Settlement Negotiations as Evidence in Contested Custody Disputes: Highly Probative Evidence or an Impermissible Infringement on a Party's Right to Confidentiality?

by Thomas DeCataldo

Any practitioner regularly handling family law matters has been there. You are sitting in the hallway of the courthouse as part of an all-day-long intensive settlement conference. In the throes of a contentious and protracted dispute, a previously intractable party finally makes an offer of compromise on a custody issue, but the offer comes with a catch — the offer is conditioned upon obtaining a specific result on an unrelated economic issue such as alimony or equitable distribution. Enraged and frustrated, your client begins questioning whether the court can be made aware of this negotiation tactic, which unquestionably uses the children as negotiable items. Much like anything else in the law, the answer to this question depends upon the unique facts and circumstances of the case.

This scenario happens regularly. For example, a party may be willing to agree to a more expansive parenting schedule for the non-custodial parent if the alimony award paid to that party is increased. Alternatively, one party may be willing to consent to another parent's request to relocate with a child, conditioned on certain economic demands being met. Sometimes, the tactic is not as unsavory as it might sound and there is a cognizable nexus between the custody issue and the economic issue. A party may be considering a compromise in good faith, but certain economic considerations are triggered if the compromise is made, such as in a dispute over sending a child to private school. Other times, one party may believe if they compromise on one issue, such as custody, they are entitled to a concurrent compromise on another issue.

Most practitioners recognize that negotiating the rights of children in exchange for money or some other unrelated demand is an anathema, universally disfavored by judges and custody experts. However, in matrimonial practice it goes on every day. The parties are supposed to formulate their positions in a custody dispute based upon the best interests of the children. When a parent leverages their position on a custody issue against another demand, one must question whether they are sincerely advocating for the best interests of a child or simply advancing their own agenda. Evidence of such behavior has the potential to be highly probative in a custody dispute, for purposes of credibility, and for purposes of evaluating whether a parent sincerely believes their proposed position reflects the arrangement that is best for the children at issue.

There is a fundamental difference between negotiating resolutions to custody and parenting time disputes and negotiating financial issues in family law disputes. With the former, the outcome of the dispute carries tremendous significance to the child at issue. The resolution to a custody dispute determines where a child will live, how major decisions will be made for the child, and how often the child will see his or her parents. Our courts have previously recognized the importance of resolving this issue, holding:

> "There are obviously few judicial tasks which involve the application of greater sensitivity, delicacy and discretion than the adjudication of child custody disputes, which result in greater impact on the lives of those affected by the adjudication, and which require a higher degree of attention to the properly considered views of professionals in other disciplines."[1]

While economic issues also carry significance in the lives of the family involved in the dispute, clearly the stakes are not quite as high.

Most litigants going through a custody dispute are routinely assured that a family part judge will never learn

about the substance of settlement negotiations because of the various evidence rules governing settlement discussions, but a legitimate question arises as to whether that should hold true. While the mere mention of settlement negotiations to family part judges often triggers a protective and disinterested response, the reality is that the rules of evidence are not quite as stringent as many attorneys and judges seem to believe. In certain settings, settlement negotiations are not sacrosanct or unmentionable and in fact they are appropriately admissible in court.

In this author's opinion, there are several valid reasons settlement proposals in child custody disputes should be more regularly admitted into evidence, depending upon the circumstances in which they arise. Conversely, there are also numerous valid reasons why these proposals should be excluded from evidence. This article examines the various considerations that are triggered when a party to a custody dispute seeks to include such evidence in a contested custody dispute.

The Rules Governing Settlement Negotiations

In determining whether or not to allow settlement proposals into evidence, it is important that the context of the proposal be established, as this will dictate the rules of its admissibility. Essentially, there are two rules that govern the admissibility of settlement negotiations: N.J.R.E. 408 and N.J.R.E. 519. The former governs general settlement negotiations and the latter governs mediation and meditation communications. Although the two rules are distinct and distinguishable, they are often confused and relied upon improperly.

Many times, family law practitioners convey a settlement proposal and refer to the proposal as privileged, or inadmissible in any further action. However, these statements are a misnomer if the proposal did not constitute a mediation communication. Settlement proposals in New Jersey are not privileged and are not confidential. To the contrary, they are supposed to be admissible in evidence so long as they are proffered for a permissible purpose.

Settlement negotiations are governed by N.J.R.E. 408. This rule does not convey any privilege or confidentiality to such communications. In fact, it is simply a rule of relevance – not a codified privilege. Specifically, the rule provides as follows:

> "When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim, shall not be admissible to prove liability for, or invalidity of, or amount of the dispute claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.[2]"

The rule governing settlement negotiations differs significantly from the rule governing mediation. If the parties exchange settlement proposals as part of mediation, the situation is governed by N.J.R.E. 519, not N.J.R.E. 408. This rule *does* render mediation communications privileged and confidential, with only very narrow exceptions, such as evidence of a signed agreement in a record, or if a threat of criminal conduct is made, among other very limited exceptions.[3]

The two rules have important distinctions. To begin, they are not even housed in the same chapter of the rules of evidence. The rule governing settlement offers and negotiations is provided under "Relevancy and Its Limits." The rule governing mediation is addressed under "Privileges." Consequently, settlement negotiations are deemed irrelevant, whereas mediation communications are confidential and privileged. This is a critical difference.

Effectively, there is virtually no way to appropriately introduce mediation communications into evidence. The focus of this article is on settlement negotiations made outside of a mediation, as such communications are not subject to confidentiality or privilege – it is simply a question of whether they are relevant.

Evidence Rulings on Settlement Negotiations is a High Stakes Determination

When a party seeks to introduce evidence of settlement negotiations before a family part judge, the court is immediately confronted with a critical decision that can impact the outcome of the dispute, as well as an inherent and irreconcilable tension between the rights of children and the rights of the parents. Pursuant to New Jersey's custody statute, children are entitled to have a custody determination made by the court that promotes their best interests.[4] This decision must consider the 14 factors set forth in the statute, which include:

1. Parents' ability to agree, communicate and cooperate in matters relating to the child;

2. Parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;
3. Interaction and relationship of the child with its parents and siblings;
4. History of domestic violence, if any;
5. Safety of the child and the safety of either parent from physical abuse by the other parent;
6. Preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;
7. Needs of the child;
8. Stability of the home environment offered;
9. Quality and continuity of the child's education;
10. Fitness of the parents;
11. Geographical proximity of the parents' homes;
12. Extent and quality of the time spent with the child prior to or subsequent to the separation;
13. Parents' employment responsibilities; and
14. Age and number of children.[5]

For their part, parents are entitled to, and in fact required to, privately pursue amicable resolutions to custody and parenting time disputes before proceeding with litigation. By court rule, parents are required to attend custody mediation, where they negotiate resolutions to custody and parenting time issues.[6] Parents expect and rely upon these conversations being confidential and not ultimately admissible in court. To a large degree, the law supports this concept. New Jersey law favors and encourages amicable out-of-court settlement of disputes. This is the underlying rationale behind the evidence rule barring the use of settlement negotiations as evidence.[7]

New Jersey decisional law has recognized the high stakes facing trial judges when determining whether to allow settlement negotiations into evidence. The court must take great care to balance the probative value of any appropriate use of settlement evidence against the very great risk of prejudice caused by such evidence.[8] Without exaggeration, this one evidentiary ruling could easily impact the outcome of a dispute depending upon the content of the settlement negotiations.

The Case for Admitting Settlement Negotiations into Evidence

Generally, a party seeking to admit evidence of settlement negotiations into evidence does so for a specific reason. Little is gained if the information set forth in the settlement negotiations is simply a recitation of the trial positions. Ordinarily, this situation arises because the proponent of the evidence wishes to attack the credibility of the other parent, or undermine the sincerity and consistency of the position the other parent is taking in the custody dispute. There are several valid reasons why this evidence should be admissible.

To begin, the task at hand for both litigants and the court is to produce a resolution that promotes the best interests of a child. If information set forth in settlement negotiations assists in that task for some meaningful reason, the court does a disservice to the child if it fails to consider same. A parent's desire to keep settlement discussions private should not trump information that could lead to improving a custodial arrangement for a child. New Jersey law regularly makes clear that the rights of children are a priority over the rights of their parents. By way of a few examples, consider:

- Parents may never waive child support as part of a negotiation;
- Parties may not address custody or child support in a prenuptial agreement; and
- Parents may not consent to an emancipation age if the child is not actually emancipated.

If there is evidence in the form of settlement negotiations that demonstrates a parent is willing to compromise his or her position on the custody issues in exchange for some other demand being met, economic or otherwise, a strong case can be made that this evidence should be considered. There is authoritative support for this argument from two sources.

N.J.S.A. 9:2-4 Implicitly Authorizes the Use of Settlement Negotiations

First, the court is required to consider the 14 factors set forth in N.J.S.A. 9:2-4. Among these factors is the "parents' ability to agree and communicate in matters relating to the child," and "any history of unwillingness to allow parenting time not based on substantial abuse."[9] Both of these factors can be examined in certain circumstances by reviewing settlement negotiations.

With regard to the first factor, one can easily envision a scenario where a party links a proposed compromise on a custody issue to a concurrent unreasonable position. For example, a parent might be willing to allow a child to spend additional overnights with the adverse party if a certain demand is met. However, using N.J.R.E. 408 as

a shield, the parent opposes this request for additional overnights to the court in certifications and a trial brief. The parent seeking the additional overnights should be permitted to share this information with the court for purposes of demonstrating that the parent opposing this request was willing to agree to the relief conditioned on a different demand being met. Allowing this into evidence ensures the statutory factor is given proper consideration.

By the same token, the court must consider any unwillingness to allow parenting time that is not based on substantial abuse. If a parent is conditionally willing to allow additional parenting time, the court should consider the nature of the condition, so it can determine whether the unwillingness to allow the parenting time was reasonable or unreasonable. Without allowing the court to consider this information, it never really obtains a full picture, which inhibits an exhaustive application of the factors it is required to consider when fashioning an award of custody.

New Jersey Decisional Law Suggests Settlement Negotiations Should be Considered

In *Burns v. Burns*, a party refused to provide his former wife a Jewish "get," citing a religious objection.[10] However, the trial court allowed evidence of settlement negotiations, which demonstrated that the man was willing to provide the "get" if the wife transferred $25,000 into a trust for their daughter.

The court's rationale for allowing evidence of the settlement negotiations was relatively obvious. The use of the settlement proposal was authorized under N.J.R.E. 408 not to conclusively prove whether or not the wife was entitled to the "get," but rather for another purpose, namely to demonstrate that man's objection was not truly religious.

The Supreme Court of New Jersey has also recognized the need to relax the rules of evidence in contested custody disputes. In *Kinsella v. Kinsella*, the Supreme Court noted that one consequence of the special role of the courts in custody disputes is that evidentiary rules normally accepted as part of the adversarial process are not always controlling in child custody cases. The rules of evidence are somewhat relaxed in trials having to do with a determination of custody, where it is necessary to learn of the child's psychology and preferences. In order to determine what is in the child's best interest, courts have often relaxed the seemingly inflexible procedural rules of traditional adversary proceeding. Thus, it is said that the courts must try to give the parties their fair trial in open court and at the same time try to do what is best for the child or children.[11]

Although there is no published authority specific to the issue of settlement negotiations in family law matters since *Burns*, clearly the rationale in that decision could be analogized to custody disputes. For example, if a parent was unwilling to agree to a parenting plan in trial submissions, but there were prior settlement proposals that reflected a willingness to do so if other demands were satisfied, the court should consider the proposal to understand the true nature of the parents' objection, if there is one. This would also seem consistent with the Supreme Court's preference for relaxing the stringency of the rules of evidence in order to fairly determine a child's best interests.

The Supreme Court of New Jersey recognized that a child's best interests is the lodestar consideration in a custody matter.[12] Given the focus our courts place on promoting the best interests of the children, the use of settlement negotiations as evidence in custody disputes should be more readily allowed. A parent should not be permitted to use the rules of evidence to shield a willingness to compromise on the custody issues in exchange for money or some other demand unrelated to the child's best interests. If the court does not allow evidence of this nature, it is deprived of probative information that provides insight into the parent's sincerity with regard to the best interests of the child(ren) at issue, as well as that parent's credibility, which in the end, only serves to hurt the very children the court is seeking to protect.

The Case Against Admitting Settlement Negotiations

Although there may be numerous reasons to consider allowing settlement negotiations into evidence in a contested custody matter, there is also great danger that doing so creates serious and irreparable prejudice to a party.

To begin, it is somewhat inconsistent that New Jersey law provides such stringent protection to mediation communications, yet treats settlement negotiations made outside of mediation in a far less protective fashion. One could reasonably question why the involvement of a third-party mediator transforms what are effectively the same communications from settlement negotiations, treated under a relevancy standard, to mediation communications that are privileged and confidential. Applying simple common sense, one could reasonably extrapolate

that settlement negotiations should rarely, if ever, be evidential, if they are effectively the same thing as mediation communications and mediation communications are almost never admissible evidence.

Both the Legislature and the Judiciary favor amicable out-of-court settlements. N.J.R.E. 519 was enacted to mimic the mediation statute enacted by the Legislature.[13] As referenced above, the Supreme Court of New Jersey favors the amicable resolution of disputes without the need for litigation, hence the rationale behind barring settlement negotiations from coming into evidence.[14]

Given the judicial and legislative desire to encourage out-of-court settlements, there is real reason to be concerned that allowing settlement negotiations into evidence would have a chilling effect on the negotiation process. If parties feared that settlement discussions would one day be revealed to the family part judge, they may be reluctant or hesitant to make any suggestion of compromise, which discourages settlement. Clearly, this is not a public policy the judiciary or legislature would likely support. Again, this could lead one to surmise that settlement negotiations were not intended to be liberally allowed into evidence given the public policy consequences that would follow.

Additionally, the consideration of settlement proposals creates the real risk that a party is severely prejudiced by the disclosure of such information. Part of the underlying rationale of N.J.R.E. 408 contemplates that a party's willingness to compromise and avoid protracted litigation may be unrelated to the merits and sincerity of the party's position. A person may merely be seeking peace of mind when compromising a claim, or simply not want to pursue the matter.[15]

While this is true in all types of litigation, it is especially present in contested custody disputes. Often, parents simply do not want to expose their children to the trial process, which can include forensic evaluations, as well as the possibility of being interviewed by an expert or the trial judge. Under these scenarios, it is reasonable to assume the party's willingness to compromise is being offered solely to bring an end to the dispute for sake of their children, not because they believe the compromised arrangement to be best for the children at issue or because their trial position is insincere.

Additionally, a party opposing the use of settlement negotiations as evidence may find support in other Rules of Evidence. N.J.R.E. 403 allows the trial court to exclude otherwise relevant evidence if the probative value is outweighed by the prejudice to a party. A party opposing the use of settlement negotiations could readily argue that the disclosure of settlement negotiations provides only modest probative value, while greatly prejudicing one of the parties.

Conclusion

Much like any other evidence ruling, the use of settlement negotiations as evidence requires a critical analysis of the purported proffer, and the specific facts of the case at bar. Even if the settlement negotiations are allowed into evidence, the court always maintains discretion over how much weight, if any, to afford such evidence. In any event, practitioners are well-served understanding the distinction between settlement negotiations and mediation communications, and making the correct arguments to the court when seeking to rely upon settlement negotiations, or to preclude the disclosure of this information.

Given the importance of custody disputes to the children at issue, there is reason to give more than mere superficial consideration to allowing the admission of settlement negotiations into evidence. Conversely, the court must be very careful to thoughtfully rule on these issues, so as to avoid deterring the free flow of settlement negotiations and to avoid unfair prejudice. ■

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Endnotes

1. *Fehnel v. Fehnel*, 186 N.J.Super. 209, 215–16, (App. Div. 1982).
2. N.J.R.E. 408.
3. N.J.R.E. 519,

4. N.J.S.A. 9:2-4.
5. *Id*.
6. N.J.R.E. 408, 519, R. 1:40-5
7. *Rynar v. Lincoln Transit Co., Inc.,* 129 N.J.L. 525 (E&A 1943)
8. *Shankman v. State,* 184 N.J. 2017-209 (2005).
9. N.J.S.A. 9:2-4.
10. *Burns v. Burns,* 223 N.J. Super. 219, 223 (Ch. Div. 1987).
11. *Kinsella v. Kinsella,* 150, N.J. 276, 318 (1997), quoting *Callen v. Gill*, 7 N.J. 312, 318, (1951); *W.W. v. I.M.*, 231 N.J. Super. 495, 502, (App.Div.1989).
12. *Pascale v. Pascale,* 140 N.J. 583 (1995)
13. N.J.S.A. 2A:23C-4.
14. *See Rynar, supra.*, *see also State v. Williams,* 184 N.J. 446, (2005).
15. *Winfield, etc. Corp. v. Middlesex, etc., Corp.*, 39 N.J. Super. 92 (App. Div. 1956).