Opening judicial proceedings helps to keep them fair, and it allows citizens to observe and monitor the workings of its system of justice.³

Theoretically, a protective order limits public access to court proceedings, contrary to American founding traditions.

These competing legal traditions are manifested in the Rules Governing the Courts of the State of New Jersey. Rule 1:21 requires open, public judicial proceedings. Rules contained in all chapters of civil, criminal and chancery practice permit liberal investigation and discovery to facilitate the search for the truth. On the other hand, Rule 3:13-1, Rule 4:10 and Rule 5:3-2 permit a court to enter protective orders to limit the collection and dissemination of information and address legitimate privacy interests.

APPLICABLE RULES

Protective orders are utilized in criminal, civil and chancery division proceedings. The judicial authority for the entry of a protective order in civil actions is found in Rule 4:10-3; in criminal actions, Rule 3:13-3; and in the family part, Rule 5:3-2.

Pursuant to Rule 5:3-2:

Hearings on Welfare or Status of a Child. Except as otherwise provided by rule or statute requiring full or partial in camera proceedings, the court, in its discretion, may on its own or party's motion direct that any proceeding or severable part thereof involving the welfare or status of a

child be conducted in private. In the child's best interests, the court may further order that a child not be present at a hearing or trial unless the testimony, which may be taken privately in chambers or under such protective orders as the court may provide, is necessary for the determination of the matter. A verbatim record shall, however, be made of all in camera proceedings, including in-chamber testimony by or interrogation of a child.

Sealing of Records. The court, upon demonstration of good cause and notice to all interested parties, shall have the authority to order that a Family Part file, or any portion thereof, be sealed.

PROTECTING CHILDREN

Under Rule 5:3-2 a proceeding shall be closed, held in camera, or sealed if required by statute, Court Rule or upon the exercise of judicial discretion in situations involving the status or welfare of a child. The trial court is vested with extraordinary power to carefully control and monitor all aspects of family law proceedings involving children. Rule 5:3-2, therefore, runs contrary to the core American legal tradition of open court proceedings, a sacrifice clearly acceptable to protect children, who are particularly vulnerable during contentious matrimonial proceedings.

Significant concerns have always existed about the involvement or participation of children in matrimonial litigation. The primary objective is to insulate children from parental conflict. When children become involved in providing

information to the court, they may be subject to influence or other pressures from their parents. As stated by Richard A. Warshak, "The more weight accorded children's stated preferences, the greater the risk of children being manipulated or pressured by parents."⁴

Attempts to influence children place them in the center of parental conflict. This may distress children, adversely impact their relationships with parents or siblings, or undermine the ability of children to form healthy relationships at a future time.⁵

Rule 5:3-2 is most familiar to family court practitioners as the source rule justifying the entry of a protective order upon the release of a forensic custody evaluation, guardian *ad litem* report, Division of Youth and Family Services records, or other documents pertaining to children. It also provides specific authority for the entry of an order restraining parties from discussing divorce matters with children or alienating their affections. In highly emotionalized custody or abuse and neglect litigation, a real possibility exists that a parent may confront a child or engage in more subtle forms of emotional retribution after reviewing an adverse report or findings.

The rule also authorizes the use of in camera proceedings for child testimony, interviews or interrogation which must be memorialized in a verbatim record.⁶

Attempts to discover the test data gathered as part of a custody evaluation have consistently resulted in the entry of protective orders. According to psychologist Daniel Tranel, there are important reasons for limiting the release of raw data. First, there is the possibility of misinterpretation by laypersons who may reach incorrect conclusions about the testing process. Of greater significance is the release of psychological test stimuli into the public domain, making it accessible to nearly everyone. It would then become virtually impossible to find anyone naive to test content, mak-

ing it necessary to discard and constantly re-author valid test criteria, a virtually impossible task.⁷

PROTECTING LITIGANTS

In addition to specifically protecting children, protective orders can be utilized in a wide variety of other contexts in family court actions. For example, the records of domestic violence proceedings are rendered confidential by virtue of N.J.S.A. 2C:25-33(a). In *Pepe v. Pepe*,⁸ Judge Alvin Milberg ruled that the confidentiality provisions of Title 2C apply to judicial records including domestic violence pleadings. In *Pepe*, the *Asbury Park Press* sought the release of certain domestic violence pleadings, an application denied by the trial court.

Pursuant to Paragraph (e) of Rule 4:10-3, a protective order may be entered sequestering witnesses at the time of depositions. In the case of *Mugrage v. Mugrage*,⁹ in which there was a history of domestic violence and an active restraining order between the parties, Judge Thomas Dilts entered a protective order dictating the conditions of deposition. Specifically, the court directed that deposition occur at the court facility, and that there be no communication between the parties before, during or after the deposition. The court further implemented a seating chart.

A *Tevis*¹⁰ claim alleging the transmission of a sexually transmitted disease should normally be subject to the entry of a protective order. In fact, any reference to physical or psychological conditions should be subject to a protective order as disclosure may impact employment opportunities, qualification for insurance or dozens of other equally important matters. All discovery and litigation should be carefully controlled as few parties wish the information to become public, or become an obstacle to future employment or licensing opportunities.

In *Smith v. Smith*,¹¹ the parents of the plaintiff, prominent in social circles, intervened in the divorce

proceeding seeking a protective order restricting the disclosure of allegations of excessive alcohol use. The issue was raised in relation to the plaintiff's application to relocate to her parents' residence in South Carolina. Judge Jack Sabitino denied the application, finding that the judicial policy of open proceedings outweighed any fear of potential reputation damage.

In *D v. D*,¹² the husband sought the release of medical records resulting from a period of psychiatric treatment the wife received at Greystone Park State Hospital two years before the divorce proceeding. Both parties sought residential custody. The wife invoked the patient-physician privilege. Judge Bertram Polow ruled that the records would be produced to the court for an in camera inspection. If her present medical or psychological condition could be established through other means such as a current independent medical examination, sufficient good cause may exist for the entry of a protective order barring the production of her previous medical records or the deposition of her previous treating physician.¹³

PROTECTING THIRD-PARTY BUSINESS INTERESTS

Rule 4:10-3 related to the entry of protective orders in civil actions provides as follows:

On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

That the discovery not be had;

That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.

That discovery be conducted with no one present except persons designated by the Court:

That a deposition after being sealed be opened only by order of the Court;

That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

When a protective order has been entered pursuant to this rule, either by stipulation of the parties or after a finding of good cause, a non-party may, on a proper showing pursuant to R. 4:33-1 or R. 4:33-2, intervene for the purpose of challenging the protective order on the ground that there is no good cause for the continuation of the order or portions thereof. Neither vacation nor modification of the protective order, however, establishes a public right of access to unfiled discovery materials.

A moving party must establish a *prima facie* showing of good cause for the entry of a protective order.¹⁴ Judge Leonard Arnold, sitting in the general equity part of the Somerset County Superior Court, issued the first reported New Jersey opinion discussing what factors should be considered in determining whether "good cause" has been shown.¹⁵ These factors are still in use today:

1. The nature of the lawsuit and the

- issues raised by the pleadings;
2. The substantive law likely to be applied in the resolution;
 3. The kind of evidence which could be introduced at the trial, and the likelihood of it being discovered by the pretrial discovery procedure which is the subject of the application for a protective order;
 4. Whether trade secrets, confidential research, or commercial information are sought in the discovery procedure employed, whether they are material and relevant to the lawsuit, and whether a protective order will insure appropriate confidentiality; (citations omitted)
 5. Whether the pretrial discovery seeks confidential information about persons who are not parties to the lawsuit; (citations omitted)
 6. Whether the pretrial discovery sought involves privileged material; (citations omitted)
 7. Whether the pretrial discovery sought relates to matters which are or are not in dispute;
 8. Whether the party seeking discovery already has the materials sought; (footnote omitted)
 9. The burden or expense to the party seeking the protective order.¹⁶

In attempting to establish good cause, the most commonly used justification in civil matters relates to the burden, trouble or expense of producing requested discovery materials.¹⁷ In *Isetts*, Judge Clarkson Fisher ruled that a general release of liability, which did not expressly include a waiver of disclosure cannot serve to limit the scope of discovery in a subsequent action involving similar parties. The litigation arose in the context of a second Conscientious Employee Protection Act claim by a police officer against his department for continued retaliation and harassment. The court denied the application of the defendants for a protective order limiting the scope of discovery to events occurring after the date of the general release.

In *Trump's Castle Assoc. v. Talone*,¹⁸ a non-party appealed the

trial court's decision denying the entry of a protective order. Judge Michael P. King ruled that, where a non-party objects to a subpoena seeking disclosure of trade secrets or proprietary information, the trial court should conduct an *in camera* review to determine if the subpoenaed information is protected from routine discovery disclosure.

The protection of confidential financial information, intellectual property or trade secrets has also been advanced as a justification for entry of a protective order.¹⁹

The rule also permits the entry of a protective order upon application by a non-party. A non-party may intervene in an action for the purpose of supporting or challenging the entry of a protective order. Such an application would be common in cases involving an ownership interest in a business, the existence of parental or third-party loans, the comingling of marital funds with assets of third parties or attempts to release confidential business information through the use of subpoenas.

Upon entry of a protective order, a court may direct that an application for certain discovery be denied, as well as the imposition of terms and conditions for effectuating such discovery, the exclusion of specified matters, limitations on disclosure of the information to third parties or entities, the protection of privileged information or trade secrets or the sealing of specified documents.²⁰ This presents enormous concerns for the family law attorney as, absent the entry of a protective order or a stipulation, parties must provide the requested discovery and are free to disclose discovered information as they deem appropriate. In other words, after being made part of a matrimonial litigation, without the entry of a protective order, trade secrets, tax documents and medical records can theoretically be freely disseminated.

In *Berrie v. Berrie*,²¹ the trial court quashed a subpoena seeking to take the deposition of the plain-

tiff's brother, who owned and operated a business similar to a business operated by the plaintiff that was subject to equitable distribution. The plaintiff argued that information pertaining to his brother's business would constitute the closest and most useful comparable for purposes of determining fair market value. The plaintiff's brother objected as the information sought was both confidential and proprietary. The letter concluded that the right of privacy with respect to personal financial affairs and confidential business records far outweighed the necessity of disclosure; other means existed to establish the value of the plaintiff's business, including a forensic business valuation.

In *Gerson v. Gerson*,²² Judge Harvey Sorkow denied a request for the entry of a protective order sought by the husband. The wife moved for an order permitting her forensic accountant to inspect the books and records of a New York-based corporation in which the husband was a 50 percent shareholder. The corporation intervened in the action and objected to the inspection on the basis of the Fifth Amendment privilege, as both the shareholders and the corporation were under investigation by the IRS. These objections were rejected by the court, and the books and records were provided for inspection.

Judge Conrad Krafe reached a similar decision in *Merns v. Merns*.²³ The court permitted depositions and the examination of corporation records by a forensic accountant conditioned upon a protective order limiting the disclosure of any information to anyone except the parties, their experts or the court.

PROTECTING ATTORNEYS

In *Torraco v. Torraco*,²⁴ Judge Sorkow held that a detective hired by the attorney for the wife acted as an agent for the attorney and could not be subject to a deposition pursuant to the attorney-client and work product privileges. It is important to note that, for this privilege to

apply, the attorney, not the litigant, must hire the detective.

Pursuant to Rule 4:10-2(g), a party may apply for a protective order seeking the return of inadvertently released material during the discovery process. For example, accidentally producing an email attachment to discoverable materials can result in the entry of a protective order prohibiting the use of the information at trial.

Any application for the entry of a protective order may include an application for an award of expenses, including attorney fees, pursuant to the provisions of Rule 4:23-1(c). This includes an award of expenses against a party to the litigation or a third party intervening in the matter.

CONCLUSION

Prior to 1969, the court rules permitted no discovery in divorce or nullity actions without court order. The predecessor to Rule 5:5-1 modified the pre-1969 practice but recognized that, in the context of matrimonial litigation, discovery is subject to abuse as a device by which spouses may harass one another. On balance, over the years, the Supreme Court committees on matrimonial litigation have determined that the benefits of discovery outweigh the potential detriments, while keeping in place throughout the court rules availability of protective orders. ■

ENDNOTES

1. 329 U.S. 495, 507 (1947).
2. 467 U.S. 20, 34-35 (1984).
3. Hon. Margaret D. McGarity, Privacy and Litigation, *Journal of the American Academy of Matrimonial Lawyers* 23 (2010): 101.
4. Richard A. Warshak, Payoffs and Pitfalls of Listening to Children, *Journal of Family Relations* 52 (2003): 373-75.
5. Gould and Martindale, Including Children in Decision Making about Custodial Placement, *Journal of the AAML* 22: 303-09.

6. *Lavene v. Lavene*, 148 N.J. Super. 267, 272 (App. Div.), cert. denied 75 N.J. 28 (1977).
7. Daniel Tranel, The Release of Psychological Data to Non Experts: Ethical and Legal Considerations, *Professional Psychological Research and Practice* 25 (1994): 33-38.
8. 258 N.J. Super. 157 (Ch. Div. 1979).
9. 335 N.J. Super. 653 (Ch. Div. 2000).
10. *Tevis v. Tevis*, 79 N.J. 422 (1979).
11. 379 N.J. Super. 447 (Ch. Div. 2004).
12. 108 N.J. Super. 149 (Ch. Div. 1969).
13. See also *Kinsella v. Kinsella*, 150 N.J. 276 (1997).
14. *Kerr v. Able Sanitary and Envtl. Serv., Inc.*, 295 N.J. Super. 147 (App. Div. 1996).
15. *Catalpa Inv. Group, Inc. v. Franklin Twp. Zoning Bd. of Adjustment*, 254 N.J. Super. 270 (Ch. Div. 1991).
16. 254 N.J. Super. at 273-74
17. See, e.g., *Isetts v. Borough of Roseland*, 364 N.J. Super. 247, 262 (App. Div. 2003).
18. 275 N.J. Super. 159 (App. Div. 1994).
19. *Hammock by Hammock v. Hoffman-Laroche, Inc.*, 142 N.J. 356 (1995); see also *Herman v. Sunshine Chemical Specialties, Inc.* 133 N.J. 329 (1993).
20. 295 N.J. Super. at 155 (App. Div. 1996).
21. 188 N.J. Super. 274 (Ch. Div. 1983).
22. 148 N.J. Super. 194 (Ch. Div. 1977).
23. 185 N.J. Super. 529 (Ch. Div. 1982).
24. 236 N.J. Super. 500 (Ch. Div. 1989).

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