SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of the more interesting changes in significant areas of practice.*

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The congregation of the Mount Carmel Reformed Episcopal Church held its weekly services in a local school building until the spring of 1981, when a rental increase forced the group to meet elsewhere. Their minister, defendant Robert J. Cameron, opened up his Franklin Township home as the temporary site for services until a more permanent place of worship could be located. About twenty-five people attended the hour-long services, which included prayers, a sermon, and a collection. 100 N.J. at 589, 498 A.2d at 1218. The township's zoning ordinance, however, excluded "churches and similar places of worship" from the use district in which Cameron's home was situated. On August 11, 1981, as a result of a neighbor's complaint, the township charged Cameron with violating the relevant ordinance by using his residence for purposes other than those permitted. *Id.* at 589-90, 498 A.2d at 1218-19.

A municipal judge directed Cameron to cease conducting worship services in his home. The judge decreed that each future violation would be subject to a $500 fine. *Id.* at 590, 498 A.2d at 1219. Upon Cameron's appeal and a new trial, the law division upheld the municipal court's finding that Cameron had violated the zoning ordinance. The appellate division affirmed this decision, but Judge Antell dissented on the ground that the ordinance was unconstitutionally vague. *Id.*

The New Jersey Supreme Court reversed the appellate court's decision, agreeing with Judge Antell that the ordinance was impermissibly vague. The court held that the ordinance as applied to Cameron was "unenforceable as a matter of constitutional due process." *Id.* at 602, 498 A.2d at 1225. In its analysis, the court observed that the purpose of the constitutional prohibition of vague laws was to invalidate regulations that fall short of providing "adequate notice of their scope and sufficient guidance for their application." *Id.* at 591, 498 A.2d at 1219. Justice Handler, writing for the majority, emphasized that under the vagueness doctrine, all statutes need not attain a uniform level of definitional clarity. *Id.* at 592, 498 A.2d at 1220. Nonetheless, in order to withstand a vagueness challenge, the terms of a particu-

lar provision must be understandable to a reasonably intelligent person. Justice Handler noted that an allegation of vagueness will precipitate an examination of the purpose of the particular law in conjunction with its contextual background. *Id.* at 591, 498 A.2d at 1219. In instances where the defendant is threatened with encroachment upon his first amendment liberties, he stated that the scrutiny accorded legislation must be "especially scrupulous." *Id.* at 592, 498 A.2d at 1220.

The court noted that another consideration upon which to judge vagueness is whether a statute is challenged "facially" or "as applied." A statute challenged "facially" may be voided if it fails to proscribe particular conduct with substantial certainty. In contrast, a statute challenged "as applied" may be unenforceably vague if the specific conduct against which it is to be enforced is not prohibited with sufficient clarity. *Id.* at 593, 498 A.2d at 1220. In either case, five factors upon which "the level of judicial scrutiny and degree of required clarity will depend [are] the purpose of the statute, the context in which the law is challenged, the conduct that is subject to its strictures, the nature of the punishment that is authorized, and, finally, the potential impact of the statute upon activities and interests that are constitutionally protected." *Id.* at 594, 498 A.2d at 1221.

In the context of constitutionally protected interests, Justice Handler observed that subtle distinctions in meaning could have critical consequences when a word like "church" is employed in a penal statute. For example, he noted that "church" could be interpreted to mean any place used for religious services. He also suggested that the ordinance could validly be construed to prohibit only the construction of a building architecturally designed and adopted for religious use. *See id.* at 595-96, 498 A.2d at 1221-22. Justice Handler pointed out, however, that such an emphasis on the structure alone would not outlaw the use of a single-family house for prayer services. *Id.* at 598-99, 498 A.2d at 1223. The majority therefore held that the ordinance failed to provide sufficient warning or guidelines to ensure that it would be consistently and uniformly enforced. Thus, the court determined that the ordinance as applied against Reverend Cameron was impermissibly vague. *Id.* at 599, 498 A.2d at 1223-24.

Justice Clifford concurred in the result, but he chastised the majority for sidestepping the underlying issue of "whether a municipality can prevent residents from preaching, praying, singing hymns, and coming together in the name of their Lord in a pri-

vate residential dwelling." *Id.* at 602-03, 498 A.2d at 1225 (Clifford, J., concurring). Rather than relying on vagueness, Justice Clifford observed that the township had failed to sustain the heavy burden of proof that would justify governmental infringement of a first amendment right. *Id.* at 607, 498 A.2d at 1228 (Clifford, J., concurring). He remarked that the zoning power of local governments would be better exercised in pursuits other than the prevention of prayer meetings in private homes. *Id.* at 610, 498 A.2d at 1229 (Clifford, J., concurring).

In a lengthy dissent, Justice Garibaldi construed the ordinance to mean that a private dwelling is a "church" when it serves as the regular location for the services of an organized religious body presided over by an ordained minister. Accordingly, she believed that Cameron used his home as a church within the prohibition of the ordinance. *Id.* at 610, 498 A.2d at 1229 (Garibaldi, J., dissenting). Justice Garibaldi observed that the ordinance was not vague in terms of the commonly accepted definition of "church" and that procedural due process considerations were satisfied by virtue of the township's notice requiring Cameron to discontinue services. *Id.* at 625, 498 A.2d at 1238 (Garibaldi, J., dissenting). Additionally, she reasoned that there was no infringement of religious freedom because the ordinance's exclusion of "churches" from that particular district "pose[d] no threat to the continued existence of the Reformed Episcopal Church," and because nearby zoning districts that allowed churches would also permit church services in a private home. *Id.* at 615, 616, 498 A.2d at 1232 (Garibaldi, J., dissenting).

The *Cameron* holding does not purport to interfere with a municipality's power to regulate other uses of a private home that may be genuinely inconsistent with the distinctive character of a residential zone. Nonetheless, the result indicates that prosecutions under broadly written ordinances will not be tolerated. Consequently, municipalities will be required to draft regulatory provisions in a narrow fashion so that they may be clearly enforced against particularly offensive or detrimental conduct.

Stephanie Rubino

FAMILY LAW—STEPPARENT EQUITABLY ESTOPPED FROM DENYING SUPPORT OBLIGATIONS AFTER DIVORCE BASED UPON PARENT-CHILD BOND—*M.H.B. v. H.T.B.*, 100 N.J. 567, 498 A.2d 775 (1985).

Henry B. and Marilyn B. were married in 1966, and they had two sons during the first five years of their marriage. In 1975, the couple began to experience marital difficulties. The plaintiff, Marilyn, then had an extramarital affair. She gave birth to a daughter, K.B., in 1977. Three months after the birth of that child, the defendant, Henry, suspected that he was not the natural father and moved out of the house, ultimately settling in Wisconsin. Throughout the separation, Henry maintained contact with the children through letters, phone calls, visits, and gifts. 100 N.J. at 569, 498 A.2d at 775-76 (Handler, J., concurring). Marilyn and the children lived with K.B.'s "purported natural father" for a short period of time. She later moved with the children to Henry's residence in Wisconsin, but attempts to reconcile failed, and the couple divorced in 1980. *Id.* at 569-70, 498 A.2d at 776 (Handler, J., concurring). The divorce agreement stipulated that all three children were Henry's, that Marilyn would assume custody, and that Henry would provide child support. *Id.* at 570, 498 A.2d at 776 (Handler, J., concurring).

Henry remarried in 1981. The following year, he petitioned a Wisconsin court for custody of all the children. The case was subsequently transferred to New Jersey, where the mother resided. Shortly thereafter, Marilyn instituted a separate action, seeking to retain custody of the children and increased child support payments. Henry filed a counterclaim in order to gain custody of the children. In the alternative, Henry contested his paternity of K.B. and petitioned the court to remove his support obligation on the ground that he was not K.B.'s natural father. During the trial, the results of a blood test confirmed that Henry was not the natural father. *Id.* at 571, 498 A.2d at 777 (Handler, J., concurring). The trial judge held that Henry was precluded from denying his support obligation under the theory of equitable estoppel, however, because he had become " 'K.B.'s psychological, if not biological parent.' " *Id.* at 572, 498 A.2d at 777 (Handler, J., concurring). A divided panel of the appellate division affirmed this holding. *Id.* On appeal, an evenly-divided New Jersey Supreme Court affirmed the appellate court's decision in a per curiam opinion. *Id.* at 568, 498 A.2d at 775.

Writing a concurrence in which Chief Justice Wilentz and Justice O'Hern joined, Justice Handler noted that the case was controlled by *Miller v. Miller*, 97 N.J. 154, 478 A.2d 351 (1984), a case in which a stepparent was equitably estopped from denying a support obligation because he had assumed full parental responsibility while deterring the children from maintaining any personal or financial relationship with their natural father. *See M.H.B.*, 100 N.J. at 572-73, 498 A.2d at 777-78 (Handler, J., concurring). Applying the *Miller* principles to the instant case, Justice Handler observed that Henry had consistently nurtured a loving parent-child relationship despite his suspicion of K.B.'s illegitimacy. Therefore, K.B. justifiably relied on Henry's paternal representations. *Id.* at 573-74, 498 A.2d at 778 (Handler, J., concurring). Justice Handler reasoned that material, financial, and emotional responsibilities flowed from the parent-child bond that Henry had created. If Henry were permitted to repudiate those parental responsibilities, "K.B. would suffer demonstrable harm fully commensurate with her dependent condition." *Id.* at 574-75, 498 A.2d at 779 (Handler, J., concurring). Acknowledging that the imposition of liability for child support upon a stepparent was warranted only in exceptional circumstances, Justice Handler reasoned that Henry's voluntary actions and K.B.'s corresponding reliance on those actions, coupled with the fact that K.B. knew no other "father," justified the imposition of liability. *Id.* at 579, 498 A.2d at 781 (Handler, J., concurring).

Concurring in part and dissenting in part, Justice Pollock suggested that Justice Handler's concurrence had unwisely expanded *Miller* to impose liability "not on the basis of estoppel but [on the basis] of a perceived emotional bonding between stepparent and child." *Id.* at 580, 498 A.2d at 782 (Pollock, J., concurring in part and dissenting in part). Justice Pollock maintained that the natural parent remains the primary source of financial support for his child and that an exception should be made only where the stepparent " 'actively interferes with the children's support from their natural parent.' " *Id.* (quoting *Miller*, 97 N.J. at 169, 478 A.2d at 359). He observed that, unlike *Miller*, the record in the present case revealed no effort by Henry to interfere in any relationship between K.B. and her natural father, a man whose identity and whereabouts were known by K.B.'s mother. *Id.* at 581-82, 498 A.2d at 782 (Pollock, J., concurring in part and dissenting in part).

Although reluctant to avoid *Miller's* requirement that the nat-

ural parent should bear the principal support responsibility whenever possible, Justice Pollock agreed that Henry was obliged to continue supporting K.B., but only until judgment could be obtained against the natural father. *Id.* at 584, 498 A.2d at 784 (Pollock, J., concurring in part and dissenting in part). He believed that the case should be reevaluated in the chancery division in view of the *Miller* decision. Justice Pollock stated, however, that because of Henry's prior agreement to support K.B., which was incorporated into the divorce decree, Henry would have to prove that support from K.B.'s natural father would be in the child's best interests before his obligation could be terminated. *Id.* at 584-85, 498 A.2d at 784 (Pollock, J., concurring in part and dissenting in part).

An inherent impropriety exists in a rule that serves to alleviate the natural father's support obligation on the basis of the "perceived emotional bonding" between a stepparent and child, particularly where there has been no interference that would discourage a natural parent from fulfilling his responsibilities. Such a rule imposes no liability on the natural father; rather, it penalizes a stepparent for caring too much. Moreover, Justice Handler's opinion affords no indication of the point in the relationship at which financial obligation attaches.

In addition, the concurrence's rule may lead to inequitable results. Both the mother and father are capable of building a strong parent-child relationship, and repudiation of the child by either parent would cause harm. Presumably, however, legal sanctions will be imposed only against the financial provider. Thus, at least one question remains unanswered—what legal obligations, if any, will be imposed on the noncustodial stepparent who strives to create a loving parent-child relationship, but who is not the financial provider in the family?

Lynn Menschenfreund

TAXATION—STATE TAXATION OF INTERSTATE COMMERCE—USE OF PART-TIME, NONRESIDENT EMPLOYEES AND AFFILIATE OFFICES PROVIDES SUFFICIENT MINIMUM CONTACTS FOR NEW JERSEY TO TAX OUT-OF-STATE CORPORATION—*Avco Financial Services Consumer Discount Co. One v. Director, Division of Taxation*, 100 N.J. 27, 494 A.2d 788 (1985).

Avco Financial Services Consumer Discount Company One (Avco) is a Pennsylvania corporation. During the taxable years of 1974 and 1975, it provided consumer loans and sold credit insurance to New Jersey residents. This service operated through the company's branch offices in Pennsylvania cities near the New Jersey border, along with New Jersey affiliates that were permitted to receive payments on the loans. 100 N.J. at 33-34, 494 A.2d at 792. When Avco filed New Jersey tax returns for the years in question, it indicated that it had "derived no income from sources within New Jersey," although it had received an estimated $150,000 each year in interest income from New Jersey borrowers. *Id.* at 35, 494 A.2d at 792. Based on these estimates, the Director of the Division of Taxation assessed a corporate income tax deficiency against Avco for 1974 and 1975. *Id.*, 494 A.2d at 792-93.

On appeal, the tax court granted Avco's refund claim, holding that the imposition of New Jersey's corporate income tax in this case ran afoul of both the due process clause and the commerce clause of the United States Constitution. The appellate division reversed on the ground that there was a rational relationship between the income derived by Avco from New Jersey and the benefits conferred by the state. The New Jersey Supreme Court granted certification and affirmed the holding of the appellate division. *See id.* at 35-36, 494 A.2d at 793. The court held that Avco "had the 'minimal connection' with New Jersey sufficient to sustain a tax that bears a 'rational relationship between the income attributed to the State and the intrastate values of the enterprise.' " *Id.* at 30-31, 494 A.2d at 790.

Justice O'Hern, writing for the majority, initially addressed Avco's claim that no income was earned in New Jersey. This contention was based on Avco's classification of the loans and promissory notes, along with the interest generated, as intangible personal property. According to Avco, this intangible personal property retained a tax situs in the domicile of the lender. *Id.* at 36, 494 A.2d at 793. The court declared, however, that the Leg-

islature had not limited the taxation of intangibles to the state of commercial domicile. Therefore, it found that the interest income was subject to New Jersey's constitutional reach because it was generated from sources within the state. *Id.* at 37, 494 A.2d at 793.

The court next addressed the question of whether there was a "minimal connection" between Avco's interstate activities and New Jersey. *Id.*, 494 A.2d at 794. The court recognized that Avco maintained no offices, did not own or lease property, and had no full-time employees in New Jersey. *Id.* at 39, 494 A.2d at 794. The court also noted, however, the "substantial physical presence" of Avco employees in New Jersey as part of a systematic effort to collect overdue accounts, the use of affiliate offices to accept payments, and in cases of default, the use of the New Jersey courts to enforce customer obligations. *Id.* at 38, 494 A.2d at 794. In declaring that the decisive consideration was "not what is absent, but what is present," the court found that Avco maintained "distinctive contacts" with the state and thus had the requisite nexus with New Jersey. *Id.* at 40, 494 A.2d at 795.

Finally, the court considered the issue of whether a rational relationship existed between the tax imposed upon Avco and the in-state values. *Id.* at 41, 494 A.2d at 796. This determination turned on whether Avco's tax liability was "out of all appropriate proportion to the business transacted." *Id.* In holding that the tax was not out of proportion, the court noted that Avco's branch supervisors spent three to five per cent of their time in New Jersey, while less than one per cent of Avco's 1974 New Jersey income was collected as tax. *Id.*

In a dissenting opinion, Justice Clifford advocated reversal of the appellate division's judgment on the ground that the tax was not supported by a sufficient nexus with the State of New Jersey. *Id.* at 43, 494 A.2d at 797 (Clifford, J., dissenting). He emphasized the absence of any continuous solicitation and any physical plants or offices in the state. *Id.* at 45, 494 A.2d at 798 (Clifford, J., dissenting). According to Justice Clifford, the use of the New Jersey courts, the in-state offices that assisted collection efforts, and the infrequent visits by collectors fell far short of a "substantial physical presence" and were therefore an insufficient basis on which to justify the imposition of tax liability. *Id.*

The decision of the *Avco* court is sound in its reasoning as well as equitable in its result. Upon a reading of the facts, it is fair to conclude that Avco received sufficient benefit from New

Jersey to justify the tax imposed. Nevertheless, the majority's determination that the requisite nexus was satisfied by "distinctive contacts" between the corporation and the state limits the holding to the particular facts of this case. The majority clearly favors an expansive view of the state's power to tax, but the holding provides little in the form of guidelines as to the scope of that power. As a result, the factors that may constitute a "minimal connection" will continue to be determined on a case-by-case basis.

James F. Mullen

ATTORNEY-CLIENT—ATTORNEY-CLIENT PRIVILEGE DOES NOT BAR DISCLOSURE OF CLIENT'S ADDRESS TO COURT—*Fellerman v. Bradley*, 99 N.J. 493, 493 A.2d 1239 (1985).

Nanc Fellerman and Francis Bradley were divorced in 1983. By court order, Bradley was responsible for paying the initial fees for the services of a court-appointed accountant. 99 N.J. at 496, 493 A.2d at 1241. The accountant's final bill for $375.00 was submitted to Ralph Ferro, Bradley's attorney. *Id.* at 496-97, 493 A.2d at 1241. Upon conclusion of the divorce litigation, the final judgment incorporated an agreement between the parties requiring Bradley to pay the accountant's fees. The trial court then wrote to Ferro, seeking payment of the fees. While Ferro admitted knowing Bradley's whereabouts, he refused to disclose his client's address to the court. Ferro based his refusal on the attorney-client privilege. *Id.* at 497, 493 A.2d at 1241.

When Ferro failed to comply with the trial court's initial request, the trial judge threatened to hold the attorney in contempt of court. Ferro again claimed the attorney-client privilege as a justification for his actions. The trial court held that recognition of the privilege under these circumstances would violate its purposes and ideals as well as frustrate the court's judgment. Consequently, the court ordered Ferro to disclose the address. Faced with the possibility of incarceration for violation of the order, Ferro appealed to the appellate division. He claimed that the privilege should be construed strictly in order to encourage free communication between an attorney and his client and that the address was a "confidence or secret" protected from disclo-

sure by Disciplinary Rule 4-101. The appellate division agreed that the privilege should be construed strictly, but concluded that the "crime or fraud" exception to the privilege permitted disclosure of Bradley's address. In addition, the court rejected Ferro's argument regarding the applicability of the disciplinary rule. Subsequently, the New Jersey Supreme Court granted certification. *Id.*

Justice Handler, writing for a unanimous court, affirmed the lower courts' decisions. *Id.* at 497-98, 493 A.2d at 1241. In so doing, he surveyed cases in this and other jurisdictions that considered the issue of whether an address may be the subject of a protected communication between an attorney and his client. While he found that an address is not necessarily outside the protection of the privilege, the invocation of the privilege must be consistent with judicial policy. *Id.* at 501, 493 A.2d at 1244. In this regard, Justice Handler noted that there are exceptions to the privilege that limit its application to the purposes for which it was designed. *Id.* at 502, 493 A.2d at 1244. One such exception has been codified in New Jersey's evidentiary rules and provides that the attorney-client privilege is not applicable where it aids in the commission of a crime or fraud. *Id.* at 503, 493 A.2d at 1244 (citing N.J. STAT. ANN. § 2A:84A-20(2)(a) (West 1976)). Applying the "crime or fraud" exception to the case at bar, the court held that defendant Bradley's effort to prevent the disclosure of his address by his attorney was an attempt to perpetrate a fraud against the court. *Id.* at 505, 493 A.2d at 1246.

Justice Handler also rejected Ferro's argument that New Jersey's Disciplinary Rule 4-101, prohibiting an attorney from revealing a confidence or secret of his client, precluded him from supplying Bradley's address to the court. *Id.* at 507-09, 493 A.2d at 1247-48. The court reasoned that if the fraud exception applied to a particular communication, as it did here, then the communication could not be deemed a "confidence" under the rule. *Id.* at 508-09, 493 A.2d at 1248. Additionally, the court determined that while Bradley's address was a "secret," the disciplinary rules allowed an attorney to disclose "secrets" when ordered to do so by a court. *Id.* at 509, 493 A.2d at 1248. Therefore, the supreme court affirmed the judgment of the appellate division. *Id.* at 510, 493 A.2d at 1248.

In deciding that disclosure of Bradley's address was well within the fraud exception to the attorney-client privilege, the court's reasoning is consistent with prior New Jersey cases. Nev-

ertheless, the court's holding is a narrow one, limited to the facts of this case. As a practical matter, it remains necessary for the attorney to determine whether nondisclosure of his client's address violates judicial policy. While in most instances this determination will be clear, borderline cases must still be decided on an ad hoc basis.

Lisa Rose

PROPERTY—LANDLORD-TENANT—TESTIMONY OF FELLOW TENANTS UNNECESSARY IN EVICTION PROCEEDINGS AGAINST VIOLENT TENANT—*Housing Authority v. Jones*, 204 N.J. Super. 600, 499 A.2d 1020 (App. Div. 1985).

Ezra Jones and his family resided as tenants in the Walsh Homes apartment complex, which was owned by the Housing Authority of the City of Newark. On or about April 23, 1984, in response to reports that one of Mr. Jones's daughters had stabbed the other in the hand, the Housing Authority served him with a notice demanding that he prevent members of his family from acting destructively and in a disorderly manner. 204 N.J. Super. at 602, 499 A.2d at 1021. On October 17, 1984, two weeks after both daughters had been arrested for assaulting two Housing Authority security officers with a chain and screwdriver, the Housing Authority served Mr. Jones with a notice terminating his tenancy. Mr. Jones refused to vacate the apartment. *Id.* at 602-03, 499 A.2d at 1021. The Housing Authority then brought a summary dispossess action, seeking eviction under N.J. STAT. ANN. § 2A:18-61.1(b) (West Cum. Supp. 1985-1986), which allows eviction of tenants if they continue, after written notice, to disrupt the peace and quiet of other occupants of the neighborhood. *Jones*, 204 N.J. Super. at 602, 499 A.2d at 1021.

Although the trial court conceded that the Housing Authority had good cause for eviction, it dismissed the action because no tenant had come forward to testify that his peace and quiet had been disturbed. *Id.* Nevertheless, the court acknowledged the possibility that the tenants' silence was due either to their not being disturbed or to their fear of reprisal. *Id.* at 603, 499 A.2d at 1022.

The appellate division reversed and remanded, noting that

the requirement that other tenants testify stemmed from prior cases involving an earlier statute prohibiting disorderly conduct by a tenant. *Id.* These cases stated that "it is not enough that the tenant's conduct is disturbing; it must be disturbing to other tenants of the landlord." *See id.* at 603-04, 499 A.2d at 1022. The court distinguished these cases from the present action, however, based on the extremely violent nature of the respondents' acts.

Writing for the panel, Judge Bilder observed that the requirement of tenant testimony was adequate for minor intrusions on peace and quiet for which individual tolerances may be taken into account. He stated that violent conduct, however, "is *per se* a destruction of peaceful residence . . . and requires no evidence beyond proof of the violence itself to establish a ground for eviction." *Id.* at 604, 499 A.2d at 1022. Both the landlord and the tenants have a right to an apartment building free of violence. Therefore, the court concluded, the Housing Authority should not be limited to evidence from other tenants to prove that the violent conduct occurred in sufficient proximity to the apartment complex so as to disturb their peace and quiet. Testimony from the Housing Authority security guards, although they were not tenants, would suffice as grounds for eviction of the Jones family. *Id.* at 604-05, 499 A.2d at 1022.

Depriving a family of its home is a serious matter. The trial court's decision, based on the notion that nonresident landlords should not be able to evict tenants capriciously for infractions otherwise tolerable to their fellow lessees, was consistent with that belief. Nevertheless, the appellate court recognized that violent tenants can either explicitly or implicitly intimidate their neighbors from testifying against them. Therefore, allowing evidence from outside sources will permit minor disturbances to be settled between neighbors, while helping to insure that both tenants and landlords do not become the prisoners of their malicious neighbors.

Kenneth J. Auslander